



In the Matter of:

LARRY E. EASH,

COMPLAINANT,

v.

ROADWAY EXPRESS, INC.,

RESPONDENT.

**ARB CASE NOS. 02-008
02-064**

ALJ CASE NO. 2000-STA-47

DATE: June 27, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul O. Taylor, Esq., *Truckers Justice Center, Eagan, Minnesota*

For the Respondent:

John T. Landwehr, Esq., Katherine T. Talbot, *Eastman & Smith, LTD., Toledo, Ohio*

FINAL DECISION AND ORDER

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (West 1997), and its implementing regulations, 29 C.F.R. Part 1978 (2002). Section 31105 provides protection from discrimination for employees who have engaged in protected activities consisting of either reporting violations of commercial vehicle safety rules or refusing to operate such a vehicle when the operation would violate or create a reasonable apprehension of a violation of these rules. We affirm the Administrative Law Judge's recommended decision. *Eash v. Roadway Express*, 2000-STA-47 (ALJ Nov. 2, 2001) (R. D. & O.).

BACKGROUND

Complainant, a truck driver employed by Respondent Roadway Express, Inc., complained that Roadway had taken disciplinary action against him in a series of warning letters. Eash asserted that the warning letters, which culminated in his suspension for the period April 19

to April 23, 1999, were sent in retaliation for his filing an earlier complaint under the STAA. We considered that initial complaint in *Eash v. Roadway Express, Inc.*, ARB No. 00-061, ALJ No. 1998-STA-28 (ARB Dec. 31, 2002). There, we set aside the Administrative Law Judge's decision granting summary judgment for Roadway and remanded the case for an evidentiary hearing on whether Eash was fatigued on two occasions when he refused to come to work after being called by the employer.

In the instant matter, we adopt the factual findings of the ALJ and summarize the context of the various warning letters as follows:

On June 15, 1998, Roadway issued a warning letter to Eash that he was 20 minutes late for work on June 12, 1998. Hearing transcript (T) 22-30; Complainant's exhibit (CX) 3 at 2; Respondent's exhibit (RX) 2 at 3. Eash defended on the ground that the clock was often inaccurate, that it had given the wrong month when he punched in, and that this was the first time he had received a warning letter for being late, even though he had been late on prior occasions. R. D. & O. at 4-5.

On September 10, 1998, Roadway dispatched Eash with three other drivers to pick up a load at the Gerstenlager Company in Ohio and deliver it to Michigan. The company provided a cellular telephone and told Eash to call the Time Critical department. The employer issued a letter of warning stating that Eash did not call Time Critical when he left after picking up the load at Gerstenlager as he was instructed. Eash asserted that he did not receive either written or verbal instructions to call Time Critical at that time. T 37-43; CX 5, 6; RX 9 at 1-2.

On September 22, 1998, Eash received a warning letter about requesting birthday leave after he had already worked on his birthday. Roadway subsequently withdrew the warning letter, but Eash continued to complain that the letter was retaliatory. *See* ALJ Order Granting in Part and Denying in Part Summary Judgment at 6 (ALJ June 13, 2001) 2000-STA-47 (hereinafter ALJ Order).

On October 11, 1998, Roadway dispatched Eash from Copley, Ohio, to West Seneca, New York, and then to Rochester, New York. He said he tried to sleep but, due to a telephone call from his attorney, he was only able to sleep for approximately three hours before he was called to work. He took a shipment from Rochester back to West Seneca. He then was given a shipment to return to Copley, Ohio. He stopped twice on the journey to rest, claiming he was fatigued. The Respondent issued a warning letter stating that Eash had taken 7¼ hours to drive on a trip that should have been completed in 5 or 5½ hours. ALJ Order at 2-4.

The most significant event occurred on January 14, 1999. The Complainant testified that on that date he noted freezing rain on U.S. Route 30, which went past his house in Dalton, Ohio, and heard news reports that it was unsafe to drive on the highways he would take when dispatched to Pittsburgh, Pennsylvania. He particularly noted that he saw two television reporters who were reporting from an interstate he would have to take in driving to Pittsburgh. He testified that the reporters were covered in freezing rain and were stating that it was unsafe to drive on the roads. Eash called the dispatcher at 3:45 p.m. and requested that he not be called

into work. He learned that other drivers were coming to work. Eash called again at 7:30 p.m. stating that the road conditions in his area had become worse due to freezing rain. He was informed that his call would be considered a call to work, giving him two hours to report to work. At 8:30 p.m., Eash began driving to work. He testified that in 15 minutes, he only traveled six miles and nearly lost control of his car at least twice. He stopped at a convenience store and called the dispatcher, saying that he could not get to work. Roadway subsequently gave him a warning letter for his failure to report to work on January 14. T 44-82, CX 8-12; RX 14-34.

Finally, on January 26, 1999, Roadway issued Eash a warning letter for destruction of company property, because he tore up a form the employer gave him to sign, informing him of a local hearing to consider Roadway's suspension of his employment for five days. ALJ Order at 6.

The Ohio Joint State Committee (OJSC) had a hearing on April 14, 1999 regarding the previous nine months of Eash's employment. The OJSC approved Roadway Express' request to suspend Eash for five days, from April 19 to April 23, 1999. CX 14-15.

Eash filed a STAA complaint with the Occupational Safety and Health Administration (OSHA). In a June 23, 2000 decision, OSHA found that the evidence did not establish a violation of the STAA and therefore dismissed his complaint. Eash then requested a review by an ALJ.

DISCUSSION

1. Standard of review

We review the ALJ's findings of fact under the substantial evidence standard. "The findings of the administrative law judge with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be considered as conclusive." 29 C.F.R. § 1978.109(c)(3). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 459 (1951). We accord special weight to an ALJ's demeanor-based credibility determination. *Poll v. R.J. Vyhnalesk*, ARB No. 98-020, ALJ No. 96-ERA-30, slip op. at 8 (ARB June 28, 2002). In reviewing the ALJ's conclusions of law, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision" 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b). Therefore, the Board reviews the ALJ's conclusions of law *de novo*. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

2. Elements, burden of proof under STAA

The STAA, 49 U.S.C. § 31105(a), prohibits discrimination against truck drivers for engaging in specified activities:

(a) Prohibitions – (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because –

...

(B) the employee refuses to operate a vehicle because –

- (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
- (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment of health. To qualify for this subsection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

To prevail on a claim under the STAA, a complainant must adduce evidence that he engaged in protected activity, that his employer was aware of the protected activity, that the employer discharged, disciplined or discriminated against him, and that there was a causal connection between the protected activity and the adverse action. *BSP Trans., Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Clean Harbors Env't'l Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich* 27 F.3d 1133, 1138 (6th Cir. 1994); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 228 (6th Cir. 1987).

If the employer presents evidence of a nondiscriminatory reason for the adverse employment action, the burden then returns to a complainant to prove, by a preponderance of the evidence, that the legitimate reason proffered by the employer is a mere pretext for discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). In showing that the asserted reason is pretextual, the employee must establish not only that the asserted reason presented by the respondent is false, but also that discrimination was the true reason for the adverse action. At all times a complainant bears the ultimate burden of persuading the trier of fact that he was subjected to discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993).

3. ALJ's order on summary decision

In his June 13, 2001 order, the ALJ granted in part and denied in part the Respondent's motion for summary judgment. See ALJ Order.

Motions for summary decision are governed by 29 C.F.R. § 18.40 (2002). The standard for granting summary decision under § 18.40 is essentially the same one used in Fed R. Civ. P. 56, the rule governing summary judgment in the federal courts. Summary decision is appropriate under §18.40(d) if there is no genuine issue of material fact. A party opposing a motion for summary decision “may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing.” 29 C.F.R. § 18.40(c). *See Webb v. Carolina Power & Light Co.*, Case No. 93-ERA-42, slip op. at 4-6 (Sec’y July 17, 1995).

The ALJ found for the Respondent on the following claims:

With regard to the warning letter for taking excessive time to return to Copley on October 13, 1998, there was no dispute as to the facts surrounding Eash’s fatigue. The ALJ concluded, as a matter of law, that since Eash had adequate time to be rested and available for work, and was fatigued through no fault of the employer, he was not engaged in protected activity. ALJ Order at 9-10. *See Asst. Sec’y & Porter v. Greyhound Bus Lines*, ARB No. 98-116, ALJ No. 96-STA-23 (ARB June 12, 1998).

The ALJ also found that the facts surrounding the destruction of company property described in the January 26, 1999 warning letter were undisputed and presented no material issue of fact. He concluded that Eash had failed to establish any causal nexus between his initial March 23, 1998 OSHA complaint and the adverse administrative action in which he was suspended from work. ALJ Order at 6.

The ALJ further found that, in regard to the September 22, 1998 warning letter, Eash had presented no material issue of fact, noting the this warning letter had been rescinded. He concluded that complainant had failed to establish any causal nexus between this letter and the adverse employment action. ALJ Order at 11.

However, the ALJ ruled that there were material issues of fact precluding summary judgment relating to warning letters for the following incidents: June 15, 1998 for being late; September 14, 1998 for not calling Time Critical; and January 14, 1999 for not appearing for work. ALJ Order, slip op. at 11-12. The ALJ subsequently denied the respondent’s motion for reconsideration of his order. Order Denying Respondent’s Motion for Reconsideration at 1-2.

4. ALJ’s November 2, 2001, recommended decision and order

In his November 2, 2001 R. D. & O., the ALJ ruled that Eash had engaged in protected activity by filing his first complaint with the Secretary on March 23, 1998. He also held that Eash had suffered an adverse administrative action in his five-day suspension. That led to an analysis of whether Roadway violated the STAA by taking adverse action because of the Complainant’s protected activity.

a. June 15, 1998 warning letter

The ALJ concluded that Eash had not submitted evidence that the June 15, 1998 warning letter was issued in retaliation for his March 1998 complaint. He noted that Eash gave speculative testimony that the employer's clock was incorrect, that loads were sometimes not ready when the driver arrived, and that drivers were occasionally required to wait at the dispatch counter or in a line to punch in. The ALJ pointed out that Eash had not established that any of these conditions actually was present on June 12, 1998. Therefore, the ALJ concluded that there was no causal nexus between the June 15, 1998 warning letter and Eash's prior protected activity. R. D. & O. at 23-24.

b. September 14, 1998 warning letter

In regard to the September 14, 1998 warning letter, the ALJ found that Complainant's testimony was unpersuasive. He concluded that Eash had understood that he was transporting a critical load and had received instructions to call Time Critical at the time he had picked up the load. He stated that, even if Eash had not received instructions, he still failed to establish a causal nexus between the warning letter and his protected activity. R. D. & O. at 24.

c. January 14, 1999 incident

The STAA, § 31105 (a)(1)(B)(i), quoted above, requires a complainant to show that his refusal to drive was based on a violation of "a regulation, standard or order" issued by the federal government. This requires a complainant to establish that the condition of the vehicle or of the roads he would drive on was actually unsafe.

However, under § 31105(a)(1)(B)(ii), an employee is protected from "discharge," "discipline" or "discriminat[ion]" when he "refuses to operate a vehicle because [he] has a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition." Section 31105(a)(2) provides that "an employee's apprehension of serious injury is reasonable only if a reasonable [person] in the circumstances . . . confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury or serious impairment [to] health." To qualify for protection under that subsection, "the employee must have sought from the employer, and then been unable to obtain, correction of the unsafe condition."

In sum, while § 31105 (a)(1)(B)(i) deals with conditions as they actually exist, § 31105 (a)(1)(B)(ii) deals with conditions as a reasonable person would believe them to be. The ALJ found no STAA violation under subsection (i), but did find a violation under subsection (ii).

In analyzing the January 14, 1999 incident under § 31105 (a)(1)(B)(i), the ALJ relied on *Robinson v. Duff Truck Line, Inc.*, 1986-STA-3 (Sec'y, March 6, 1987), *aff'd*, *Duff Truck Line, Inc. v. Brock*, 848 F.2d 189 (table)(6th Cir. 1988). Applying *Robinson*, Eash was required to show that the weather conditions must be such that the vehicle could not be safely operated. The ALJ found that only Eash testified that there were icy roads at the time he was called to work.

He noted that the evidence Eash presented did not prove that freezing rain was falling in his area at the times he claimed to have observed it. The ALJ determined Eash's testimony not to be credible, because the Complainant's testimony as to the weather conditions at the time he refused to work was entitled to less weight. He concluded that Eash had failed to establish that the type of weather conditions existed that would have made it unsafe to operate a commercial vehicle on January 14, 1999, and therefore was not entitled to the protection of the STAA. The Complainant therefore did not establish a violation of § 31105(a)(1)(B)(i). R. D. & O. at 27-28.

The ALJ ruled, however, that § 31105(a)(1)(B)(ii) of the STAA provided protection based on a reasonable person standard. He, therefore, found that a reasonable person in the Complainant's situation would have recognized a bona fide danger of accident or injury to his person, and that the Complainant had a reasonable apprehension of serious injury to himself or the public because of the unsafe driving conditions. The record demonstrates that the Complainant saw a television news broadcast that showed freezing rain on one section of the route the Complainant would drive accompanied by reporters stating that conditions were unsafe and that people should stay off the roads unless they had an emergency. Eash attempted a correction of the order to report to work in two hours by asking that he not be required to drive. The ALJ ruled that Eash had established a protected activity under § 31105(a)(1)(B)(ii) and had attempted to get his employer to correct the situation by asking that he be excused from driving that day. R. D. & O. at 24-29.

The ALJ stated that there was no dispute that the Complainant was disciplined by a five-day suspension. He found, however, that Eash failed to prove that the adverse action was taken on the basis of his protected activity. The ALJ found that the only adverse action that Eash experienced solely because of his protected activity was the warning letter issued because of his refusal to drive on January 14, 1999. The ALJ determined that, based on Respondent's evidence, particularly the testimony of Mark Rosendale, the relay manager for the Respondent, Eash was suspended due to his entire work record, not just his refusal to drive on January 14, 1999. The ALJ's ruling, which we affirm, was that Respondent had offered sufficient evidence to establish that, even in the absence of the January 19, 1999 warning letter, Complainant would have been suspended. The ALJ found the proper remedy was to expunge the January 19, 1999 warning letter. He ordered respondent to pay costs incurred by Eash, including attorney's fees. R. D. & O. at 30.

5. ALJ's order on attorney's fee

We also affirm the ALJ's order on fees. Supplemental Recommended Decision and Order Granting Attorney's Fees and Costs (Mar. 13, 2002) (hereinafter S. R. D. & O.) The ARB has endorsed the lodestar method of calculating attorney's fees, which requires multiplying the number of hours reasonably expended by a reasonable hourly rate. *Scott v. Roadway Express*, ARB No. 01-065, ALJ No. 98-STA-8 (ARB May 29, 2003); see *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A reduction of the lodestar is appropriate where a complainant achieves limited success. *Scott v. Roadway Express, Inc.*, ARB No. 99-013, ALJ No. 1998 STA-8, slip op. at 9-11 (ARB July 28, 1999); see *Hensley*, 461 U.S. at 435.

In this case, the ALJ granted partial attorney's fees based on the degree of success of the Complainant's attorney in presenting his client's case. The ALJ found that in the summary decision, issued on June 13, 2001, three issues were presented, one involving four letters of warning. At that time, the ALJ dismissed the claims related to one issue and two of the four warning letters. The ALJ therefore concluded that the Complainant's attorney was entitled to one-half of his fees for work performed prior to June 13, 2001 because one-half of his case was dismissed at that time. S. R. D. & O. at 3.

The ALJ determined that there were three issues present after June 13, 2001, of which the Complainant prevailed on only one issue, the January 14, 1999 incident. He therefore ordered that the Complainant's attorney receive one-third of all fees charged after June 13, 2001. S. R. D. & O. at 3. We rule that the ALJ acted properly in apportioning the attorney's fees to one-half of the fees occurred for work done before June 13, 1999 and one-third of the fees for work done after June 13, 1999. S. R. D. & O., at 4.

As permitted under *Clay v. Castle Coal & Oil Co., Inc.*, 1990-STA-37 (Sec'y, June 3, 1994), the ALJ reduced the travel time for the Complainant's attorney from eight hours to four hours. He indicated that the Complainant's attorney charged 54.45 hours for the period prior to June 13, 2001 and 63.20 hours for services after June 13, 2001. He reduced the hours to 27.73 and 21.10 respectively which, when combined with his travel time, equaled 52.33 hours of time. He concluded that, at a rate of \$225.00 per hour, the Complainant's attorney was entitled to \$11,774.25. S. R. D. & O. at 4.

The ALJ noted that a second attorney also represented the Complainant at the hearing. He found that, since the second attorney performed all his work after June 13, 2001, he was entitled to one-third of the fee he charged. He concluded that the second attorney was entitled to fees in the amount of \$3,434.00. S. R. D. & O. at 4.

Observing that the Complainant's attorney requested \$151.36 in costs that had not been reimbursed by the Complainant, the ALJ found that the fees for photocopying and postage were clerical duties that were not recoverable in a petition for fees and costs. *See Charvat v. Eastern Ohio Regional Wastewater Authority*, 1996-ERA-37 (ALJ, Mar. 3, 1999). He therefore disallowed \$104.80 in costs. S. R. D. & O. at 5.

The ALJ noted that the Complainant sought reimbursement of \$3,847.68 for the costs he personally incurred in the claim. He reduced some of the Complainant's costs in the same proportion as the attorney's fees, including the fees for long distance telephone calls, calls from a cellular telephone, and charges to his telephone number at home, as well as mileage, transcript expenses, and evidentiary expenses. He disallowed the Complainant's charges for postage, photocopying, and reimbursement for lost wages while he attended a deposition and hearing in this case. S. R. D. & O. at 5.

We affirm the ALJ's order that Respondent pay \$17,774.25 in attorney's fees and costs. S. R. D. & O. at 6.

CONCLUSION

In summary, we affirm the ALJ's findings of fact and conclusions of law. The record supports the ALJ's conclusion on summary disposition that there were not issues of material fact with regard to three of the warning letters. *Porter, supra*, supports the ruling that Eash was not engaged in protected activity on October 13, 1998. He also properly found that Eash had not established that the September 22, 1998 warning letter and the January 26, 1999 warning letter were given in retaliation for protected activity for filing a previous complaint.

In his R.D. & O., the ALJ correctly held that Eash had not established that the June 15, 1998 warning letter for being late on June 12, 1998 or the September 14, 1998 warning letter for not calling Time Critical as instructed were in retaliation for his protected activity in filing the prior complaint. The ALJ had substantial evidence to conclude that Eash had not shown that weather conditions actually existed to make driving hazardous. But the ALJ further held that, under *Robinson, supra*, and using a reasonable person standard, Eash had engaged in protected activity on January 14, 1999 in refusing to drive that night. We have held that ALJ's apportionment of the attorney's fees and costs is proper.

We have conducted a *de novo* review of the ALJ's R.D.& O. See *Roadway Express v. Dole*, 929 F.2d at 1066. The ALJ's opinion is fully supported by the facts and relevant law. Accordingly, the ALJ's Recommended Decision and Order is **AFFIRMED**. It is further **ORDERED** that the Complainant shall have 20 days from the date of this Decision and Order to submit to this Board an itemized petition for additional attorney's fees and other litigation expenses incurred in connection with our review. The Complainant shall serve the petition on the Respondent, which shall have 30 days after issuance of this Decision and Order to file objections to the petition with this Board.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge