In the Matter of:

DANIEL DAVIS,

COMPLAINANT,

v.

CHEM CANADA LOGISTICS, INC.,

RESPONDENT.

ARB CASE NO. 08-010

ALJ CASE NO. 2006-STA-047

DATE: July 24, 2008

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

Daniel Davis filed a complaint with the United States Department of Labor alleging that his former employer, Chem Canada Logistics, Inc. (Chem Canada), terminated his employment, in violation of the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA)[1] and its implementing regulations,[2] after he repeatedly complained about safety defects in his assigned truck and trailer. Following a hearing at which Chem Canada did not appear, a Department of Labor Administrative Law Judge (ALJ) determined that Davis failed to establish that he reported any safety defects which qualified as "protected activity" and that Davis failed

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[1] 49 U.S.C.A. § 31105 (West 2008). The STAA has been amended since Davis filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). We need not determine whether the amendments are applicable to this case because they would not affect our review even if they were.

[2] 29 C.F.R. Part 1978 (2007).

to establish that Chem Canada terminated him for reporting safety defects.[3] Accordingly, the ALJ recommended that Davis's complaint be denied.[4] Upon review of the record and the ALJ's R. D. & O., we accept the ALJ's recommendation and deny Davis's complaint.

BACKGROUND

Chem Canada was a North Carolina-based trucking company owned and operated by Cory Cavazos and Philip Brown.[5] Cavazos hired Davis, who worked for Chem Canada as a long-haul tractor-trailer driver from March 6, 2006, through April 5, 2006.[6] During his employment, Davis made two trips out to California and back to North Carolina. The trips spanned March 12, 2006, to March 22, 2006, and March 26, 2006, to April 5, 2006.

Davis alleged that on his first trip for Chem Canada he noticed that the tractor's brakes were not functioning properly due to a leak in the air tank and that the middle and rear marker lights were out on the trailer. Davis never noted any defect or deficiency in his documentation of the trip, but claimed that he complained verbally to Cavazos regarding the truck's condition. He also allegedly submitted a write-up of mechanical problems to Cavazos, a copy of which is not in evidence, following the trip. According to Davis, Cavazos assured him that the listed problems would be corrected prior to his next trip. On March 20, 2006, a Louisiana State Police Officer stopped and cited Davis for failure to keep his Driver's Record of Duty Status logbook up to date. Davis testified that he delayed completing his logs at Cavazos's request in order to always have hours available.

Davis alleged that during his second trip for Chem Canada, he found that none of the safety defects he had reported had been corrected. Davis testified that he began keeping detailed accounts of the problems in his daily log to protect himself from liability for Cavazos's failure to resolve the safety problems.[7] He further alleged that he requested permission from Cavazos to have the problems rectified while stopped for routine maintenance, a request that was denied.[8] The bill from this maintenance stop did not document either an air leak or marker lights problems.

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[3] Recommended Decision and Order (R. D. & O.) at 12-13.

[4] R. D. & O. at 13.

[5] Administrative Law Judge Exhibit (ALJX) 1.

[6] *Id.*

[7] Transcript (Tr.) at 21.

[8] Tr. at 22.

On April 5, 2006, at around 9:30 p.m., Cavazos instructed Davis to clean the truck out when he returned to North Carolina. When Davis returned to his pickup truck, he found an envelope containing paperwork Cavazos wanted him to complete, which Davis took home with him. Davis returned the paperwork to Cavazos in the morning. Davis contended that Cavazos terminated his employment because of his repeated complaints about safety defects. Cavazos denied that any such complaints had ever been brought to his attention and insisted that Davis informed him prior to his second trip that it would be his last for Chem Canada. Cavazos also contended that he told Davis after an argument immediately prior to the second trip that he did not want Davis to take the load and to clean out the truck, but that Davis proceeded to make the trip despite Cavazos's objections.

Davis filed his complaint with the Occupational Safety and Health Administration (OSHA) on May 8, 2006. In their August 17, 2006 findings, OSHA found Davis's claims unsupported by credible evidence.[9] Davis requested a hearing before an ALJ on September 19, 2006.[10] After failed efforts to contact Chem Canada, the ALJ held a hearing on July 26, 2007, at which only Davis appeared. After Davis was sworn, the ALJ inquired if he wished to adopt letters he had written to the OSHA investigator detailing his allegations as part of his testimony. Davis responded affirmatively, and the ALJ therefore adopted the letters as part of Davis's testimony.[11] The ALJ then questioned Davis regarding some aspects of his complaint.

Cavazos contacted the ALJ's clerk on August 13, 2007, claiming that he had only recently received notice of the hearing. The ALJ kept the record open to allow Chem Canada to file documents or written statements, which Cavazos subsequently did. Cavazos denied that Davis had informed him of any safety defects and included a copy of OSHA's findings, among other things, as corroboration.[12] The ALJ issued his R. D. & O. on October 15, 2007. He held that Davis failed to establish a STAA violation because the documentary evidence that Davis provided, namely his second trip logs, even if considered credible, were never seen by Cavazos prior to his termination, and because Davis's allegations of oral reports were insufficient to prove he engaged in "protected activity."

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9 ALJX 1.

10 ALJX 2.

11 Tr. at 12-13.

12 Respondent's Exhibit 1.

This case comes before the Board under the STAA's automatic review provisions.[13] Neither party responded to the Board's notification that they had the right to file a brief supporting or opposing the ALJ's R. D. & O.

JURISDICTION AND STANDARD OF REVIEW

The Board reviews an ALJ's findings of fact under the substantial evidence standard, meaning we are bound by the ALJ's factual findings if the record considered as a whole supports those findings.[14] 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."[15] Since the ARB is Secretary's designee and acts with "all the powers [the Secretary] would have in making the initial decision…,"[16] the Board reviews the ALJ's conclusions of law de novo.[17]

DISCUSSION

To prevail under the STAA, a complainant must demonstrate by a preponderance of the evidence that he engaged in protected activity; that his employer was aware of the protected activity; that his employer discharged, disciplined or discriminated against him; and that the employer took the adverse action because the complainant engaged in the protected activity.[18] STAA-protected activities include making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard or order."[19] The STAA also protects refusals to operate a vehicle because "the operation violates a

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[13] 29 C.F.R. § 1978.109(a). The Secretary of Labor has delegated her authority to issue final agency decisions under the STAA to the Administrative Review Board. Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. Part § 1978 (2007).

[14] 29 C.F.R. 1978.109(c)(3).

[15] *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

[16] 5 U.S.C.A. § 557(b) (West 2008).

[17] *See Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993).

[18] *See Carter v. Barclay, Inc.*, ARB No. 06-154, ALJ No. 2006-STA-022, slip op. at 3-4 (ARB April 28, 2008); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071, 03-095, ALJ No. 2002-STA-035, slip op. at 7 (ARB Aug. 6, 2004).

[19] 49 U.S.C.A. § 31105(a)(1)(A) (West 2008). *See Zurenda v. J & R Plumbing & Heating Co., Inc.*, ARB No 98-088, ALJ No. 1997-STA-016, slip op. at 5 (ARB June 12, 1998) ("Under STAA a safety complaint to any supervisor, no matter where that supervisor falls in the chain of command, can be protected activity.").

regulation, standard, or order of the United States related to commercial motor vehicle safety or health," and because "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition."[20] Since Davis never refused to operate the vehicle, we need only consider the applicability of complaint provision. We find that substantial evidence supports the ALJ's decision that Davis failed to establish by a preponderance of the evidence that he engaged in protected activity, and as such, his termination did not violate the STAA.

I. Respondent's Knowledge of Complainant's March 26 Trip Logbooks

The record supports the ALJ's conclusion that the documentary evidence Davis provided, most notably his travel logs containing complaints about safety problems, did not provide notice to Cavazos of Davis's safety complaints prior to his decision to terminate Davis and therefore could not have influenced Cavazos's decision. Davis produced no documents that Cavazos could have possibly seen prior to Davis's termination that indicate there were mechanical problems with either the tractor or trailer. As the ALJ astutely noted in his R. D. & O., Davis's logbook from his March 26 trip, even if credible (which the ALJ doubted), could not have prompted Cavazos to retaliate against him since Cavazos never saw the logbook prior to the termination. Cavazos told Davis to "clean out the truck" (i.e., Cavazos terminated Davis's employment) while Davis was en route to North Carolina, making it impossible for Davis's written safety complaints in the logbook to be considered an activity which contributed to his termination.[21] Davis failed to prove that Cavazos terminated him because he had logged mechanical defects during his second trip. Thus, substantial evidence supports the ALJ's conclusion that Cavazos did not know of the logged deficiencies prior to making his decision to terminate Davis, and therefore that they did not contribute to his termination.[22]

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[20] 49 U.S.C.A. § 31105(a)(1)(B)(i),(ii) (West 2008).

[21] While we agree with the ALJ's conclusion that Cavazos lacked knowledge of the contents of the March 26 logbook and, therefore, that his decision to terminate Davis could not have been caused by the logbook entries, we find that the ALJ erred in concluding that "documentary evidence fails to establish 'protected activity' under the Act before 9:30 PM, April 5, 2006." Although Cavazos was not aware of the contents of the logbook, the entries denoting safety defects could still constitute "protected activity." Whether an activity is protected does not depend on whether the respondent knew the complainant had engaged in the activity; knowledge is a separate component of the analysis in assessing whether a violation of the STAA has occurred. *See Ridgley v. C.J. Dannemiller Co.*, ARB No. 05-063, ALJ No. 2004-STA-053, slip op. at 5 (ARB May 24, 2007).

[22] *See Anderson v. Jaro Trans. Serv. & McGowan Excavating, Inc.*, ARB No. 05-011; ALJ Nos. 2004-STA-002, 2004-STA-003, slip op. at 6 (ARB Nov. 20, 2005) (holding that complainant must prove by a preponderance of the evidence that the adverse action occurred because of the protected activity).

II. Davis's Testimony Regarding Protected Activity

The ALJ determined that Davis's testimony regarding verbal reports of safety defects he made to Cavazos prior to his termination on April 5, 2006, was not credible, and, therefore that he had not proven that he had engaged in protected activity. The ALJ concluded that Davis's actions prior to the end of his employment undermined his claim that he had made oral reports.

The ALJ relied upon several pieces of evidence. He cited Davis's testimony that he routinely delayed completion of his daily Driver's Record of Duty Status.[23] He found that Davis's practice of delaying completion of his Status reports diminished their probative value since they did not reflect reporting of events as they occurred, and made them more likely to be inaccurate or false. When considered with Davis's testimony that he needed to complete paperwork upon returning from his second trip, the ALJ found that the written reports undermined Davis's alleged verbal safety complaints.[24]

The ALJ held that the content of the Driver's Record of Duty Status reports also worked to diminish Davis's credibility. He first noted that Davis recorded no safety defects on the status logs from his first trip, despite the fact that he claimed to have made oral reports to Cavazos regarding such defects.[25] Second, the ALJ determined that the fact that all of the Duty Status reports from Davis's March 26 trip contained identical language for the defects and deficiencies, and that the certification of the entries to be "true and correct" wording above his signature was crossed out on each entry undermined Davis's contention that he made verbal reports to Cavazos. Furthermore, it appears that the first two entries from that trip, the March 26 and 27 entries, were initially recorded as listing no defect and were later changed to list the same safety defects and deficiencies as the remainder of the reports.[26] Therefore, we find that substantial evidence supports the ALJ's determination that Davis's testimony regarding safety complaints was not credible.

CONCLUSION

The ALJ concluded that since Davis could not have submitted written reports prior to his termination and that his alleged verbal reports were not credible, Davis had failed to prove that Chem Canada had violated the STAA. Davis had the opportunity to challenge the ALJ's findings on appeal to us, but he chose not to do so. Davis has not proven on the record before us that he engaged in protected activity or that he was terminated for doing so.

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[23] R. D. & O. at 11.

[24] *Id.* at 12.

[25] *Id.*

[26] *Id.*

Upon review, we find that substantial evidence supports the ALJ's findings of fact and that he has correctly applied the law. Therefore, we accept the ALJ's recommendation and **DENY** his complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge