



In the Matter of:

WILLIAM STEPHENSON,

ARB CASE NO. 06-133

COMPLAINANT,

ALJ CASE NO. 2004-STA-058

v.

DATE: January 31, 2008

YELLOW TRANSPORTATION, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

William Stephenson, *pro se*, Bartlett, Tennessee

For the Respondent:

Anderson B. Scott, *Fischer & Phillips, LLP*, Atlanta, Georgia

FINAL DECISION AND ORDER

The Complainant, William Stephenson, contends that the Respondent, Yellow Transportation, Inc., violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (West 2007), and its implementing regulations, 29 C.F.R. Part 1978 (2007). For reasons stated herein, we affirm the Administrative Law Judge's (ALJ) Recommended Decision and Order (R. D. & O.) issued on August 4, 2006, that Yellow did not commit a violation of the STAA.

BACKGROUND

We adopt and summarize the ALJ's findings of fact. Stephenson was a tractor-trailer driver, working for Yellow, a shipping company subject to the STAA, as a "casual" (i.e., part time, as needed) driver until September 21, 2003. R. D. & O. at 2; Transcript (Tr.) at 21-22.

The incidents at issue occurred from September 18 to September 21, 2003. On September 18, 2003, Yellow dispatched Stephenson, accompanied by Nealso Miller, on an expedited round trip from Memphis, Tennessee, to San Bernardino, California. R. D. & O. at 3; Tr. at 108-110. On September 19, on the return trip to Memphis, Stephenson complained that he was tired and then ill, halted the tractor-trailer at a truck-stop, and checked into a local motel in Kingman, Arizona for an unscheduled eight-hour rest stop. R. D. & O. at 4-5; Tr. at 60-61.

After stopping in Kingman, Miller contacted the Memphis dispatcher, Jeff Cain, who called Stephenson in his motel room to determine the reason for the stop. R. D. & O. at 5; Tr. at 325-26, 352. Stephenson insisted that he was out of hours, but after Cain informed Stephenson that he and Miller possessed enough hours left to complete the trip, Stephenson then asserted that he was too ill to continue. Tr. at 252-54. Unsure of how to proceed, Cain contacted the shift manager, Bill Lindsley, and informed him of Stephenson's unexpected stop. R. D. & O. at 5-6; Tr. at 254-55. Lindsley called Stephenson at the hotel and asked if he needed medical attention, which Stephenson declined, claiming instead he only needed eight hours of rest and he would be fine. R. D. & O. at 6; Tr. at 288. The following day, September 20, Stephenson and Miller left Kingman and finished their trip, arriving in Memphis after the scheduled deadline for the freight on September 21. R. D. & O. at 6; Tr. at 330.

Upon Stephenson's return to Memphis, Lindsley contacted Gene Berg, the line haul operations manager in Memphis for Yellow, to let him know about the events that occurred from September 18 to September 21 and to begin an internal investigation. R. D. & O. at 6; Tr. 337. Once completed, Berg's investigation concluded that Stephenson had failed to properly contact Yellow when choosing to make an unscheduled stop. R. D. & O. at 6; Tr. 348-50. Based on this investigation, Berg decided to stop using Stephenson as a casual driver for Yellow. R. D. & O. at 2; Tr. 71.

Stephenson filed a complaint with the Occupational Safety and Health Administration (OSHA) on November 18, 2003, asserting that Yellow discontinued using him as a casual driver due to both his complaint over not having enough hours to complete the trip from San Bernadino to Memphis and "because [he] got sick and stopped at a motel." Stephenson's Statement to OSHA, at 1, 4, April 24, 2004. OSHA denied Stephenson's complaint and he timely filed an appeal with an ALJ. On August 4, 2006, the ALJ found that Stephenson did not run out of hours and that his testimony about being ill was not credible. R. D. & O. at 9. Accordingly, the ALJ concluded that Stephenson had not engaged in protected activity under the STAA, and denied his claim.

DISCUSSION

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under, inter alia, the STAA and the implementing regulations at 29 C.F.R. Part § 1978. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct.17, 2002). This case is before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a). We are bound by the factual findings of the ALJ if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Transp., Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991). However, the Board reviews questions of law de novo. See *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Roadway Express*, 929 F.2d at 1063.

The STAA, 49 U.S.C.A. § 31105(a), 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” when the employee refused to drive because “operation [would] violate[] a regulation, standard, or order of the United States related to commercial motor vehicle safety or health,” 49 U.S.C.A. § 31105(a)(B)(i), or because “the employee has a reasonable apprehension of serious injury to the employee or public because of the vehicle’s unsafe condition.” 49 U.S.C.A. § 31105(a)(B)(ii).

To prevail on a claim of unlawful discrimination under the whistleblower protection provisions of the STAA, the complainant must allege and later prove by a preponderance of the evidence that he is an employee and the respondent is an employer; 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 the protected activity was the reason for the adverse action. *Eash v. Roadway Express*, ARB No. 04-063, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005); *Forrest v. Dallas & Mavis Specialized Carrier Co.*, ARB No. 04-052, ALJ No. 2003-STA-053, slip op. at 3-4 (ARB July 29, 2005); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-030, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. Nat'l Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004).

In this case, it is undisputed that Stephenson was a Yellow employee and Yellow was an employer subject to the STAA, and that Yellow stopped using Stephenson as a casual driver. At issue, however, is whether Stephenson engaged in protected activity. If Stephenson failed to prove that he engaged in protected activity, a requisite element of his case, his entire claim must fail. *Eash* slip op. at 5; *Forrest*, slip op. at 4.

We agree with the ALJ's conclusion that Stephenson did not engage in protected activity when he complained that he was out of hours and then that he was too ill to drive. R. D. & O. at 9. Initially, Stephenson claimed that he was out of hours, referring to U.S. Department of Transportation hours-of-service regulations that limit the number of hours a commercial truck driver may operate his or her vehicle during any given day and 7-day period. 49 C.F.R. § 395.3 (2007). This complaint was not valid. As the ALJ noted, Stephenson admitted and the record supports, that he still had adequate driving hours available at the time he stopped in Kingman, Arizona. R. D. & O. at 9.

Then, Stephenson contended that he was too ill to continue driving. Under 49 C.F.R. § 392.3 (2007), “[n]o driver shall operate a commercial motor vehicle . . . while the driver’s ability or alertness is so impaired . . . through [] illness . . . as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.”

However, the ALJ found that Stephenson was not too ill to continue driving. R. D. & O. at 9. The ALJ discounted Stephenson’s testimony that he was ill, finding that it was “utterly lacking in credibility.” R. D. & O. at 8. The ALJ made extensive credibility findings, detailing contradictions in Stephenson’s testimony, evasive behavior, and dishonest statements. R. D. & O. at 8-9. Instead, the ALJ accepted the testimony of Miller, Cain, and Lindsley in determining that Stephenson was not too ill to drive. R. D. & O. at 9.

In his brief to us, Stephenson reasserts that he was sick, but he does not challenge the ALJ’s findings on credibility. *See generally* Complainant’s Brief (CB). We accept the ALJ’s findings, because substantial evidence supports them. Stephenson failed to show that his continued driving would violate a commercial motor vehicle safety regulation or that he had a reasonable apprehension of serious injury to himself or the public. The ALJ correctly held that Stephenson did not engage in protected activity, and so his STAA complaint failed. R. D. & O. at 9.

On appeal to us, Stephenson makes several arguments peripheral to his STAA claim. For instance, he attacks Miller’s work performance and attendance, CB at 2-3. Stephenson also asserts without specificity that “[he does] have grounds if [he] wishes to take Yellow to court on something else.” However, we will not consider issues or arguments that a party raises for the first time on appeal, *Rollins v. Am. Airlines, Inc.*, ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 4 n.11 (ARB Apr. 3, 2007 (corrected)); *Carter v. Champion Bus, Inc.*, ARB No. 05-076, ALJ No. 2005-SOX-023, slip op. at 7 (ARB Sept. 29, 2006), or over which we do not have jurisdiction, *Fish v. H & R Transfer*, ARB No. 01-071, ALJ No. 2000-STA-056, slip op. at 2 (ARB Apr. 30, 2003).

CONCLUSION

In sum, we hold that substantial evidence in the record supports the ALJ's findings of fact and that he correctly applied the law. Accordingly, we **AFFIRM**, the ALJ's R. D. & O. and **DENY** Stephenson's complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge