In the Matter of:

TERRY PUGH, **ARB CASE NO. 03-142**

COMPLAINANT, **ALJ CASE NO. 03-STA-27**

v. **DATE: May 28, 2004**

CON-WAY SOUTHERN EXPRESS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Terry Pugh, ***pro se, Nesbitt, Mississippi***

For the Respondent:
Carla J. Gunnin, Esq., ***Constangy, Brooks & Smith, LLC, Atlanta, Georgia***

FINAL DECISION AND ORDER

This case arises from a complaint Terry Pugh (Pugh) filed alleging that his employer, Con-Way Southern Express (Con-Way), violated the employee protection (whistleblower) provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and recodified, 49 U.S.C.A. § 31105 (West 1997), when it terminated his employment. On August 19, 2003, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order of Dismissal (R. D. & O.) in which he determined that Pugh had not established that he engaged in activity protected by the STAA and, although an adverse action was taken against him when his employment was terminated, Pugh had not established that his termination was due to any discriminatory motive. We determine that Pugh failed to show that Con-Way fired him for protected activity and **DISMISS** the case.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under, inter alia, the STAA and the

implementing regulations at 29 C.F.R. Part § 1978 (2003). Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). This case is before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a).[1] Pursuant to 29 C.F.R. § 1978.109(c)(1), the Board is required to issue "a final decision and order based on the record and the decision and order of the administrative law judge."

When reviewing STAA cases, the Administrative Review Board is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Trans, 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); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). 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 Envtl. Services, Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389401 (1971)); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 03-STA-12, slip op. at 3 (ARB Feb. 27, 2004).

In reviewing the ALJ's conclusions of law, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision … ." 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's conclusions of law de novo. *See Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

BACKGROUND[2]

On the morning of August 1, 2002, Terry Pugh had two teeth extracted while he was under general anesthesia. At 11 a.m. and 2 or 2:30 p.m. that day, Pugh took a prescription medication, Mepregan, for pain. R. D. & O. at 4; Hearing Transcript (HT) at 41-42; Complainant's Exhibits (CX) 1-3. Also that afternoon, prior to his normal shift, Pugh called his dispatcher, Robert Bell, and asked for the evening off.[3] R. D. & O. at 4;

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[1] This regulation provides, "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee."

[2] The ALJ's recommended decision provides a summary of the testimony of record. We address the portion of the testimony relevant to the determination of this complaint.

[3] Pugh also testified that on July 31, he submitted a form requesting sick leave and advised Bell that he should not be scheduled to work August 1 because he was going to the dentist. R. D. & O. at 4; HT at 38-40. Con-Way's Service Manager, Charles Leeke, testified that he is the only person authorized to sign sick leave forms, and that he first saw Pugh's

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HT at 42, 76, 85. The content of Pugh's August 1 communications with Bell is disputed. Pugh testified that at approximately 2:30 p.m., he called Bell to confirm that he was "marked off" for the day. According to Pugh, Bell insisted that Pugh had to work, and, following Pugh's protestations that he could not drive because he had been under anesthesia and pain medication, stated Pugh would be fired if he did not report. R. D. & O. at 4; HT at 41-43. Pugh further testified that he called Bell again at 6:30 p.m., said he was not going to make it, and again was told he would lose his job if he did not work. R. D. & O. at 4; HT at 44-45. Bell testified that Pugh told him he was not feeling well, and had been to the dentist. HT at 76, 85. However, he denied having a conversation with Pugh in which Pugh indicated he could not drive and was under medication. He also denied telling Pugh his job would be in jeopardy if he did not work. R. D. & O. at 5; HT at 78-79, 83-84. According to Bell, he spoke with Pugh at around 4 p.m. and then drew up driving assignments which did not list Pugh because he did not expect him to work HT at 76; Respondent's Exhibit (RX) 4.

It is uncontested that at approximately 8 p.m., Pugh reported for work and was dispatched.[4] At approximately 4:30 a.m. on August 2, on the return portion of his run, Pugh had a single-vehicle accident which damaged the truck. R. D. & O. at 4, 5; HT at 47-49; RX 1. After the accident, Pugh was relieved of his duties, pending an investigation. R. D. & O. at 4; HT at 49. Although Pugh attributed the accident to a blown tire, the State of Arkansas' Motor Vehicle Collision Report noted that the investigator found no physical evidence to support that statement. On August 9, 2002, Con-Way terminated Pugh's employment for having a severe preventable accident. R. D. & O. at 8; HT at 21, 50, 87-91; RX 3. On September 17, 2002, Pugh filed a complaint under the STAA, alleging that Con-Way had violated the motor vehicle safety regulation which prohibits carriers from requiring or permitting a driver to drive when the driver's alertness or ability to drive is so impaired as to make driving unsafe. 49 C.F.R. § 398.4 (2003).

REQUIREMENTS OF THE STAA

The STAA provides in pertinent part:

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sick leave request the day before the hearing. R. D. & O. at 6; HT at 99, 103-105. Jamuel Johnson, Con-Way's Personnel Supervisor, testified that when an employee wants to take sick leave, he provides the employee with a sick leave form, on which he records the number of days the employee has been absent. HT at 109. He also testified that his handwriting was not on the form submitted into evidence by Pugh, and that the form submitted was a version which had been out of use for two to three years prior to Pugh's accident. HT at 110; CX 4.

[4] Pugh testified that he reported for work between 7 and 7:30 p.m. HT at 45. Bell testified that Pugh appeared at 8 p.m. HT at 77.

> Prohibitions - (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because –
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> (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
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> (B) the employee refuses to operate a vehicle because –
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> (i) the operation violates a regulation, standard, or order of the United States related to the 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.
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> (ii) 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.

DISCUSSION

To prevail on a claim under the STAA, the complainant must prove by a preponderance of the evidence that: 1) he engaged in protected activity, 2) his employer was aware of the protected activity, 3) the employer discharged him, or disciplined or discriminated against him with respect to pay, terms, or privileges of employment, and 4) there is a causal connection between the protected activity and the adverse action. *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 228 (6th Cir. 1987). The complainant bears the burden of persuading the trier of fact that he was subjected to discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

The ALJ found no evidence that Pugh filed any safety complaint or that Pugh initiated, or was involved with, any safety-related proceeding. 49 U.S.C.A. § 31105(1)(A); R. D. & O. at 7. Based on Pugh's testimony, the ALJ further determined that Pugh did not refuse to operate his truck based on any unsafe condition involving his ability to safely operate his truck or because of any unsafe condition regarding the truck itself. 49 U.S.C.A. § 31105(1)(B); R. D. & O. at 8. HT at 62-64. Finally, the ALJ concluded that Pugh did not establish that the termination of his employment was due to anything other than his accident in Arkansas. R. D. & O. at 8-9. Thus, the ALJ concluded that Pugh did not prove that he engaged in protected activity and that Con-Way did not discriminate against him in violation of the STAA.

The ALJ's R. D. & O. thoroughly and fairly recites the relevant facts underlying this dispute. In addition, since we did not have the benefit of witnessing the testimony of Pugh and Bell, we defer to the ALJ's demeanor-based observations about their credibility.[5] Having reviewed the entire record, we find substantial evidence supports the ALJ's findings of fact.

Pugh testified that he informed his supervisor that he would not be able to drive on the night his accident occurred because he had been treated by his dentist and given medication. HT at 48-40, 43-44. Although the ALJ did not analyze whether Pugh's communication would constitute a safety-related complaint, any need to do so is vitiated by the ALJ's crediting of Bell's testimony that Pugh did not indicate to him in any way that Pugh was unsafe to operate his truck on August 1, and Pugh's testimony that his initial refusal to drive was not based on any unsafe condition. R. D. & O. at 8 n.4; HT at 79, 84.[6]

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[5] The ALJ credited Pugh's testimony that he had not refused to drive his truck because it would be unsafe and that, at the time of the accident that ultimately was the reason for his termination, he had the ability to safely drive his truck and that there was no unsafe condition regarding the truck itself. *See* Hearing Transcript at 46, 62-64, 70-7; R. D. & O. at 4. In weighing the testimony of witnesses, the fact-finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony and the extent to which the testimony was supported or contradicted by other credible evidence. *Cobb v. Anheuser Busch, Inc.,* 793 F. Supp. 1457, 1489 (E.D. Mo. 1990); *Shrout v. Black Clawson Co.,* 689 F. Supp. 774, 775 (S.D. Ohio 1988); *Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 9 (ARB Feb. 28, 2003). The ARB defers to an ALJ's credibility findings that "rest explicitly on an evaluation of the demeanor of witnesses." *Stauffer v. Wal-Mart Stores, Inc.,* ARB 99-STA-2, slip op. at 9 (ARB July 31, 2001) quoting *NLRB v. Cutting, Inc.,* 701 F.2d 659, 663 (7th Cir. 1983).

[6] In discussing the complaint prong of the Act, the ALJ stated that evidence that Pugh was disobedient to Con-Way was key to establishing a basis for which an employer would

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Most importantly, the ALJ credited Con-Way's explanation for its termination of Pugh's employment (that he had a severe preventable accident). R. D. & O at 8. There is substantial evidence supporting his findings. (The State of Arkansas' Motor Vehicle Collision Report, Con-Way's internal memoranda demonstrating that several other employees had been fired because they were involved in preventable accidents, and the testimony of Pugh and Jeff Kerbo, Con-Way's Director of Human Resources, that a preventable accident could be grounds for termination. HT at 50, 69, 87-89, 90-91; RX 1, RX 2.) Further, Pugh failed to show that Con-Way's explanation was pretext for discrimination.

Consequently, we affirm the recommended decision because there is substantial evidence to support the ALJ's findings of fact, and determinations that Pugh did not engage in protected activity and that Con-Way's decision to terminate Pugh's employment was not based on any protected activity. Thus, the ALJ correctly concluded that Pugh did not prove by a preponderance of evidence the causality element of a traditional STAA whistleblower claim.

Accordingly, we **DENY** Pugh's complaint.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

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retaliate against an employee. We clarify that evidence of disobedience is not required in establishing coverage under the complaint provision. Pugh's STAA claim is that he was fired because he made a complaint relating to a violation of a particular safety requirement. That requirement prohibits the company from requiring a driver to drive when his ability or alertness are so impaired that driving is unsafe. Pugh's testimony that (in his conversation with Bell he did not protest because of an unsafe condition) undercuts his argument that he was making a complaint relating to driving when impaired alertness or ability make driving unsafe. Similarly, the ALJ's crediting of that testimony is fatal to Pugh's refusal to drive claim because there would be no violation of subsection (1)(b)(i) if it was safe for Pugh to drive, and no violation of (1)(b)(ii) if Pugh had no reasonable apprehension of injury to himself or the public because of an unsafe condition.