U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

STEPHEN COTTIER,

PETITIONER,

v.

BAYOU CONCRETE PUMPING, LLC,

and

JULIO ARANA,

RESPONDENTS.

ARB CASE NO. 2020-0069

ALJ CASE NO. 2019-STA-00046

DATE: January 18, 2022

Appearances:

For the Petitioner:
Peter L. LaVoie, Esq., Paul O. Taylor, Esq.; *Truckers Justice Center*; Edina, Minnesota

For the Respondent:
Sarah K. Casey, Esq., Emily Olivier Kesler, Esq.; *Baker Donelson Bearman Caldwell & Berkowitz, PC*; New Orleans, Louisiana

Before: James D. McGinley, *Chief Administrative Appeals Judge*, Thomas H. Burrell and Randel K. Johnson, *Administrative Appeals Judges*

DECISION AND ORDER OF REMAND

PER CURIAM. This case arises under the Surface Transportation Assistance Act of 1982 (STAA or the Act), as amended, and its implementing regulations.[1] Stephen Cottier (Complainant) filed a complaint alleging that Bayou Concrete Pumping, LLC (Bayou Concrete) and Julio Arana (collectively Respondents)

[1] 49 U.S.C. § 31105(a), and its implementing regulations at 29 C.F.R. Part 1978.

retaliated against him in violation of the STAA's whistleblower protection provisions. The Administrative Law Judge (ALJ) issued a Decision and Order dismissing the complaint (D. & O.). Complainant appealed to the Administrative Review Board (ARB or the Board). The Board vacates the ALJ's D. & O. and remands for further proceedings consistent with this Decision and Order of Remand.

BACKGROUND

Bayou Concrete provides concrete services for residential projects and commercial construction in Louisiana.[2] At the time of the OALJ hearing, Bayou Concrete owned eleven "boom trucks" that pumped concrete, with its largest truck measuring sixty-one meters tall.[3] Arana is the owner and president of Bayou Concrete; he also oversees all of the company's operations.[4]

Complainant was employed as a concrete pump operator and mostly ran the forty meter (40m) and sixty-one meter (61m) trucks.[5] Complainant received his weekly job assignments and schedule through Bayou Concrete's dispatcher, Hope Hiscox.[6]

It was common for Bayou Concrete's trucks to experience mechanical problems due to their size and complex nature.[7] According to Complainant, if a truck had a maintenance issue, an employee was expected to either "stop what he was doing and call someone," or write-it up on an inspection form depending on the severity of the issue.[8] Bayou Concrete employs in-house mechanics including lead mechanic, Calvin Brown. When the in-house mechanics cannot fix a maintenance issue, Bayou Concrete sends the truck to a third-party mechanic.[9]

1. Mechanical issues with the 40m truck

Throughout Complainant's employment at Bayou Concrete, he experienced several mechanical issues with both the 40m and 61m trucks. The first issue

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2 D. & O. at 2; Hearing Transcript (Tr.) at 22-23.

3 D. & O. at 9; Tr. at 23.

4 D. & O. at 9; Tr. at 22.

5 D. & O. at 4.

6 Tr. at 47-48.

7 *Id*. at 290-91.

8 D. & O. at 4-5.

9 Tr. at 30, 244, 282-83.

Complainant experienced in the 40m truck was a turning problem.[10] According to Complainant, the 40m truck had a problem turning to the left so he "wrote it up multiple times, but it was never addressed."[11] Complainant informed Respondents that he was not going to drive the 40m truck until the turning problem was fixed.[12] Respondents removed the truck from operation and discovered that the front leaf spring system was failing.[13]

The second issue Complainant experienced in the 40m truck was with the grease lines and the power steering pump box.[14] Complainant listed the problems in a weekly inspection report on March 23, 2018.[15] The third issue Complainant experienced in the 40m truck was with the steering box and tire pressure. Complainant listed these problems in a weekly inspection report on May 29, 2018.[16] In August 2018, the Department of Transportation (DOT) inspected the 40m truck and detected problems with the grease lines and power steering pump box, just as Complainant had discovered and previously reported to Respondents.[17] The DOT inspectors informed Bayou Concrete that the truck had to be fixed right away.[18]

2. Mechanical issues with the 61m truck

Complainant also experienced several mechanical issues with the 61m truck. First, in April 2018, Complainant was driving the 61m truck on the interstate headed to New Orleans when the truck's drive lines broke loose and he lost control of the truck's steering, air, and brakes.[19] Complainant described the incident as terrifying, "catastrophic[,] and nothing but one big explosion."[20] According to Complainant, about sixty gallons of hydraulic fluid spilled out onto the interstate and it took Respondents four hours to clean up the mess and the mechanical breakdown.[21]

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10 D. & O. at 5.

11 *Id*.

12 *Id*.

13 *Id*.

14 *Id*.; Joint Exhibit (JX)-3 at 1, 6-7, 9.

15 D. & O. at 5; JX-3 at 9.

16 D. & O. at 5; JX-3 at 4.

17 D. & O. at 5.

18 *Id*.

19 *Id*. at 5-6.

20 *Id*. at 6.

21 *Id*.

Prior to the breakdown, Complainant called Arana and sent him a video of the power takeoff (PTO) light blinking.[22] Arana told Complainant to slow down, but to continue driving to the job site.[23] Complainant testified that it felt and sounded like the truck was surging and something was hitting the undercarriage of the pump.[24] Respondents made repairs to the truck's driveline, hanger bearings, hydraulic pump, air tanks, brake hand, hydraulic hoses, and power steering hoses following this breakdown.[25]

Second, on September 8, 2018, Complainant was operating the 61m truck on Tulane University's campus when the truck broke down. Upon inspection, he discovered a knot in the driveline and that all the hanger bearings had blown out.[26] Complainant attempted to contact Arana to inform him of the breakdown, but Arana did not answer.[27] Complainant then contacted Hiscox, informed her of the breakdown, and asked the site contractor if he could leave the truck on site.[28] At the same time, another employee contacted Arana and informed him of the 61m truck's mechanical issues. The truck stayed on site over the weekend, and Respondents replaced the driveshaft and the hanger bearings on Monday.[29]

In addition to these two specific incidents, Complainant also experienced continuous problems with tires, a wedge pin, air bags, and leveling rods in the 61m truck.[30] According to Complainant, he would write up these various issues on weekly inspection reports, but often they would not be fixed.[31] If Respondents attempted to fix these problems, they would not be long-term solutions and the parts would just fail again.[32]

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22 *Id*. at 5.

23 *Id*.

24 *Id*.

25 *Id*. at 6.

26 *Id*. at 7.

27 *Id*.

28 *Id*.

29 *Id*.

30 *Id*. at 5; JX-3.

31 D. & O. at 5; Tr. at 103.

32 D. & O. at 20; Tr. at 174.

3. Complainant's refusals to operate the 61m truck and termination

Following the breakdown at Tulane University, Complainant sent Hiscox a text message that he left the truck at the job site and would not drive the 61m truck again.[33] Hiscox responded to Complainant and sent the text messages, "Omg fuck" and "Ok thanks I don't blame you."[34] On Wednesday, September 12, 2018, Hiscox sent Complainant a text message asking whether he would like to run the 40m or 61m truck for a job on Thursday.[35] Complainant responded with "40."[36] Hiscox gave Complainant the 40m truck job assignment, but informed him later that day that the job was canceled due to the weather.[37] That evening, Hiscox sent another text message to Complainant asking whether he was operating the 40m or 61m truck on Friday, September 14, 2018. Complainant reiterated again that he would not operate the 61m truck.[38]

On Thursday, September 13, 2018, Hiscox assigned Complainant to operate the 61m truck for September 14, 2018.[39] Complainant refused the assignment and stated his frustrations about not working enough hours, his hand injury, and the lack of help he received the last time he operated the 61m truck.[40] Hiscox switched the assignments so Complainant could operate the 40m truck instead of the 61m truck.[41] Complainant responded, "I'm not going anywhere oh or in the 61 again. Had 3 meetings and nothing changes. Except were gonna fix it next time!!! Next time never comes!! [sic throughout]" and "[c]ool[.]"[42]

At some point following Complainant's refusal, Hiscox and Arana had a conversation during which Hiscox informed Arana that Complainant refused to operate the 61m truck.[43] Arana testified that Hiscox stated she did not know why Complainant refused the assignment.[44] Arana called Complainant and asked him to

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33 Complainant's Exhibit (CX)-1 at 9 ("Left it at Tulane. Will not drive it again").

34 CX-1 at 9.

35 *Id*. at 10.

36 *Id*.

37 *Id*. at 11.

38 *Id*. at 13.

39 *Id*. at 14.

40 *Id*. at 15-16.

41 *Id*. at 16-18.

42 *Id*. at 18.

43 Tr. at 83.

44 D. & O. at 11; Tr. at 83.

run the 61m for Friday.[45] Complainant testified that he told Arana that he did not have enough help, that the truck was not safe, and that it was eventually going to kill somebody.[46] According to Complainant, Arana assured him that the truck was fixed and safe for him to operate, but Complainant still refused to operate it.[47] Conversely, Arana testified that Complainant never mentioned any safety concerns or mechanical issues with the 61m truck.[48] Rather, Arana claimed that Complainant simply refused to operate the 61m truck and wanted to operate the 40m truck.[49]

Arana then called his business partner, Earl Dufrene, and informed him of Complainant's refusal.[50] Arana was angry and thought Complainant's refusal was unacceptable because it occurred late in the day and it was difficult to find someone to replace him.[51] After discussing the situation with Dufrene, Respondents terminated Complainant's employment.[52]

A Bayou Concrete employee, Bryan Scandaliato, operated the 61m truck on September 14, 2018, with no mechanical issues. On or about September 17 or 18, about four days after Complainant's refusal and ten days after the initial breakdown at Tulane University, Scandaliato drove the 61m truck and noticed a defect with its drive shaft and hanger bearings.[53] Scandaliato and Brown inspected the 61m truck and observed abnormal wear on the driveshaft close to the hanger bearings.[54] According to Arana, it was unusual for drivelines and hanger bearings to have issues within five months of replacing them.[55] Respondents took the 61m truck to a third-party mechanic, Brook Bouvier, who discovered that the driveshaft was too long, causing the truck to vibrate and burn through the hanger bearings.[56] Bouvier replaced the incorrectly-sized driveshaft.[57]

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45 D. & O. at 11-12; Tr. at 84.

46 Tr. at 173-74.

47 *Id*. at 174.

48 D. & O. at 12; Tr. at 84.

49 D. & O. at 11-12; Tr. at 84.

50 D. & O. at 12; Tr. at 84.

51 D. & O. at 12; Tr. at 84-85.

52 D. & O. at 12.

53 *Id*. at 13.

54 *Id*. at 13.

55 Tr. at 79.

56 D. & O. at 15.

57 *Id*. at 15.

4. Administrative proceedings and procedural history

On November 9, 2018, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that he had been fired for raising safety issues.[58] Complainant requested that OSHA terminate its investigation before it was complete, and OSHA therefore dismissed the complaint on May 21, 2019.[59] Complainant objected to OSHA's dismissal and requested a hearing before the Office of Administrative Law Judges (OALJ).[60]

On September 15, 2019, the Administrative Law Judge (ALJ) issued a Decision and Order dismissing the complaint (D. & O.). On September 28, 2020, Complainant petitioned the ARB for review of the ALJ's D. & O. For the reasons discussed below, we remand.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to hear appeals from ALJ decisions and issue agency decisions in cases arising under the STAA.[61] The Board reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations as long as they are supported by substantial evidence.[62] Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[63]

DISCUSSION

To prevail on a STAA retaliation complaint, a complainant must prove by preponderance of the evidence that (1) he engaged in protected activity, (2) he suffered an unfavorable personnel action, and (3) that the protected activity was a contributing factor in the unfavorable personnel action.[64] If the employee meets his

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58 *Id*. at 2.

59 *Id*.

60 *Id*.

61 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

62 29 C.F.R. § 1978.110(b); *Jacobs v. Liberty Logistics, Inc.*, ARB No. 2017-0080, ALJ No. 2016-STA-00007, slip op. at 2 (ARB Apr. 30, 2019) (reissued May 9, 2019) (citation omitted).

63 *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

64 *Heyward v. Benore Logistic Sys., Inc.*, ARB No. 2021-0023, ALJ No. 2020-STA-00117 (ARB July 29, 2021).

burden of proof, the employer may avoid liability by proving by clear and convincing evidence that it would have taken the same unfavorable action in absence of the protected activity.[65]

1. Complainant had a reasonable apprehension of serious injury and his refusal is protected under § 31105(a)(1)(B)(ii)

The ALJ found the Complainant's refusal on September 13, 2018, did not constitute protected activity under section 31105(a)(1)(B)(ii). Complainant argues on appeal that the ALJ erred by relying upon Respondents' history of addressing mechanical and safety issues instead of focusing on the 61m truck's failed repairs and breakdowns.[66] Conversely, Respondents aver that Complainant's refusal was not reasonable because the vehicle had been repaired, and that Complainant did not seek correction of any alleged mechanical issues.[67] We agree with Complainant and find that the ALJ's determination is not supported by substantial evidence.

The STAA provides than an employer may not discharge or otherwise retaliate against an employee with respect to the employee's compensation, conditions, or privileges of employment because the employee engaged in STAA-protected activity. Specifically, it states:

> A person may not discharge an employee, or discipline or discriminate against an employee . . . because . . . the employee refuses to operate a vehicle because (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or (ii) 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 . . . .[68]

Under section 31105(a)(1)(B)(ii), "an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury or serious impairment to health," and "[t]o qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition."[69] As we have discussed in prior cases, "[w]hether a refusal to drive qualifies for STAA protection requires the evaluation of the circumstances

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65 49 U.S.C. § 42121(b).

66 Comp. Br. at 16-19.

67 Resp. Reply at 18-22.

68 49 U.S.C. § 31105(a)(1).

69 49 U.S.C. § 31105(a)(1)(B)(ii).

surrounding the refusal under the particular requirements of each of the provisions."[70]

The ALJ determined that "the 61m truck was repaired and safe to operate, at least in the very short term of the job [Complainant] was assigned [and refused]."[71] Although the ALJ is correct that the 61m truck did not fail on this particular job assignment, his finding that the truck was "safe to operate, at least in the very short term" is not reasonable. Only days after Complainant's refusal, the truck needed repairs to the driveshaft and hanger bearings—the same repairs that Respondents continuously failed to fix over the course of five months.[72] A vehicle that is only operational in ideal conditions or for short term use and, fortunately, does not breakdown on a specific trip, is not "safe" to operate. The purpose of the STAA is to promote highway safety and protect employees from retaliatory discharge.[73] Any finding that encourages employers to implement shoddy repair practices or insufficient, temporary fixes in order to circumvent employees' complaints and refusals contradicts the purpose of the STAA.

The STAA requires that the fact-finder focus on whether the driver had a reasonable belief that the truck would create a real danger of accident, injury, or serious impairment to health. Here, the ALJ's reasonable apprehension analysis focused on specific problems with the 61m truck, including the April 2018 breakdown and the September 2018 breakdown, but also the mechanical history and problems with the 61m truck, and Complainant's allegation that Respondents failed to adequately respond to mechanical problems.[74] The ALJ determined that the 61m truck's "previous incidents would give a reasonable driver cause to be concerned about whether operating the truck would create a real danger of accident,

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[70] *See, e.g., Melton v. Yellow Transp., Inc.*, ARB No. 2006-0052, ALJ No. 2005-STA-00002, slip. op. at 5 (ARB Sept. 30, 2008).

[71] D. & O. at 19.

[72] Arana testified that Bayou Concrete replaced the hanger bearings two or three times between April and September 2018. Tr. at 66-68. Bouvier testified that repeated premature failure and wear of hanger bearings is usually a sign that there is an underlying issue causing them to burn up. Tr. at 275.

[73] The Senate Commerce Committee noted "enforcement of commercial motor vehicle safety laws and regulations is possible only through an effort on the part of employers, employees, State safety agencies and the Department of Transportation." 128 Cong. Rec. S14028 (daily ed. December 7, 1982). Since then, the Secretary has recognized that "an employee's safety complaint to his employer is the initial step in achieving this goal . . . an internal complaint by an employee enables the employer to comply with the safety standards by taking corrective action immediately and limits the necessity of the enforcement though formal proceedings." *Davis v. H.R. Hill, Inc.*, Case No. 1986-STA-00018, slip op. at 2 (Sec'y Mar. 19, 1987).

[74] D. & O. at 19.

injury, or serious impairment to health."[75] We agree with this finding, and it is supported by the record.

However, following this finding, the ALJ discredited Complainant's reasonableness by shifting his focus to Respondents' response to mechanical problems. Specifically, the ALJ determined that Respondents considered safety a priority, instituted preventative maintenance measures, and properly addressed mechanical and safety issues, including regularly taking unsafe equipment out of operation.[76] Although this finding is supported by the record, such a finding does not preclude Complainant's reasonable apprehension of serious injury concerning operating the 61m truck on September 14, 2018. Respondents can be both safety conscientious and also own a truck that may be occasionally unsafe to operate; neither is solely dependent on the other. While an employer's reputation or business practices may provide some inference as to a vehicle's condition, such information does not outweigh the actual evidence surrounding a particular vehicle or set of circumstances.

In this case, Complainant testified that Arana told him that the 61m truck was repaired on September 10, and safe to operate for the September 14 job assignment. However, the record does not reflect what information Arana actually conveyed to Complainant concerning which repairs were made to the 61m truck. Rather, the record reflects a constant pattern over a five-month period: Complainant would make a safety complaint concerning the 61m truck, Respondents would address the problem with an inadequate repair, and the truck would eventually break down. This pattern even continued after Complainant refused to operate the 61m truck following Arana's assurances that the truck was safe to operate. Only days after Complainant's refusal on September 13, the 61m truck needed repairs to the drive shaft and hanger bearings, the same problem Complainant experienced at Tulane University. Under these specific circumstances, it is unreasonable to hold Complainant accountable for not knowing the 61m truck's mechanical state when Respondents also clearly did not know the truck's mechanical state.

Although we disagree with the ALJ's protected activity finding, the ALJ is correct that a complainant must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition in order for a refusal to be protected.[77] Respondents cite to this statutory requirement as well as the

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[75] *Id*. at 20.

[76] *Id*.

[77] *Id*.

holding in *Gatto v. General Utilities*,[78] in which the Board affirmed an ALJ's decision that a driver's refusal to operate a vehicle was unreasonable.[79]

However, we disagree with the ALJ that Complainant failed to seek and was unable obtain correction of the dangerous condition. As discussed above, Complainant made several attempts to seek and obtain correction of the problems that surrounded the 61m truck between May 2018 and September 2018. These attempts were listed on weekly inspection reports, received via text message to Hiscox, and even discussed with Arana on September 13. Respondents addressed these complaints with inadequate, temporary repairs and/or assurances that the vehicle was safe to operate. Given that these attempts to seek correction were made following a breakdown on the interstate in April 2018, and continued until Respondents made repairs to the 61m truck days after Complainant's refusal, we conclude from these facts that Complainant sought and was unable to obtain correction of the 61m truck's dangerous condition.

Second, *Gatto* is distinguishable from the present case. In *Gatto*, a seasonal fuel driver noticed a leak from his truck's gas tank and was directed to take a spare truck by his manager.[80] The seasonal driver refused to take the spare truck because he stated it was unsafe based on prior experiences of being unable to open the doors or windows of the truck.[81] The seasonal driver did not conduct a pre-trip examination, enter the spare truck, or try its doors and windows before his refusal.[82] The company's chief mechanic also told the seasonal driver that the spare truck was safe to operate.[83] Moreover, the truck's maintenance history provided that it was repaired in March 2016, and passed a state inspection in October 2016, before the driver's refusal in December 2016.[84]

In the present case, although we also have a driver who refused to operate a truck based on prior mechanical issues and without conducting a pre-trip examination, there are significant differences between the drivers' refusals and the company's responses to the mechanical issues. Complainant operated the 61m truck at Tulane University on a Saturday when there were problems with the driveline and hanger bearings. Respondents attempted to repair the 61m truck on Monday,

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78 *Gatto v. Gen. Utils.*, ARB No. 2019-0008, ALJ No. 2018-STA-00003, slip op. at 2-3 (ARB June 19, 2019).

79 Resp. Reply at 20.

80 *Gatto*, ARB No. 2019-0008, slip op. at 1-2.

81 *Id*. at 2.

82 *Id*.

83 *Id*.

84 *Id*.

two days following the breakdown. Complainant was asked to operate the 61m truck that Wednesday and Thursday, two and three days following the attempted repair. Comparatively, in *Gatto*, the driver experienced the mechanical problems in early 2016 and his refusal came nearly nine months later.

Moreover, in the present case, the record reflects that although Respondents made several attempts to repair the 61m truck between April 2018 and September 2018, each attempt failed, and the truck would eventually need further repairs to address the same problems.

This is best illustrated by the week leading up to Complainant's termination. The truck's driveline and hanger bearings malfunctioned on a Saturday, repairs to the driveline and hanger bearings were made that Monday, Complainant's last refusal to operate the truck occurred that Thursday, and the same driveline and hanger bearings needed further repairs only three or four days later.

Comparatively, in *Gatto,* the employer made repairs to the spare truck following the driver's initial complaint. The record does not reflect that these repairs were inadequate or temporary. Rather, the record reflects that no other repairs were made to the spare truck, and that it passed a state inspection in between the employer's repair and the driver's refusal. Given the differences in the events leading up to the drivers' refusals and the employers' responses to mechanical problems, these cases are distinguishable from one another.

Therefore, we find that Complainant's refusal on September 13, 2018, was protected activity under section 31105(a)(1)(B)(ii) and reverse the ALJ's protected activity finding.

2. Respondents had knowledge of Complainant's protected refusal

The record supports and it is undisputed that Complainant suffered an adverse action when Respondents terminated his employment.[85] However, the ALJ found that Complainant's alleged STAA-protected activity was not a contributing factor in his discharge.[86] The ALJ determined that even though Complainant was fired because he refused to operate the 61m truck, the individuals involved in terminating his employment were unaware that his refusal was based on safety concerns.[87]

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[85] The record is inconsistent as to the actual date Respondents' terminated Complainant's employment. These dates vary between September 14, September 16, and September 19, 2018. *See* D. & O. at 2, 15; JX-1; Tr. at 82, 174.

[86] D. & O. at 21.

[87] *Id*.

On appeal, Complainant contends that the ALJ erred in finding that Arana had no knowledge of Complainant's refusal due to safety concerns.[88] Conversely, Respondents claim that the ALJ's finding is supported by substantial evidence.[89] Again, we agree with Complainant.

To prevail on his complaint, Complainant must prove that he engaged in STAA-protected activity that was a contributing factor in his discharge. A contributing factor is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision."[90]

A. Actual Knowledge

The ALJ's contributing factor analysis focused on whether Arana had knowledge of Complainant's refusal to drive due to safety concerns. Specifically, the ALJ found that Arana had knowledge of Complainant's refusal, but believed the refusal was due to Complainant's scheduling frustrations over the lack of hours he worked due to his hand injury. In doing so, the ALJ focused on a single text message sent from Complainant to Hiscox as well as Arana's testimony concerning the discussions he had with Hiscox and Complainant.

The text message that the ALJ relied upon stated:

> So they don't let me work all week because of my hand. Everyone else seems to be on the clock. And I'm going not only on the 61 but with 5 hoses. Not gonna happen!! Said I wasn't running it after last week after getting fucked. So why would I do it again. A whole 10 hours for the week and now going to a system pour but I can't work in the shop!!????? [sic throughout].[91]

On its own, we would find substantial evidence supports the ALJ's finding that no safety implications were addressed in this text message. However, it is impractical to examine this text message on its own, in a vacuum, instead of evaluating all of the text messages in the series of communications. This is particularly true given that these text messages occurred within days of each other.

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88 Comp. Br. at 19-22.

89 Resp. Reply at 22-24.

90 *Simpson v. Equity Transp. Co., Inc.*, ARB No. 2019-0010, ALJ No. 2017-STA-00076, slip op. at 8 (ARB May 13, 2020) (citing *Palmer v. Canadian Nat'l Ry.*, ARB No. 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 53 (ARB Jan. 4, 2017)).

91 D. & O. at 16; CX-1 at 16.

Immediately following the breakdown at Tulane University on September 8, Complainant sent Hiscox a video and text messages regarding safety concerns regarding the 61m truck.[92] These text messages stated "[l]eft it at Tulane. Will not drive it again[,]" and "[y]ea. It would have been bad if I got it moving."[93] Later that week, Complainant sent Hiscox the following text messages: "I'm not running the 61 again" and "I'm not going anywhere oh or in the 61 again. Had 3 meetings and nothing changes. Except were gonna fix it next time!!! Next time never comes!! [sic throughout]."[94] These four text messages illustrate Complainant's refusal was not solely based on his hand injury and scheduling frustrations, but also his safety concerns surrounding the 61m truck.

Even with these text messages, the ALJ still determined that Arana was unaware of Complainant's safety concerns. Instead, the ALJ focused on the fact that Complainant could not prove what messages Hiscox forwarded to Arana, and then relied upon Arana's testimony concerning his conversations with Hiscox and Complainant. For the following reasons, we find the ALJ erred.

The ALJ's finding that Arana did not have knowledge about Complainant's safety-based refusal ignores the events of September 8. In light of the September 8 phone call informing Arana of the situation and the repair on September 10, Respondents had knowledge of Complainant's safety concerns and refusal to drive the 61m truck.[95] The ALJ's finding also presumes that Arana had knowledge of only the one text message from Hiscox where Complainant's refusal appears to be due to his hand injury and scheduling frustrations, but was unaware of the numerous other text messages sent to Hiscox concerning Complainant's refusal to drive for safety concerns. As the president who "oversee[s] all of the actions . . . [and] any concerns or problems that develop," messages alleging safety concerns and mechanical problems surrounding a specific truck are the exact types of information that should be (and likely were) forwarded to Arana for decision-making.[96] We note that Arana's testimony concerning his communication with Hiscox is hearsay, and Respondents did not call Hiscox as a witness to explain the inconsistency concerning the text messages.[97]

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92 CX-1 at 8-9.

93 *Id*. at 8-9.

94 CX-1 at 13, 18.

95 Byron Scandaliato testified that "Complainant had reported an issue with the hanger bearings and felt unsafe to drive it. There was a hanger bearing issue and it was coming apart." D. & O. at 13.

96 Tr. at 23.

97 Administrative hearings in STAA cases are conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings. See 29 C.F.R. § 1978.106(a) (citing 29 C.F.R. Part 18). Under these rules, hearsay statements are inadmissible unless they are

Along with this omission, the ALJ also failed to make credibility determinations among contradicting witnesses. Arana testified that Complainant never addressed safety concerns while discussing his refusal for the September 14 job.[98] On the other hand, Complainant testified that he warned Arana that "the truck's not safe and it's going to eventually kill somebody."[99] The Board gives ALJ credibility determinations "great deference" if they are not "inherently incredible or patently unreasonable."[100] The Board affords such deference because the ALJ is able to observe the "witnesses' demeanor while testifying" and "the extent to which their testimony is supported or contradicted by other credible evidence."[101] Since the ALJ did not make credibility determinations among contradicting witnesses, we cannot extend this measure of deference.

B. Constructive Knowledge

Assuming arguendo that the ALJ was correct that Arana did not have actual knowledge of Complainant's safety concerns, it is undisputed that: (1) Complainant communicated his refusal to operate the 61m truck several times to Hiscox; (2) Arana was aware that Complainant operated the 61m truck just days prior when it suffered another major breakdown at Tulane University; and (3) Arana was aware of the past maintenance reports and reoccurring issues surrounding the 61m truck. These facts establish at a minimum that Respondents had "constructive knowledge"

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defined as non-hearsay or fall within an exception to the hearsay rule. 29 C.F.R. § 18.802. A statement not covered by any of the other exceptions to the hearsay rule, "but having equivalent circumstantial guarantees of trustworthiness to the aforementioned hearsay exceptions," are admissible if the ALJ determines that:

> (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

29 C.F.R. § 18.803(a)(24).

98 Tr. at 89.

99 *Id*. at 173-74.

100 *Adm'r, Wage and Hour Div., U.S. Dep't of Labor v. Sun Valley Orchards, LLC*, ARB No. 2020-0018, ALJ No. 2017-TAE-00003, slip op. at 18 (ARB May 27, 2021) (citing *Kanj v. Viejas Band of Kumeyaay Indians*, ARB No. 2012-0002, ALJ No. 2006-WPC-00001, slip op. at 6 (ARB Aug. 29, 2012)).

101 *Id*. (quoting *Caldwell v. EG&G Def. Material, Inc.*, ARB No. 2005-0101, ALJ No. 2003-SDW-00001, slip op. at 12 (ARB Oct. 31, 2008)).

of the safety concerns reported by Complainant.[102] Complainant is not required to prove "direct personal knowledge on the part of" Arana that he engaged in protected activity.[103] 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."[104]

In this case, the "bureaucratic ignorance" constructed by Bayou Concrete is the communication procedure, or lack thereof, between Arana and Hiscox. Arana testified that Hiscox told him that Complainant was not going to do the September 14th job, and did not know why Complainant was refusing to accept the job assignment.[105] Arana testified that Complainant and other drivers regularly communicated with Hiscox.[106] Hiscox was responsible for providing drivers their assignments,[107] receiving vehicle inspection reports,[108] and alerting scheduling problems to Arana.[109] In such a business structure where a dispatcher regularly receives safety complaints, it is unlikely that a dispatcher picks and chooses which complaints and refusals are forwarded to "upper" management.

There is also unrebutted evidence that Complainant began a series of communications with Hiscox, as early as of September 8, addressing the most recent safety concerns with the 61m truck. These safety concerns and refusals continued through September 13th. Yet, Arana was apparently somehow unaware of Complainant's safety concerns either due to Hiscox's neglect or deliberate action. Hiscox, or any dispatcher in such a position, should have forwarded these concerns to Arana. Hiscox apparently did forward the one text in the series in which safety concerns with the 61m truck are not explicitly mentioned.[110]

This reasoning by no means creates a bright-line rule for all complaints or refusals between drivers and dispatchers or even more generally, for employees and

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102 29 C.F.R. § 1978.104(e)(2)(ii) (permitting investigations if "[t]he respondent knew or suspected, actually or constructively, that the employee engaged in the protected activity").

103 *Warren v. Custom Organics*, ARB No. 2010-0092, ALJ No. 2009-STA-00030, slip op. at 7 (ARB Feb. 29, 2012) (citing *Zinn v. American Commercial Lines*, ALJ No. 2009-SOX-00025, slip op. at 61-62 (ALJ Nov. 5, 2009)).

104 *Zinn v. Am. Com. Lines*, ALJ No. 2009-SOX-00025, slip op. at 18 (ALJ Nov. 19, 2012) (quoting *Frazier v. Merit Sys. Prot. Bd.*, 672 F.2d 150, 166 (D.C. Cir. 1982)).

105 Tr. at 83.

106 D. & O. at 10.

107 Tr. at 47.

108 *Id*. at 41.

109 *Id*. at 83.

110 D. & O. at 21.

managers. However, given these specific facts, Bayou Concrete's size and culture, and the communication procedures it established, we conclude that the ALJ's finding is not supported by substantial evidence, and that Respondents had knowledge of Complainant's refusal due to safety concerns.[111]

Since Respondents had knowledge, actual or constructive, of Complainant's protected refusal, and it is undisputed that Complainant was terminated due to his refusal to operate the 61m truck, we conclude that Complainant's protected activity was a contributing factor in the decision to terminate Complainant's employment.

3. The ALJ did not make a finding as to Respondents' same action defense—we therefore remand for further proceedings

If a complainant meets his burden of proof that he engaged in protected activity and that protected activity contributed to an adverse action, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity.[112] We have said that the employer satisfies this burden when it shows that it is "highly probable" that it would have taken the action in the absence of protected activity.[113]

Since the ALJ found that Complainant did not engage in protected activity, and that his alleged protected activity was not a contributing factor in his discharge, the ALJ did not make a finding as to Respondents' same-action defense. Therefore, we remand this case to the ALJ to determine whether Respondents would have terminated Complainant's employment if he had not engaged in protected activity.

CONCLUSION

We **REVERSE** the ALJ's finding that Complainant did not engage in protected activity, and that the employer did not have knowledge of Complainant's protected activity. Further, we **REVERSE** the ALJ's finding that the protected activity was not a contributing factor in the termination. We **REMAND** for the ALJ to apply the STAA's same-action defense.

SO ORDERED.

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111 Arana testified that Bayou Concrete is a small business with nineteen employees. Tr. at 26. Complainant testified that Bayou Concrete is "not a very large company where they have a designated safety person." Tr. at 103.

112 49 U.S.C. § 42121(b).

113 *Simpson*, ARB No. 2019-0010, slip op. at 9 (citing *Palmer*, ARB No. 2016-0035, slip op. at 52).