



In the Matter of:

PETER KLOSTERMAN,

ARB CASE NO. 08-035

COMPLAINANT,

ALJ CASE NO. 2007-STA-019

v.

DATE: December 18, 2012

E.J. DAVIES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Joseph J. Ranni, Esq., *Jacobowitz and Gubits, LLP*, Walden, New York

For the Respondent:

Richard M. Ziskin, Esq., *The Ziskin Law Firm*, Commack, New York

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*. Judge Corchado concurring.

DECISION AND ORDER OF REMAND

Peter Klosterman filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, E.J. Davies, Inc., violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and re-codified, and its implementing regulations, when E.J. Davies terminated his employment in retaliation for protected activities. 49 U.S.C.A. § 31105; 29 C.F.R. Part 1978. After a hearing, a Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed Klosterman's complaint because she found that Klosterman failed to establish

that E.J. Davies took any adverse action against him.¹ We affirmed in part, but remanded for further findings, and concluded that, based on the facts, E.J. Davies constructively discharged Klosterman.

On remand, the ALJ dismissed Klosterman's complaint because she found that E.J. Davies did not discriminate against Klosterman "based on protected activity." D. & O. on Remand at 11. She also found that E.J. Davies established by a preponderance of the evidence that it would have taken the same action notwithstanding any history of protected activity on Klosterman's part. *Id.* Because the ALJ erred as a matter of law and substantial evidence does not support her findings on critical issues, we reverse and remand on the issue of damages.

BACKGROUND

Fred Vordermeier, Jr., the owner of the Respondent company, E.J. Davies, hired Klosterman as a truck driver in 2000. D. & O. at 1, 10; see Hearing Transcript (Tr.) at 38. Klosterman repeatedly complained to Vordermeier about the condition of his assigned truck. D. & O. on Remand at 6; D. & O. at 23. Klosterman's "concerns regarding the condition of the Respondent's vehicles were often justified and were not always addressed satisfactorily." D. & O. at 20.

On December 17 or 18, 2005, Klosterman reported that his assigned truck had a flat tire. D. & O. at 11; D. & O. on Remand 7-9; see Tr. at 448. On December 19, 2005, Vordermeier drafted a letter to Louis Bisignano, the union representative, stating that it would be in the best interests of both the union and E.J. Davies to replace Klosterman as shop steward. D. & O. at 9, 18-19. Vordermeier was frustrated with Klosterman and thought that replacing him would make working with customers easier, and he would not be confronted as often with Klosterman's concerns about the condition of the vehicles and equipment. D. & O. at 25.

On December 20, 2005, Klosterman again complained to Vordermeier about a flat tire on the truck Vordermeier assigned to him. D. & O. on Remand at 4 (citing D. & O. at 24). A flat tire constitutes a safety hazard. *Id.* at 7 (citing Tr. at 86, 441). Klosterman's truck had had a flat tire several days earlier. *Id.* at 7 (citing Tr. at 448-49). Klosterman refused to drive the truck and requested reassignment to a different truck. *Id.* Vordermeier refused to allow Klosterman to drive a substitute truck and stated; "it's just one trip." *Id.* at 9 (citing Tr. at 85). Vordermeier told Klosterman to "drive or go home" after which Klosterman left the premises. *Id.* at 4 (citing D. & O. at 24).

¹ *Klosterman v. E.J. Davies*, ARB No. 08-035, ALJ No. 2007-STA-019 (ALJ Jan. 2, 2008). For purposes of this decision, we label this ALJ decision simply "D. & O.," and the ALJ's January 11, 2012 Decision and Order on Remand, "D. & O. on Remand."

When Vordermeier told Klosterman to “drive or go home,” he was motivated to do so because of his “overall impatience and frustration” with Klosterman and because of Klosterman’s comments on December 20, 2005 about the condition of his assigned truck. D. & O. on Remand at 4 (citing D. & O. at 24), 11 (citing D. & O. at 24).

Klosterman filed a STAA complaint asserting that Vordermeier terminated his employment on December 20, 2005, in violation of the STAA.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority and assigned responsibility to the Board to act for her, in review or on appeal, including, but not limited to, the issuance of final agency decisions under the STAA. Secretary’s Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69379 (Nov. 16, 2012). The Board “shall 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).

THE LEGAL STANDARDS

The STAA provides that an employer may not “discharge an employee, or 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 activity. The STAA protects an employee who makes a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order;” or who “refuses 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;” or who “refuses 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).²

² Although the burdens of proof under STAA have been amended, we are applying the pre-amendment burdens of proof given the totality of the procedural posture of this case. We find that it would be fundamentally unfair to switch burdens of proof where the claim arose prior to the amendments and, most importantly, the evidentiary hearing was tried prior to the amendments, and the ALJ applied the previous burdens of proof. *See* 49 U.S.C.A. § 31105 (Thomson/West Supp. 2010); 29 C.F.R. Part 1978 (2009). Moreover, in the numerous filings with the ALJ and the Board, the parties have not argued that the post-amendment law should be applied. Even were we to apply the post-amendment law, the result would not change because the ALJ found that Vordermeier’s action in discharging Klosterman on December 20, 2005, was motivated in part by Klosterman’s refusal to drive on that date. A motivating factor standard is a more difficult standard to prove than

To prevail on a STAA claim, an employee must prove that he engaged in protected activity, that his employer took an adverse employment action against him, and that the adverse action taken against him was because of his protected activity. *Myers v. AMS/Breckenridge/Equity Grp. Leasing I*, ARB No. 10-144, ALJ Nos. 2010-STA-007, -008; slip op. at 5 (ARB Aug. 3, 2012) (citation omitted); 49 U.S.C.A. § 31105(b)(1). If the employee does not prove one of these elements, the entire claim fails. *See West v. Kasbar, Inc./Mail Contractors of Am., Inc.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005). If the complainant proves that the employer discriminated against him because of his protected activity, then the employer may escape liability by demonstrating that the employer would have taken the same unfavorable personnel action in the absence of the protected activity. *Muzyk v. Carlsward Transp.*, ARB No. 06-149, ALJ No. 2005-STA-060, slip op. at 5 (ARB Sept. 28, 2007).

DISCUSSION

The ALJ found that Klosterman was more credible than Vordermeier, particularly on critical events that occurred on December 20, 2005. D. & O. on Remand at 7 (citing D. & O. at 19-20). The ALJ also found factors that weighed against Casale's (the Respondent's employee and witness) credibility and rejected his testimony concerning December 20, 2005. *Id.* at 8. Consequently, the ALJ accepted Klosterman's testimony about the December 20th events.

The ALJ found that Klosterman again complained to Vordermeier about a flat tire on the truck that Vordermeier assigned to him on December 20th. *Id.* The ALJ further found that Klosterman did not tell Vordermeier that he was quitting on December 20, 2005, as Vordermeier testified occurred. *Id.* Rather, she found that Klosterman complained to Vordermeier about his truck's condition and Vordermeier told Klosterman to "drive or go home." *Id.* The ALJ found that after Klosterman complained about the truck's tire, Vordermeier responded: "it's just one trip." *Id.* at 9 (citing Tr. at 85). Vordermeier did not tell Klosterman that the truck's tire had been repaired. *Id.* at 9. There was no evidence in the record that the tire had been repaired other than Vordermeier's isolated testimony that he had fixed the tire. *Id.*; see Tr. at 448. But the ALJ expressly found Vordermeier's testimony about December 20th not credible. The ALJ further found that "Vordermeier wanted the Complainant removed from his position as union steward," and that "if the union did not act to [remove] the Complainant from his union steward position, it was in Vordermeier's interest for the Complainant to quit his employment with the Respondent." *Id.* at 8.

the contributing factor standard the current law provides for – since Klosterman's protected activity was a motivating factor in the termination of his employment, it was necessarily a contributing factor. Likewise, because the Respondent cannot prove that it would have terminated Klosterman's employment absent protected activity by a preponderance of the evidence, it cannot prove it would have done so by clear and convincing evidence, a more difficult standard.

1. Protected activity

The ALJ found that the Complainant engaged in protected activity both before December 20, 2005, and afterwards. We agree. The Complainant also contended, however, that he engaged in protected activity on December 20, 2005, when he told Vordermeier that his assigned truck had a flat tire and refused to drive it in that condition. We agree that Klosterman continued his protected activity on December 20, 2005, when he again reported that he believed there was a flat tire on the truck assigned to him. The ALJ focused only on Klosterman's refusal to drive on December 20th and analyzed this refusal to drive under both subsections of the STAA's "refusal to drive" provision. 49 U.S.C.A. § 31105(a)(1)(B). Subsection (i) protects an employee who refuses to operate a vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security." 49 U.S.C.A. § 31105(a)(1)(B)(i). Subsection (ii) protects an employee who refuses 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 hazardous safety or security condition." 49 U.S.C.A. § 31105(a)(1)(B)(ii).

The ALJ ultimately concluded that Klosterman failed to demonstrate that he engaged in protected activity on December 20, 2005, under either subsection because he did not ascertain whether the tire was flat on December 20, 2005. When the material factual issues are resolved or undisputed, the ultimate determination as to whether a complainant's action constitutes "protected activity" is a legal conclusion, which we review de novo. *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 2004-STA-026, slip op. at 12 n.14 (ARB Oct. 31, 2007). We reverse for the following reasons.

The ALJ incorrectly states: "It is clear, from the language of this provision, that an employee who complains about an ostensibly flat tire must establish that the tire is indeed flat, not just that he believes it to be flat." D. & O. on Remand at 10. We recently addressed this very issue in a case that involved a scenario very similar to the case before us. Noting that the statute does not include the qualifier "actual," we ultimately concluded "that the protection Section 31105(a)(1)(B)(i) affords also includes refusals where the operation of a vehicle would actually violate safety laws under the employee's reasonable belief of the facts at the time he refuses to operate a vehicle, and that the reasonableness of the refusal must be subjectively and objectively determined."³

³ *Ass't Sec'y & Bailey v. Koch Foods*, ARB No. 10-001, ALJ No. 2008-STA-061, slip op. at 9 (ARB Sept. 30, 2011).

In *Bailey v. Koch Foods*, a driver for Tyson Foods was fired for refusing to haul a trailer he believed violated state and federal law regarding weight of tractor-trailers.⁴ The company argued that Bailey’s “refusal to drive” was not protected activity because there would not have been an *actual* violation of any federal law governing weight limits if Bailey had hauled the trailer since it was not in fact overweight. Bailey’s supervisor testified that the weight ticket of the trailer Bailey refused to haul indicated that the trailer was not overweight. The company also claimed it had addressed the weight problem. Nevertheless, the ALJ held, and we affirmed, that Bailey need not prove an actual violation and that his refusal to drive constituted protected activity since he reasonably believed that the trailer would have violated the law had he hauled it. We based our finding of the “reasonableness” of Bailey’s belief that the trailer was overweight on the following facts in the record: weight tickets demonstrating that trailers similar to the one Bailey refused to drive had exceeded weight limits at least three times prior to Bailey’s refusal; the day before his refusal to drive, Bailey himself had hauled a similar trailer that exceeded the weight limits; and the company failed to inform Bailey that the problem had been solved.

Similarly, we find that the ALJ’s findings of fact along with others in the record are sufficiently clear that the law requires a finding that Klosterman reasonably believed that the tire on his truck was flat, and his refusal to drive was therefore protected activity.⁵ Acknowledging that her finding was an extremely close question, the ALJ concluded that Klosterman could not demonstrate reasonable belief because he did not establish conclusively that the tire was flat on December 20th. However, as explained above, Klosterman did not have to prove that the tire was flat on December 20, 2005 – he merely had to show that operation of the truck would have violated a safety regulation under his reasonable belief of the facts when he refused to operate the truck. 49 U.S.C.A. § 31105(a)(1)(B)(i). It is undisputed that the tire was flat at some point shortly before December 20th, when Klosterman refused to drive the truck. It is further undisputed that Vordermeier was unresponsive to Klosterman’s complaints at times. D. & O. at 25; Tr. at 457. Although Vordermeier claims he fixed the flat, there is no other evidence in the record to support his claim. Nor is there evidence that Klosterman no longer reasonably believed the tire was flat. Further, the ALJ erred when she held that Klosterman did not refute Vordermeier’s testimony that he had fixed the truck. Klosterman testified that:

[Vordermeier] said you got to move a machine for me today. I said, [Vordermeier], I can’t move a machine, I got a flat tire. He says, you just got to move a machine, it’s one move, use the truck.

⁴ *Id.*

⁵ See *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982) (“[W]here findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue.”) (citing *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 331-32 (1974)).

The tire was off the rim, it was that flat. It wasn't just flat, it was hanging, it was broken from the rim of the truck. I could not and I did not use that truck. I told him, I said give me another truck and he said, you got to use that truck. Why? Because it's the only truck with the wet line to use for the gooseneck, so I had to use that truck. Fix the tire; he didn't want to fix the tire.

Tr. at 84. Klosterman testified twice more that Vordermeier refused to fix the flat tire. Tr. at 85, 86. The testimony is admittedly silent regarding whether or not Klosterman inspected the truck on December 20, 2005, and leaves the question open. But, it is undisputed that Vordermeier did not inform Klosterman that he had fixed the truck. When Klosterman asked Vordermeier to fix the truck's tire, Vordermeier did not reply that he had done so, but instead replied "it's just one trip" and "drive or go home." These responses suggest that the tire was not fixed. It would have been simple enough for Vordermeier to tell Klosterman that he had fixed the tire. Had he done so, there would have been no basis upon which Klosterman could have legitimately refused to drive.⁶ Under the governing law, we find the undisputed facts sufficiently clear to allow us to conclude that Klosterman reasonably believed that the tire on his truck was indeed flat on that day, and that he therefore engaged in protected activity when he complained about his flat tire to Vordermeier on December 20.⁷

⁶ See *Kallman v. N.L.R.B.*, 640 F.2d 1094, 1099 (9th Cir. 1981) (where the Board and the ALJ agree as to the existence of a particular fact, the Board may draw different inferences from that fact); *Penasquitos Village, Inc. v. N.L.R.B.*, 565 F.2d 1074, 1078-80 (9th Cir. 1977) (deference is accorded to ALJ's testimonial inferences, i.e., those derived from credibility determinations, but given Board's particular expertise, Board may draw different inferences from evidence itself).

⁷ See *Weisgram v. Marley Co.*, 528 U.S. 440, 449-451 (2000) (court of appeals may order dismissal or judgment for defendant when plaintiff's verdict has been set aside due to insufficient evidence); *Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162, 170 (1967) (where point is clear, effective judicial administrative requires appellate body to dispose of issue); see also *Consol. Aluminum Corp. v. Foseco Int'l Ltd.*, 910 F.2d 804, 814 (Fed. Cir. 1990) ("A remand, with its accompanying expenditure of additional judicial resources in a case thought to be completed, is a step not lightly taken and one that should be limited to cases in which further action must be taken by the district court or in which the appellate court has no way open to it to affirm or reverse the district court's action under review."); *SmithKline Diagnostics, Inc. v. Helena Labs. Corp.*, 859 F.2d 878, 886 n.4 (Fed. Cir. 1988) ("An appellate court may make a finding of fact on evidence that is undisputed."); *U.S. v. Crain*, 589 F.2d 996, 1000 (9th Cir. 1979) ("If all necessary facts were of record and not in dispute, and the only remaining question was the effect of Arizona law, then this court could decide the case without remanding."); 9C Fed. Prac. & Proc. Civ. § 2577 (3d ed.) ("The appellate court will determine the appeal without further elaboration by the trial judge if the record sufficiently informs it of the basis of the district court's decision of the material issues in the case, or if the only contentions raised by the parties on appeal do not turn on findings of fact.").

2. Adverse action

The ALJ found that on December 19, 2005, Vordermeier schemed to neutralize Klosterman's "first man" status and neutralize his ability to raise complaints. The ALJ also found that Klosterman did not quit on December 20th but Vordermeier concocted this story to try to end Klosterman's employment, knowing that he lacked authority to fire Klosterman. Given these ALJ findings, we find as a matter of law that these actions constitute adverse action, even before considering whether such action amounted to a "constructive discharge." Antagonizing Klosterman, ordering him to "drive or go home," and announcing that Klosterman had quit was obviously adverse to Klosterman's employment.

In our prior opinion, we explained in detail why we concluded as a matter of law that Vordermeier terminated Klosterman's employment (i.e., "discharged" him) on December 20, 2005, when he told him to drive or go home and then immediately considered that Klosterman had voluntarily quit. *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-019, slip op. at 8-10 (ARB Sept. 30, 2010); *see also Ass't Sec'y & Lajoie*, No. 1990-STA-031, slip op. at 5-6 (Sec'y Oct. 27, 1992). On remand, the ALJ acknowledged that the Respondent had effectively terminated Klosterman on December 20, 2005, but ultimately "inferred" that the termination lasted only one day. D. & O. on Remand at 13. We affirm the former conclusion but reverse the latter.

The issue of whether or not Klosterman "shaped" (presented himself at the worksite for work every morning) after December 20, 2005, is a red herring and not dispositive of either the determination of retaliatory termination or any damages as provided by the STAA.

It is undisputed that Klosterman shaped on December 20, 2005. Later that day, after being instructed to "drive or go home," Klosterman contacted his union representative, Bisignano, regarding his possible remedies. D. & O. at 26. Bisignano told Klosterman that Vordermeier told him that Klosterman had quit. *Id.* at 14. Klosterman told Bisignano that he had not quit; he had simply refused to drive an unsafe vehicle. *Id.* at 14. Bisignano told Klosterman that he was going to look into the matter. *Id.* at 12. Klosterman and his counsel attempted on many occasions to compel the union to intervene on Klosterman's behalf because he refused to drive unsafe equipment at E.J. Davies. *Id.* at 9; RX Z. Klosterman also attempted to file grievances that the union did not accept. *Id.* at 9. At some point after January 31, 2006, Bisignano told Klosterman that he was required to "shape" to have the union file a grievance on his behalf. *Id.* at 26.

Klosterman's actions following December 20, 2005, may be relevant to a determination of his rights and remedies under the CBA. However, under STAA precedent, Vordermeier's behavior that day constituted termination. Therefore, regardless of whether or not Klosterman shaped thereafter, as of December 20, 2005, the Respondent no longer employed him. Logically,

because after December 20, 2005, Klosterman was no longer employed by the company, he could not have had a duty to “shape.” Following termination of employment, STAA precedent requires only that Klosterman mitigate damages by attempting to find comparable employment.⁸ Consequently, we reverse the ALJ’s finding that Vordermeier’s discharge of Klosterman was limited to a single day.

3. Causation

To show that an employer retaliated in violation of the STAA, a complainant must show that the employer took adverse action against that complainant because of protected activity. The ALJ found that Klosterman raised protected safety complaints before December 20th. She also found that, on December 19, 2005, Vordermeier began devising a plan to neutralize Klosterman’s ability to make many of his safety complaints by removing him as the shop union steward. More importantly, Vordermeier could not fire Klosterman and knew that the union had to fire Klosterman or he had to quit to end his employment. Consequently, we conclude that these findings by the ALJ demonstrate that Klosterman’s safety complaints partly motivated Vordermeier’s adverse actions on December 19 and 20, 2005. We agree with Klosterman that the Respondent set out to create a “flashpoint” on December 20, 2005, and the ALJ’s fact findings support this conclusion, particularly her findings about previous protected activity, Vordermeier’s frustration, and Vordermeier’s plan on December 19, 2005. Additionally, the ALJ found that Vordermeier’s actions on December 20, 2005, in particular his injunction to “drive or go home,” were motivated in part by the Complainant’s refusal to drive on the same date. D. & O. on Remand at 11. She explicitly held in her earlier decision: “I also find the evidence establishes that Mr. Vordermeier’s “drive or go home” statement was made specifically in response to the Complainant’s comments about the vehicle he was assigned to drive.” D. & O. at 24. Since Klosterman’s refusal to drive constituted protected activity, causation is established as a matter of law.⁹

⁸ A complainant has a duty to exercise reasonable diligence to mitigate damages by searching for substantially equivalent work. However, it is the employer’s burden to prove failure to mitigate. *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 7 (ARB Mar. 31, 2005).

⁹ Klosterman’s other protected activities are not directly at issue. We note however, that the ALJ erred when she required that Klosterman provide evidence that “on December 20, 2005, Vordermeier made any comment to the Complainant about any past incidents of protected activity” to show that Klosterman’s history of protected activity prompted Vordermeier’s action. D. & O. on Remand at 11. See *Riess v. Nucor Corporation-Vulcraft-Texas, Inc.*, ARB No. 08-137, 2008-STA-011, slip op. at 5 (ARB Nov. 30, 2010):

There are alternative methods by which an employee can prove that protected activity was a contributing factor to an adverse employment

4. The Respondent's affirmative defense

The ALJ ruled that Klosterman failed to establish the requisite element of causation. In the alternative, she ruled that the Respondent proved “by a preponderance of the evidence, that it would have taken the same action notwithstanding any history of protected activity on the Complainant’s part.” D. & O. on Remand at 11. In particular, the ALJ found “that the record establishes an independent basis other than the Complainant’s history of protected activity for Vordermeier’s action,” namely, Vordermeier’s “frustration relating to the Complainant’s dealings with Vordermeier’s customers.” *Id.* However, the only evidence linking Vordermeier’s frustration with Klosterman’s customer relations is that generated by Vordermeier himself – a witness the ALJ found lacked credibility.¹⁰ There is no other evidence in the record to support Vordermeier’s testimony regarding his frustration with Klosterman’s dealings with customers. There was no evidence of warnings, suspensions, or customer complaints in Klosterman’s personnel file and none in the record. Tr. at 425. At least one of the “customers” Vordermeier asserts complained about Klosterman, subsequently hired Klosterman. Tr. at 361, 508, 509. On the other hand, there is abundant circumstantial evidence that Vordermeier’s “frustration” with Klosterman may have been due to his history of protected activity. Substantial evidence in the record supports the ALJ’s finding that Klosterman had a history of protected conduct. As the ALJ wrote in her initial decision; “[a]ll of the witness[es] agreed that the Complainant made many complaints to Mr. Vordermeier about the condition of the Respondent’s vehicles, and that these complaints included allegations the vehicles were unsafe.” D. & O. at 23. Vordermeier himself testified that Klosterman “complained constantly every day about everything.” Tr. at 447. From this evidence we may infer, as did the ALJ in her original decision, that Vordermeier,

action. Where there is no direct evidence of illegal motive, the employer can use indirect, circumstantial evidence. One of the common sources of indirect evidence is “temporal proximity” between the protected activity and the adverse action. The closer the temporal proximity is, the stronger the inference of a causal connection. Such indirect evidence can establish retaliatory intent. *See, e.g., Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 8 (ARB Dec. 30, 2004), *aff’d Vieques Air Link, Inc. v. U.S. Dept. of Labor*, 437 F.3d 102, 109 (1st Cir. 2006). A temporal connection between protected activity and an adverse action may support an inference of retaliation, but it is not necessarily dispositive. *See, e.g., Robinson v. Nw. Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005).

¹⁰ The ALJ also references Vordermeier’s December 19, 2005 letter to union representative, Bisignano, urging him to replace Klosterman as shop steward. In her original opinion, the ALJ suggested that this letter indicated that Klosterman’s removal would make things easier with customers but also that Vordermeier “would not be confronted so much with the Complainant’s concerns about the condition of the vehicles and equipment.” D. & O. at 25.

at a minimum, wished he “would not be confronted so much with the Complainant’s concerns about the condition of the vehicles and equipment.” D. & O. at 25.

Furthermore, the Respondent never argued that it would have terminated Klosterman’s employment because of customer complaints. On the contrary, throughout this litigation, the Respondent has argued that regardless of Klosterman’s safety complaints, it would have fired him because he did not complete the trip he was scheduled to make on December 20, 2005. Because the refusal to make that trip was itself protected activity, it cannot constitute a legitimate business justification for Klosterman’s termination. Additionally, Vordermeier’s testimony regarding the effect of Klosterman’s refusal to drive is contradicted by Casale’s testimony. Vordermeier claims he had to call the customer and tell them he had no driver available to service them that day. Tr. at 492. Casale however testified that he was available that day but that he did not get the job and did not work that day. Tr. at 387, 390. Casale also testified that one of Vordermeier’s relatives completed the job. Tr. at 390. Finally, the ALJ’s own findings questioning the credibility of every one of the Respondent’s witnesses bolster our conviction that substantial evidence does not support the Respondent’s affirmative defense. The ALJ’s alternative finding that the Respondent established by a preponderance of the evidence that it would have taken the same action, notwithstanding any history of protected activity on Klosterman’s part, is not supported by substantial evidence.

CONCLUSION

For the reasons explained above, we conclude that E.J. Davies violated the STAA when it terminated Klosterman’s employment on December 20, 2005. We therefore **VACATE** the dismissal of Klosterman’s claims and **REMAND** for the calculation of damages as provided by the STAA. On remand, the ALJ should order E.J. Davies to reinstate Klosterman unless the parties show that circumstances exist under which reinstatement would not be appropriate.¹¹

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

¹¹ Reinstatement is a presumptive remedy under STAA unless the parties demonstrate that it is impractical or impossible. Furthermore, back pay liability does not end until the employer makes an unconditional offer of reinstatement. *Dickey v. West Side Transp., Inc.*, ARB Nos. 06-150, 06-151; ALJ Nos. 2006-STA-026, -027, slip op. at 8-9 (ARB May 29, 2008).

Judge Corchado *concurring*:

I concur with the majority's decision to remand this matter on the issue of damages and with most of the majority's reasoning. I write separately to address succinctly why I cannot agree on two issues without further findings from the Administrative Law Judge (ALJ): (1) the refusal to drive and (2) the ALJ's finding of a one-day discharge from work. D. & O. on Remand at 7-9 and 13.

As to the refusal to drive, I agree with the majority's reasons and conclusion that Klosterman had a reasonable belief *upon arriving* at work on December 20, 2005, that his assigned truck had a flat tire and driving it would be a safety violation. Because the ALJ focused on whether the tire was actually flat and not on the issue of reasonable belief, we do not know whether the ALJ thought Klosterman's belief of a safety violation was objectively reasonable *when he went home*. The majority rationally explained its basis for finding that Klosterman reasonably believed that the tire was flat when he went home. But, given the importance the ALJ placed on the required pre-trip inspections, it is unclear to me whether the ALJ was suggesting that it was unreasonable for Klosterman not to perform a pre-trip inspection on December 20, 2005, and, therefore, not objectively reasonable to continue assuming that the tire was flat. See D. & O. on Remand at 9. I disagree with the majority that this case is similar to *Ass't Sec'y & Bailey v. Koch Foods, LLC*, ARB No. 10-001, ALJ No. 2008-STA-061 (ARB Sept. 30, 2011), where the employee had no realistic way to check if his truck was overweight, unlike Klosterman's ability to easily check the tires in this case. To clarify, I do not suggest that Klosterman was legally obligated to check his truck, but a fact question exists whether it was objectively reasonable in *this specific case* for Klosterman to rely solely on an assumption. Here, given the ALJ's findings, it is questionable whether other drivers placed in Klosterman's situation would have assumed that the tire was still flat without first doing a pre-inspection report. In the end, this unanswered question proves harmless because the ALJ found that Klosterman made protected safety complaints before December 20, 2005, and he made a safety complaint upon arriving at work on that day. I agree with the majority that the ALJ's findings demonstrate that these safety complaints partly motivated Vordermeier to have the critical confrontation on December 20, 2005.

Regarding the adverse action, the ALJ's finding of a one-day discharge in her remand decision causes me to reconsider our previous finding of a constructive discharge. See *Klosterman v. E.J. Davies, Inc.*, ARB No. 08-035, ALJ No. 2007-STA-019, slip op. at 10 (ARB Sept. 30, 2010). I certainly appreciate the difficulty the ALJ had deciding whether the Respondent constructively discharged Klosterman beyond December 20, 2005, given Klosterman's unclear explanation as to why he did not return the next day for another assignment. D. & O. on Remand at 12. The ALJ found that (1) Klosterman did not quit and (2) Vordermeier announced that Klosterman voluntarily quit. *Id.* at 8, 12. The ALJ left critical facts unresolved by "[p]resuming that Complainant testified accurately as to the Respondent's practice

of calling” Klosterman about available work, “presuming that Vordermeier chose to ‘freeze out’ the Complainant,” and speculating that the Complainant “could have forced Vordermeier to employ him” by “shaping.” *Id.* at 13. Again, the majority rationally explained the basis for holding to our initial finding of constructive discharge, which was the law of the case upon remand. I prefer that we reopen the issue of constructive discharge and ask the ALJ to resolve on remand the presumptions she made and then decide the issue of damages. Nevertheless, even without additional findings, the ALJ found that Vordermeier stated that Klosterman had quit, a deliberate attempt to end Klosterman’s employment. This adverse action against Klosterman had most likely created confusion and had consequences potentially lasting beyond December 20, 2005. The Secretary long ago stated that the “general rule is that a wrongdoer is liable to the person injured in compensatory damages for all of the natural and direct or proximate consequences of his wrongful act or omission.” *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, ALJ No. 1993-ERA-024 (Sec’y Sept. 1, 1994). It is understandable if Klosterman did not know exactly how to respond to Vordermeier’s deliberate attempts to end Klosterman’s employment, and it may be that Klosterman could have been more proactive in challenging Vordermeier. These issues would have been relevant in deciphering the natural and foreseeable consequences of a one-day discharge and Vordermeier’s announcement that Klosterman quit, but not under a constructive discharge theory. In the end, it is possible that the ALJ would have awarded the same remedies under the majority’s view of a constructive discharge or the ALJ’s view of a one-day discharge that Vordermeier painted as Klosterman voluntarily quitting.

LUIS A. CORCHADO
Administrative Appeals Judge