In the Matter of:

MARK MONTGOMERY,

COMPLAINANT,

v.

JACK IN THE BOX,

RESPONDENT.

ARB CASE NO. 05-129

ALJ CASE NO. 2005-STA-006

DATE: October 31, 2007

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Larry Watts, Esq., Missouri City, Texas

For the Respondent:
J. Michael Colpoys, Esq., *Vial, Hamilton, Koch & Knox, LLP,* Dallas, Texas
James W. Stubblefield, Esq., *Jack in the Box,* San Diego, California

FINAL DECISION AND ORDER

Mark Montgomery filed a complaint with the United States Department of Labor in which he alleged that when his employer, Jack in the Box (JiB), terminated his employment, it violated the employee protection section of the Surface Transportation Assistance Act (STAA or the Act).[1] After a hearing, a Department of Labor

[1] 49 U.S.C.A. § 31105(a) (West 1997). Regulations implementing the STAA are found at 29 C.F.R. Part 1978 (2007). The STAA has been amended since Montgomery filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). Even if the amendments were applicable to this complaint, they would not affect our decision.

Administrative Law Judge (ALJ) concluded that JiB did not violate the STAA. We affirm.

BACKGROUND

JiB is a Delaware corporation that distributes food and related supplies to company owned and franchised fast food restaurants.[2] JiB hired Montgomery in 1999 to drive trucks out of its Dallas Distribution Center. He reported directly to Jason Whitefield and Jose Angel, two transportation supervisors.

During his employment, Montgomery complained about "a variety of things that [he] believed were misconduct on the part of … management."[3] He testified that he inspected vehicles he drove and discovered "various violations which indicated that repairs were needed, showing that the equipment was sub-standard to DOT regulations and needed repairs" and that sometimes he was ordered to drive "in violation."[4] He also made phone calls to JiB's Ethics Hotline, which had been established to allow employees to lodge complaints and receive guidance. During those phone calls, Montgomery complained about employee performance evaluations, driver safety, and what he perceived as management's mistreatment of employees.[5]

Montgomery also testified that, "During the year of 2003, [he] was assigned and instructed to drive routes that had violations of the [DOT regulations pertaining to] service hours. And when [he] recognized certain routes [he] was driving had those violations, [he] definitely made immediate reports to various managers about that."[6] Whitefield acknowledged that Montgomery complained that his assigned routes could not

---

[2] Complainant's Exhibit (CX) 60.

[3] Transcript (Tr.) 234.

[4] Tr. 198. U.S. Department of Transportation (DOT) regulations in effect at the time required that "Every motor carrier shall systematically inspect, repair, and maintain, or cause to be systematically inspected, repaired, and maintained, all motor vehicles subject to its control." 49 CFR § 396.3(a) (2002). This regulation is still in effect. *See* 49 C.F.R. § 396.3 (a) (2007).

[5] Tr. 227; CX 26.

[6] Tr. 205. The regulation in effect at the time stated that drivers are not permitted to drive more than 10 hours following 8 consecutive hours off duty, or for any period after having been on duty 15 hours following 8 consecutive hours off duty. *See* 49 CFR § 395.3(a) (2002). Effective on June 27, 2003, the regulation was amended and prohibited driving more than 11 hours after 10 consecutive hours off duty, or for any period after being on duty 14 hours following 10 consecutive hours off duty. *See* 49 C.F.R. § 395.3(a) (2003).

be completed without violating the hours of service rules.[7] And in March 2003 Gary Hunter, a human resources and training manager, sent a letter to Montgomery acknowledging his complaints about "tight schedules" and "being forced to drive illegally."[8] Furthermore, Montgomery testified that on July 5, 2003, David Cox, a driver and occasional supervisor, instructed him to drive in violation of the hours of service rules.[9] Montgomery also stated that he contacted Frank Luna, General Manager of the Dallas Distribution Center, to complain about Cox's instruction and that Luna told him to continue driving.[10]

Meanwhile, between May and August 2003, JiB disciplined Montgomery for several violations of company policy, including failing to report damage to his vehicle, violating the hours of service rules, harassing other drivers, and "substandard work."[11]

On October 19, 2003, Montgomery had completed his scheduled route when he felt tired and decided that he needed to stop driving and rest. He drove a short distance to a service station in order to take a break in the service station's parking lot. Since construction was being performed in the front of the station, Montgomery entered an adjacent driveway and began to make a left turn. When he realized that he could not turn the vehicle, he began to back it up until the rear tires rolled over a median and the truck became stuck.

Montgomery went into the service station and called a towing service. A driver arrived and towed the vehicle off the median. The vehicle was not damaged. Montgomery used a personal credit card to pay $150.00 for the tow, and he did not request reimbursement from JiB. Montgomery did not report this incident to JiB on October 19. And on his time card, Montgomery designated the period when his truck was towed as a "break."[12]

According to its company policy handbook and its Distribution Center handbook,[13] which had been provided to Montgomery when he was hired, JiB required

---

7 Tr. 47-49.

8 CX 23.

9 *Id.* at 210-11.

10 *Id.* at 212-13.

11 Respondent's Exhibit (RX) 31, 33, 37, 38.

12 Tr. 184-87; RX 7-G.

13 CX 58 (policy handbook) at 128 ("Immediately report to your supervisor all unsafe

drivers to immediately report accidents to their supervisors. Montgomery testified that he knew about this policy and the potential consequences of not immediately reporting.[14]

On October 23, 2003, but before management knew about the October 19 incident, Montgomery received a low score on his performance evaluation, which warned that he had to improve within 30 days "to continue employment."[15]

General Manager Luna learned of the October 19, 2003 incident when he received a call from an employee who worked at one of the JiB restaurants. The caller had noticed that Montgomery's truck was stuck on the median and required a tow. Luna called local towing companies until he located the one that had towed Montgomery's truck. On November 3, the towing service sent Luna a copy of the report of the tow. Luna then reviewed Montgomery's driver's log and trip sheet, neither of which indicated that he had received a tow on October 19.[16]

JiB human resources official Gary Hunter, working in California, learned about the towing incident when someone at the Dallas Distribution Center called him. Sometime thereafter, according to Angel, Montgomery's supervisor, and Isidro Galicia, the transportation manager, Hunter or someone else at human resources in California recommended that Montgomery be terminated.[17] As a result, Montgomery met with Angel and Galicia on November 8, 2003. They gave him a "Separation Notice" that explained that JiB was terminating him for "failure to report a company vehicle accident."[18]

---

conditions, accidents and injuries, even if they seem minor. Failure to do so could result in disciplinary action."); RX 4 (Distribution Center handbook) at 139 ("JiB requires that any violation of company policy, traffic laws regulations, or accidents be reported to your supervisor as soon as possible (no later than completion of the day's activities.) Failure to follow this requirement may result in disciplinary action, up to and including termination."); 140-41 ("You are responsible for reporting all vehicle accidents no later than completion of the day's activities. Failure to meet this requirement will result in disciplinary action up to and including termination.").

[14] Tr. 251.

[15] RX 21.

[16] RX 7-C through 7-J.

[17] Tr. 92, 127-128.

[18] RX 7-A.

Montgomery filed his STAA complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on April 20, 2004. OSHA investigated the complaint and determined that JiB did not violate the STAA when it fired Montgomery. Montgomery requested a formal hearing, and on February 15, 2005, the ALJ conducted a hearing in Dallas, Texas. On July 21, 2005, the ALJ issued a Recommended Decision and Order (R. D. & O.) in which he concluded that JiB did not violate the STAA when it discharged Montgomery. We automatically review an ALJ's recommended STAA decision.[19]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB or the Board) the authority to issue final agency decisions under, inter alia, the STAA.[20] When reviewing STAA cases, the ARB is bound by the ALJ's fact findings if they are supported by substantial evidence on the record considered as a whole.[21] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[22] We must uphold an ALJ's finding of fact that is supported by substantial evidence even if there is also substantial evidence for the other party, and even if we "would justifiably have made a different choice" had the matter been before us de novo.[23]

DISCUSSION

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 activities.[24] These protected activities include complaining to the employer about "a violation of a commercial motor vehicle safety regulation, standard, or order."[25]

---

19 29 C.F.R. § 1978.109(a).

20 Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

21 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 2001-STA-038, slip op. at 2 (ARB Feb. 19, 2004).

22 *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

23 *See Universal Camera Corp.*, 340 U.S. at 488; *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 2003-STA-012, slip op. at 3 (ARB Feb. 27, 2004).

24 49 U.S.C.A. § 31105(a)(1).

To prevail, Montgomery must prove by a preponderance of the evidence that he engaged in protected activity, that JiB was aware of the protected activity, that he suffered an adverse action, and that JiB took the adverse action because of his protected activity.[26]

The ALJ concluded that Montgomery engaged in STAA protected activity when he complained to management about hours of service violations and about the condition of his vehicles.[27] Substantial evidence supports this conclusion. Termination is, of course, an adverse action. The remaining issue we must decide is whether JiB terminated Montgomery because he engaged in protected activity.

The ALJ found that JiB did not terminate Montgomery because of his protected activity but because of "multiple incidents which resulted in disciplinary actions and several 'final chances.'"[28] But according to the "Separation Notice" that Angel and Galicia presented to him on November 8, JiB terminated Montgomery for "Failure to report a company vehicle accident."[29] Therefore, regardless of other reasons JiB may have presented at the hearing, failing to report the October 19 incident was JiB's stated reason, on November 8, for terminating Montgomery. If Montgomery proved by a preponderance of the evidence that his failure to report the incident was not JiB's true reason for discharging him, but was a pretext for retaliating against him because of his protected activity, the ALJ (and we) could infer that JiB terminated him because of protected activity, though he is not (and we are not) compelled to so infer.[30]

Montgomery argues that the incident on October 19 was not an accident because, as stipulated, the vehicle suffered no damage. Besides, as also stipulated, JiB "did not

---

[25] 49 U.S.C.A. § 31105(a)(1)(A).

[26] *Ridgley v. C.J. Dannemiller*, ARB No. 05-063, ALJ No. 2004-STA-053, slip op. at 5 (ARB May 24, 2007).

[27] R. D. & O. at 19.

[28] *Id.* at 22.

[29] RX 7-A.

[30] *See Dannemiller*, slip op. at 5; *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.").

have a specific, written policy defining the term 'accident.'"[31] Therefore, Montgomery contends that terminating him for not reporting an "accident" was a pretext.[32]

But the ALJ found that the incident did constitute an accident. In so finding, he relied upon testimony from other drivers and managers. Peter Romanuck, a JiB driver from September 1973 to March 24, 2004, testified that when a vehicle becomes "high centered" (raised in the middle so as to prevent the drive wheels from propelling the vehicle), an accident has occurred. Whitefield opined that getting stuck and requiring a tow constitutes an accident. Angel testified that when a vehicle runs into a stationary object, an accident has occurred. Galicia said that he had "no doubt" that Montgomery had been involved in an accident. And Luna testified that becoming stuck on a median is considered an accident.[33]

Given this substantial evidence supporting the ALJ's finding that Montgomery was involved in an accident, we are bound to accept that finding. Moreover, the record clearly indicates that Montgomery did not report the incident. Therefore, like the ALJ, we find that JiB's reason for firing Montgomery was not a pretext.[34] Furthermore, even if JiB policy did define "accident," and even if the October 19 incident did not fall within JiB's definition of "accident," Montgomery has not presented evidence that JiB terminated him because he complained about violations of DOT hours of service and condition of vehicle regulations. Absent evidence of pretext or other evidence that JiB retaliated because of protected activity, Montgomery's STAA claim must fail.

Montgomery's November 15, 2005 Motion

On November 15, 2005, Montgomery submitted a 366 page document captioned "Motion Pursuant To Administrative Rule 18.201 Official Notice Of Adjudicative Facts; Motion Pursuant To Administrative Rule 18.609 Impeachment By Evidence Of Conviction Of Crime; Amended Motion To Supplement Discovery And Evidence; Amended Motion To Reopen The Hearing And Amended Motion For New Trial

---

[31] Brief at 29; R. D. & O. at 3 (Stipulations 6, 7).

[32] Brief at 2, 29. We reject Montgomery's additional arguments pertaining to collateral estoppel, perjury, judicial error, and "final order out of time" either because Montgomery presented no legal authority for his argument or because the argument is not relevant to the issue before us, which is whether JiB retaliated because of protected activity. *Id.* at 2-28. Furthermore, we deny Montgomery's October 13, 2005 "Motion for Leave to Amend Brief In Opposition To ALJ's R. D. & O." because he has not demonstrated why he could not present the amended brief's new arguments in his original brief.

[33] Tr. 36-37, 79, 103, 139, 150.

[34] R. D. & O. at 21 ("I do not find that Complainant has established that his accident was not the true reason for his termination, and therefore he has not established causation.").

Pursuant To Federal Rule Of Procedure 59." This motion presents five arguments which we discuss in turn.

First, Montgomery contends that he "is granted the right, pursuant to AR 18.201, to Officially Notice All Facts Request [sic] Contained in the TWC Hearing Opinion and Matching Transcript; all DOT Judgments Against the Company; All Certified Transcripts of Audio Recordings; and Steve Bell's Affidavit, of this motion."[35] Montgomery asks that we take official notice of these documents and have their contents "declared conclusive fact." We must deny this request.

Rule 18.201, Rules of Practice and Procedure for Administrative Hearings Before The Office of Administrative Law Judges, is a rule of evidence applicable to adjudicatory proceedings before Department of Labor ALJs.[36] It permits an ALJ to take official notice of facts not subject to reasonable dispute because generally known within the local area, or capable of accurate and ready determination by consulting reliable sources, or derived from reliable scientific, medical, or technical process, technique, or principle. Montgomery has provided no authority for this Board to take official notice of the facts contained within the documents he lists. Moreover, since Montgomery requests that we officially notice "all facts" contained in the all of the documents he lists, his request far exceeds the scope of the rule.

Montgomery also contends that the ALJ "erred in failing to officially notice" the facts contained in the documents. But Montgomery did not request the ALJ to take official notice. Therefore, we decline to consider an argument that a party raises for the first time on appeal.[37]

Second, Montgomery requests that he be "granted the right, pursuant to AR 18.609, impeachment to Company for its civil conviction for falsification of documents."[38] While that rule does provide that when a party seeks to attack the credibility of a witness, the ALJ "shall" admit evidence that the witness has been convicted of certain crimes, Montgomery did not argue this to the ALJ. Thus, we will not consider it.

---

35 Motion at 7-9, 347-350, 362.

36 *See* 29 C.F.R. §§ 18.201, 18.1(a).

37 *See 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).

38 Motion at 10, 362. Montgomery is referring to 29 C.F.R. § 18.609.

Montgomery's third and fourth requests ask that we reopen the record and compel further discovery.[39] Montgomery presented these requests to the ALJ on June 7, 2005, in a motion captioned "Motion to Compel Document Production, Supplement Discovery and Evidence, and Re-Open Hearing or Alternatively to Continue Deadline to File Post-Hearing Briefs Due on June 17, 2005." The ALJ denied the motion.[40] Montgomery has not demonstrated that the ALJ acted arbitrarily or abused his discretion in denying the motion for additional discovery.[41] Furthermore, as the ALJ noted, Montgomery has not demonstrated, as the applicable rule requires, that the evidence he now seeks to admit was unavailable before the record closed.[42] Therefore, we too deny this request.

Finally, Montgomery requests that we "remand" his case to "the investigator and/or ALJ" because "Complainant contends he can show 'clear and convincing evidence' to support the Respondent has produced no genuine issue of material fact adverse to him either at fact and law to support his termination."[43] Montgomery's request that we remand to the ALJ was premature in that we had not yet reviewed the record, the ALJ's recommended decision, or the parties' arguments when Montgomery filed his motion. Since we have now reviewed the record, the ALJ's decision, and the briefs, and since the record supports our conclusion that JiB did not violate the STAA, and since the ALJ did not commit prejudicial error, we have no reason to, and will not, remand.[44]

---

[39] Motion at 117-150, 362.

[40] "Complainant's counsel conducted themselves competently at trial, [and] the fact that Complainant now disagrees with their presentation or strategy of the case and wishes to add additional evidence that was either available prior to the first hearing or which has been created post-hearing, provides no grounds to reopen the record. Likewise, as to discovery, ample time for discovery existed prior to trial and at trial the parties were given the opportunity to examine and cross-examine both witnesses and documents." June 7, 2005 Order at 2.

[41] *See Friday v. Northwest Airlines*, ARB No. 03-132, ALJ Nos. 2003-AIR-019, -020, slip op. at 4 (ARB July 29, 2005) ("As to discovery motions, the Board has held that ALJs have wide discretion to limit the scope of discovery and will be reversed only when such evidentiary rulings are arbitrary or an abuse of discretion.").

[42] *See* 29 C. F. R. § 18.54 (c) ("Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence had become available which was not readily available prior to the closing of the record.").

[43] Motion at 25-26, 362. Despite the Motion's caption indicating that he is moving for a new trial pursuant to Fed. R. Civ. P. 59, Montgomery's Motion does not cite or present argument about that rule.

CONCLUSION

Montgomery did not prove by a preponderance of the evidence in the record before the ALJ and the ARB that JiB terminated him because of his protected activity. Since this proof was necessary for Montgomery to prevail, we must **DENY** his complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

---

[44] Because we deny the November 15, 2005 Motion, the following motions are moot: Respondent's November 25, 2005 "Motion to Strike and Opposition to" Montgomery's November 15, 2005 Motion; Complainant's December 16, 2005 "Motion For Leave to File Complainant, Mark Montgomery's Supplemental Response To The Complainant's Response To Jack in the Box's Motion To Strike" Montgomery's November 15, 2005 Motion; Complainant's January 20, 2006 "Motion For Leave To File" an amended version of the November 15, 2005 Motion; and Complainant's January 26, 2006 "Amended Motion For Leave" pursuant to the January 20, 2006 Motion. Furthermore, we note that on December 2, 2005, Montgomery submitted to the Board a document captioned "Complaint, De Novo, At Law." Pursuant to 29 C.F.R. § 1978.102(c), STAA complaints must be filed "with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but filing with any OSHA officer or employee is sufficient."