

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 October 2010

CASE NO.: 2005-STA-00050

In the Matter of:

ROBERT HOLLAND,
Complainant,

vs.

AMBASSADOR LIMOUSINE,
RITZ TRANSPORTATION,
Respondent.

Appearances: Robert Holland, *pro se*
Complainant

Robert Winner, Esquire
Respondent

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

INTRODUCTION

This matter is before me on a request by Robert Holland, the Complainant, for a hearing before the Office of Administrative Law Judges (“OALJ”) under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (“the Act” or “STAA”), 49 U.S.C.A § 31105. The Complainant filed a timely objection to the findings issued by the Regional Administrator of the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) on June 30, 2005, which dismissed the complaint he filed on June 22, 2005. The OALJ has jurisdiction over this matter pursuant to 29 C.F.R. Part 1978 (2005). The Findings of Fact and Conclusions of Law which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing, the evidence that was admitted into the record, and my analysis of the entire record, arguments of the parties, and applicable regulations, statutes and case law.

This matter was heard in Las Vegas, Nevada on August 26, 2009. The Complainant and counsel for the Respondent appeared and participated in the hearing. At the hearing, ALJ Exhibits (“ALJX”) 1, 2, and 3 were admitted into evidence, as were the Complainant’s Exhibits

(“CX”) A, C, D, and G, and the Respondent’s Exhibit (“RX”) A.¹ The Complainant’s Exhibits B and F were excluded from evidence.²

For the reasons set forth below, I find that the Complainant is not entitled to relief under the STAA and his complaint is DISMISSED WITH PREJUDICE.

ANALYSIS AND FINDINGS

Procedural Background

On June 21, 2005, the Complainant filed a complaint against Ambassador Limousine and Ritz Transportation (herein collectively referred to as the Respondent) with the U.S. Department of Labor. (ALJX 1B.) The Complainant said that he was fired on May 2, 2005, for failure to drive a two-hour bus run on April 30, 2005. (ALJX 1B, p. 1.) The Complainant did not specifically mention the STAA in his complaint, but alluded to the fact that he was required by his employer to drive hours in excess of federal and state laws on prior occasions, apparently referring to regulations that limit the number of hours a commercial driver may drive per day. He also said “had I done that run I would have been in violation of Federal and State laws,” (ALJX 1B, p. 2.)

The Department of Labor’s Occupational Safety and Health Administration conducted an investigation. On June 30, 2005, the Secretary of Labor, acting through her agent, the Regional Administrator for OSHA, dismissed the Complainant’s complaint. (ALJX 1A.) Specifically, the Secretary concluded that there was no *prima facie* allegation of retaliation because while the Complainant alleged that he was terminated unfairly for refusing to do the two-hour bus run, he failed to allege that he engaged in any protected activity prior to his termination, *i.e.*, that Complainant refused to do the bus run because of STAA-protected safety concerns. (ALJX 1, p. 1.)

On July 20, 2005, the Complainant filed an objection to the Secretary’s findings with the U.S. Department of Labor. (ALJX 2A.) In the objection letter, the Complainant specifically mentions the STAA and once again intimates that on the day of the bus run in question, he would have been in violation of maximum hour laws had he done the bus run. (ALJX 2A, pp. 1-2.) In this letter, the Complainant also includes an additional basis for the refusal to drive, tiredness. The Complainant wrote that near the time he refused to drive the bus, he told his supervisor that he was “tired,” and says:

Based on what I’ve read, driver fatigue is the number one cause of accidents among commercial drivers...Ambassador fired me for failing to perform an unsafe act...[they] attempted to force me to drive a commercial bus filled with

¹ Some of the exhibits are comprised of more than one document. When that is the case, the different documents are denoted in this decision, for example, as ALJX 1A, ALJX 1B, etc.

² Complainant offered no exhibit marked E.

passengers in the 14 and 15 hour of a 24 hour period. This violates the Department of Labor Surface Transportation Assistance Act Sect 31105(a)(1)(B).

(ALJX 2A, p. 1.) On July 26, 2005, the Complainant sent notice of his objection to the Secretary's findings to the Respondent. (ALJX 3.)

The matter was assigned to an Administrative Law Judge ("ALJ"), and a hearing was set for September 12, 2006, in Las Vegas. On August 30, 2006, the Respondent submitted a motion for summary decision seeking dismissal of the Complainant's complaint pursuant to the provisions of 29 C.F.R. §18.40(d). On October 19, 2006, the ALJ issued a Recommended Order granting the Respondent's motion for summary decision. *Holland v. Ambassador Limousine*, OALJ No. 2005-STA-050 (ALJ Oct. 19, 2006) ("R.D. & O" or "Recommended Order.").

The ALJ's Recommended Order noted the Complainant's conflicting versions of what constituted protected activity, *i.e.*, refusing to drive over the maximum hours allowed by law as well as refusing to drive while tired. R.D. & O. at 5. The ALJ found that both an affidavit by the Complainant's supervisor and the Complainant's own deposition testimony confirmed that no concerns related to maximum driving hours were expressed to Respondent before the Complainant's termination, and accordingly, those post-termination assertions could not sustain an action under the STAA. R. D. & O. at 5.

However, the ALJ considered the Complainant's claim on the assumption that when he said he was "tired," he meant that he was too fatigued to drive safely, which has been recognized as STAA-protected activity. R. D. & O. at 5-6. Resting upon that assumption, the ALJ applied the burden-shifting rules set forth in the Supreme Court's decision in *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973), which is discussed in the "Causation" section of the Recommended Order, and concluded that the Complainant presented a *prima facie* case under the STAA, but that Respondent had rebutted the Complainant's *prima facie* case by articulating and presenting evidence of a legitimate, non-discriminatory reason for the adverse action. R. D. & O. at 7-8.

Specifically, the ALJ found that Respondent presented evidence proving that the termination was motivated by the Respondent's good faith belief that the Complainant's inability to perform the previously-scheduled bus run was entirely due to his own volitional acts, not because of a refusal to drive protected under the STAA. R. D. & O. at 8. The ALJ further found, pursuant to the burden-shifting framework in *McDonnell*, that the Complainant had failed to meet his burden of presenting evidence to discredit the Respondent's explanation, *i.e.* show that the explanation was a pretext for unlawful retaliation, and concluded that the complaint should be dismissed with prejudice. R. D. & O. at 8.

The Recommended Order was automatically reviewed by the Administrative Review Board (ARB).³ After reviewing the Recommended Order, the ARB concluded that "at the very

³ Prior to August 31, 2010, the Administrative Review Board automatically reviewed an Administrative Law Judge's STAA decision pursuant to 29 C.F.R. § 1978.109(a) and Secretary's Order 1-2002, 67 Fed Reg. 64,272 (Oct 17, 2002). Effective August 31, 2010, 29 C.F.R. § 1978.109 was revised and now provides that an ALJ's decision is effective 10 business days after the date of decision unless it is appealed to the ARB.

least a question of fact exists as to whether Ambassador terminated [Complainant] because of protected activity,” and consequently Ambassador was not entitled to summary decision. *Holland*, ARB No. 07-013 at 4. On October 31, 2008, the ARB issued an Order of Remand reversing the ALJ’s summary decision order and remanding the case for further proceedings. *Holland v. Ambassador Limousine*, ARB No. 07-013, at 4, (ARB Oct. 31, 2008).

I was assigned this matter on remand, and I scheduled a hearing and invited the parties to submit Pre-Hearing Statements. The Respondent’s March 9, 2009, pre-hearing statement says that the Complainant “refused to do a bus run on 04-30-05 which he had promised to cover, so he was fired.” (Respondent’s Pre-Hearing Statement, p. 2.) The Complainant submitted two Pre-Hearing Statements: one on March 9, 2009, when he was represented by counsel, and one on August 12, 2009, appearing *in proper person*.⁴ In his March 9, 2009, statement the Complainant claims that “At 7:00 pm, on [April 30, 2005], he told Respondent’s dispatcher that he was too tired to do the bus run and that if he did the run he would exceed the maximum driving time regulation. *See*, 49 C.F.R. § 395.5. Two days later, Respondent terminated Complainant for not doing the bus run” (Complainant’s First Pre-Hearing Statement, pp. 1-2.) The Complainant’s second Pre-Hearing Statement says “On 30 April 2005 at approximately 5: pm (sic) I left work with the intention of coming back to do the bus run. However, after the 45 minute ride home, fatigue set in and I chose not to come in and jeopardize the safety of the bus passengers and myself.” (Complainant’s Second Pre-Hearing Statement, pp. 2-3.) His second statement also repeats the assertion that he told the dispatcher that he was too tired to do the bus run and if he did the run he would violate maximum hour laws. (Complainant’s Second Pre-Hearing Statement, p. 3.)

Stipulations

The parties have stipulated to the following:

- A. The Complainant began working for Ambassador Limousine and Ritz Transportation in January, 2005.
- B. The Complainant was employed by Ambassador Limousine and Ritz Transportation as a driver.
- C. Ambassador Limousine and Ritz Transportation terminated the Complainant’s employment on May 2, 2005.

(Hearing Transcript [“HT”], pp. 19-20.)

⁴ Jeffrey E. Fisher, Esquire, noticed his appearance on behalf of the Complainant on March 4, 2009. I received a Notice of Substitution dated May 1, 2009, whereby the Complainant, appearing *in proper person*, substituted for Mr. Fisher.

FACTUAL BACKGROUND

The Respondent Companies

The Respondent companies in this matter, Ambassador Limousine (“Ambassador”) and Ritz Transportation (“Ritz”), provide transportation services in and around the Las Vegas, Nevada area. (HT, p. 74-75.) Both companies are owned by Ray Chenoweth and their drivers are dispatched out of the same building, but they are separate business entities. (HT, p. 75.) Complainant worked for both companies concurrently. (HT, p. 19; CX G.)

The two companies provide different modes of transportation for passengers; Ambassador owns and operates limousines, and Ritz owns and operates mini buses. (HT, pp. 74-75, 109.) Typically, the mini buses are used to take passengers to and from the airport, but they can also be used for chartered trips to other destinations around the Las Vegas area. (HT, p. 44; ALJX 2B.) Due to the passenger capacity of the mini buses, Ritz’s drivers are required to possess a commercial driver’s license. (HT, p. 121.) Ritz has an interstate license issued by the Department of Transportation (“DOT”) that allows it to transport passengers outside of Nevada, although it rarely makes out-of-state trips. (HT, pp. 84-85, 109.) The Respondent stated that Ritz is subject to federal safety laws and regulations because it has a DOT license. (HT, pp. 85-86, 109.) Consequently, Ritz has sent at least one employee to “DOT school” where they were given training on DOT rules and regulations. (HT, pp. 75-76.)

Ambassador provides transportation via limousines. (HT, pp 74-75, 109.) Typically, limousines are used to transport passengers to and from the airport, hotels and restaurants around the Las Vegas area. (HT, pp. 110-111.) A commercial driver’s license is not required to operate one of Ambassador’s limousines, and Ambassador does not have a DOT interstate license. (HT, pp. 85, 121.) Thus, the Respondent has stated that Ambassador is not subject to DOT regulations, but answers to local authorities in that regard. (HT, pp. 85-86.) It is not uncommon for a driver who has a commercial driver’s license, such as the Complainant, to work for both companies as needed. (HT, p. 20, 121, 130, 161.)

The Respondent employs a driver-supervisor to oversee the drivers of both companies. (HT, pp. 109, 114-15, 120-21.) During the time of the Complainant’s employment, the Respondent companies had a total of around 100 employees that the driver-supervisor managed. (HT, pp. 137, 140.)

Limousine Industry Terminology

The testimony in this matter presented me with terminology and practices that are commonly used in the limousine industry as a whole. Some terms are central to the issues in this case. For sake of clarity, I define the relevant terms below.

In the limousine industry, customer pick-ups can be arranged in three different ways: “reservations,” “personals,” and “kellys.” A “reservation” has the same meaning as it does in common parlance: it is when a customer calls the Respondent’s office and arranges for a ride at a certain time and place. (HT, p. 78.) When a reservation comes in, a dispatcher checks a list of vehicles that are out in the field and available for work, and dispatches one to the customer. (HT, p. 111.)

A “personal,” on the other hand, refers to a customer who arranges for a ride at a certain time and place, but also requests that the ride be with a specific driver—usually someone they have used before and are comfortable with. (HT, p. 77.) A personal can transpire in two ways: the customer may call the Respondent and request the driver by name, or the customer may call the driver directly and arrange for a ride. (HT, p. 77.) If a personal is arranged directly with the driver, the protocol is for the driver to notify the Respondent’s dispatch office so they can ensure that there isn’t a conflicting reservation for that driver and that a vehicle will be available at the time needed. (HT, pp. 79-80.) It obviously allows the Respondent to keep tabs on the driver, too.

Finally, a “kelly” is a generic name for a person who does not have any type of reservation, but spontaneously appears before a driver and requests a ride. (HT, pp. 77-78.) Kellys can occur anywhere, such as at hotels, restaurants, dance clubs, or anyplace else where a driver sitting idle and an individual needing a ride can cross paths. (HT, pp. 77-78.) When a driver picks up a kelly, they are supposed to call it in so that the Respondent knows that the driver is in-service and the destination of the trip; the company doesn’t know about a kelly until it happens and trusts the drivers to call them in as they occur. (HT, pp. 77-78, 112.)

After a day of handling reservations, personals, and kellys, there comes a time when the driver is told by dispatch to “code six,” or head back to the Respondent’s yard to return the vehicle and leave for the day. (HT, p. 145.)

The Complainant’s Employment With The Respondent

The Complainant was hired by the Respondent in January 2005 and terminated on May 2, 2005. (HT, pp. 19-20, 46, 63-64.) Driving limousines was the Complainant’s second career. He had a 30-year military career, retiring as a United States Air Force Chief Master Sergeant. (HT, pp. 48-49; ALJ 1D, p.2.) Although the Complainant applied to work for Ambassador as a limousine driver, when the Respondent learned that he possessed a commercial driver’s license, he was told he would be working for Ritz driving buses as well. (HT, p. 20.) He started working around the same time that the Respondent was instituting operational changes.

The Complainant drove limousines and mini-buses for the Respondent. On Friday, April 29, 2005, the Complainant’s supervisor asked him to do a two-hour bus run scheduled for 10:15 p.m. the following night, Saturday, April 30, 2005. Although that Saturday was supposed to be his day off, the Complainant agreed to do it. The Complainant showed up for work on the morning of the scheduled bus run, unbeknownst to his supervisor, and drove a limousine from roughly 9:00 a.m. to 5:00 p.m., trolling around Las Vegas looking to pick up spontaneous rides. His supervisor discovered that he was out driving and told him to come in, and the Complainant did so around 5:00 p.m. and then went home. A dispatcher called the Complainant around 8:00 p.m. to inquire whether he was still going to do the bus run he had agreed to do. The Complainant responded that he was not because he was “tired” and had consumed beer. The Respondent immediately suspended the Complainant and terminated him two days later for refusing to do the scheduled bus run.

Respondent's Operational Changes

Respondent's business practices underwent a change one month into the Complainant's tenure as driver. Shaun Fabretti, who did not testify at the hearing, was the driver-supervisor for the Respondent when the Complainant was hired in January 2005. (HT, pp. 20, 113-15.) Around February of 2005, Michael Rabonza was brought in to the driver-supervisor position. (HT, p. 113.) Mr. Rabonza—who had worked for the Respondent since 1999 and served in capacities involving sales, marketing, and driving—was asked by the owner, Mr. Chenoweth, to return to the driver-supervisor position that he had occupied before to correct operational troubles the Respondent was encountering. (HT, pp. 109, 113-15, 138.) The primary problem was that there was no routine employee scheduling or accountability policy in place, making for a disjointed workforce. The difficulty in keeping track of the employees was due in large part to the dispatchers giving out keys to drivers whether or not they were scheduled to work. (HT, pp. 115, 136, 149-50.) The Complainant testified that he took advantage of that, as there were times he would work a full day shift and then go to dispatch and tell them he had a personal, or that he just wanted to go back out, so he could get a vehicle to go hunt for kellys. (HT, pp. 63-64.) Due to the lack of routine procedures, the Respondent was having difficulty determining which drivers were damaging vehicles, and it was losing out on money because some drivers would not notify the company when they picked up kellys so they could keep the proceeds for themselves. (HT, pp. 113-16.)

Mr. Rabonza instituted changes to correct those problems. Instead of drivers coming in any time they wanted, he created day and night shifts, and assigned drivers to specific vehicles. (HT, pp. 57, 115.) Additionally, Mr. Rabonza required drivers to complete a vehicle inspection form for their vehicle so he could determine when damage occurred. (HT, p. 115.) Furthermore, dispatch's practice of handing keys to whoever asked for them was changed. Mr. Rabonza specified that dispatch had the authority to give out keys only to drivers who were scheduled to work. (HT, pp. 136, 149-50, 173-74.) These changes, instituted to give the Respondent greater control over day-to-day operations, were not uniformly popular with the drivers. (HT, p. 115, 138.) The Complainant testified that the new rules did not bother him. (HT, p. 57.) However, Mr. Rabonza testified that the Complainant didn't like the changes, which caused arguments and confrontations between them over the Complainant's tendency to try to get a vehicle at night after he was finished with his day shift. (HT, pp. 116-17.) He said the Complainant liked to do his own thing, so the new procedures bothered him. (HT, pp. 115-16.)

The Complainant's Adherence To Policy

The testimony and exhibits revealed that the Complainant's tenure with the Respondent was discordant at certain points. As noted earlier, Shaun Fabretti was driver-supervisor when the Complainant started working for Ambassador. Mr. Fabretti was the person who hired the Complainant, and the Complainant has expressed the sentiment that things were generally good for him under Mr. Fabretti's management. (HT, p. 20; ALJX 2A, p. 2.) Around one month after the Complainant's hiring, when Mr. Rabonza took over, the Complainant claims "everything changed. I was treated like [Mr. Rabonza] owned me." (ALJ 2A, p. 2.) The Complainant felt that Mr. Rabonza's management style was overbearing and "considerably more strict" than Mr. Fabretti's. (HT, pp. 57, 137-38.) The Complainant also said that Mr. Rabonza was intimidating because he didn't ask him to do something, he told him to do it. (HT, pp. 21, 48.)

The discontent between the parties cut both ways. The Respondent was dissatisfied with the Complainant's work habits, but its concerns did not stem from a lackadaisical work ethic. In fact, its concerns were quite the opposite. The Complainant always wanted to stay out working and would not code six when he was told. In its Pre-Hearing Statement, the Respondent referred to the Complainant as "a smart and charming man, who was a hard worker." (Respondent's Pre-Hearing Statement, p. 6.) At the hearing, the Respondent's witnesses testified about how Complainant's stay-out-late work ethic was unsanctioned by management and caused difficulties for dispatchers and other drivers.

Kenneth Langille, a dispatcher for the Respondent from 2004 to 2008, testified about his experiences with the Complainant. (HT, p. 144.) He said that the Complainant liked working long hours and always wanted to keep working beyond his scheduled shift. (HT, 147-48.) Mr. Langille testified that when he told the Complainant to code six, it would be several hours before he would return to the yard and that other dispatchers experienced the same issue with the Complainant. (HT, pp. 145-47.) According to Mr. Langille, the Complainant "ma[de] it known that it was a problem for him to bring the car in each time we asked him to." (HT, p. 149, 157.) He would frequently explain that he was tardy because he had a personal to do, had heard about someone who needed a ride, or was waiting for a ride at a door. (HT, p. 147.) Mr. Langille's interpretation of those responses was that the Complainant didn't want to call it quits for the day and would rather stay out and try to get kellys. (HT, p. 147-49.)

The Complainant's lateness caused problems for the dispatchers because it disrupted their assignment of vehicles on busy days when all of the vehicles were booked for rides. (HT, p. 146.) It also affected the night shift driver assigned to share the Complainant's vehicle because they would have to wait until he returned to start their shift or switch to a different car. (HT, pp. 146-47.) Mr. Langille testified that the Respondent no longer allowed drivers to stay out when their shift had ended, and that the owner, Mr. Chenoweth, was "breaking down very hard" on dispatchers who did not ensure drivers end their shift when they were supposed to. (HT, p. 148.) According to Mr. Langille, once Mr. Rabonza became the driver-supervisor, things were more organized, and dispatchers could talk to him if they were having problems with a driver. (HT, p. 148.) He complained to Mr. Rabonza on many occasions about the Complainant's tendency to return his vehicle to the yard late. (HT, p. 148.) Mr. Rabonza testified that he had tried to "put a lid" on the Complainant's practice of working those long hours, causing arguments between him and the Complainant, who told Mr. Rabonza that he was staying out after his shift was done to make money. (HT, pp. 116-17.)

Apparently, some drivers are not good at kellying. (HT, p. 92.) The Complainant did not disguise the fact that he enjoyed, and was good at, getting kellys. In his May 10, 2005, rebuttal letter, he says "I'm the only driver I know who works for Ambassador who gets numerous kellys from restaurants, clubs, and [hotels]. Dispatchers and most drivers are at awe at the number of kellys I generate." (ALJX 1D, p. 1.) There was testimony that generating kellys was indeed something that the Respondent encouraged its drivers to do. Mr. Rabonza said that drivers had the right to go roaming around in search of kellys if they had no reservations at the time. (HT, p. 111.) Mr. Langille testified that he remembered Mr. Chenoweth congratulating the Complainant on the number of kellys he generated. (HT, p. 167.) However, the balance of the Respondent's testimony at the hearing made clear that, at least during Mr. Rabonza's tenure as driver-

supervisor, while the Respondent approved of drivers searching for kellys, it was only authorized when they were on their scheduled shift.

The Complainant's Disciplinary History

At some point during the Complainant's employment with the Respondent, the date is unclear from the testimony,⁵ Mr. Rabonza approached him and asked if he would work on a Saturday, his usual day off, because a NASCAR event was in town and the Respondent needed as many drivers as possible. (HT, pp. 59, 123; ALJX 1B, p. 2.) The Complainant said he could not work because he had an appointment that day, and Mr. Rabonza fired him. (HT, pp. 59, 123; ALJX 1B, p.2) The Complainant then went to Mr. Chenoweth, the owner, to explain that he had the appointment and that he felt it was unfair to be fired for not coming in on his day off, and he was reinstated. (HT, pp. 59, 123; ALJX 1B, p.2.)

Around March 2005, the Complainant was suspended for four days without pay for inattention to detail due to an incident involving the acceptance of a payment voucher. (ALJX 1B, p. 3; Complainant's Second Pre-Hearing Statement, p. 2.) The Complainant was dispatched to pick up customers at a hotel, and after some confusion about the amount of money owed and the destination of the trip, which the Complainant attributes to a mix-up between the hotel and dispatch, the customers were late in getting to their destination. (ALJX 1B, p. 2.) The Complainant ended up returning cash he had collected from the passengers for the trip and accepting a payment voucher from the hotel. (ALJX 1B, p. 3.) Apparently, there was a problem with the type of voucher the Complainant had accepted, and Mr. Rabonza suspended him for four days. (ALJX 1B, p. 3.) The Complainant got a letter from the concierge of the hotel stating that she had used that particular type of voucher with the Respondent before with no problem. (CX A.) The Complainant requested the assistance of an individual that worked in the Respondent's front office to intervene on his behalf, and he was once again reinstated by Mr. Chenoweth. (ALJX 1B, p. 3.)

The Events Surrounding April 30, 2005

The termination at issue here occurred on May 2, 2005, and was for the stated reason that the Complainant refused to do a bus run scheduled for April 30, 2005. (RX A.) The Complainant claims that he was terminated in retaliation for engaging in protected activity, *i.e.* refusing to drive the bus because of safety-related concerns, on April 30, 2005.

Some of the events surrounding April 30, 2005 are not in dispute. The parties agree that on Friday, April 29, 2005, Mr. Rabonza asked the Complainant to cover a bus run scheduled for around 10:15 p.m.⁶ the next day, Saturday, April 30, 2005, which would have been the

⁵ However, this event must have occurred during or after February 2005, when Mr. Rabonza became his supervisor, since Mr. Rabonza is the one who fired him.

⁶ At times, the parties state the bus ride as being at 9:45 p.m., 10:00 p.m., or 10:30 p.m. I find it clear that they are referencing the same bus run, and will refer to it as the 10:15 p.m. trip because ALJX 2B, the reservation confirmation for the trip, shows a pick-up time of 10:15 p.m.

Complainant's usual day off. (HT, pp. 37, 40, 48, 120.) The bus run had already been scheduled, and the Complainant was the last available driver with a commercial driver's license that Mr. Rabonza could ask. (HT, pp. 122, 131.) Mr. Rabonza testified that the Complainant was hesitant about committing to the run because he didn't like driving the buses, but he pleaded with the Complainant to accept the bus run. (HT, p. 122.) The Complainant testified that he felt he would have been fired had he said no. (HT, pp. 48, 55-56.) Mr. Rabonza denies that he threatened to fire the Complainant if he didn't agree to do the bus run. (HT, pp. 122-124.)

It is undisputed that the Complainant agreed to do the April 30, 2005 bus run. (HT, pp. 37, 48, 120-22.) The Complainant admits that at the time he agreed to do the bus run, he knew he had a personal scheduled for 9:00 a.m. the next morning,⁷ but did not tell Mr. Rabonza about it. (HT, pp. 49, 122.) At the hearing, he agreed that he should have told Mr. Rabonza about the personal. (HT, pp. 49-50.)

It is also undisputed that the Complainant, unbeknownst to Mr. Rabonza, clocked-in to work around at 7:30 a.m. on the morning of April 30, told Mr. Langille in the dispatch office that he had a personal, Mr. Langille gave him a key, and he proceeded to drive one personal and four kellys around until around 3:45 p.m., when he was told to code six by Mr. Langille and Mr. Rabonza.⁸ (HT, pp. 49-50, 60, 122, 124-26; CX D9.) Mr. Rabonza testified that he only discovered that the Complainant was out kellying that day when Mr. Langille complained about problems getting the Complainant to code six at around 3:45 p.m. (HT, pp. 124-25.)

Mr. Rabonza was surprised to hear that the Complainant was out driving because he was not supposed to be working until later, called him and told him to come in. (HT, pp. 124-125.) Both parties contend that, after being told to code six, the Complainant then came in to the yard around 5:00 p.m. where he exchanged words with Messrs. Rabonza and Langille. (HT, pp. 39, 124-28.) The Complainant did not tell Mr. Rabonza what time he had shown up that morning because he figured Mr. Rabonza already knew. (HT, pp. 60-61.) The parties disagree about the content and tenor of that exchange in the yard. They do agree that afterwards, the Complainant went home and consumed at least one beer, and, when called by a dispatcher to inquire whether he was coming back to do the scheduled bus run, said that he was not because he was tired and

⁷ There was considerable testimony regarding the date the personal was made and whether the personal was arranged through the Respondent or with the Complainant directly. (HT, pp. 37-39, 52-55, 80, 92-95, 117-20.) The Complainant said the personal was called-in to the Respondent a few days prior to April 30, 2005, and it was the Respondent who notified him that he had the ride. The Respondent says that they did not know about the personal until the Complainant told them he needed a vehicle on the morning of April 30, 2005, and that is the reason he was given a vehicle in the first place that morning. The Complainant seems to think that if it the personal was called-in to the company, the knowledge of the personal should somehow be imputed to Mr. Rabonza, which would in some way sanction the Complainant's actions during the day in question. From the testimony, it appears more likely that the personal was called in to the Respondent's office one or two days prior to April 30, 2005. However this is of little consequence since the personal was only a 30 minute ride starting at 9:15 a.m. (CX D9), which would have given the Complainant 12 hours off-duty before he had to report to work for the bus run, and he admits that he was not even required by the Respondent to come in that day except for the bus run. (HT, pp. 53-54.)

⁸ The Complainant's daily trip log reveals that on April 30, 2005, he clocked-in at 7:38 a.m., he did one 30-minute personal starting at 9:15 a.m., followed by four kellys with pick up times of 10:35 a.m., 11:45 a.m., 12:48 p.m., and 1:45 p.m., finally returning to the yard and clocking-out at 5:17 p.m. (CX D8.)

had consumed beer. (HT, pp. 45, 127-28, 157-58; ALJX 2A.) The Complainant was told not to come in that night, was immediately suspended by Mr. Rabonza, and ultimately terminated two days later. (HT, pp. 45, 128-29.) The Complainant testified that he was not told of his suspension right away, but found out when he showed up for work on Sunday, May 1, 2005, a regular duty day for him. (HT, p. 41.)

The Parties' Contentions

The Complainant has claimed variously that he told the Respondent at some time on April 30, 2005, that he was not going to do the bus run because to do so would violate hours of service regulations and because he was tired; refusals that may invoke the protections of the STAA. At the hearing, the Respondent offered testimony that implicit in agreeing to do the April 30, 2005, bus run was a promise to show up ready to work, rested, and sober, and that the Complainant broke that promise by kellying for most of the day without permission and consuming beer while still scheduled to perform a bus run. They contend that he was ultimately fired for refusing to perform the scheduled bus run because he essentially made himself unable through insubordination, and not because he engaged in protected activity.

APPLICABLE LAW

The parties have not disputed that this case arises under the jurisdiction of the STAA. At the hearing, the Respondent did not raise any jurisdictional objections. Additionally, the Respondent presented testimony that Ritz Transportation, the company that owns the commercial vehicle that the Complainant refused drive on April 30, 2005, is subject to Federal DOT safety regulations. (HT, pp. 84-86, 109.)

The employee protection provision of the Surface Transportation Assistance Act of 1982, 49 U.S.C § 31105,⁹ was enacted to encourage employees in the transportation industry to report noncompliance with applicable safety regulations governing commercial motor vehicles. This “whistleblower” statute protects employees by forbidding the employer from discharging, or taking other adverse employment actions against an employee in retaliation for the employee’s refusal to operate a motor vehicle that does not comply with applicable safety regulations or for filing complaints alleging such noncompliance. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 255 (1987). The STAA was enacted by Congress “to combat the increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents on America’s highways.” *Yellow Freight Sys., Inc., v. Reich*, 8 F.3d 980, 984 (4th Cir. 1993).

To accomplish that purpose, the STAA provides that:¹⁰

⁹ Section 405 of the STAA was originally codified at 49 U.S.C. § 2305, but it was re-numbered to 49 U.S.C. § 31105 in 1994.

¹⁰The Complainant filed his complaint in this matter in 2005. Congress amended the STAA, effective August 3, 2007, as part of the Implementing Recommendations of the 9/11 Commission Act of 2007. *See* Public Law 110-53, 121 Stat. 266. The amendment added protection for complaints or refusals to drive based on a violation of security regulations or vehicle security conditions, and also required that complaints initiated under the STAA be governed

(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because—

(A) (i) the employee...has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or ...

(B) 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 or health; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a); *see also Brock v. Roadway Express, Inc.*, 481 U.S. 252, 255 (1987); *Calhoun v. U.S. Dept. of Labor*, 576 F.3d 201, 208 (4th Cir. 2009); *Leach v. Basin W., Inc.*, ARB No. 02-089, ALJ No. 2002-STA-005, slip op. at 3 (ARB July 31, 2003).

The Complainant claims that he was terminated because he refused to drive on April 30, 2005, due to safety-related concerns. As such, his claim falls within the purview of the refusal clause. The complaint clause is not implicated in this case.

Under the STAA's employee protection provisions, to establish a *prima facie* case, a Complainant must allege and later prove by a preponderance of the evidence that: 1) he or she engaged in protected activity; 2) that he or she was subjected to an adverse employment action; 3) that the Respondent was aware of the protected activity when it took the adverse action; 4) and that the protected activity was the reason for the adverse action. *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 5 (ARB Sept. 30, 2008); *Forrest v. Dallas & Mavis Specialized Carrier Co.*, ARB No. 04-052, ALJ No. 2003-STA-053, slip op. at 3-4 (ARB July 29, 2005); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-030, slip op. at 4 (ARB Oct. 20, 2004). If the Complainant fails to allege and prove one of

the burden of proof set forth by 42 U.S.C. 42121(b) (the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, also known as "AIR 21").

That an amendment expands coverage under the STAA for complaints or refusals to drive due to security concerns is of no consequence in this matter since the Complainant has put forth no proof evincing security concerns. However, the implementation of the AIR 21 burden of proof requires a different weighing of the evidence than traditional pre-amendment STAA jurisprudence. The pre-amendment burden of proof requires that a Complainant to prove by a preponderance of the evidence that an employer took adverse action against them because they engaged in protected activity. The post-amendment burden of proof, however, requires the Complainant to show by a preponderance of the evidence that that protected activity was a "contributing factor" in an adverse action. 42 U.S.C. 42121(b); *Villa v. D.M. Bowman, Inc.*, ARB No. 08-128, ALJ No. 2008-STA-046, slip op. at 3 (ARB Aug. 31, 2010). The ARB has held that complaints filed prior to the effective date of the amendment shall be decided under the burden of proof applicable when the complaint was filed, and not the AIR 21 burden of proof. *See Fleeman v. Neb. Pork Partners*, ALJ No. 2008-STA-015, ARB Nos. 09-059, 09-096 (ARB 28, 2010) (Stating that where complaint was filed on May 30, 2007, it was error for ALJ to use the AIR 21 burden of proof since complaint was filed prior to effective date of STAA amendment). As such, the pre-amendment burden of proof will be used in this matter. However, I note that even if the AIR 21 burden of proof was applicable here, it would not change the outcome of this decision.

these requisite elements, his entire claim must fail. *Melton*, ARB No. 06-052 at 5. The ultimate burden of persuasion that the Respondent intentionally discriminated because of the Complainant's protected activity remains at all times with the Complainant. *Bates v. USF Reddaway, Inc.*, ARB No. 07-086, ALJ No. 2005-STA-029, slip op. at 13 (ARB May 20, 2009).

Where a Complainant is a *pro se* litigant, they must, of course, be given fair and equal treatment, but are charged with the same burdens of production and persuasion as complainants represented by counsel. *Worku v. Preflight Parking*, ARB No. 07-028, ALJ No. 2006-STA-040, slip op. at 5 (ARB April 22, 2008).

The ARB has declared that where, as here, a case has been fully tried on its merits, it is not necessary for an ALJ determine whether the Complainant presented the proof necessary to establish a *prima facie* case; the relevant inquiry is whether the Complainant has established all elements of his case by a preponderance of the evidence. *Leach*, ARB No. 02-089 at 6; *Assistant Sec'y & Ciotti v. Sysco Foods Co. of Phila.*, ARB No. 97-STA-30 (ARB July 8, 1998); *see also USPS Board of Governors v. Aikens*, 460 U.S. 711, 713-16 (1983).

DISCUSSION AND ANALYSIS

It is fundamental that under the STAA a complainant is charged with establishing by a preponderance of the evidence that he or she engaged in protected activity. The documents that comprise this case file reveal that the Complainant alleges that he refused to drive on April 30, 2005, because of safety-related concerns pertaining to the violation of regulations governing hours of service and driving while "tired," which may be activity protected under the STAA. Since the Complainant alleges that he voiced such concerns on two separate occasions on April 30, 2005—and that he voiced two different safety-related concerns on those occasions—I depart momentarily from the framework of the STAA to determine, as a matter of fact, whether the Complainant ever voiced safety-related concerns during the various times of that day, and if so, when he did. Finally, I will decide, as a matter of law, whether the Complainant proved by a preponderance of the evidence that the Respondent violated the STAA when it terminated his employment.

The Complainant Has Not Proven By A Preponderance of the Evidence that He Refused to Drive Because of Concerns About Violation of Hours of Service Regulations

In order to prevail in a cause of action under the STAA for retaliation under the refusal to drive clause, the Complainant first must prove by a preponderance of the evidence that he engaged in a protected activity, *i.e.*, that he refused to perform the bus run because of concerns that to do so would violate a safety regulation. It is not enough that the Complainant had after-the-fact concerns about a violation. Rather, those concerns must have manifested and been communicated in some fashion to the employer prior to or at the time of refusal. *See Leach*, ARB No. 02-089 at 5-6 (a finding of protected activity is not permitted where a complainant does not establish that they voiced specific safety-related concerns, such as hours of service violations or driver fatigue, or otherwise put employer on notice thereof, until two days after refusal to drive).

In both of the Complainant's Pre-Hearing Statements, he alleges that that during the evening call from dispatch, he "told Respondent's dispatcher that he was too tired to do the bus run and that if he did the run he would exceed the maximum driving time regulation." (Complainant's First and Second Pre-Hearing Statements, p. 1, -3.) The regulation at 49 C.F.R. 395.5 limits the total number of hours driven per day or week by a driver of passenger-carrying vehicles.¹¹ As will be explained below, the assertions in the Pre-Hearing Statement regarding the communication of concerns about an hours of service violation have proven false, thereby precluding a finding of protected activity on that ground. Consequently, I find that the Complainant is unable to carry his burden of establishing by a preponderance of the evidence that he engaged in protected activity in regard to hours of service violations.

The record supports this conclusion. Complainant alleged in his June 21, 2005, complaint letter that he had been in violation of hours of service regulations prior to the day he refused to drive, and states "had I done [the April 30, 2005 bus run] I would have been in violation of Federal and State laws." (ALJX 1B, p. 2.) But in reference to what he told the Respondent at the time of the refusal, he writes that a "dispatcher called me and asked if I was coming in at [9:45 p.m.] to do the [10:45 p.m.] two hour bus run. I told her that the day dispatcher had told me he could cover that run so I hadn't planned to come in. I told [the night dispatcher] I had had a couple of beers. She said ok." (ALJX 1B, p. 1.) In this complaint letter, which was written less than two months after the day in question, the Complainant does not allege that his refusal to drive on April 30, 2005, was based on concerns of an hours of service violation, or any other regulatory violations for that matter. (ALJX 1B.) Nor does he allege that any such concerns were made known to Respondent at the time of refusal. (ALJX 1B.)

Likewise, the Complainant's July 20, 2005, objection letter alleges that he had concerns that he would have violated hours of service regulations on April 30, 2005, if he had taken the bus run, but makes no mention that his refusal to drive that day was based on the hours of service problem or that his concern was communicated to the Respondent. (ALJX 2A.)

The Complainant's Pre-Hearing Statements provide the only support for the suggestion that the Complainant refused to drive for the stated reason that to do so would violate an hours of service regulation. But that proposition was subsequently refuted by the Complainant at the hearing.

The Complainant testified that he had never spoken to anyone at the Respondent—whether Mr. Rabonza, Mr. Chenoweth, dispatch, or anyone else—about being made to work hours in excess of the law.¹² (HT, pp. 58-59.) The Complainant also acknowledged that in the

¹¹ Merely asserting that an hours of service regulation would have been violated by the operation of a vehicle at the time of refusal does not create an actionable claim under 49 U.S.C § 31105 (a)(1)(B)(i). A complainant also has to prove that operating a vehicle would in fact have violated a specific safety regulation, here 49 C.F.R § 395.5. Since the Complainant has not produced sufficient evidence that he raised any concerns about an hours of service violation to the Respondent at the time of refusal to drive, or even during his termination meeting two days later, it is unnecessary to analyze the mandates of 49 C.F.R. § 395.5 or decide whether his purported concerns would have been an actual violation thereto.

¹² He later qualified that statement, saying: "I think Mr. Fabretti and I had talked about it [working too many hours] on occasions...he was concerned about the hours he was working as well," but the Complainant gave no date, time,

past when he was concerned about his treatment by the Respondent (during previous terminations or suspensions) he had gone to see Mr. Chenoweth to address his concerns, but that he never went to speak with him about working hours in excess of those permitted by the law. (HT, pp. 59-60.) The Complainant also acknowledged that when Mr. Rabonza told him he was terminated on May 2, 2005, two days after his refusal to drive, he did not tell Mr. Rabonza that he would have violated hours of service regulations had he made the trip. (HT, pp. 63-64.)

It is elementary that a Complainant must voice, or otherwise make known, their safety-related concerns to their employer in order to invoke the protections of the STAA refusal to drive clause. *Brink's, Inc., v. Herman* 148 F.3d 175 (2d Cir. 1998) (employee's failure to raise his safety-related concerns at time he refused to work precluded him from establishing violation of STAA's refusal to drive clause). I find the weight of the evidence, and specifically the Complainant's own testimony, conclusively prove that he did not convey any concerns about hours of service violations when he refused to drive on April 30, 2005. Therefore, the Complainant has failed to prove the first element of his claim, that he engaged in protected activity under an hours of service theory, by a preponderance of the evidence, and his STAA claim therefore must fail.

The Complainant Has Not Proven By A Preponderance of the Evidence that He Said He Was "Tired" When He Returned to the Company Yard on April 30, 2005

As discussed earlier, the basis for the remand in this case was that the Complainant had said he was "tired" at some point during April 30, 2005. The Complainant as well as the Respondent both agree that the Complainant said he was "tired" during the evening phone call with dispatch. (HT, pp. 64, 157.) However, the record reveals that the Complainant has also alleged that he said he was tired on April 30, 2005, when he returned to the yard at 5:00 p.m. after being told to code six. In his July 20, 2005, objection letter, the Complainant states "I told Michael [Rabonza] *when I was call[ed] in at 1700 [5:00 pm]* that I was tired." (ALJ 2A, p. 1.) (emphasis added). However, that single sentence in the objection letter is the only support in the entire record for that contention, and it is unsupported.

The hearing testimony revealed that in the afternoon on April 30, 2005, the Complainant was called back to the Respondent's vehicle yard where he exchanged words with both Mr. Rabonza and Mr. Langille. (HT, p. 125, 162.) The parties' accounts of what occurred in the yard differ greatly.

The Complainant testified that he was not upset about being required to bring the vehicle back to the Respondent's yard before the bus run that day. (HT, p. 60.) Mr. Rabonza disagreed. According to Mr. Rabonza, at around 3:45 p.m. he learned from Mr. Langille that the Complainant was out driving a limousine and that Mr. Langille was having trouble getting him to code six. (HT, pp. 124-125.) That upset Mr. Rabonza because the Complainant did not have his

or context to that purported conversation. (HT, pp. 59-60.) Mr. Fabretti did not testify at the hearing. I give little weight to this statement because of its vagueness, the fact that it is uncorroborated by any other evidence, and note that even if the conversation did happen, it was apparently long before the events at issue here, and could not serve as a basis for an STAA-protected refusal to drive on April 30, 2005.

authority to be out, and he knew the Complainant had a bus run scheduled for later that day. (HT, pp. 125-126.) Mr. Rabonza then called the Complainant and told him to bring the vehicle in, and the Complainant responded "If I bring the car in, I'm not going to do the bus run." (HT, pp. 125-126.) The Complainant subsequently returned to the yard around 5:00 p.m. (HT, p. 126.)

Mr. Langille testified that upon arriving at the yard, the Complainant went to the dispatch window and was "irate," screaming at Mr. Langille through the window. (HT, p. 156.) The Complainant told him he did not want to do the bus run, would rather have stayed out, and was under the impression that Mr. Langille had cost him a ride by making him come in. (HT, p. 157.) They went out in the yard to talk. (HT, pp. 156, 164.) From there, Mr. Rabonza got involved (HT, p. 156.), and they spoke in the yard. (HT, pp. 126, 134-135.) The Complainant, angry that he had been called in, said that he was not going to do the bus run. (HT, p. 126.) Mr. Rabonza told him that if he didn't do it, he would be fired. (HT, p. 126.) Mr. Rabonza testified that during their conversation in the yard, the Complainant did not complain about being tired, nor did he make a complaint about working excessive hours. (HT, p. 129.) The Complainant then went home. (HT, p. 127.)

I find the testimony of Mssrs. Rabonza and Langille about what occurred upon the Complainant's arrival at the yard that afternoon more credible. Their testimony regarding the events that day was substantially similar and was corroborated by the Complainant's own testimony. At the hearing, the Complainant admitted that he did not tell Mr. Rabonza that he was going to work the morning of April 30, that he came in on that day of his own volition, and that Mr. Rabonza would not have known he had come in for work that morning unless dispatch told him. (HT, pp. 54-55, 59-61, 135-136.) This corroborates Mr. Rabonza's testimony that he was surprised to hear the Complainant was out driving that day. The Complainant also testified that it was his intention to come in and work all day in a limousine, and then do the night-time bus run, even if it violated hours of service regulations. (HT, pp. 61-62.) According to the Complainant, it is easier to work through a long day than to stop in the middle (HT, p. 62.); further crediting Mssrs. Rabonza and Langille's account that the Complainant did not want to come in that day.

Although I find that an exchange of words occurred upon the Complainant's return to the Respondent's yard that day, not one of those words was "tired." The only support for that allegation is found in the Complainant's July 20, 2005, objection letter. I find this single fleeting statement in the objection letter was either inadvertent, or subsequently abandoned. The Complainant has put forth no other evidence that he stated he was tired when he returned to the yard. Consequently, the Complainant has failed to prove by a preponderance of the evidence that he engaged in any protected activity when he returned to the company yard on April 30, 2005.

The Complainant Did Tell Respondent He Was Tired When Dispatch Called Him Around 8:00 p.m. on April 30, 2005

The parties agree that when dispatch called the Complainant at home around 8:00 p.m., the Complainant stated something to the effect that he refused to do the bus run because he was

“tired and had had a beer.”¹³ (HT, p. 40, 127-128, 134, 169-170; ALJ 2A, p. 1.) It is this statement that the Complainant also contends is protected activity under the STAA.

Under the Circumstances of this Case, the Complainant’s Statement that He Was “Tired” Is Not Sufficient to Establish Protected Activity

Under the STAA, one must do more than state that they are too tired to drive to seek refuge from workplace repercussions. The refusal to drive clause has two prongs which require, at a minimum, that a Complainant prove by preponderance of the evidence either that they refused to drive because to do so would violate a safety regulation (the actual violation prong), or because of a reasonable apprehension of harm to themselves or the public if they drove (the reasonable apprehension prong). 49 U.S.C. § 31105(a)(1)(B)(i)(ii). Whether a refusal to drive qualifies for STAA protection requires evaluation of the circumstances surrounding the refusal under the particular provisions of each of the prongs. *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 5 (ARB Sept. 30, 2008) (citing *Johnson v. Roadway Express, Inc.*, ARB No. 99-011, ALJ No. 1999-STA-005, slip op. at 7-8 (ARB Mar. 29, 2000) (the ALJ properly considered all the circumstances of the Complainant’s refusal to drive, including his work record and medical excuses).

Actual Violation Prong

Under the actual violation prong of the STAA, a refusal to drive is protected only if the Complainant establishes that their operation of a commercial vehicle would have actually violated a pertinent motor vehicle standard. 49 U.S.C. § 31105(a)(1)(B)(i); *see Leach v. Basin W., Inc.*, ARB No. 02-089, ALJ No. 2002-STA-005, slip op. at 4 (ARB July 31, 2003); *Bates v. USF Reddaway*, ARB No. 07-086, ALJ No. 2005-STA-029, slip op. at 8 (ARB May 20, 2009).

The Complainant has not cited to any specific regulations that he claims would have been violated had he driven while tired. He did, however, state in his July 20, 2005, objection letter that “[drivers] should not be forced to drive while *fatigued*.” (ALJ 2A, p. 1.) (emphasis added) For purposes of this decision, I will assume that when the Complainant said he was “tired” on that evening, he referring to the oft-cited 49 C.F.R. § 392.3, “fatigue rule.” The fatigue rule has been held to be applicable to the STAA’s refusal to drive clause. *Leach*, ARB No. 02-089 at 4; *Bates*, ARB No. 07-086 at 8. At the time of the Complainant’s refusal to drive, the fatigue rule read:

No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver’s ability or alertness is so impaired, or so likely to become impaired,

¹³ There was some controversy during the hearing whether the Complainant told dispatch that he had consumed only one beer, or more than one. (HT, pp. 40, 127-128, 134, 169-170.) During the Complainant’s cross-examination of Mr. Langille, his questions were aimed in part at determining how some people had the impression that he had consumed more than one beer. I note that in the Complainant’s original complaint on June 21, 2005, he writes that he told the dispatcher he had “a couple of beers.” (ALJ 1B, p. 1.) The resolution of this matter does not depend on the exact number of beers the Complainant consumed that evening.

through fatigue, illness or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

49 C.F.R. § 392.3 (2005). The fatigue rule plainly covers a driver whose driving ability or alertness is so impaired or who anticipates that his or her ability or alertness is so likely to become impaired that it would be unsafe to begin or continue driving. *Bates*, ARB No. 07-086 at 9 (citing *Eash v. Roadway Express*, ARB No. 04-063, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005)). The determination of whether an actual violation would have occurred is a “threshold inquiry” when a complainant alleges that he or she was retaliated against for a refusal protected under the actual violation prong. *Minne v. Star Air, Inc.*, ARB No. 05-005, ALJ No. 04-STA-26, slip op. at 10 (ARB Oct. 31, 2007) (citing *D’Agostino v. B&Q Distribution Serv., Inc.*, 1988-STA-11, slip op. at 2 (Sec’y May 10, 1989)). Therefore, a complainant has to prove by a preponderance of the evidence that he refused to drive because his ability or alertness were in fact so impaired, or so likely to become impaired, through his illness and fatigue, as to make it unsafe for him to begin or continue to operate a commercial motor vehicle. *Wrobel v. Roadway Express, Inc.*, ARB No. 01-091, ALJ No. 200-STA-48, slip op. at 4 (ARB July 31, 2003).

Reasonable Apprehension Prong

Alternatively, a complainant’s refusal to drive may also be protected under the refusal to drive clause if he or she refused to drive because of “a reasonable apprehension of serious injury to [himself or herself] or the public because of the vehicle’s unsafe condition.” 49 U.S.C. § 31105(a)(1)(B)(ii). The reasonable apprehension prong covers more than just mechanical defects of a vehicle—it is also intended to ensure “that employees are not forced to commit...unsafe acts.” *Melton*, ARB No. 06-052 at 6 (citing *Garcia v. AAA Cooper Transp.*, ARB No. 98-162, ALJ No. 1998-STA-023, slip op. at 4 (ARB Dec. 3, 1998)). Thus, a driver’s physical condition, including fatigue, could cause them to have a reasonable apprehension of serious injury to themselves or the public if they drove in that condition. *Melton*, ARB No. 06-052 at 6 (citing *Somerson v. Yellow Freight Sys., Inc.*, ARB Nos. 99-005, -036, ALJ Nos. 1998-STA-009, -11, slip op. at 14). The burden is on the complainant to prove by a preponderance of the evidence that: 1) they held a belief that their driving would pose a risk of serious injury to themselves or the public; 2) that the belief was objectively reasonable; and 3) that they based their refusal to drive on that objectively reasonable belief. *Wrobel*, ARB No. 01-091 at 6.

The reasonable apprehension prong also expressly requires that the employee had “sought from the employer, and been unable to obtain, correction of the unsafe condition.” 49 U.S.C. § 31105(a)(2); *Shields v. James E. Owen Trucking*, ARB No. 08-021, ALJ No. 2007-STA-022, slip op. at 7 (Nov. 30, 2009)

The Complainant’s assertion that he engaged in protected activity when he said he was “tired” and refused to do the bus run (as well as the fact that he admittedly had consumed alcohol and worked over nine hours without permission from his direct supervisor prior to the putative protected activity occurring) raises a number of issues.

The Complainant Did Not Prove By A Preponderance of the Evidence that An Actual Violation of the Fatigue Rule Would Have Occurred

First, the proposition that one engages in protected activity when they utter the conclusionary statement “I’m tired” presents a serious question as to whether they specifically invoked the protections of the STAA or presented sufficient evidence through that statement alone of an actual violation of the fatigue rule. This is not the first time the vagaries of a complainant’s purported protected activity have been pondered. The ARB has had occasion to determine whether conclusionary statements such as “I’m sick” rise to the level of an actual violation of the fatigue rule and thus represent protected activity under the STAA.

In *Wrobel v. Roadway Express, Inc.*, the ARB found that the complainant did not prove by a preponderance of the evidence that he engaged in protected activity when he told his employer that he was refusing to drive because he was “sick.” ARB No. 01-091, ALJ No. 200-STA-48 (ARB July 31, 2003). Although the operation of the fatigue rule plainly covers “illness,” the ARB agreed with the ALJ below and ruled that the complainant had not shown that he would have actually violated the fatigue rule had he driven since he offered no evidence of sickness other than the statement itself and a vague chiropractor’s note. *Wrobel*, ARB No. 01-091 at 3-4. In so holding, the ARB looked at the totality of the circumstances, and found that the Claimant had multiple opportunities during the day in question to notify dispatch of his sickness, but only chose to do so when told to work his available hours, and he had engaged in similar patterns of behavior. *Wrobel*, ARB No. 01-091 at 3. The ARB also pointed out that even if the statement “I’m sick” was a protected activity in that case, given that the Complainant did not elaborate to his employer in any way how the condition would have made it unsafe for him to drive, the employer could not have discriminated against him because it lacked the requisite knowledge of his protected activity. *Wrobel*, ARB No. 01-091 at 5.

Likewise, in *Bates v. USF Reddaway*, the ARB held that the complainant did not establish that he engaged in protected activity under the actual violation prong when he refused to drive because he was “sick.” *Bates v. USF Reddaway*, ARB No. 07-086, ALJ No. 2005-STA-029 (ARB May 20, 2009). There, the ARB noted that even though there was evidence that the complainant was sick at the time he refused to drive, “while [the complainant] ultimately told [the employer] that he was sick, he did not tell [the employer] that he was too sick to drive the run he refused. [The complainant] did not tell his employer, as he must, that he could not safely drive that run as his illness impaired or had potential to impair his alertness or driving ability.” *Bates*, ARB No. 07-086 at 10. It also noted that “[the complainant] never asserted an actual violation of the requirements of the fatigue rule as he must to invoke the protection of the [actual violation prong].” *Bates*, ARB No. 07-086 at 11; see also *Assistant Sec’y & Porter v. Greyhound Bus Lines*, ARB No. 98-116, ALJ No. 96-STA-23 (June 12, 1998) (A simple claim that one is “sleepy” is not sufficient to show an actual violation of the fatigue rule had they driven.)

Here, I am faced with circumstances similar to those in *Wrobel*, *Bates*, and *Porter*. To reiterate, the Complainant here did not tell his employer that he was fatigued or specifically mention the fatigue rule at the time of refusal to drive; the Complainant has established that he told the Respondent that he was “tired,” with no further elaboration. It was only after his termination that the Complainant alluded to the fact that his tiredness affected his ability to

safely operate the bus on the day in question. The Complainant's complaint letter did not mention being tired or fatigued on the day in question, but his July 20, 2005, objection letter did. The bulk of that letter complains of hours of service violations, although he also says he was "fir[ed] for failing to perform an unsafe act...regardless of how you figure it, [I worked] too many hours that day [with] not enough rest to safely transport passengers." (ALJ 2A, p. 1.) He refers to the bus run as "a real safety, potentially deadly situation," and says "I feel lucky to have not made any errors in judgment while driving that could have caused injury to my clients. One good judgment I did make was not to do that [10:15 p.m.] bus run. (ALJ 2A, p. 1-2.). The Complainant does not elaborate on the claim that he was tired, and appears to base his assertion on the number of hours he was on duty that day (over nine hours).

At the hearing, the Complainant stated that he arrived home on April 30, 2005, at about 6:00 p.m. and was "pretty tired because [he] had worked pretty hard that day." (HT, p. 40.) He said one of his concerns that evening was that the particular bus run he was scheduled to do was routed through an area undergoing major construction which was "hazardous, at best, when you were alert. There's no way at night and tired that—that you should do that run. That was my opinion. So when [the Respondent] actually told me not to come in, that made me really happy actually, because I think it could have prevented problems in—or an accident. (HT, pp. 40-41.) He follows "I think I was fired for no reason. I had worked a number of hours and had I gone back out, I think a serious incident could have occurred." (HT, p. 41.)

Here, the Complainant did not establish, or even assert, as he must, that had he driven that day, he would have violated the mandates of the fatigue rule. Nor did he adduce any evidence that he told his employer at the time of refusal, as he must, that he could not safely drive the run because his level of tiredness was such that his alertness or driving ability was impaired to the point that he could not have safely performed the bus run. Even in his original complaint letter, the Complainant did not express safety concerns regarding his level of tiredness. Additionally, the Respondent has provided credible testimony that the Complainant was angry at being called in. His claim that he was tired appears to be more likely a subterfuge for a continued protestation of being made to code six that day than a genuine invocation of the fatigue rule. The Complainant himself testified that it was his intention to work straight through the day and then do the bus run, even if it violated the law. I find that under the facts of this case, the Complainant's statement that he was "tired," even assuming that it was specific enough to invoke the fatigue rule, is insufficient to prove by a preponderance of the evidence that his operation of a commercial vehicle during the night in question would have constituted an actual violation that rule, and he has therefore failed to show that he engaged in this protected activity, and his claim under a theory of fatigue fails.

The Complainant Did Not Prove By A Preponderance of the Evidence that He Had A Reasonable Apprehension of Serious Injury to Himself or the Public

For the same reasons that the Complainant failed to prove an actual violation would have occurred, I too find that he has failed to establish that he had an objectively reasonable belief that operation of a commercial vehicle would have posed a risk of serious injury to himself or the public. *See Assistant Sec'y & Porter v. Greyhound Bus Lines*, ARB No. 98-116, ALJ No. 96-STA-23 (June 12, 1998) (the complainant who simply claimed he was "sleepy" when refusing to drive did not present sufficient evidence by that statement alone that he reasonably believed he

was too fatigued to take the assignment). Nor do I find that the Complainant's belief was reasonable in these circumstances. Also, the record does not show that he sought from the Respondent, as he must, a correction of the unsafe condition, *i.e.*, a substitute driver, or that that the Respondent was unable to provide one. To the contrary, the Respondent was able to arrange for the bus run to be accomplished without the Complainant. (HT, p. 128.) Therefore, he has not established that he engaged in protected activity, and his claim under a theory of fatigue fails.

Even If the Complainant Was Fatigued, the STAA Likely Would Not Protect Him Under the Circumstances of this Case

A troubling aspect of this case is that at the time the Complainant engaged in the purported protected activity, he was under the influence of alcohol and had broken company policy earlier in the day. It is noteworthy that in *Wrobel* and *Bates*, the ARB looked to attendant circumstances to determine if those circumstances established or militated against finding an actual violation of the fatigue rule. However, a separate line of cases raise questions about whether, even if a complainant establishes that he or she was truly fatigued at the time he or she refused to drive, attendant circumstances such as their own voluntary actions nonetheless made it such that the STAA does not afford them protection for their refusal.

In *Assistant Sec'y & Porter v. Greyhound Bus Lines*, ARB No. 98-116, ALJ No. 96-STA-23 (June 12, 1998), the complainant was an on-call bus driver, who would fill in for other drivers who were sick. On one occasion, he was called to work at 2 a.m., but refused because he was "sleepy." *Porter*, ARB No. 98-116 at 2. He told his supervisor that he had been fatigued when called because he had been out with family and friends the night before. *Porter*, ARB No. 98-116 at 2. The complainant's work history showed that he was unavailable for work six prior times in his one-and-a-half year tenure with the company. *Porter*, ARB No. 98-116 at 1. The ARB first stated that he had not engaged in protected activity by simply saying he was "sleepy" when he refused to drive. *Porter*, ARB No. 98-116 at 2. But it went further. The *Porter* case was a review of an arbitrator's decision during a grievance proceeding, and the ARB was reviewing the Arbitrator's decision to ensure it was not "repugnant to the purposes of the STAA." *Porter*, ARB No. 98-116 at 2. The Arbitrator noted that the complainant had ample opportunity to become rested before he was told to work and decided that the STAA does not protect an employee who deliberately made himself unavailable for work by not taking advantage of his time off to become rested and available when called. *Porter*, ARB No. 98-116 at 2. The ARB said "We agree...that the STAA does not protect an employee who, through no fault of the employer, has made himself unavailable for work." *Porter*, ARB No. 98-116 at 3.

In *Blackann v. Roadway Express, Inc.*, an unpublished opinion, the Sixth Circuit reached a similar result. 159 Fed.Appx. 704 (6th Cir. 2005). In *Blackann*, the complainant was an on-call truck driver who had problems adjusting his sleep patterns to sleep during the day to be alert for the late-night shifts he worked. *Blackann*, 159 Fed.Appx. at 707. Due to his own difficulty sleeping when off duty, he became fatigued while driving, and needed to take extended fatigue breaks. *Blackann*, 159 Fed.Appx. at 706. His fatigue breaks caused him to be late with his deliveries, for which he received four warning letters. *Blackann*, 159 Fed.Appx. at 705. The complainant filed a complaint because he felt he was receiving adverse employment action for taking fatigue breaks in violation of the STAA. *Blackann*, 159 Fed.Appx. at 706.

The ALJ below, citing *Porter*, held that a driver is not protected by the STAA if he is unavailable for work because he did not take advantage of his time off to become rested and was fatigued through no fault of his employer. *Blackann v. Roadway Express*, ARB No. 02-115, ALJ No. 00-STA-38, slip op. at 3 (June 30, 2004). As such, the ARB noted that the ALJ concluded, as a matter of law, that the complainant's fatigue breaks were not protected activity under the STAA. *Blackann*, ARB No. 02-115 at 3-4.

The ARB agreed with the conclusion, but with what it called a modified analysis. The ARB did not specifically hold, as the ALJ, that as a matter of law the complainant did not engage in STAA protected activity when he took fatigue breaks. *Blackann* at 3. Instead, they concluded "we do not believe that Roadway violated the STAA in issuing warning letters for [the Complainant's] failure to meet established running times on four nearly successive nights, and so hold." *Blackann*, ARB No. 02-115 at 4. Instead of holding that the complainant did not engage in STAA-protected activity, the ARB essentially said that the STAA was not designed to protect an employee whose own action made himself fatigued and refused to apply it in that case.

The Court of Appeals, noting that the ARB did not explicitly state that the complainant had failed to establish a *prima facie* case (*i.e.* which specific element was lacking), affirmed the ARB's conclusion under that rubric saying "Clearly, the ARB concluded that [the complainant] was discharged due to his repeated reporting for duty when he was simply too tired to perform that duty, and not because of taking STAA-protected fatigue breaks. *Blackann*, 159 Fed.Appx. at 708. Thus, the Court found that the ARB decided that the complainant failed to prove causation.

Under the rationale offered by these cases, I am not persuaded that the Complainant here—who came in on his day off and worked unbeknownst to his direct supervisor and then consumed alcohol while still scheduled to drive a commercial vehicle—should be provided refuge under the STAA for those completely voluntary actions. If, in fact, he was too fatigued to drive, he created the situation, not the Respondent. He certainly was the one who decided to consume the beers, making him ineligible to drive under STAA.

The Complainant Has Failed to Prove By A Preponderance of the Evidence that the Respondent Terminated His Employment Because He Engaged in Protected Activity

Even if the Complainant could be said to have shown that he engaged in protected activity, he has failed to show that the Respondent terminated him because of that protected activity.

The ARB has interpreted "because" to mean that an STAA complainant must show that the protected activity was a "motivating factor" in the employer's decision to take adverse action. *Carter v. Marten Transport, LTD.*, ARB Nos. 06-101, -59, ALJ No. 2005-STA-063, slip op. at 10-11 (ARB June 30, 2008). The ARB has stated that although temporal proximity may constitute evidence of retaliatory animus, it is just one piece of evidence for the trier of fact to weigh in deciding the ultimate question [of] whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action. *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ No. 1996-ERA-034, slip op. at 6 (ARB Mar. 30, 2001). Here, I find that, given the Complainant's actions on April 30,

2005, temporal proximity alone is not sufficient to prove that protected activity was a motivating factor in his termination. The Complainant produced virtually no independent evidence to support the contention that he was terminated for engaging in protected activity.

First, even assuming that the Complainant's actions on April 30, 2005, rise to the level of protected activity, he has made no showing that the Respondent construed his exclamation that he was "tired" as tantamount to saying he was too fatigued to drive safely. Although the analysis of this case has proceeded to this point upon the assumption that the Complainant engaged in protected activity when he said he was "tired," the Complainant has not presented sufficient proof that the Respondent, at the time of the refusal to drive, was made aware that the Complainant was invoking the protection of the "fatigue rule." Taken in context with the other occurrences on that day, I find that the Respondent likely interpreted the Complainant's claim of tiredness as a protestation, continued from the argument in the yard, for being required to quit kellying and bring the vehicle back. I decline to impose liability on the Respondent under the STAA for something that it was unaware of.

Second, "[t]he STAA protects only a driver who may unexpectedly encounter fatigue on the course of a journey; it obviously does not protect [activity] unrelated to the statutory purposes of public and personal safety...an employer obviously remains free to sanction an employee for chronically tardy conduct or indeed for any action not protected by the STAA" *Yellow Freight Sys. v. Reich* 8 F.3d 980, 987-88 (4th Cir. 1993). One cannot disregard company policy and work for a number of hours without their direct supervisors knowledge and consent, next, voluntarily consume alcohol while they are scheduled to perform a bus run, then refuse to drive and use the "fatigue rule" and the STAA as a shield to avoid workplace repercussions. The Complainant's actions on April 30, 2005, were clearly conduct that the Respondent found objectionable, and since the Respondent had terminated the Complainant on prior occasions for conduct that it found objectionable, I find that the Respondent has made clear that the breaking of the Complainant's promise and the consumption of alcohol making it impossible to carry out his promise, substantiate that insubordination was the reason for the Complainant's termination. (HT, pp. 48-49.)

While I noted earlier that the ARB has stated that at the hearing stage it is not necessary to perform a *prima facie* analysis of a Complainant's complaint, it has also noted that a *prima facie* analysis may serve as a clarifying agent in the evaluation of issues presented in the case. *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-030, slip op. at 5 (ARB Oct. 20, 2004); *Regan v. Natnl. Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 5 (ARB Sept. 30, 2004); *See also Jenkins v. United States Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 17-22 (ARB Feb 28, 2003) (demonstrating that *prima facie* analysis may help to sharpen the issues remaining for decision in an environmental whistleblower case) Even assuming, *arguendo*, that the Complainant has alleged a *prima facie* case of retaliation under the STAA, his claim fails.

Where a Complainant has made a *prima facie* case of retaliatory discharge under the STAA, the ARB has adopted the burden-shifting analysis used in cases arising under Title VII of the Civil Rights Act of 1964, as amended, announced by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. *Calmat Co. v. US Dep't of Labor*, 364 F.3d 1117, 1122 (9th Cir. 2004); *Regan*, ARB No. 03-117 at 5-6. *See also Reeves v.*

Sanderson Plumbing Products, Inc., 530 U.S. 133, 142-43 (2000); *St. Mary's Honor Ctr. V. Hicks*, 509 U.S. 502, 513 (1993); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Poll v. R.J. Vyhnalek Trucking*, ARB No. 99-110, ALJ No. 96-STA-35, slip op. at 5-6 (ARB Jun. 28, 2002).

Under the *McDonnell* burden-shifting framework, the employer may rebut the Complainant's *prima facie* showing by articulating a legitimate, non-retaliatory reason for the discharge; at this stage, the burden is one of production, not persuasion. *Calmat Co.*, 364 F.3d at 1122; *Regan*, ARB No. 03-117 at 5-6; *Densieski*, ARB No. 03-145 at 4. Upon a lawful reason being presented, the burden then shifts back to the Complainant to prove by a preponderance of the evidence that the proffered reason is pretext for unlawful retaliation. *Calmat Co.*, 364 F.3d at 1122; *Clean Harbors Env't. Services, Inc. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998); *Melton*, ARB No. 06-052 at 12-13; *Densieski*, ARB No. 03-145 at 4; *Regan*, ARB No. 03-117 at 6. The fact-finder may then consider the credibility of the parties' evidence and inferences properly drawn therefrom in deciding whether the Respondent's explanation is pretext. *Reeves*, 530 U.S. at 146; *Densieski*, ARB No. 03-145 at 4; *Regan*, ARB No. 03-117. at 6 Again, the ultimate burden of persuasion that the Respondent intentionally discriminated because of the complainant's protected activity remains at all times with the complainant. *St. Mary's Honor Ctr.*, 509 U.S. at 502; *Melton*, ARB No. 06-052 at 13; *Densieski* ARB No. 03-145 at 4-5; *Regan*, ARB No. 03-117 at 6.

In this case, the Respondent has articulated a legitimate, non-retaliatory reason for the Complainant's discharge, *i.e.*, insubordination by taking unsanctioned actions that resulted in the broken promise. (HT, pp. 48-49.) It is undisputed that the Complainant promised to perform the April 30, 2005 bus run. At the hearing, the Complainant agreed that in doing so, he implicitly promised to show up ready for work, rested, and not under the influence of alcohol. (HT, p. 65.) He also agreed that through his voluntary actions, he broke that promise. (HT, p. 65.) At the hearing, the Respondent alleged, and the Complainant agreed, that he came in on the morning of April 30, 2005, unbeknownst to and without the authorization of his direct supervisor, Mr. Rabonza, and proceeded to do one personal and four kellys before being discovered by Mr. Rabonza and told to code six. It is also unrefuted that prior to the time the putative protected activity took place, the Complainant had consumed at least one beer, making him ineligible to perform the bus run even if he were not tired. (HT, pp. 64-65.)

Finally, once the employer produces a legitimate, non-retaliatory reason for an adverse employment action, the burden shifts back to the complainant to prove by a preponderance of the evidence that the reason offered is pretext to mask unlawful retaliation. Here, the Complainant has failed to put forth any evidence that the Respondent's legitimate, non-retaliatory reason for termination—what essentially amounts to insubordination—is pretext for unlawful retaliation. As such, even assuming that the Complainant has established that he engaged in protected activity, he has failed to carry his burden of proving the Respondent's reason for termination was pretext, and his claim under the STAA therefore fails.¹⁴

¹⁴ I note that even if the AIR 21 burden of proof were applicable here, the Respondent has shown by clear and convincing evidence that it would have terminated the Complainant for the incident on April 30, 2005, in the absence of any protected activity.

CONCLUSION

The Complainant has failed to show that his refusal to drive the bus run on April 30, 2005, was protected activity under the STAA. Alternatively, he has not shown that his termination was because of protected activity or presented sufficient evidence to refute the Respondent's legitimate, non-retaliatory reason for the discharge.

ORDER

It is ORDERED that the Complainant's June 21, 2005, and July 20, 2005, complaints alleging that the Respondent violated § 31105 of the Surface Transportation Assistance Act of 1982 be DISMISSED.

A

JENNIFER GEE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1978.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1978.110(a) and (b).