



In the Matter of:

DANIEL DAVIS,

ARB CASE NO. 07-041

COMPLAINANT,

ALJ CASE NO. 2007-STA-041

v.

DATE: March 27, 2009

ROCK HARD AGGREGATE, LLC,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (West 2008), and its implementing regulations, 29 C.F.R. Part 1978 (2008). Daniel Davis filed a complaint on August 3, 2006, accusing his former employer, Rock Hard Aggregate, LLC, of committing various vehicle safety violations. An Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) on January 19, 2007, dismissing the complaint on the ground that Davis failed to prove that he engaged in STAA-protected activity prior to his discharge from employment with Rock Hard. We affirm.

BACKGROUND

Rock Hard hired Davis on May 15, 2006, to work as a truck driver. On May 18, 2006, Davis and another Rock Hard driver parked two of the company's vehicles in the parking lot of a restaurant to perform a repair on one of the vehicles. Hearing Transcript (Tr.) at 12-13. Keith Call, the owner of Rock Hard, travelled to the parking lot and

observed Davis engaging in an argument with the restaurant owner. *Id.* at 14-16. Davis failed to report to work on May 19, 2008, and Rock Hard terminated Davis' employment that same day. *Id.* at 12; R. D. & O. at 1.

Davis filed his complaint with the Occupational Safety and Health Administration (OSHA) on August 3, 2006. He alleged that Rock Hard committed various motor vehicle safety violations as well as tax and Social Security fraud. Complaint at 1, R. D. & O. at 4. The complaint did not indicate that Davis presented any of his concerns to anyone at Rock Hard. OSHA interviewed Davis, and he admitted that he never raised concerns to anyone at Rock Hard about safety violations. Secretary's Findings at 2. OSHA denied the complaint and Davis requested a hearing before an ALJ.

The ALJ conducted a hearing on November 20, 2006. Rock Hard failed to appear, and Davis appeared pro se. Davis presented his case. During his testimony, Davis did not indicate that he presented any safety complaints to anyone during his employment at Rock Hard. At the conclusion of Davis' testimony, the ALJ told Davis that one of the issues relevant to the case was whether Davis engaged in protected activity. Tr. 19. Davis submitted a letter to the ALJ on December 5, 2006, and the letter did not contain any allegation that Davis had engaged in protected activity while employed by Rock Hard.

The ALJ issued his R. D. & O. on January 19, 2007. The ALJ found that there was no allegation in the complaint or evidence in the record that Davis "had communicated either safety concerns or unwillingness to drive to Respondent before he was fired." R. D. & O. at 4. He therefore concluded that Davis failed to prove that he had engaged in activity protected by the STAA. *Id.*

This case is now before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a). On February 5, 2007, the Board issued a Notice of Review and Briefing Schedule reminding the parties of their right to file briefs with the Board in support of or in opposition to the ALJ's recommended order within thirty days of the date on which the ALJ issued it. Neither party filed a brief.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under the STAA and its implementing regulations. Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. Part 1978. The ARB is required to issue "a final decision and order based on the record and the decision and order of the administrative law judge." 29 C.F.R. § 1978.109(c)(1). 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). The

Board reviews questions of law de novo. *See Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993).

DISCUSSION

To prevail on a claim of unlawful discrimination under the STAA's whistleblower protection provisions, the complainant must allege and later prove by a preponderance of the evidence that he is an employee and the respondent is an employer; that he engaged in protected activity; that his employer was aware of the protected activity; that the employer discharged, disciplined, or discriminated against him regarding pay, terms, or privileges of employment; and that the protected activity was the reason for the adverse action. *Bettner v. Crete Carrier Corp.*, ARB No. 06-013, ALJ No. 2004-STA-018, slip op. at 12-13 (ARB May 24, 2007); *Eash v. Roadway Express*, ARB No. 04-063, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005); *Forrest v. Dallas & Mavis Specialized Carrier Co.*, ARB No. 04-052, ALJ No. 2003-STA-053, slip op. at 3-4 (ARB July 29, 2005); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-030, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. Nat'l Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004). If the complainant fails to allege and prove one of these requisite elements, his entire claim must fail. *Cf. Forrest*, slip op. at 4.

The employee activities the STAA protects include: making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," 49 U.S.C.A. § 31105(a)(1)(A); "refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health," 49 U.S.C.A. § 31105(a)(1)(B)(i); or "refus[ing] to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition," 49 U.S.C.A. § 31105(a)(1)(B)(ii).

We agree with the ALJ's conclusion that Davis' complaint does not allege that he engaged in STAA-protected activity pursuant to subsections (A) and (B) of § 31105. The complaint does not assert that Davis complained to anyone at Rock Hard about motor vehicle safety. It fails to allege that Davis refused to drive because doing so would have constituted a safety violation. And the complaint fails to state that Davis refused to drive because he was apprehensive about the unsafe condition of an assigned vehicle.

At the hearing on his complaint, the ALJ informed Davis that the issue of protected activity was an element of his case. But Davis presented no testimony or evidence that he engaged in any protected activity. Davis submitted a letter to the ALJ after the hearing, but this letter does not indicate that Davis engaged in STAA-protected activity while employed by Rock Hard.

While a pro se litigant must of course be given fair and equal treatment, pro se complainants have "the same burdens of production and persuasion as complainants

represented by counsel.” *Coates v. Southeast Milk, Inc.*, ARB No. 05-050, ALJ No. 2004-STA-060, slip op. at 8 (ARB July 31, 2007). Because Davis has neither alleged nor proven that he engaged in protected activity, he has not satisfied one of the requisite elements of his STAA case, and his entire claim must fail.

CONCLUSION

The record supports the ALJ’s conclusion that Davis did not prove that he engaged in STAA-protected activity during his employment with Rock Hard Aggregate, LLC. We therefore **AFFIRM** the ALJ’s R. D. & O. and **DENY** Davis’ complaint.

SO ORDERED.

WAYNE C. BEYER
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge