In the Matter of:

DWIGHT E. TOLAND, **ARB CASE NO. 03-151**

COMPLAINANT, **ALJ CASE NO. 03-STA-25**

v. **DATE: January 28, 2005**

KEYSTONE FREIGHT CORPORATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Dwight E. Toland, pro se, *Westerville, Ohio*

For the Respondent:
Catherine S. Ryan, Esq., *Reed Smith, LLP, Pittsburgh, Pennsylvania*

FINAL DECISION AND ORDER

Dwight E. Toland filed a complaint under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 2004), alleging that his employer, Keystone Freight Corporation, terminated his employment because he had informed Keystone that he was concerned about driving in excess of the hours the Department of Transportation (DOT) regulations permit.[1] On August 26, 2003, a Department of Labor Administrative Law

[1] The employee protection provisions of the STAA prohibit employment discrimination against any employee for engaging in protected activity, including filing a complaint or beginning a proceeding "related to" a violation of a commercial motor vehicle safety regulation, standard, or order or testifying or intending to testify in such a proceeding. 49 U.S.C.A. § 31105(a)(1)(A). Protected activity also includes a refusal to operate a commercial motor 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

Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) denying Toland's complaint. The R. D. & O. is now before the Administrative Review Board (ARB) pursuant to 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1)(2003).

STANDARD OF REVIEW

Under the STAA, the ARB is bound by the factual findings of the ALJ if supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 03-STA-12, slip op. at 3 (ARB Feb. 27, 2004).

In reviewing the ALJ's conclusions of law, the ARB, 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 2004). Therefore, we review the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

DISCUSSION

To prevail on a claim under the STAA, the complainant must prove by a preponderance of the 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 is 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); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003).

Here, the ALJ found that Toland failed to prove that he engaged in protected activity on December 13, 2002, when he called Keystone's dispatcher, Mr. Randolph, and asked about the company's policy concerning over hours driving. The ALJ found Toland's call to Randolph was not protected because it was merely a "query," not a concern or complaint about violating the DOT driving hours regulations. R. D. & O. at 4, 9. The ALJ also found that Toland had not complained about or expressed concern to Keystone over driving excess hours or being fatigued after he collided with a parked car in a customer's parking lot on December 17, 2002. *Id.* Thus, since Toland had not

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has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C.A. § 31105(a)(1)(B).

proven protected activity, a necessary element of his case, the ALJ denied Toland's complaint.[2]

We have reviewed the record and find that substantial evidence on the record as a whole supports the ALJ's findings. They are therefore conclusive. 29 C.F.R. § 1978.109(c)(3). In his thorough, well-reasoned discussion, the ALJ applied the correct legal standard to his findings. Therefore, we adopt the ALJ's decision, attach and incorporate the R. D. & O., and **DENY** Toland's complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE G. BEYER
Administrative Appeals Judge

[2] The ALJ also found that Toland had not proven that Keystone was aware of any of Toland's purported protected activities or that a causal connection existed between the alleged protected activity and the termination. R. D. & O. at 9.