U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 June 2008

CASE NO.: 2008-STA-00030

In the Matter of:

WILLIAM PETERS,
Complainant,

v.

RENNER TRUCKING AND EXCAVATING,
Respondent.

Appearances:

William Peters, in *pro se*
Cornelius, OR
for Complainant

Norman Cole, Esq.
Sather, Byerly & Holloway, LLP
Portland, OR
for Respondent

BEFORE:
Gerald M. Etchingham
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING CASE

This proceeding arises under the provisions of Section 405 of the Surface and Transportation Assistance Act, 49 U.S.C.§ 31105 (hereinafter referred to as the "STAA")[1].

On May 11, 2007, Complainant William Peter's ("Complainant's") complaint under the "whistleblower" protection provisions of the STAA, against Respondent, Roy Renner Trucking, a.k.a. Renner Trucking and Excavating, ("Employer" or "Respondent") was received by the Secretary of Labor. Complainant alleged that his employment with Respondent was terminated

[1] The STAA was enacted for the purpose of promoting safety on the nation's highways, and, among other things, prohibits any person from discharging or otherwise discriminating against an employee in retaliation for having engaged in certain safety-related activities. The Department of Labor regulations implementing the STAA are set forth at 20 C.F.R. § 1978.

in retaliation for protected activities–refusing to operate a vehicle with unsafe brakes, and filing two complaints, both with Respondent's management and a governmental agency, one regarding unsafe brakes on his assigned vehicle and the other regarding the inspection form provided to him by Respondent. The Occupational Safety and Health Administration ("OSHA") conducted an investigation; thereafter, the Secretary of Labor, through her agent, the Acting Regional Administrator for OSHA, issued findings on January 15, 2008, finding that Complainant's claim lacked merit. On February 15, 2008, Complainant requested a hearing before an administrative law judge.

A formal hearing was held in Portland, Oregon, on March 20, 2008. Complainant represented himself, in *pro se*. Respondent was represented by Norman Cole, Esq. of Sather, Byerly & Holloway, LLP. The following exhibits were admitted into evidence: Complainant's Exhibit ("CX") 1; Respondent's Exhibits ("RX") 1-27; and Administrative Law Judge's Exhibits ("ALJX") 1-4[2]. Complainant, Roy Renner (co-owner of Respondent), Denise Renner (co-owner of Respondent), Peter Miranda (Ms. Renner's assistant) and Mickey Vaandering (Respondent's dispatcher/supervisor) testified at trial.

On April 30, 2008, Respondent filed a motion to submit an additional exhibit–an affidavit of Denise Renner to correct an error in the trial transcript, or if her testimony was correctly transcribed, to correct an error in her testimony. Complainant did not object. On May 14, 2008, for good cause shown, I granted Respondent's motion and Ms. Renner's affidavit was admitted into evidence as RX 28.

Complainant filed a closing brief on May 13, 2008, which is hereby admitted into evidence as ALJX 5. Respondent filed a closing brief on May 15, 2008, which is hereby admitted into evidence as ALJX 6. The record is closed and the matter is submitted and ready for decision.

For the reasons discussed below, I find that Complainant's claim has no merit and should be dismissed because he failed to prove by a preponderance of the evidence that his protected activities were a motivating factor in his termination.

STIPULATIONS

The parties stipulate, and I accept that:

1. Respondent maintains a place of business in Hillsboro, Oregon;
2. Respondent is a commercial motor carrier within the meaning of 49 U.S.C. § 31101, which is the section that applies to this proceeding;
3. During all relevant times, Respondent engaged in transporting products on the highways via commercial motor vehicle;

[2] ALJX 1 is comprised of my February 23, 2005 Notice of Hearing and Pre-Trial Order issued in this case. ALJX 2 is Complainant's Pre-Trial Statement. ALJX 3 is Respondent's Pre-Trial Statement. ALJX 4 is Respondent's Pre-Trial List of Exhibits.

4. Respondent uses commercial motor vehicles to transport products with a gross weight rating of 10,001 pounds or more;
5. Respondent provides dump trucks primarily for construction hauling services;
6. Respondent hired Complainant as a truck driver in August 2006;
7. Complainant drove Respondent's truck(s) over highways in commerce to engage in construction hauling services;
8. Complainant's job duties included hauling construction materials, such as aggregate, rock, dirt, and asphalt;
9. Complainant's employment was terminated on February 1, 2007;
10. On May 11, 2007, Complainant filed a complaint with the Secretary of Labor alleging that Respondent discriminated against him in violation of the STAA.

TR[3] at 18-22. Because there is substantial evidence in the record to support the foregoing stipulations, I accept them.

ISSUES

The unresolved issues in this proceeding are:

1. What, if any, preclusive effect the Oregon unemployment compensation decision(s) has upon this matter, and;
2. Was Complainant terminated in retaliation for protected activities, in violation of the STAA?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Testimony and Evidence

A. Background

Complainant was born in 1957 and holds a Class A Commercial Driver's License. CX 1. Complainant was employed as a commercial truck driver for several years before his work for Respondent. EX 3 at 4.

Respondent is a truck hauling business, in operation for 23 or 24 years. TR at 149, 178. It is jointly owned by Mr. and Mrs. Roy and Denise Renner. *Id.* Respondent had nine or ten trucks in operation during Complainant's employment. TR at 150.

Mr. Renner has a hand in the entire operation, including hiring, firing, and driving. TR at 150. Mr. Renner is also a mechanic with 40 years of experience, and had two mechanics on staff during Complainant's tenure. TR at 149-50. Mrs. Renner testified that she handles the accounts, forms, employee files, and drug testing files. TR at 178. Mickey Vaandering has worked for Respondent for 10 years, and became the dispatcher/supervisor shortly before Complainant was

[3] The abbreviation "TR" refers to the March 20, 2008, hearing transcript.

hired. TR at 213. Peter Miranda has worked for Respondent as an administrative assistant since April 2006. TR at 240.

Respondent hired Complainant as a truck driver and his first day of employment was August 2, 2006. TR at 44. His first week consisted of training with another driver in "Truck No. 12." EX at 35-37; TR at 44, 85-86. After that Complainant began working on his own and he drove "Truck No. 2" almost every day of his employment for Respondent. *See* EX 7.

B. The Brakes Complaint

Although Complainant does not have a brake certification, he testified that he believes that his 1995 truck driving training satisfies the DOT requirements for brake certification "to operate and adjust brakes on a truck. . . ." TR at 45; *see* TR at 109-114.

Complainant testified that at about 6:30 a.m. on August 7, 2006–his first day in "Truck No. 2"–he noticed a 1/2 inch "groove of wear" on the brakes. TR at 44; EX 7 at 38. Complainant testified that looking at the brake drums was part of his pre-trip inspection. TR at 91. Complainant testified that he discovered the half-inch groove when he ran his hand "across the inside of the brake drum." TR at 88. He testified that he then measured it with a tape measure. *Id.*

Complainant testified that he noted the brake groove on his Vehicle Inspection Report ("VIR"). TR at 44, 88-89. A copy of a VIR dated August 7, 2006, and consistent with that testimony was received into evidence. *See* EX 9. On the VIR, Complainant checked the box labeled "Condition of the above vehicle is satisfactory." *Id.* He testified that he did so because he felt that the groove was a safety issue, but, he "felt OK to drive the truck" as long as he did not have a job that would require him to go downhill for a long time. TR at 101.

Complainant further testified that he turned in the original of the August 7, 2006, VIR to Mr. Vaandering (the dispatcher) at the end of that day, and discussed the problem with him that day or the next day. TR at 93, 97. Complainant testified that Mr. Vaandering told him new drums would be ordered. TR at 99.

Mr. and Mrs. Renner both testified that Respondent encourages its employees to report safety issues and partially relies on the driver's VIRs, as well as regular inspections by the mechanics based on the truck's mileage. TR at 151-52, 179. They both testified that they never saw the August 7, 2006, VIR until "it was sent to us from OSHA" and that they would have seen it if it had been turned in as Complainant alleged. TR at 144, 161, 203. Mr. Renner testified that, if he had seen that VIR, he would have talked to the dispatcher and they would have inspected the drum. TR at 161.

Complainant testified that, before August 15, 2006, someone pointed out to him that there was a bad bearing seal on the back of Truck No. 2, which "probably saved my life." TR at 108. He then testified that he did not know when that happened. TR at 109.

Respondent submitted the repair records for Truck No. 2 from August 14, 2006, through February 1, 2007. *See* EX 11; TR at 185. The August 15, 2006, record indicates that the "driver axle brake wore out" on Truck No. 2, so "R&R driver axle brakes" and "replaced a bad bearing seal. . . ." EX 11 at 188. Mr. Vaandering testified that "R&R" meant "repair and replace" and that the pad *and* drums would have been replaced. TR at 223. Furthermore he testified that the bad bearing seal, if bad enough to saturate the pads and drums with "rear end grease," would have independently necessitated replacing both the pads and drums. TR at 223-24.

Complainant testified that on August 16, 2006, after Respondent had changed the brake pads on Truck No. 2, he noticed that the drums had not been changed and pointed that out to one of Respondent's mechanic's ("Bob," no longer an employee of Respondent). TR at 90-91, 98-99.

Complainant testified that the brake shoe can wear a groove in the drum even before the shoe is totally worn out and that the portion of the brake drum where the shoe wears a groove is one inch thick on a new brake drum. TR at 136-38.

Mr. Renner testified that he is a certified brake inspector. TR at 161-62. He testified that regular wear occurs evenly across the surface of the brake drums, not in a groove as Complainant described. TR at 153. Respondent submitted a schematic for the brake drums used on its trucks. *See* EX 10. The schematic indicates that the thickness of the drum at the place where the pad creates a wear pattern is 0.53 inches. *Id.*; *see* TR at 155. Mr. Renner testified that if there was, hypothetically, a half-inch groove in the brake drum, the truck would be inoperable because the drum would "come in two, and the brake would be 'cam'd over'" because the drum is only 0.03 inches thicker than the hypothetical groove. TR at 157-58. He further testified that wear on the drum does not affect the operation of the truck until it gets to the point at which the "s-cam" locks up. TR at 158-59. So, from the driver's point of view, the drum either works fine or the wheel is totally locked up. *Id.* Mr. Renner also testified that he did not think that the groove Complainant described could be observed without removing the wheel. TR at 156, 174-75.

Complainant repeatedly testified that through the end of his employment in February 2007, the brake drums on Truck No. 2 were never replaced. TR at 45.

> So, from that point on, I was talking to everybody about trying to get a repair made. And they – it started out sounding like they were going to do it, and they said that they had them on order, they were waiting for them to come, and they never came during my period of time while I was there. I asked them several times.

TR at 100; *see* TR at 45. However, Mr. Vaandering testified that when Complainant requested repairs they were made and he denied that Complainant repeatedly complained about a brake problem. TR at 230. Mr. Vaandering also testified that, according to the repair records in EX 11, the brakes on Truck No. 2 would have been checked on approximately 20 occasions during Complainant's six months of employment with Respondent. *See* TR at 226-28; EX 11. He testified that Respondent changes the brake drums on its trucks approximately once a year because they do so much stopping and starting. TR at 239. He further testified that he

occasionally observed Complainant at the beginning and endings of his shifts and Complainant only inspected his truck 25-30% of the time. TR at 231-32.

Truck No. 2 was inspected by the Oregon Department of Transportation ("ODOT") on September 30, 2006. EX 14; TR at 108. Complainant admitted that the ODOT inspection was thorough *and that he talked to the inspector about the brake drums*. TR at 108, 135. Mr. Vaandering also testified that an ODOT inspector would detect defective brakes, if present. TR at 230. The ODOT inspector did *not* find any problems with the brakes. EX 14; TR at 108.

C. Refusal to Operate a Vehicle

In his original complaint, Complainant alleged that he refused to operate a vehicle because it had unsafe brakes. *See* EX 22 at 276. At trial, he testified that he drove Truck No. 7 ("the red truck") in late November or early December 2006, had problems stopping, and adjusted the brakes. TR at 106-07. He testified that he refused to operate that truck the next day and filed a complaint. TR at 103, 106. Respondent's Daily Haul Report for November 28, 2006, indicates that Complainant drove Truck No. 4 and has a notation "adjusted brakes," but no other evidence of a safety complaint was presented. EX 7 at 117.

D. The VIR Form Complaint(s)

Sometime around October 2006, Respondent switched from a commercially published Vehicle Inspection Report to one that Ms. Renner devised and had printed. TR at 47, 85, 189. Respondent submitted a copy of the top page, inner flap, and a blank checklist from the new form. EX 25; TR at 163-64, 180. Mrs. Renner testified that they created their own form to "be more specific about certain items that were being overlooked by some of the drivers" and also to switch to a form that required the drivers to affirmatively check that each item was OK. TR at 193-94.

Complainant testified that Respondent changed forms "three quarters of the way through" or "towards the end of" his employment. TR at 47, 84-85. He testified that he did not believe that Respondent's new form complied with the applicable regulations because 1) it was not purchased from an authorized vendor, 2) it was a "post trip" instead of "pre-trip" form, and 3) three required categories were missing–"Service Brakes," Parking Brakes," and Lighting Devices and Reflectors." TR at 49, 84, 118. Complainant testified that he did not believe that "it was ok to switch and do a post trip inspection," so he continued his practice of filling out his VIRs "pre-trip," before he drove the truck. TR at 57, 126. Complainant testified that he complained about the form to Respondent because he felt that the new form subjected him to the risk of getting a $100 dollar citation. TR at 47-50.

He also testified that he refused to use the new form and continued using the old form. TR at 56-57. Mr. Miranda testified that Complainant used the new form despite his reservations. TR at 247.

Mr. Renner admitted that he was aware that Complainant believed that the new VIR was noncompliant. TR at 148, 164. Complainant admitted that when he questioned the new post trip VIR, Respondent provided him with a document that summarized the applicable regulations. Mr. Miranda testified that he showed Complainant that the new VIR met each of the requirements of the regulation, but Complainant maintained that Respondent was required to buy the form from someone else. *See* TR at 59. Complainant also testified that he has consistently maintained that Respondent's new VIR form is noncompliant. TR at 65, 119, *see* TR at 121-24. At trial, Respondent's counsel read to Complainant the part of the regulation that states that a post-trip report is required and asked if he still believed that "somehow there is no requirement to do a report in writing at the completion of each days work?" TR at 85. Complainant answered "You know, I'm not sure on that now." *Id.* Shortly thereafter, Complainant emphasized that he was certain, at the time of his testimony, that a written post-trip report was not required in August of 2006. TR at 93-95.

Mr. Renner testified that a written post-trip form has always been required, but "years and years ago" a written pre-trip was also required. TR at 170. However, throughout Complainant's tenure and long beforehand, there has been no requirement to fill out a form until the post-trip inspection. TR 168-71.

E. Tardiness and Unexcused Absences

Respondent submitted the relevant "Daily Haul Reports," "Time Tickets," and Weekly Safety Meeting attendance records covering the period of Complainant's employment. EX 5; EX 7, EX 8; TR at 179-181, 184. Mrs. Renner also prepared and submitted a summary of Complainant's attendance at the Weekly Safety Meetings. EX 6; TR at 180-82. Her summary was created by comparing Complainant's start time as listed in his Daily Haul Report to the start time of the safety meeting. TR at 180. The summary indicates that out of 27 safety meetings, Complainant was late 9 times and absent 5 other times. EX 6. However, Mrs. Renner testified that a couple of days before trial she realized that she had made an error and Complainant was not late to the December 6, 2006, meeting–that meeting had started. TR at 181. Therefore, Respondent's evidence suggests that Complainant was late or absent for 13 of the 27 weekly safety meetings–almost half.

Respondent also submitted Complainant's two page "Employee File." EX 15. Mrs. Renner testified that their employee records are kept on a computer as a "rolling document" and a printout is made after each new entry. TR at 187. Complainant's employee file documents four *additional* absences on days when there was not a safety meeting, as well as three *further* instances of tardiness and a January 29, 2007, incident where Complainant ran a personal errand while on the clock, but filled out his daily haul report as if he was working. EX 15; *see* TR at 167, 207-08.

The employee file also indicates that Complainant was given a "final warning notice" on December 26, 2006. EX 15 at 258. Respondent submitted a copy of a December 26, 2006, "Employee Warning Notice" form that is directed to and signed by Complainant. EX 16. Complainant and Mr. Renner's signatures are dated "12/28/2006." *Id.* It lists two absences and one instance of tardiness and warns that Complainant will be "terminated if further action is

required." *Id.* In summary, Respondent's evidence indicates that Complainant was late 11 times and absent 9 times during his six months of employment.

Complainant testified that he only remembered being written up for attendance once, in late December, and he "disputed it." TR at 136.

F. The Termination

Complainant was terminated on February 1, 2007. TR at 66, 166.

Mr. Renner testified that, on January 29, 2007, he was checking daily haul reports and noticed that Complainant took over two hours to return from a job. TR at 167. Mr. Renner testified that incident–it turned out that Complainant had stopped at the post office to mail his house payment–led him to check Complainant's employee file. TR at 167. He then noticed that Complainant had been late several times since the last warning and decided to terminate him–"that was enough." TR at 167. Mrs. Renner also testified that Complainant's personal errand on company time drew her attention to Complainant's recent attendance. TR at 208.

Mr. Renner testified that he fired Complainant at the end of his shift. TR at 166. Mr. Renner testified that he told Complainant "it's because of tardiness." TR at 166. Mr. Renner testified that Complainant denied ever being tardy, but Mr. Renner then pointed out several instances that occurred after Complainant's "final notice." TR at 166-67.

Complainant testified that Mr. Renner told him that he was being fired for conducting personal business on Respondent's time–specifically for stopping at the post office to mail his house payment. TR at 69. Complainant testified that the Renners did not tell him that he was being fired for lateness or tardiness until the unemployment hearing on March 29, 2007. TR at 69, 73.

The January 29, 2007, entry in Complainant's employee file documents his personal errand on company time ends with the following text: "*notation- falsifying your daily haul sheets is grounds for immediate dismissal. See attached copy of daily haul sheet for 1/29/07." EX 15 at 259.

Complainant also testified that Mr. and Mrs. Renner were "obviously" not happy about his complaints and Mr. Renner "always seemed to disappear" when Complainant would return to the "the shop." TR at 51. He stated that he believed that he was "stirring up some mud that they didn't want to deal with" and he believes that is why they terminated his employment. TR at 62. Complainant testified that he concluded, *the day he was fired*, that he had been fired because of his complainants about the brakes or the VIR form. TR at 67, 75.

Complainant admitted that Mr. Renner never told him that his termination was related to his complaints about brakes or the VIR form. TR at 70.

Mr. Renner testified that his decision to terminate Complainant had nothing to do with complaints about brake drums or brakes in general. TR at 162-63. He also testified his decision to terminate Complainant was not related Complainant's complaints about the new VIR form. TR at 164-65. Mr. Renner testified that he fired Complainant for "[t]ardiness and absence, not showing up for work." TR at 165.

Mrs. Renner testified that she participated in the decision to fire Complainant and she was not even aware that Complainant had made complainants about brakes. TR at 204. She also testified that, although she was aware that Complainant was dissatisfied with the new VIR form, the decision to fire him was unrelated to his complaints. TR at 205. Mrs. Renner testified that Complainant was fired "because he was unreliable, and his tardiness and his attendance was to the point we needed to let him go." TR at 205, 208.

G. The "Duplicate" VIRs

EX 17 was submitted by Respondent. It is a completed VIR (Respondent's new form), dated February 1, 2007. *Id.* In the field next to "Exhaust System," a comment is written–"Flex tube loose @ both ends." *Id.* In the "Remarks" field it states "Airleak on trans range shifter trailer tongue [illegible] surge stopper not locking." *Id.*

Complainant suggested that someone had tampered with EX 17. TR at 128-33. He admitted that the signature, "Flex tube loose @ both ends," and the time notation were in his handwriting, but denied writing the "M," the date, and the "Airlock" remark. *Id.*

Mrs. Renner testified that Respondent is only required to retain the VIRs for 90 days and they routinely throw the old ones out, "otherwise, we'd have volumes." TR at 191. She further testified that she wrote the comment "This is the only post-trip that was remaining in our files" on EX 17 because, by the time Complainant filed his complaint with OSHA in May 2007, it was the only one they still had. TR at 195. She also testified that the "M" on EX 17 represents Mr. Vaandering's (Mickey's) initial and is in his handwriting. TR at 195.

EX 18 was submitted by Respondent. It is also a copy of Respondent's VIR. It is blank except that it has a comment "Flex tube loose at both ends" and a remark "Airleak on trani shift hose." Trailer ~~tong~~ toung [sic].[4]" EX 18. Mrs. Renner testified that Respondent received it with the documents Complainant submitted to OSHA. TR at 196.

Careful examination of the two exhibits reveals that the "Flex tube" comments are very similar, but are not mechanical or digital copies.[5] Mrs. Renner also testified that submitted VIRs must have the Truck No., date, and the driver's signature, all of which are missing from EX 18. TR at 197.

[4] The strikethrough in the text of the exhibit.

[5] For example, the horizontal bars of the "F" in "Flextube" are widely spaced in EX 17 and close together in EX 18 and the spacing between the "x" and the "T" is different, as well.

Complainant admitted that he did not turn EX 18 in to Respondent, but testified that he kept it as a "sample" of the form he believed to be non-compliant. TR at 55-56, 58. He did not explain why he partially filled it out with information similar to his final VIR.

H. The Unemployment Compensation Proceedings

After his February 1, 2007, termination, Complainant filed an unemployment compensation claim with the Oregon Employment Department. EX 19 at 263. The claim was denied in a decision mailed March 7, 2007, based upon a finding that Complainant was terminated for misconduct–unexcused absences and tardiness. *Id.*

Complainant appealed and a hearing was held on March 29, 2007. EX 20 at 266. Complainant and Ms. Renner testified. *Id.* In an April 2, 2007, decision, the Administrative Law Judge ("ALJ") found Complainant's testimony less reliable than Ms. Renner's, "because of [C]omplainant's largely evasive manner and frequently non-responsive testimony." *Id.* The ALJ further found that Respondent gave Complainant a final written warning regarding attendance on December 28, 2006, and that Complainant had been several hours late on January 10 and 18, 2007. *Id.* at 267. The ALJ concluded that Respondent met its burden of proving that Complainant was terminated for misconduct and affirmed the denial of benefits. EX 20 at 269-70.

On April 3, 2007, Complainant appealed the ALJ's decision to the Oregon Employment Appeals Board. EX 21 at 272. On May 2, 2007, the Board issued a decision affirming the ALJ's April 2, 2007, decision. *Id.*

Complainant testified in this trial that he did not recall if his complaints about brakes or VIR forms was discussed in the unemployment hearing. TR at 74. He also testified "It wasn't a DOT hearing, it was an unemployment hearing." TR at 75. The ALJ's decision appears thorough, but makes no mention of any complainants about brakes, forms, or any other protected activity. *See* EX 20.

Complainant testified that he received a final denial on May 2, 2007, and filed this whistleblower claim nine days later. TR at 75-76. He testified that he had verbally complained to the U.S. Department of Labor "through the whole period of time." TR at 76.

II. <u>Credibility</u>

A. Complainant

Complainant was pleasant and likeable at trial, but not credible.

1. <u>The Brakes</u>

Complainant testified that, on August 7, 2006, he noticed a 1/2 inch "groove of wear" on the brake drums of Truck No. 2, and that he measured the groove with a tape measure. TR at 44, 88. However, Mr. Renner, a certified brake inspector, submitted a schematic indicating that the

thickness of the drum at the place where the pad creates a wear pattern is 0.53 inches. EX 10; *see* TR at 155. Mr. Renner credibly testified that if there was, hypothetically, a half-inch groove in the brake drum, the truck would be inoperable because the drum would "come in two, and the brake would be 'cam'd over'" because the drum is only 0.03 inches thicker than the hypothetical groove. TR at 157-58.

Complainant also testified that he noted the problem on his VIR that day, followed up with several complaints, and, although the pads were changed on August 15, 2006, the drums were never replaced during his employment. EX 9; TR at 44-45, 88-91, 93, 97-99, 100.

Mr. and Mrs. Renner both testified that they never saw the August 7, 2006, VIR until "it was sent to us from OSHA," and that they would have noticed it. TR at 144, 161, 203. Mr. Renner also testified that he did not think that the groove Complainant described could be observed without removing the wheel. TR at 156, 174-75. Furthermore, the relevant repair records for Truck No. 2 indicate that the brakes were replaced on August 15, 2006, because of wear and a bad bearing seal. EX 11 at 188. Mr. Vaandering testified that the pad *and* drums would have been replaced, but if the bearing seal was bad enough to saturate the pads and drums with "rear end grease," that would also have necessitated replacing both the pads and drums. TR at 223-24. Complainant confirmed the bad bearing seal and that it was life-threatening. TR at 108.

Mr. Vaandering also testified that, according to the repair records in EX 11, the brakes on Truck No. 2 would have been checked on approximately 20 occasions during Complainant's employment with Respondent. *See* TR at 226-28; EX 11. Moreover, Truck No. 2 was inspected by the Oregon Department of Transportation ("ODOT") on September 30, 2006. EX 14; TR at 108. Complainant admitted that the ODOT inspection was thorough *and that he talked to the inspector about the brake drums*. TR at 108, 135. The ODOT inspector did not find any problems with the brakes. EX 14; TR at 108. Mr. Vaandering also confirmed that an ODOT inspector would detect defective brakes, if present. TR at 230.

Considering all the evidence, I find that it is extremely unlikely that there was ever a 1/2 groove in the brake drum of Truck No. 2 because it would likely have made the truck totally inoperable. The repair records and Complainant's own testimony indicate that regular wear and a bad bearing seal were responsible for the August 2006 brake problem. The repair records and the September 30, 2006, ODOT inspection also contradict Complainant's assertion that there was a serious continuous problem with the brakes on Truck No. 2. Therefore, the great weight of the evidence dictates a finding that there was never a 1/2 inch groove that Complainant claimed to have measured with a tape measure, and whatever brake problem existed was fixed promptly and did not continue through Complainant's employment as he testified. This inconsistency was very damaging to Complainant's credibility.

2. The Duplicate VIRs

Perhaps most disturbing was the VIR copy that Complainant submitted to OSHA (EX 18), which appears likely to have been an attempt to falsify evidence of a protected activity. Complainant admitted that he did not turn EX 18 in to Respondent and testified that he kept it as

a "sample" of the form he believed to be non-compliant. TR at 55-56, 58. However, the fact that he partially filled it out with information almost identical to the final VIR he submitted to Respondent (EX 17) supports the inference that he was trying to pass it off as his final VIR, perhaps because he did not have a copy of the true report. There would be no reason to fill out the form if was merely intended as a "sample."

Complainant also testified that he refused to use Respondent's VIR form, but he later admitted that his handwriting was on EX 17 (Respondent's VIR form), but denied that it was legitimate, and finally he admitted that he did use Respondent's VIR form. TR at 56-57, 128-34. That inconsistency and obfuscation further reduced his credibility.

I reject Complainant's assertion that EX 17 was tampered with and find that EX 17 is authentic copy of the VIR he submitted on February 1, 2007. Respondent's explanations for two of the other entries–Mr. Vaandering's initial and date and Mrs. Renner's comment "This is the only post-trip that was remaining in our files"–are obvious and credible. TR at 195. Complainant testified that the entry "air lock on the transmission range shifter" "doesn't look like" his writing. TR at 131. However, it appears very similar to me, and there is no plausible motive for Respondent to falsify an insignificant portion of the document. Moreover, Complainant's protestations about the authenticity of EX 17 are even less credible in light of the faux VIR he submitted to OSHA.

3. Complainant's Testimony Concerning the Timing of His Belief That He Was Discriminated Against

Complainant testified that, *on the day he was fired*, he concluded it was because of his complainants about the brakes or the VIR form. TR at 67, 75. However, he also testified in this trial that he did not recall if his complaints about brakes or VIR forms were discussed in the unemployment hearing. TR at 74. He also testified "It wasn't a DOT hearing. . . ." TR at 75. I find it very unlikely that if he had concluded that he was fired for his complaints on the day of his termination, that he would not remember whether he brought that up at the unemployment hearing. If Complainant thought he was fired for his complaints, he would have stressed that in his unemployment hearing and would likely have remembered that at the time of this trial. A much more likely explanation is that he did not mention his safety complaints at the unemployment proceedings because he did not think that Respondent terminated him for that reason. Complainant's unlikely testimony that he did not remember if his complaints about brakes or VIR forms were discussed in the unemployment hearing further reduced his credibility in this action. Also, the lack of any supporting witness testimony or documentary evidence for Complainant further damages his credibility.

4. Complainant's Attitude Towards Accuracy During the Trial

At various times during the trial Complainant answered questions by saying 'I don't care much about that," "Let's go ahead and say that," and "I'll go along with it." TR at 87, 103, 115. At another point he stated "I don't really care what's going on, at this point." TR at 198.

5. Summary of Complainant's Credibility

I find that the falsified VIR, Complainant's contradictory testimony about using the new VIR form, his impossible assertions about the brake drums, his unlikely memory lapse by not mentioning the alleged retaliation at the unemployment hearing, and his occasionally obvious disregard for the truth of his own testimony totally devalues the credibility of his testimony. I specifically do not find Complainant credible in his assertions about a continuing brake drum problem in Truck No. 2., or that he refused to use the new VIR form.

B. The Other Witnesses

I found the other witnesses in this case generally credible. Like Complainant, Mr. and Mrs. Renner had a stake in the outcome of the decision and Mr. Vaandering and Mr. Miranda have an interest in pleasing their employers, however, their testimony was generally consistent– both internally and with the objective evidence.

There were two minor exceptions. Mr. Renner's testified that Complainant's trip to the post office on company time was not a factor in his decision to fire him, which was at odds with Complainant's testimony that Mr. Renner told him he was being fired for that reason and the notation in Complainant's file to the effect that the post office trip was grounds for termination. However, Complainant's credibility was so damaged that his contradiction of Mr. Renner does not weigh heavily against Mr. Renner's credibility and the notation only indicated that Complainant *could* be fired for his unauthorized detour.

The other conflict is that Mr. and Mrs. Renner both testified that they had not seen the August 7, 2006, VIR before they received a copy from OSHA. However, the VIR is on the old form which supports a finding that it predated the switch to the new forms. Nevertheless, it is possible that Complainant did not turn it in, even if he filled it out on the date indicated. Again, his testimony was not generally credible. Alternately, the Renners might not have seen it or might have forgotten, although those possibilities seem less likely. Either way, the truth of their statements is unclear and did not weigh heavily in determining their credibility.

III. Discussion

Complainant's closing brief contains no substantive allegations or legal theories. *See* ALJX 5. However, in his Pretrial Statement he stated that felt that he was terminated in retaliation for his complaints about the brake drums on Truck and Trailer No. 2, as well as his complaints about the "new Post Trip VIR's." ALJX 2 at 1. He also alleged that he "filed a verbal report with DOT, [t]hen was terminated." *Id.* In his original complaint to OSHA, Complainant alleged that he refused to operate a vehicle because it had unsafe brakes. *See* EX 22 at 276.

Respondent argues that issue preclusion forecloses Complainant's STAA claim and, alternatively, that his termination was not related to any complaints protected by the STAA. ALJX 9-10.

A. Issue Preclusion and Deference to Other Proceedings

Respondent argues that Complainant did not argue that "his termination was due to complaints about brakes" until after his unemployment compensation appeal, therefore issue preclusion prevents him "from asserting now that he was terminated for some other reason." ALJX 6 at 10.

Respondent cites no authority for the proposition that Complainant's speculations before the Oregon Employment Department regarding Respondent's motive for his termination would somehow preclude him from arguing retaliation in this STAA proceeding. It is the Oregon Employment Department's determination that Complainant was terminated for unexcused absences and tardiness that might–via the doctrine of issue preclusion–preclude Complainant from re-litigating the issue of Respondent's motive.

In STAA proceedings, state court judgments are given the same preclusive effect as they would be given by the courts of the state that rendered the judgments. *Germann v. Calmat Co.*, ARB No. 04-008, ALJ No. 02-STA-28, p. 3-4 (2005); *see* 28 U.S.C.A. § 1738 (West, 2008); *Kremer v. Chem. Constr. Corp*., 456 U.S. 461, 466 (1982); *Graybill v. U.S. Postal Serv*., 782 F.2d 1567, 1570-71 (Fed. Cir. 1986).

Here, Complainant's termination was litigated before the Oregon Employment Department. However, Oregon bars the use of "the decisions, findings, conclusions, final orders and judgments" of its unemployment hearings and appeals "for the purpose of claim preclusion or issue preclusion in any other action or proceeding except [a proceeding under Oregon's Unemployment Insurance statute]." O.R.S. § 657.273. Therefore, the decisions of the Oregon Employment Department and Appeals Board have no preclusive effect in a STAA proceeding.

Moreover, Title 29 of the Code of Federal Regulations subsection 1978.112(c) sets forth the standards for deferral to the outcome of other proceedings. *See also Germann*, ARB No. 04-008 at 5. Here, there is no evidence that the prior proceedings dealt with the effect–if any–of Complainant's complainants about brakes or VIRs on Respondent's decision to terminate him. Therefore, I cannot defer to the Oregon Employment Department and Appeals Board decisions.

B. Retaliation

The employee protection terms of the STAA in effect during the period of Complainant's employment provide that:

> (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because--
>
> > (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or

(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 to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

49 U.S.C.A. § 31105(a) (2006).[6]

To prevail on an STAA whistleblower claim, a complainant must prove by a preponderance of the evidence that 1) he engaged in protected activity, 2) suffered an adverse action, and 3) that his protected activity was a "motivating" factor in the employer's decision to take the adverse action. *Muzyk v. Carlsward Transp.*, ARB No. 06-149, ALJ No. 2005-STA-60, p. 4-5 (ARB Sept. 28, 2007). Even if a complainant proves those elements, the employer can avoid liability "by proving, by a preponderance of evidence in STAA cases, that it would have reached the same decision even in the absence of protected activity." *Muzyk*, ARB No. 06-149 at 5, n.23.

1. **Protected Activities and Adverse Action**

Complainant alleges that he reported a safety problem with the brakes of Truck No. 2 on August 7, 2006, and that he complained about Respondent's new VIR that was introduced "three quarters of the way through" or "towards the end of" his employment. TR at 47, 84-85. Ms. Renner testified that the VIR switch occurred sometime around October 2006. TR at 47, 85, 189.

I reject Complainant's testimony that he continued complaining about the brakes after September 2007 because the evidence clearly establishes that repairs were made and the truck passed an ODOT inspection. However, I will assume without deciding that he made the initial brake drum complaint(s) and continued to voice complaints about the new VIR through the end of his employment.

[6] Subsection 31105(a) has since been amended, but the changes would not have changed the outcome of this case, even if they were applicable. *See* 49 U.S.C.A. § 31105(a) (2007).

I will further assume, without deciding, that Complainant's complaints about the new VIR form constitute a legitimate protected activity.[7] Complainant was very vague about the specific timing of his complaints regarding the new VIR form, as were the Renners. Because it is Complainant's burden to present the facts showing the alleged discrimination, I assume that Complainant voiced his last complaint about the new VIR sometime in his last month of employment.

Complainant also testified that he drove Truck No. 7 ("the red truck") in late November or early December 2006, had problems stopping, and adjusted the brakes. TR at 106-07. He testified that he refused to operate that truck the next day and filed a complaint. TR at 103, 106. Respondent's Daily Haul Report for November 28, 2006, indicates that Complainant drove Truck No. 4 and has a notation "adjusted brakes," but no other evidence of a complaint was presented. EX 7 at 117. Because Respondent offered no rebuttal, I find that Complainant engaged in a protected activity on November 29, 2006.

Complainant also alleged in his Pretrial Statement that he "filed a verbal report with DOT, [t]hen was terminated." ALJX 2 at 1. No evidence was offered to support this allegation by Complainant, so I do not find another protected activity occurred.

In summary, Complainant's protected activities consist of August 2006 complaints about the brakes on Truck No. 2, the refusal to drive Truck No. 4 on November 29, 2006, and complaints about the new VIR from October 2006 through December 2006.

Complainant was terminated on February 1, 2007, which constitutes an adverse action under the STAA.

2. **Motive**

It is also Complainant's burden to prove by a preponderance of evidence that his protected activities were a "motivating" factor in Respondent's decision to terminate his employment. *See Muzyk*, ARB No. 06-149 at 4-5.

Here, Complainant has offered no "smoking gun" evidence–direct evidence of a retaliatory motive. Complainant testified that Mr. Renner told him that he was being fired for conducting personal business on Respondent's time, which is unrelated to his protected activities. *See* TR at 69.

Complainant also testified that Mr. and Mrs. Renner were "obviously" not happy about his complaints and Mr. Renner "always seemed to disappear" when Complainant would return to the "the shop." TR at 51. He stated that he believed that he was "stirring up some mud that they didn't want to deal with" and he believes that is why they terminated his employment. TR at 62. However, Complainant's assertion that he could not remember if he advanced that theory in his unemployment hearings cast doubt on the sincerity of his accusations, much less their truth.

[7] Respondent's VIR form complies with the applicable regulation.

There was no evidence presented that Complainant engaged in any protected activity after December 2006. Therefore, temporal proximity only raises a weak inference of causation. In other words, since Complainant was not fired a day, a few days, or a few weeks after engaging in protected activity, the timing does not strongly suggest the protected activity was the motive for his termination.

On the other hand, Respondent presented persuasive, credible evidence of two non-retaliatory motives for terminating Complainant–attendance problems and a falsified haul report after an unauthorized detour to the post office.

The evidence shows that Complainant was late 11 times and absent 9 times in his six months of employment with Respondent. *See* EX 5; EX 6; EX 7, EX 8; EX 15; TR at 179-82, 184, 187. Complainant was also given a "final warning notice" on December 26, 2006. EX 15 at 258. Two of his absences and one instance of tardiness occurred *after* his final warning. EX 16.

Complainant testified that he only remembered being written up for attendance once, in late December, and he "disputed it." TR at 136. However, his testimony was not credible, especially in light of the documentary and testimonial evidence to the contrary.

Additionally, Complainant was discovered to have run a personal errand while on the clock, but filled out his daily haul report as if he was working without interruption on January 29, 2007–just a few days before his termination. EX 15; *see* TR at 167, 207-08.

Finally, both Mr. and Mrs. Renner credibly testified that Complainant's termination was unrelated to his protected activities. *See* TR at 162-65, 204-05, 208. An employer's denial of a retaliatory motive is not necessarily persuasive, but here it is relatively weighty simply based upon the supporting evidence and the absence of significant evidence to the contrary.

In conclusion, Complainant did not meet his burden to prove by a preponderance of evidence that his protected activities were a "motivating" factor in Respondent's decision to terminate his employment. *See Muzyk*, ARB No. 06-149 at 4-5. His testimony that the Renners were displeased with his complaints was not credible and the temporal proximity of the protected activities and the adverse action only raised a weak inference of causation. That inference was overwhelmed by the ample evidence of a non-discriminatory motive for his termination–tardiness and attendance problems and, perhaps, his falsification of his timesheet after his unapproved detour to the post office on company time. Complainant's failure to prove by a preponderance of evidence that his protected activities were a "motivating" factor in Respondent's decision to terminate his employment is fatal to his STAA retaliatory discharge complaint.

RECOMMENDED ORDER

IT IS RECOMMENDED that the STAA complaint filed by William Peters be **DISMISSED**.

A

GERALD M. ETCHINGHAM
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. See 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.