



In the Matter of:

LANCE JOHNSON,

ARB CASE NO. 05-131

COMPLAINANT,

ALJ CASE NO. 2005-STA-24

v.

DATE: January 31, 2007

ROCKET CITY DRYWALL,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Complainant:

Lance Johnson, *pro se*, Hazel Green, Alabama

FINAL DECISION AND ORDER

Lance Johnson filed a complaint with the United States Department of Labor alleging that his employer, Rocket City Drywall (Rocket), violated the employee protection (whistleblower) 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 (2006), when it terminated his employment on June 4, 2004. After a hearing, a Department of Labor Administrative Law Judge (ALJ) recommended that the complaint be dismissed because Johnson did not adequately prove his case. We concur and deny the complaint.

BACKGROUND

Johnson began driving delivery trucks for Rocket in 1998 and continued to work intermittently for the firm until his termination on June 4, 2004. Tr. 44, 47. Rocket sells and delivers drywall, roofing, and related building supplies. Tr. 46, 76.

Johnson expressed concerns about unsafe conditions at Rocket throughout his employment. On several occasions between 2001 and 2004, Johnson complained to his supervisor, James Andrews, and to Rocket's owners, Charles and Jewell Stanley about safety issues concerning window removal and unsafe operation of cranes at job sites. Tr. 12. Johnson was concerned that when unloading drywall, he had to stand on the drywall hanging from a boom and remove a window to pass the drywall into the building. Tr. 48-49, 80. Also, on four separate occasions between December 2003 and April 2004 Johnson had seen Andrews driving a commercial vehicle without a commercial driver's license (CDL). Tr. 42-43, 47, 80. Johnson also raised the CDL issue with the Stanleys. Tr. 48. Finally, Johnson was concerned about the operation of a boom truck used by Rocket as a "backup" truck. According to Johnson, the truck was out of date, had been involved in accidents, and did not have seat belts. Tr. 54-55. In addition, the crane on the truck did not hold drywall in place and was hard to maneuver. Tr. 54. Johnson said that when he and other employees complained about the truck, their supervisors told them to work with the truck or lose their jobs. Tr. 69.

The Stanleys and Andrews testified that they were aware of Johnson's concerns about the window removal and unsafe operation of cranes, and that Charles Stanley had addressed Johnson's concerns. Tr. 79, 105, 135. When Johnson complained that it was unsafe to stand on drywall suspended from a crane to take out a window, Stanley told him that he could either take the drywall up the stairs or use another method to take out the window if he did not feel safe. Tr. 70, 79-80. Also, in April 2004 Stanley bought safety harnesses to protect the employees from falling when they were unloading drywall from the crane. Tr. 70, 106-107. Rocket did not have written safety rules and procedures, but instead orally informed employees of safety rules and procedures. Tr. 80-81; RX-4; R. D. & O. at 6.

Because of his safety concerns, Johnson began looking for a new job shortly before the end of his employment with Rocket and eventually gave Rocket two weeks' notice. Tr. 78. He withdrew his notice, however, because he had trouble finding a job.

Tr. 53. Jewell Stanley allowed him to continue working for Rocket, but he had to take a warehouse position because she had already replaced him with another driver. Tr. 78.

In the course of his employment with Rocket, Johnson had a series of performance problems on the job. Once, when a spotter told Johnson to go one way with his truck, Johnson ignored the instructions and went another way, striking a light pole and bringing down a wire. Tr. 88. Johnson also ran over a brick mailbox, backed into two septic tanks, and backed a truck into a shed. Tr. 131-132.

According to Andrews, on one job Johnson appeared to be impaired. He left a boom truck leaning precariously, and a homeowner called Rocket's office for help, reporting that Johnson appeared to be "on something." Tr. 89-90, 132-133. The owner reported that Johnson was walking in the woods, looking up at trees, and talking to himself. When Andrews went to investigate, he decided that Johnson was impaired and should not drive the truck back to the warehouse. Tr. 133. Andrews had no recourse but to drive the truck himself even though he did not have a CDL. Tr. 90, 133.

On June 4, 2004, Rocket re-assigned Johnson from the warehouse to driving duties and asked him to make a delivery. Johnson drove the "back-up" boom truck to a job site and had problems operating the crane to unload the drywall. He dropped two loads of drywall, damaging 68 boards. Tr. 58. According to two employees at the site, he improperly positioned the boards. The employees at the site warned Johnson that he picked the load up incorrectly, but Johnson ignored the warning. Tr. 115. Charles Stanley asked Johnson to return the damaged drywall to the warehouse. Tr. 58. As Johnson was parking the truck at Rocket's warehouse without a spotter, he backed over the edge of a ramp and blew out a tire. Tr. 60-61. Johnson had been warned in the past not to back up a truck without a spotter. Tr. 86, 130-131. Stanley was already angry with Johnson about the damaged drywall, and when he discovered the blown tire, he fired him.¹ Tr. 107.

¹ Johnson testified that Stanley fired him before he disclosed that he had blown the tire. Tr. 59, 61-62. The other witnesses at the hearing testified that the firing occurred after Stanley found out about the blown tire. Tr. 86-87, 115-116, 125. The ALJ credited the other witnesses. R. D. & O. 16. The sequence of the two events, however, is immaterial.

ISSUE

The question we consider is whether substantial evidence in the record supports the ALJ's ruling that Rocket did not violate the STAA by terminating Johnson's employment because he made protected safety complaints.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her jurisdiction to decide this matter to the Administrative Review Board (ARB or Board). 49 U.S.C.A. § 31105(b)(2)(C). See Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17 2002). See also 29 C.F.R. § 1978.109(c). When reviewing STAA cases, the ARB is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F. 3d 41, 44 (2d Cir. 1995). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). In reviewing the ALJ's legal conclusions, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision" Therefore, the Board reviews the ALJ's legal conclusions de novo. 5 U.S.C.A. § 557(b) (West 1996). See *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

1. The Legal Standard

The STAA provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. The protected activity includes filing a complaint or beginning a proceeding "related to a violation of a commercial motor vehicle safety regulation, standard, or order." 49 U.S.C.A. § 31105(a)(1)(A).

To prevail on this STAA claim, Johnson must prove by a preponderance of the evidence that he engaged in protected activity, that Rocket was aware of the protected activity, that Rocket took an adverse employment action against him, and that there was a causal connection between the protected activity and the adverse action. *Regan v. Nat'l Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004); *BSP Trans, Inc. v. U.S. 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). If the employee fails to prove any one of these elements, the claim must be dismissed. *Eash v. Roadway Express*, ARB No. 04-036, ALJ No. 1998-STA-28, slip op. at 5 (ARB Sept. 30, 2005).

There is no dispute here that Johnson's complaints about unsafe operation of commercial motor vehicles were protected and that Rocket was aware of Johnson's protected activity. R. D. & O. at 16. Since Rocket terminated Johnson's employment, Johnson certainly suffered adverse action. Therefore, we must decide whether substantial evidence supports the ALJ's finding that Johnson did not prove by a preponderance of evidence that Rocket fired him because of his protected activity.

2. Johnson Did Not Prove That Rocket's Reasons For Terminating Him Were Pretexts

Johnson, who appeared pro se at the hearing, filed a petition for review, alleging only that Rocket's witnesses perjured themselves to avoid higher rates on unemployment compensation. Testifying at the hearing on behalf of Rocket were Charles and Jewell Stanley; Kenny Bannister and Mike Blackmon, employees; and James Andrews, Rocket's general manager and Johnson's supervisor. Johnson testified on his own behalf.

The ALJ found all of Rocket's witnesses to be "highly credible." R. D. & O. at 16. He also found that Rocket's witnesses consistently testified that Johnson "was fired because of his careless attitude, accident/incident history, and final precipitating mishaps with the drywall and blown tire on 4 June." Tr. 85; R. D. & O. at 16. The ARB will uphold an ALJ's credibility findings based on substantial evidence unless they are "inherently incredible or patently unreasonable." *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-10, slip op. at 4-5 (ARB Dec. 30, 2004). *Accord Lockert v. United States Dep't of Labor*, 867 F.2d 513, 519 (9th Cir. 1989). Here, we defer to the ALJ's credibility determinations and findings of fact. *See Safley v. Stannards, Inc.*, ARB No. 05-113, ALJ No. 2003-STA-54, slip op. at 6, n.3 (ARB Sept.

30, 2005); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 03-095; ALJ No. 2002-STA-35, slip op. at 8-9 (ARB Aug. 6, 2006).

After reviewing the hearing transcript, we conclude that the ALJ fairly and thoroughly analyzed the witnesses' testimony and concluded that Rocket fired Johnson "because he violated Respondent's rules regarding backing up, ignored the advice of co-workers, destroyed property, and manifested a careless attitude toward his work." R. D. & O. at 17. The record contains substantial evidence to support the ALJ's finding.

Johnson has offered no other evidence that Rocket's proffered reasons for terminating him are pretextual. An inference of discrimination, however, may arise when adverse action closely follows protected activity. Although the ALJ made no findings as to exact dates of Johnson's protected activity, he concluded that there was insufficient evidence of a temporal nexus between Johnson's protected activity and his termination to raise the inference of causation. R. D. & O. at 17.

Temporal proximity is not always dispositive. "[W]hen the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation becomes less likely because the intervening event also could have caused the adverse action." *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ Nos. 96-ERA-34, 38, slip op. at 6-7 (Mar. 30, 2001). Here, assuming arguendo that Johnson's final complaint in April 2004 was in temporal proximity to his termination, intervening events reasonably could have caused Stanley to terminate Johnson's employment. On his last day of work, Johnson dropped two loads of drywall while unloading a truck at a job site, damaging 68 boards. He then blew out a tire because he backed up his truck without using a spotter – a violation of Rocket's safety rules that alone was grounds for termination. Tr. 83-84; 139. These intervening events negate the inference of causal relationship between Johnson's protected activity and his termination. See *Anderson v. Jaro Trans. Servs. and McGowan Excavating, Inc.*, ARB No. 05-011, ALJ Nos. 2004-STA-2, 3 (ARB Nov. 30, 2005).

Like the ALJ, we find it especially probative that Charles Stanley allowed Johnson to return to full driving duties on June 4, the same day that he fired Johnson for destroying two loads of drywall and violating safety rules regarding backing up a truck. If Stanley had any animus toward Johnson for his safety complaints, he would not have allowed him to return to full driving duties on June 4. And we concur with the ALJ that Rocket terminated Johnson for legitimate, non-discriminatory reasons unrelated to his protected activity. Johnson violated Rocket's safety rules, ignored warnings of co-workers, and destroyed property.

CONCLUSION

Substantial evidence in the record as a whole supports the ALJ's finding that Rocket did not fire Johnson because of his protected activity. The ALJ properly applied the relevant law. Therefore, we agree with the ALJ's conclusion that Rocket did not violate the STAA. Accordingly, we **DENY** the complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge