



In the Matter of:

OSCAR SIMPKINS,

ARB CASE NO. 02-097

COMPLAINANT,

ALJ CASE NO. 2001-STA-0059

v.

DATE: September 24, 2003

RONDY COMPANY, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Oscar Simpkins, pro se, Greenwood, South Carolina

For the Respondent:

Deborah Casey Brown, Esq., Gallivan, White & Boyd, P.A., Greenville, South Carolina

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 1997), and the implementing regulations at 29 C.F.R. Part 1978 (2000). The STAA protects employees from retaliation for engaging in specific types of activities that are related to motor carrier vehicle safety. 49 U.S.C.A. § 31105(a)(1)(A), (B). On November 20, 2000, the Complainant, Oscar Simpkins, filed a complaint with the Department of Labor Occupational Health and Safety Administration (OSHA) alleging that the Respondent, Rony Company, Inc., retaliated against him for pursuing safety-related issues covered by the STAA. Joint Exhibit 1 at OSHA Discrimination Case Activity Worksheet. Specifically, Simpkins alleged that Rony terminated him from his job hauling recyclable materials because he had raised concerns about mechanical defects in the trucks Rony assigned him to drive. *Id.* at Secretary's Findings. Following investigation by OSHA, Simpkins' complaint was dismissed as lacking merit. *Id.* Simpkins requested a hearing before an Administrative Law Judge (ALJ), which the ALJ held on December 11, 2001. Following that hearing, the ALJ issued a Recommended Decision and Order (R. D. & O.), concluding that Simpkins had engaged in safety-related activities protected

by the STAA, that Rondy was aware of those protected activities, and that Rondy had taken adverse action against Simpkins by issuing letters of warning and then terminating his employment. R. D. & O. at 8; *see* R. D. & O. at 3 (referring to parties' stipulations regarding the foregoing elements). The ALJ further concluded, however, that the evidence did not establish that Simpkins' protected activity played a role in Rondy's issuing the warning letters or that the protected activity otherwise contributed to Rondy's termination decision. *Id.* at 8-10. The ALJ accordingly recommended denial of the complaint.

Pursuant to 29 C.F.R. § 1978.109(a), (b) (2002), the ALJ forwarded the case to this Board for review. Both parties have filed briefs for the Board's consideration. *See* 29 C.F.R. § 1978.109(c)(2). We have jurisdiction to decide this case pursuant to 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1). *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). Based on review of the record and the ALJ's decision, we adopt the ALJ's recommendation to deny the complaint. The ALJ provided a thorough discussion of the relevant evidence and fully explained how the evidence supported his findings of fact. R. D. & O. at 3-10. Furthermore, the ALJ's conclusion that a preponderance of the evidence did not establish that Simpkins' raising of safety concerns motivated Rondy's termination decision is fully supported by the ALJ's factual findings and is otherwise in accord with applicable law. With the minor clarification of the ALJ's analysis of the Complainant's burden in establishing retaliatory intent that follows, we incorporate the attached R. D. & O. herein.

STANDARD OF REVIEW

Under the STAA, the Board 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 Transp. 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 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 Env'tl. Servs. 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 conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making an initial decision. . . ." 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(c) (providing for issuance of a final decision and order by the Board). Therefore, the Board reviews the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

The ALJ correctly identified the elements that a complainant must establish to prevail in a STAA complaint. R. D. & O. at 8 (citing *BSP Transp.*, *supra*, and *Moon v. Transp. Drivers*, 836 F.2d 226 (6th Cir. 1987)). As the ALJ stated, R. D. & O. at 8, the parties' stipulations that Simpkins had engaged in activity protected by the STAA, that Rondy had knowledge of that activity, and that Rondy had taken adverse action against Simpkins, left only the question of a

causal link between the protected activity and the adverse action to be resolved. *See Ass't Sec'y v. Minn. Corn Processors, Inc. (Helgren)*, ARB No. 01-042, ALJ No. 2000-STA-0044, slip op. at 4 (ARB July 31, 2003) (citing *BSP Transp.* and *Moon, supra*). The ALJ ultimately considered all the evidence relevant to the question of whether the adverse action was motivated by an intent to retaliate against Simpkins for protected activity, but he initially evaluated the evidence in terms of the requirements of a complainant's prima facie case. R. D. & O. at 8-10. Since all the issues of Simpkins' whistleblower complaint were adjudicated at hearing before the ALJ, consideration of whether the Complainant had met the preliminary requirement of establishing a prima facie case was unnecessary. *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 713-14 (1983); *Johnson v. Roadway Exp.*, ARB No. 99-111, ALJ No. 1999-STA-5, slip op. at 7 n.11 (ARB Mar. 29, 2000). As the following discussion indicates, any error in the analytical framework the ALJ employed is harmless, as it did not undermine his weighing of all the evidence relevant to the question of whether Rondy took the adverse actions in retaliation for protected activity.

Rondy terminated Simpkins' employment immediately before the end of a 90-day probationary period that followed his hiring.¹ R. D. & O. at 6. To determine whether the evidence demonstrated that Simpkins' raising of STAA-protected safety concerns contributed to Rondy's decision to take the adverse actions – two written warnings and the termination action – the ALJ reviewed the sequence of events over the approximate three months that Simpkins worked for Rondy. The ALJ credited the testimony of Gordon, the Rondy on-site manager, that he recommended the first warning letter and personally issued the second letter, and that he later recommended that Rondy terminate Simpkins' employment. R. D. & O. at 3, 5-6; *see* HT at 148-49, 167-69, 179-81 (Gordon); DX 2, 3. In addition to the parties' stipulation that Rondy was aware of Simpkins' protected activity when it terminated his employment, Gordon testified that he had personal knowledge of the Complainant's safety-related concerns when he initiated the warnings and the termination. R. D. & O. at 3, 6; HT 133-37, 142-48 (Gordon). The ALJ concluded, however, that the evidence was inadequate to establish that Simpkins' raising of STAA-related concerns contributed to Rondy's decision to take the adverse actions. *Id.* at 9, 10.

The ALJ based that conclusion on the lack of temporal proximity – i.e., closeness in time – between Simpkins' raising of STAA-related concerns and the warning letters and subsequent

¹ The R. D. & O. contains a discrepancy regarding the exact period of Simpkins' employment with Rondy. The ALJ found that Rondy hired Simpkins on July 5 and terminated his employment on October 10, 2001. R. D. & O. at 3, 6. Those findings are clearly supported by both documentary evidence and witness testimony. Hearing Transcript (HT) 24, 29 (Simpkins), 121 (Gordon); Respondent's Exhibit (DX) 4. The ALJ also found that Rondy terminated Simpkins' employment prior to the end of a 90-day probationary period. R. D. & O. at 3. That finding is also clearly supported by the evidence of record, including the testimony of both Simpkins and Gordon. HT 66-67 (Simpkins); 121-22, 149 (Gordon). However, the July 5 – October 10 employment period spans more than 90 days, and the record is unclear regarding how the 90-day probationary period was calculated. Inasmuch as Simpkins does not challenge this finding and a resolution of this factual discrepancy is unnecessary to our disposition of this case, further action regarding this discrepancy is not required.

termination. The ALJ found that Rondy issued each warning letter immediately after an incident that Rondy deemed a deviation from company policy. R. D. & O. at 8-9. Similarly, the termination decision followed a few days after issuance of the second warning letter. *Id.* at 9. The ALJ also relied on the lack of evidence indicating that Simpkins' STAA-protected concerns generated hostility by Rondy management. *Id.* at 8. Finally, the ALJ cited the concerns raised by Rondy about Simpkins' work over the approximate three-month period. In addition to the two incidents for which Rondy issued the warning letters – returning a truck without refueling it and failing to fully comply with company procedures during a two-day absence – Rondy cited a failure to complete daily paperwork, repeated failure to have the dump truck weighed, and damaging company equipment. R. D. & O. at 3-5, 9; HT 123-27, 131-32, 137-42, 165-66, 170-74 (Gordon). As the ALJ noted, Simpkins acknowledged some of the cited conduct and raised only minor challenges to Rondy's other contentions. R. D. & O at 9; HT 33-39, 54-66, 82-96 (Simpkins). The ALJ thus determined that Rondy had based its decision to take adverse action against Simpkins on factors not related to the raising of STAA-protected concerns. Because the Complainant had failed to establish this necessary element of his case, the ALJ properly concluded that the complaint should be denied.

CONCLUSION and ORDER

The ALJ's findings of fact are supported by substantial evidence on the record considered as a whole and his legal conclusions are fully in accordance with applicable law. We therefore adopt the ALJ's recommendation and, with the clarification set forth herein, incorporate the ALJ's recommended decision that is attached, and **DENY** the complaint.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge