



In the Matter of:

BYRON WARREN,

ARB CASE NO. 10-092

COMPLAINANT,

ALJ CASE NO. 2009-STA-030

v.

DATE: February 29, 2012

CUSTOM ORGANICS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Raymond L. Jackson, Jr., Esq., *Jackson Law Group, P.C.*, Opelika, Alabama

For the Respondent:

Scott E. Morris, *Holt, Ney, Zatcoff & Wasserman, LLP*, Atlanta, Georgia

Before: E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*. Judge E. Cooper Brown concurring.

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2010) (STAA), and its implementing regulations at 29 C.F.R. Part 1978, 75 Fed. Reg. 53544 (Aug. 31, 2010). Complainant Byron Warren, a trucker with Respondent Custom Organics, filed a complaint with the Occupational Safety and Health Administration

(OSHA) alleging that the company violated the STAA when it terminated his employment. OSHA dismissed the complaint on March 13, 2009. Warren sought review by an Administrative Law Judge (ALJ). After a hearing, the ALJ issued a decision on April 27, 2010, recommending that the complaint be dismissed. Warren appeals. We remand for further proceedings.

BACKGROUND

A. *Facts*

The ALJ made few factual findings. The facts set out below are based on the ALJ's Decision, as well as testimony and exhibits taken at the administrative hearing held on December 16, 2009.

Custom Organics, LLC (Custom Organics or company) is a commercial motor carrier within the meaning of STAA, 49 U.S.C.A. § 31101. Recommended Decision & Order (R. D. & O.) at 2. The company processes waste food products into chick and cow feed. The company hired Warren as a commercial motor vehicle driver within the meaning of 49 U.S.C.A. § 31101, in February 2008. *Id.* at 2-3. A few days after Custom Organics hired him, he hit and damaged a light pole at a client company location. *Id.* at 3; Hearing Transcript (Tr.) at 35 (Warren). See also Tr. at 113-114 (Cowan). Later that month, Cowan verbally reprimanded Warren for driving a truck with his young son in the passenger seat. Tr. at 48; R. D. & O. 8. Warren stated that he did not have childcare that day because his wife was in the hospital having their baby. Tr. at 48. Around May or June 2008, Warren was given a \$1/hour raise. Tr. at 53 (Warren), 119 (Cowan). In July 2008, Mike Desmelik, vice president of engineering for the company, reprimanded Warren for failing to operate equipment properly. R. D. & O. at 8, citing Tr. at 116 (Desmelik).

1. *Reporting Unsafe Vehicle Conditions*

A few weeks after Custom Organics hired Warren, he began verbally reporting problems with the trucks to his manager, Adam Cowan. R. D. & O. at 4, 17. Warren and other drivers filled out pre-trip checklists that noted any problems with the trucks. *Id.* at 3. When Cowan requested that Warren's concerns be in writing, Warren filled out the pre-trip checklists to note problems with the trucks. R. D. & O. at 17, citing Tr. at 14-15. The checklist created an original and a carbon copy. Warren believed that the original copy was submitted to the plant manager, and the carbon copy stayed in a book in the truck. Tr. at 57-58. Warren testified that he tried to turn in the checklists to Cowan, but Cowan told him to keep them. R. D. & O. at 17, citing Tr. at 17. See also Tr. at 15, 57-58. Warren eventually began leaving the original (and copies) of checklists that he filled out in the book that was in the truck. Tr. at 14-17, 57-58. Another witness, Richard

Taylor, testified that he was aware of the checklists and that he was told to keep the completed checklists in the truck. Tr. at 76-77.

2. *Overweight trucks*

Warren made verbal complaints to management regarding other issues, including complaints about overweight trucks, working over the hour limits, and missing mudflaps. R. D. & O. at 4. Warren testified that Cowan told him to drive trailers even if they were overweight, and that Cowan told him to bypass the federal scales if he thought that his trailer was overweight. *Id.*; see also Tr. at 19 (Warren). Warren testified that on one occasion when he arrived to pick up an overweight trailer, Cowan told him not to carry it that night. R. D. & O. at 4. Warren testified that during his tenure at the company he was never informed that he was written up for carrying any overweight trailers. Tr. at 20-21. He also testified that while employed with the company he never received any write-ups or warnings for any of his actions as a trucker. Tr. at 21-22.

On another occasion on July 7, 2008, Warren testified that he called Cowan to report an overweight trailer, and Cowan told him, “It’s got to come back. If you won’t pull it, we’ll find somebody that will.” R. D. & O. at 4, quoting Tr. at 20. Warren “copied the weight ticket that showed his truck weighed 117,560 pounds and put it on Mr. Cowan’s desk with a note that they needed to fix the overweight trucks or he would go to the Department of Transportation.” R. D. & O. at 4; Tr. at 17. The ALJ found that of 150 weight tickets that Warren procured, six showed that his trailer was over 80,000 pounds and one showed that it was over 100,000 pounds. R. D. & O. at 18, citing RX 20; see also Tr. at 65. Warren testified that he called the company two or three times to directly report overweight loads. Tr. at 65-66.

Another witness at the hearing, Richard Dean Taylor, testified for the Complainant. Taylor drove for the company and stated that during his employment Cowan told him to drive overweight trailers, and that he was never written up for driving overweight. Tr. at 77-78 (Taylor). Taylor also testified that Cowan and another company manager, Chris Ryko, told Taylor that when he was driving overweight trailers, to drive around or avoid DOT. Tr. at 78. Taylor testified that he complied with that request by “tak[ing] the back roads.” *Id.*

3. *Driving extended hours*

Warren testified that he complained to the company about working beyond statutory hour limits. R. D. & O. at 19, citing Tr. at 17. Warren testified about an incident involving a co-worker, Grover Milton, that entailed the company requesting that Milton drive over the 12-hour limit. R. D. & O. at 19; Tr. at 18-22. Warren testified that he told Milton to wait until the morning to make the trip otherwise he risked “wrecking, killing somebody, killing yourself.” Tr. at 18. Warren then drove the truck home. Tr. at

22. Another witness, Richard Taylor, who also drove for the company, testified that he drove his truck home for about eight months after he was hired, until Cowan told him that driving the trucks home was against the company's insurance policy. Tr. at 84-85. Cowan testified that Taylor was the only person who drove his truck home, and that the company did not permit drivers to take trucks home. Tr. at 124. Cowan stated that Warren took home his truck only once, on July 13, 2008, and that was without permission. Tr. at 124-125. Cowan testified that when he saw the truck missing that morning he called Warren and had difficulty reaching him. Tr. at 125.

Taylor testified that when he worked for the company he drove more than 12 hours a day in violation of DOT regulations, but that after Warren was terminated he stopped driving more than 12 hours at a time. Tr. at 78-79. Taylor testified that he received a "blanket text" that had been sent by the company to "all the truck drivers" informing them that their checks would be held if they did not fix their logs to reflect that they drove no more than 12 hours at a time. Tr. at 80. Cowan testified that he never told drivers to adjust their daily logs to reflect that they drove fewer than 12 hours each day. R. D. & O. at 9, citing Tr. at 149 (Cowan).

4. *Warren's termination*

Warren testified that that on July 16, 2008, the company terminated his employment at a meeting with company managers after Cowan told him he was "unable to adapt to the company." Tr. at 25; R. D. & O. at 23, citing Tr. at 129. The ALJ found that there was no other reason given for the termination at the meeting. R. D. & O. at 23.

B. *Administrative Proceedings*

Warren filed an OSHA complaint on July 18, 2008. After an investigation, OSHA dismissed the complaint on March 13, 2009. Warren filed objections to OSHA's findings and requested a hearing before an ALJ on April 2, 2009.

A full hearing was held on December 16, 2009. On April 27, 2010, the ALJ entered a recommended decision and order dismissing the complaint. The ALJ held that Warren failed to show that he reported unsafe driving conditions because the checklists were not turned in to management and thus Cowan had no notice of problems with the trucks. R. D. & O. at 17. The ALJ found that the company's practice made truckers responsible for repairing their own trucks, and that "[w]ithout evidence that complainant made repeated complaints on issues outside of his normal duties, I did not find the oral statements rise to the level of protected activity." *Id.* at 18.

The ALJ also determined that Warren's evidence was "inadequate" to establish that he complained about hauling overweight trailers or was told to do so based on findings that of the 153 loads for which there were tickets, six were over 80,000 pounds

and only one was over 100,000 pounds. The ALJ also accorded significant weight to Cowan's testimony that the company relies on customers to load the trailers, that truckers call the office when trailers are overloaded, and that he has never told drivers to haul overweight loads or avoid weigh stations. *Id.* The ALJ determined that Warren's testimony about hauling overweight loads was not adequate to overcome the company's evidence, and that Warren needed "more corroboration than Mr. Taylor's testimony, especially in light of the instance when Mr. Cowan helped him deal with an overweight trailer." *Id.* at 19. The ALJ also determined that Warren's statements about driving excessive hours were not protected activity because "three members of [the company's] management team testified that [Warren] had never complained about having to drive excessive hours." *Id.* The ALJ determined that Warren's testimony that he told Milton not to drive more than 12 hours did not constitute protected activity because it was not Warren's refusal to drive for which Warren sought protection, but instead it was Milton's refusal. *Id.* at 20.

The ALJ next determined that even if Warren had engaged in protected activity, there was no causal link between the activity and his termination. The ALJ rejected the theory that the temporal proximity of his termination within two weeks of complaining about being told to haul an overweight trailer, and two days after telling Milton not to driver over his hours, caused the adverse action. *Id.* The ALJ determined that any statements Cowan made were "too ambiguous" to establish an "illegal motive" that violated STAA. *Id.* (ALJ referring to Complainant's testimony that Cowan told him that he was "being terminated for not being able to adapt to the company").

Finally, the ALJ determined that the company had legitimate reasons for terminating Warren, including the accident resulting in damage to a light pole that occurred within a few days after Warren started at the company, his lack of air brake certification that caused him to be out for three days when he first started working for the company, having his child in the truck when his wife was hospitalized, the incident between Warren and Desmelik concerning the use of company equipment, and a verbal reprimand for an overweight haul on July 7, 2008. *Id.* at 21-22. The ALJ also rejected Warren's contention that truckers regularly took trucks home, crediting instead Cowan's testimony that only one employee took his truck home. *Id.* at 22. The ALJ determined that Cowan's refusal to show Warren his employment file and his failure to tell him the reasons for his termination was not pretextual because Warren "became hostile during the meeting and he did not want to prolong the meeting." *Id.* at 23.

Warren petitions the Administrative Review Board (ARB) for review. We remand for further proceedings.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA and its implementing regulations at 29 C.F.R. Part 1978.¹ In reviewing STAA cases, the ARB 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); *Bailey v. Koch Foods, LLC*, ARB No. 10-001, ALJ No. 2008-STA-061, slip op. at 3 (ARB Sept. 30, 2011). The ARB reviews the ALJ's conclusions of law de novo. *Id.*

DISCUSSION

A. *Statutory Framework and Burden of Proof*

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 activity. 49 U.S.C.A. § 31105(a)(1). The STAA protects an employee who makes a complaint “related to a violation of a commercial motor vehicle safety or security regulation, standard, or order.” *Id.*

The ALJ used the burden-shifting standard employed under Title VII pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and its progeny. *See* R. D. & O. at 16-17, citing *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (relying on burden-shifting analysis of *McDonnell Douglas* in STAA retaliation case). About a year before Warren filed his complaint with OSHA, this burden of proof standard was amended on August 3, 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266 (9/11 Commission Act). The Act amended paragraph (b)(1) of 49 U.S.C.A. § 31105 to state that STAA whistleblower complaints will be governed by the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (Thomson/West 2007), which contains whistleblower protections for employees in the aviation industry.

Under the amended STAA standard set out in the 9/11 Commission Act, Warren must prove by a preponderance of the evidence that his safety complaints to his employer were protected activity, that the company took an adverse employment action against him, and that his protected activity was a contributing factor in the adverse personnel action. *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011). If Warren proves by a preponderance of evidence that his

¹ Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. 1978.109(a).

protected activity was a contributing factor in the adverse personnel action, his employer may avoid liability if it “demonstrates by clear and convincing evidence” that it would have taken the same adverse action in any event. *Williams*, ARB No. 09-092, slip op. at 5 (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)). “Clear and convincing evidence is ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’” *Williams*, ARB No. 09-092, slip op. at 5, quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006) (citing BLACK’S LAW DICTIONARY at 577).

B. *Protected Activity*

Warren argues that the ALJ erred because he engaged in protected activity of which his employer was aware. We find a remand warranted for further consideration of the protected activity that Warren asserts below.

1. *Unsafe vehicle conditions*

The ALJ determined that the checklists could not constitute protected activity because they were not “turned in to management and, therefore, could not constitute notice of a complaint.” R. D. & O. at 17. We disagree. Warren testified that he tried to turn in some checklists, but Cowan told him not to turn them in but instead to leave them in the truck. Tr. at 14 (Warren testified: “once we got the write-up sheets . . . we started filling out the trip sheets. And when we’d turn them in, he [Cowan] was like, [‘]just hold onto them; just hold onto them.[’] It was – it did no good to fill them out and turn them in.”); see also Tr. at 15, 57-58. Even though the ALJ resolved the factual dispute about the checklists in Cowan’s favor (by finding that Warren was “not good about turning them in”), the ALJ did find that Cowan expected that the pre-checklists would be turned in to him and that he (Cowan) never told Warren not to turn them in to him. R. D. & O. at 17. While Warren testified that Cowan rebuffed his attempts to turn in the checklists, it is undisputed that Warren at minimum left copies of the checklists in a book maintained in the truck. See Tr. at 67 (Warren testifies as to the checklists, and states that the original “goes to the boss, the plant manager,” and the carbon copy “stays attached in the book, and the book stays in the truck.”). These facts establish at minimum Cowan had “constructive knowledge” of problems reported by Warren by virtue of Warren’s initial complaints to Cowan and other supervisors, and the checklists that Warren left in the truck in accordance with Cowan’s instructions to him. Warren is not required to prove “direct personal knowledge on the part of” Cowan that he engaged in protected activity. *Zinn v. American Commercial Lines*, ALJ No. 2009-SOX-025, slip op. at 61-62 (Nov. 5, 2009), citing *Frazier v. Merit Sys. Prot. Bd.*, 672 F.2d 150, 166 (D.C. Cir. 1982). Indeed, the law “will not permit an employer to insulate itself from liability by creating ‘layers of bureaucratic ignorance’ between a whistleblower’s direct line of management

and the final decision-maker.” *Zinn*, ALJ No. 2009-SOX-025, slip op. at 61-62, quoting *Frazier*, 672 F.2d at 166.

In this case, the “bureaucratic ignorance” constructed by the company is the use of the checklists (which is the mechanism set up by the company so that employees can report safety conditions of trucks), and attempts by the company under the circumstances presented in this case to feign ignorance that they even knew about any safety violations that Warren sought to report. Here there is unrefuted evidence that Warren at some point verbally complained about the trucks, and that Cowan told him to report his complaints on the checklists. Whether Cowan sought to review the checklists is an issue that must be resolved on remand. But since the company set up this procedure for its employees to report safety complaints and specifically directed Warren to document his concerns in that way, Warren may have engaged in protected activity of which the company had constructive knowledge. *See, e.g., White v. Osage Tribal Council*, ARB No. 96-137, ALJ No. 1995-SDW-001, slip op. at 3 (ARB Aug. 18, 1997) (“the very essence of [complainant’s] job was to monitor and report compliance” thus “reports filed by [complainant] triggered the . . . enforcement process”). That is for the ALJ to determine in the first instance.

Additionally, the ALJ erred as a matter of law in concluding, without citation to any authority to support his rationale, that Warren’s oral safety complaints were not protected because they were part of his job duties. *See R. D. & O.* at 18 (“Without evidence that the Complainant made repeated complaints on issues outside of his normal duties, I do not find the oral statements rise to the level of protected activity.”). The Secretary and Board have consistently found that employees who report safety concerns as part of their job responsibilities engage in protected activity. Affirming one such case, the court of appeals reasoned that quality control inspectors play a crucial role in enforcing the Nuclear Regulatory Commission regulations and, consequently, “[i]n a real sense, every action by quality control inspectors occurs ‘in an NRC proceeding,’ because of their duty to enforce NRC regulations.” *Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) (court further observes that “[i]f the NRC’s regulatory scheme is to function effectively, inspectors must be free from the threat of retaliatory discharge for identifying safety and quality problems.”). This rationale applies with equal force to employees like Warren, whose job duties include monitoring the safety of the trucks they operate. *See also Vinnett v. Mitsubishi Power Sys.*, ARB No. 08-104, ALJ No. 2006-ERA-029, slip op. at 6 & n.57 (ARB July 27, 2010) (reporting cases finding that employees who report safety violations as part of their “job duties” may still be engaged in protected activity).

The ALJ’s determination that Warren failed to report safety violations because Cowan had no knowledge of the violations, and that his oral communications were not protected because they were part of his responsibilities as a trucker with the company, is legal error. On remand, the ALJ is directed to determine whether the submission of the

checklists, and the verbal communications, constituted notice of a safety complaint by Warren.

2. *Overweight loads*

Next, the ALJ determined that Warren's testimony at hearing was contradictory and inadequate to establish that he complained about hauling overweight trailers despite the corroborating testimony provided by former employee Richard Taylor. R. D. & O. at 19. While the ARB generally defers to an ALJ's credibility determination, *Mailloux v. R & B Transp.*, ARB No. 07-084, ALJ No. 2006-STA-012, slip op. at 8-9 (ARB June 16, 2009), the ALJ here did not find that Warren's testimony lacked credibility on this issue. The ALJ also did not find that Taylor's testimony lacked credibility, although the ALJ determined that Warren needed more evidence than just Taylor's testimony to corroborate Warren's claim that he complained about driving overweight loads. "In weighing the testimony of witnesses, the ALJ as factfinder considers . . . the extent to which their testimony was supported or contradicted by other credible testimony." *Mailloux*, ARB No. 07-084, slip op. at 9. The substantial evidence of record in this case neither supports the ALJ's assertion that Warren's testimony is contradicted or the ALJ's view that his testimony is lacking in corroboration. One need look no further than the ALJ's R. D. & O.

While there is contradictory evidence about whether Custom Organics ordered its drivers to haul overweight loads, that is not a complaint for which Warren seeks whistleblower protection. Rather, Warren seeks protection *for complaining about hauling overweight loads*. Moreover, while there may exist contradictory evidence about *how often* Warren complained, the fact that he nevertheless *did* complain is uncontradicted. Warren testified that he made numerous verbal complaints to management regarding overweight trucks, and recalled at least one instance, in July of 2008, when he spoke directly with Cowan by phone about an overweight trailer he was about to haul. R. D. & O. at 4. In addition, Warren submitted documentary evidence showing that at least in six separate instances his truck was overloaded. *Id.* Corroborating Warren's complaints to management on at least two occasions, Milton, one of the Respondent's drivers, testified that he witnessed one incident where Warren called Cowan to complain about an overweight trailer they were scheduled to haul, which they subsequently did not haul at Cowan's instruction, R. D. & O. at 7, and Cowan testified that in May or June of 2008, Warren called Cowan to express his concerns about an overweight trailer Warren was scheduled to haul,² R. D. & O. at 9.

² The record reflects that on at least two occasions, Cowan helped Warren "deal with the overweight trailer." R. D. & O. at 18-19. It seems logical to assume that in both those circumstances Cowan's assistance was triggered by a complaint from Warren about the weight of the trailer. It seems unlikely that Cowan would not have responded to Warren's complaints had they been unreasonable.

Far from being “contradicted” or “inadequate” due to lack of corroboration, the evidence of record supports Warren’s testimony that he engaged in STAA whistleblower protected activity through his complaints to management about hauling overweight trailers.³

3. *Driving extended hours*

Warren also argued that the ALJ erred in determining that his complaints over the statutory driving limits were not protected. We affirm the ALJ ruling on that issue. Substantial evidence supports the ALJ’s decision that Warren’s actions relating to driving over daily hourly limits were not protected. R. D. & O. at 19. Besides the ALJ’s finding that Warren did not complain to management about his hours, the timesheets Warren submitted reflect that he “exceeded the regulatory limit of 12 hours” in “only one instance” and only by “37 minutes.” R. D. & O. at 19, citing RX 21 & 21y; see also R. D. & O. at 19 (ALJ finds that “[s]ince three members of Custom Organics’ management team testified that the Complainant had never complained about having to drive excessive hours, I do not find [that] his alleged statements qualify as protected activity.”). Based on these facts, while Warren may have demonstrated a subjective belief of a violation by virtue of his verbal complaints, his belief lacked objective reasonableness since the timesheets show that he exceeded the regulatory limit only once.

C. *Contributing Factor*

If on remand the ALJ determines that Warren’s actions constituted protected activity, the ALJ must then determine whether that activity was a “contributing factor” in the employer’s decision to terminate his employment. *Dick v. J.B. Hunt*, ARB No. 10-

³ In giving more weight to the Respondent’s witnesses (company managers who testified that they never ordered Warren to carry overweight loads), the ALJ in this case suggests that Warren needed to show that an actual STAA violation occurred. R. D. & O. at 18 (citing testimony of company managers and employees Cowan, Craig, and Shelnett). It is well established that a STAA complainant “need not prove an actual violation of a motor vehicle safety regulation, standard, or order, but must at least be acting on a reasonable belief regarding the existence of an actual or potential violation.” *Dick v. J.B. Hunt Transp., Inc.*, ARB No. 10-036, ALJ No. 2009-STA-061, slip op. at 6 (ARB Nov. 16, 2011) (an “internal complaint to superiors conveying [an employee’s] reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under the STAA”)(citation omitted). Thus Warren need not show that an actual violation occurred (that his managers expressly directed him to drive overweight trucks); he need only show that he had a reasonable belief (objective and subjective) that he had to drive overweight trucks based on a preponderance of direct *or* circumstantial evidence.

036, slip op at 6; *Williams*, ARB No. 09-092, slip op. at 6. A contributing factor is “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Williams*, ARB No. 09-092, slip op. at 5. Warren can succeed by “providing either direct or indirect proof of contribution.” *Id.* If Warren “does not produce direct evidence, he must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating his employment.” *Id.* One of the common sources of indirect evidence is “temporal proximity” between the protected activity and the adverse action. *Reiss v. Nucor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010). While not dispositive, the closer the temporal proximity is, the stronger the inference of a causal connection. This indirect or circumstantial evidence can establish a causal connection between the protected activity and adverse acts. *Id.*, citing *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 sub nom. Vieques Air Link, Inc. v. U.S. Dep’t of Labor*, 437 F.3d 102, 109 (1st Cir. 2006); *see also Robinson v. Northwest Airlines, Inc.*, ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005).

The ALJ noted that “close proximity in time would be sufficient to establish the causal link,” but ultimately determined that the two incidents Warren raised “did not constitute protected activity in either situation.” R. D. & O. at 20. Warren engaged in protected activity when he “made numerous verbal complaints to management regarding overweight trucks” during the summer of 2008. R. D. & O. at 4; *see also id.* at 4, citing Tr. at 17 & RX 20ii. This activity occurred shortly before the company terminated his employment. On remand, the ALJ should determine whether the temporal proximity between Warren’s protected activity, including reporting the overweight loads and any other activity that the ALJ finds protected (e.g., submission of the checklists and oral safety complaints, all of which occurred in the spring and summer of 2008) and Warren’s termination in July 2008, may be sufficient to establish the element of causation. *See, e.g., Couty v. Dole*, 886 F.2d 147, 148 (8th Cir.) (temporal proximity of 30 days established nexus); *Nichols v. Bechtel Constr., Inc.* No. 1987-ERA-044, slip op. 12 (Sec’y Oct. 26, 1992)(temporal proximity of about two months established nexus); *Goldstein v. EBASCO Contractors, Inc.*, No. 1986-ERA-036, slip op. at 11-12 (Sec’y Apr. 7, 1992) (temporal proximity of seven to eight months established nexus).

We note that in addition to or in conjunction with temporal proximity evidence and other circumstantial evidence in this case, an employee can prove or buttress a whistleblower claim by proving that the employer’s proffered reasons were pretextual (not credible), but such a showing is not required. *Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 (ARB Sept. 30, 2011). However, where the employee presents evidence that the employer’s adverse actions *were* pretextual, this may warrant a finding by an ALJ that the employer failed to prove by clear and convincing evidence that the adverse action would have occurred even absent the protected activity. Nevertheless, as we explain below, a complainant is not

required to demonstrate that his employer's reasons for an adverse action were pretext to prevail on a complaint. In the end, all pretext evidence should be weighed with all of the circumstantial evidence to determine the issue of causation after an evidentiary hearing.

D. Nondiscriminatory Reason for Termination

The ALJ stated that if Warren were able to demonstrate that the company fired him for "mixed motives," "the employee must show by a preponderance of the evidence that it would have taken the same adverse action absent the complainant's protected activity." R. D. & O. at 16-17. The 2007 amendment to the STAA burdens of proof, however, requires that where the ALJ finds that Warren's actions were protected and a contributing factor in his termination, the company can avoid liability only if it "demonstrates by clear and convincing evidence" that it would have taken the same adverse action in any event. *Williams*, ARB No. 09-092, slip op. at 5, (citing 49 U.S.C.A. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a)). "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Williams*, ARB No. 09-092, slip op. at 5, (quoting *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, slip op. at 14). In this case, the ALJ imposed an improperly high burden on the Complainant to prove his case. R. D. & O. at 16 ("complainant must establish that the proffered reason for the adverse action is false and that his protected activity was the *true reason* for the adverse employment action.") (emphasis added); R. D. & O. at 23 ("I further find that the Complainant has failed to show that the reasons listed above were *mere pretext* for his termination.") (emphasis added). Under the 2007 amendment to the STAA burden of proof, an employee is not required to prove that his employer's reasons for an adverse action were pretext, e.g., that the employer had an alternate, albeit improper, motive for the adverse action,⁴ to prevail on a complaint. See *Bechtel*, ARB No. 09-052, slip op. at 13.

Because the ALJ used the wrong burden of proof for Warren to rebut Custom Organics' claim that it had a legitimate reason for terminating him, we decline to credit the ALJ's resolution of Warren's evidence of pretext. The 2007 amendment to STAA reduced the burden of proof for complainants, and raised the burden of proof for employers. See Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Surface Transportation Act of 1982, 75 Fed. Reg. 53544, 53550 (Aug. 31, 2010); see also *Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-47, slip op. at 4, n.1 (ARB Aug. 31, 2011); *Clarke v. Navajo Express, Inc.*, ARB No. 09-114, ALJ No. 2009-STA-018, slip op. at 4 n.1 (ARB June 29,

⁴ See *Simon v. Sancken Trucking Co.*, ARB No. 06-039, -088; ALJ No. 2005-STA-040 (ARB Nov. 30, 2007) (defining "pretext" as an "'ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive.'" BLACK'S LAW DICTIONARY at 1351 (Rev'd 4th Ed. 1968)").

2011) (stating that “the ‘contributing factor’ standard that the complainant is required to meet is a lesser burden of proof than that which the ALJ used, and the ‘clear and convincing evidence standard [required of the employer] is a higher burden of proof than the preponderance of evidence standard”). The ALJ’s incorporation of the Title VII proof standards effectively negates the lesser burden of proof contained in the 2007 amendments to STAA. Rather than a burden of proof standard requiring that Warren merely prove that his protected activity “alone or in combination with other factors tend[ed] to affect in any way the outcome of the [adverse personnel] decision,” *supra* at 10, the ALJ required Warren to provide sufficient evidence to overcome any legitimate business reason articulated by the Respondent for the adverse action, *including* proof, by a preponderance of the evidence, that those articulated business reasons were pretextual.⁵

The ALJ’s imposition of the pre-amendment, burden-of-proof standard thus constitutes additional grounds for finding reversible error. Although we are bound by the “substantial evidence” standard of review, we have recognized that reversal of an ALJ’s findings of fact may exist where the ALJ has applied the wrong legal standard in reaching those findings. *Klopfenstein v. PCC Flow Techs. Holdings*, ARB No. 04-149, ALJ No. 2004-SOX-011, slip op. at 20 (ARB May 31, 2006) (recognizing that factual findings cannot necessarily be relied upon where “made under the wrong legal standard”). Consequently, because the ALJ erred in determining that Warren failed to establish protected activity and misstated the Respondent’s standard of proof on causation, we decline to credit the ALJ’s resolution of the evidence of either party. Indeed, we cannot ascertain whether the ALJ definitely resolved certain conflicting evidence and factual inconsistencies due to employing the incorrect legal standard. On remand, the ALJ must make specific factual findings that address any inconsistencies in the testimony and that are employed under the proper burden of proof standard. 29 C.F.R. § 18.57(b) (an ALJ “shall include findings of fact and conclusions of law, with reasons therefore, upon each material issue of fact or law presented on the record.”).

⁵ The ALJ credited the reasons for Warren’s termination as those listed in forms Cowen filed with the Georgia Department of Labor, and the company’s response to Warren’s OSHA complaint. See R. D. & O. at 23, citing RX 11, 15a, 16; see also *supra* at 2. In determining whether that evidence is “clear and convincing,” the ALJ should weigh that against Warren’s circumstantial evidence that he never received any complaints about his performance while he was employed, that he was not told the reasons that he was being fired at the time the company terminated his employment, and that he was not given the full reason until the company responded to his OSHA complaint. R. D. & O. at 5, 22-23. The ALJ should analyze consideration of Warren’s circumstantial evidence in view of pertinent DOL whistleblower caselaw. See, e.g., *Scott v. Roadway Express*, ARB No. 99-013, ALJ No. 98-STA-008, slip op. at 11 (ARB July 28, 1999) (finding that the company’s issuance of “warning letters” to complainant was evidence of nondiscriminatory reasons for complainant’s termination); *Townsend v. Big Dog Holdings, Inc.*, ALJ No. 2006-SOX-028, slip op. at 16-17 (Feb. 14, 2006).

CONCLUSION

For the foregoing reasons, we **REMAND** the ALJ's Decision for further proceedings consistent with this opinion.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

E. Cooper Brown, Deputy Chief Administrative Appeals Judge, *concurring.*

I concur in the decision to remand this case for further consideration. I write separately because I do not agree with several aspects of the majority's analysis that I consider critical to a proper application of STAA's whistleblower protection provision to the facts of the instant case, as hereinafter discussed.

Complainant presents three bases upon which he claims that he engaged in STAA protected activity, which the ALJ separately addressed: (1) reporting of unsafe vehicle conditions; (2) reporting of overweight vehicular loads; and (3) complaining about working in excess of statutory hour limitations. With respect to the first, reporting of unsafe vehicle conditions, the ALJ found that written pre-trip inspection checklists that recorded unsafe conditions, upon which Warren relies in part to establish protected activity, "were never turned in to management and, therefore, could not constitute notice of a complaint." R. D. & O. at 17. Whether some of these reports were turned in or not (the evidence is contradictory on this point), substantial evidence of record supports the ALJ's finding. The majority nevertheless argues that the evidence establishes that Mr. Cowan, Warren's immediate supervisor and the individual responsible for Warren's employment termination, was constructively on notice of the safety complaints raised by the pre-trip inspection reports. Holding that "Warren is not required to prove 'direct personal knowledge on the part of' Cowan that he engaged in protected activity," the majority cites the ALJ's decision in *Zinn v. American Commercial Lines*, 2009-SOX-025 (Nov. 11, 2009), and *Frazier v. Merit Sys. Prot. Bd.*, 672 F.2d 150 (D.C. Cir. 1982), for the proposition that STAA's whistleblower protection provision "will not permit an employer to insulate itself from liability by creating 'layers of bureaucratic ignorance' between a whistleblower's direct line of management and the final decision-maker." While I agree with the legal proposition forwarded by the majority, I am not convinced

that it applies to the facts of the instant case inasmuch as Warren's immediate supervisor and the final decision-maker were one and the same, i.e., Mr. Cowan.

A determination of whether Cowan was on constructive notice as to Warren's written safety complaints, as the majority requires of the ALJ upon remand, is immaterial to the conclusion that Warren did in fact engage in whistleblower protected activity through his *oral* complaints of unsafe vehicle conditions. Prior to utilizing the pre-trip checklists to record his safety concerns, Warren verbally reported his concerns to Cowan (R. D. & O. at 3) and another member of Respondent's management team, a Mr. Craig (R. D. & O. at 15). Notwithstanding his recognition that under STAA a complainant's safety concerns can be oral rather than written, citing *Moon v. Transp. Drivers*, 836 F.2d 226, 227-29 (6th Cir. 1987),⁶ the ALJ concluded that because Warren's oral complaints fell within his normal duties, "the oral complaints [do not] rise to the level of protected activity." R. D. & O. at 18. I agree with the majority that the ALJ's conclusion in this regard constitutes error as a matter of law. ARB case authority is clear: protected activity includes complaints made within the scope of an employee's regular duties. See e.g., *Mackowiak v. University Nuclear Sys.*, 735 F.2d 1159, 1163 (9th Cir. 1984); *Vinnett v. Mitsubishi Power Sys.*, ARB No. 08-104, ALJ No. 2006-ERA-029, slip op. at 6 & n.57 (ARB July 27, 2010) (citing supporting case authority); *Wells v. Kansas Gas & Electric*, No. 1983-ERA-012 (Sec'y June 14, 1984).

The ALJ's finding that Warren orally communicated some of his concerns about vehicle safety is not disputed. Consequently there is no need, as the majority orders, to remand to the ALJ the issue of whether or not his complaints to management about vehicular safety constituted STAA-protected activity. As a matter of law, his oral communications were protected.

With respect to the other two bases upon which Warren argues that he engaged in STAA-protected activity, I agree with the majority, for the reasons the majority cites, that his concerns raised with management about hauling overweight vehicular loads constituted protected activity for the reasons cited by the majority. Regarding Warren's remaining claim of protected activity based on complaining about working in excess of statutory hour limitations, I join with the majority in affirming the ALJ's conclusion that Warren's activities did not constitute STAA-protected activity, although for different

⁶ The ARB has long held that the provisions of STAA found at 49 U.S.C.A. § 31105(a)(1)(A)(i) and (ii), as well as similarly worded provisions in other whistleblower statutes enforced by OSHA, cover both written and oral complaints to the employer or a government agency. See, e.g., *Harrison v. Roadway Express, Inc.*, ARB No. 00-048, ALJ No. 1999-STA-037 (ARB Dec. 31, 2002), *aff'd on other grounds*, 390 F.3d 752 (2d Cir. 2004); *Calhoun v. Dep't of Labor*, 576 F.3d 201, 212 (4th Cir. 2009); *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993).

reasons. Based on the facts presented, the majority concludes that “while Warren may have demonstrated a subjective belief of a violation by virtue of his verbal complaints, his belief lacked objective reasonableness since the timesheets show that he exceeded the regulatory limit only once.” I fail to see the relevance of the reasonableness of Warren’s belief that statutory hour limitations on driving were exceeded given that the ALJ found that Warren never complained about driving in excess of the statutory limitation. My affirmation of the ALJ’s determination is thus based on my conclusion that the substantial evidence of record supports the ALJ’s finding that Warren never complained about working in excess of the statutory twelve-hour limit. With respect to Warren’s assertion that his advice that another driver refrain from further driving in light of excessive hours already driven constituted protected activity, I note that in rejecting this aspect of Warren’s claim the ALJ treated the matter as a STAA “refusal to drive” claim for which protection is afforded when it is the employee himself that refuses to drive. Whether the ALJ was correct in his determination or not, there is no evidence of record showing that Warren ever complained to management about his fellow driver having exceeded the statutory hours limit. Consequently, on this point also the substantial evidence of record supports the ALJ’s determination that Warren did not engage in protected activity.

While I consider it unnecessary to remand this case to the ALJ to determine whether Warren engaged in protected activity given the evidence of record clearly establishes that he did, remand is nevertheless required in order to permit the ALJ to reconsider the causal relationship between Warren’s protected activity and the adverse action taken against him under the appropriate burdens of proof standards.

In 2007, as the majority notes, the STAA whistleblower protection provisions were amended as part of the 9/11 Commission Act of 2007, Public Law 110-53, 121 Stat. 266. The 9/11 Commission Act amended paragraph (b)(1) of 49 U.S.C.A. § 31105 to state that STAA whistleblower complaints will be governed by the legal burdens of proof set forth in AIR 21, 49 U.S.C.A. § 42121(b), which contains whistleblower protections for employees in the aviation industry. Accordingly, under the STAA whistleblower provisions applicable to the instant case a violation may be found at the hearing stage if the complainant proves by a preponderance of the evidence that protected activity was a contributing factor in the adverse action described in the complaint. Relief is nevertheless unavailable if the employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. *Williams v. Domino’s Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6 (ARB Jan. 31, 2011). *Brune v. Horizon Air Indus., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13-14 (ARB Jan. 31, 2006). *See also, Vieques Air Link, Inc. v. Dep’t of Labor*, 437 F.3d 102, 108-09 (1st Cir. 2006) (per curiam) (burdens of proof under AIR 21).

In the instant case the ALJ applied the burdens of proof standards applicable to cases arising under STAA prior to the 9/11 Commission Act amendments.⁷ As a result, the ALJ erroneously imposed upon Warren the burden of establishing a *prima facie* case of retaliation by proving, by a preponderance of the evidence, a causal link between Warren’s protected activity and the termination of his employment – a higher burden of proof than that required of complainants by the 2007 amendments.

A “contributing factor” includes “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision,” and may be established by direct or indirect proof by way of circumstantial evidence. *Williams*, ARB No. 09-092, slip op. at 5. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer’s policies, an employer’s shifting or contradictory explanations for its actions, antagonism or hostility toward a complainant’s protected activity, the falsity of an employer’s explanation for the adverse action taken, a change in the employer’s attitude toward the complainant after he or she engages in protected activity. *Bechtel v. Competitive Techs.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. 13, 28 (ARB Sept. 30, 2011); *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011). On appeal Warren points to circumstantial evidence of record that falls within several of these categories that the ALJ failed to consider.⁸ On remand this evidence must be taken

⁷ Prior to the 9/11 Commission Act amendments, the parties’ burdens of proof in STAA actions were analogous to those developed for retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* See, e.g., *Clean Harbors Env’tl. Servs., Inc. v. Herman*, 146 F.3d 12, 21-22 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994). The complainant was initially required to establish a *prima facie* case of retaliation, which required proof by a preponderance of the evidence that (1) he or she engaged in protected activity; (2) the employer was aware of the protected activity; (3) the complainant suffered an adverse action; and (4) a causal connection existed between the two events. See, e.g., *Baughman v. J.P. Donmoyer, Inc.*, ARB No. 05-105, ALJ No. 2005-STA-005 (ARB Oct. 31, 2007). Once the complainant made this showing, an inference of retaliation arose and the burden shifted to the employer to produce evidence of a legitimate, non-retaliatory reason for the adverse action. *Clean Harbors*, 146 F.3d at 21; *Yellow Freight*, 27 F.3d at 1138. If the employer met this burden of production, the inference of retaliation was rebutted and the burden shifted back to the complainant to show by a preponderance of the evidence that the legitimate reason was a pretext for unlawful retaliation. *Id.* Where there was evidence that the employer acted out of mixed motives, i.e., it acted for both permissible and impermissible reasons, the employer bore “the burden of establishing by a preponderance of the evidence that it would have taken the adverse employment action in the absence of the employee’s protected activity.” *Clean Harbors*, 146 F.3d at 21-22.

⁸ For example, the ALJ ignored evidence showing shifting reasoning by Respondent as to why Warren was terminated, instead focusing exclusively on a single statement alleged to have been made by Cowan at the time of Warren’s termination that the ALJ concluded was

into consideration in determining whether Warren meets his burden of proving that his protected activity was a contributing factor in his discharge.⁹

Finally, there is the question of Respondent's rebuttal burden of proof standard under STAA. Notwithstanding his conclusion that Warren failed to meet his burden of proving that he engaged in protected activity that resulted in the termination of his employment, the ALJ proceeded to address whether Custom Organics nevertheless met what the ALJ perceived as Respondent's rebuttal burden of proof on the assumption that Warren had met his burden of proof. In so doing, the ALJ resorted to the pre-2007 STAA burden of proof required of a respondent: i.e., "the burden to articulate a legitimate, non-discriminatory reason for taking the adverse employment action." R. D. & O. at 21. Consistent with this test, the ALJ also imposed upon Warren the ultimate burden of proving that Custom Organics' reasons for terminating his employment were pretextual. *Id.*¹⁰

"too ambiguous to establish an illegal motive for the Complainant's termination." R. D. & O. at 20.

⁹ The majority notes the ALJ's acknowledgement that if Warren had engaged in protected activity (which the ALJ concluded he had not), "close proximity in time would be sufficient to establish the causal link." R. D. & O. at 20. Given that the evidence of record clearly establishes that Warren engaged in protected activity, the ALJ's statement would seemingly suggest that Warren has met his initial burden of proving that his protected activity was a "contributing factor" without the need for remand. However, the ALJ's view of the causative sufficiency of temporal proximity fails to take into consideration ARB precedent holding that temporal proximity *alone* may not be sufficient to meet a complainant's burden of proving by a preponderance of the evidence at the hearing stage that protected activity was a "contributing factor" in the adverse action taken against the complainant. *Brune*, ARB No. 04-037, slip op. at 13-14. See *Robinson v. Northwest Airlines*, ARB No. 04-041, 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005) ("where the protected activity and the adverse action are separated by an intervening event that *independently* could have caused the adverse action, there is no longer a logical reason to infer a causal relationship between the activity and the adverse action"). See also *Spelson v. United Express Sys.*, ARB No. 09-063, ALJ No. 2008-STA-039, slip op. at 3 n.3 (ARB Feb. 23, 2011) (temporal proximity alone generally cannot support an inference of causation in the face of compelling evidence to the contrary). *Accord Moon v. Transp. Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). *Cf.*, *Peck v. Safe Air Int'l*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9 (ARB Jan. 30, 2004) (temporal proximity between protected activity and adverse personnel action "normally" will satisfy the complainant's burden of making a *prima facie* showing at the OSHA investigatory stage).

¹⁰ The majority characterizes the ALJ's determination that Custom Organics met its rebuttal burden of proof as having been reached under the pre-2007 "mixed motives" test, stating: "The ALJ stated that if Warren were able to demonstrate that he was fired for 'mixed

As previously noted, as a result of the 2007 amendments to STAA an employer must prove by clear and convincing evidence that it would have taken the same adverse action in the absence of a complainant's protected activity in order to successfully rebut the complainant's showing that protected activity was a contributing factor in the adverse action taken. This is, as the majority points out, a higher burden of proof standard than that required under STAA prior to the 2007 amendments. I thus agree with the majority that the ALJ's resort to the lesser standard in determining whether Custom Organics would have met its rebuttal burden of proof had Warren met his burden of proof constitutes an additional basis for reversible error.

For the foregoing reasons, I concur in the decision remanding this case to the ALJ for further proceedings.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

motives', 'the employee must show by a preponderance of the evidence that it would have taken the same adverse action absent the complainant's protected activity.'" However, the ALJ did not impose upon Respondent the burden of proving that it would have taken the adverse employment action in the absence of Warren's protected activity because no evidence was presented that Respondent acted out of mixed motives.