

**U.S. Department of Labor**

Office of Administrative Law Judges  
2 Executive Campus, Suite 450  
Cherry Hill, NJ 08002

(856) 486-3800  
(856) 486-3806 (FAX)



**Issue Date: 29 June 2009**

CASE NO.: 2005-STA-00051

ARB NO.: 06-040

In the Matter of:

**JOSHUA J. ISRAEL,**  
Complainant,

v.

**SCHNEIDER NATIONAL CARRIERS, INC.,**  
Respondent.

Appearances:

Joshua J. Israel,  
Complainant Pro se

James C. Hardman, Esq.,  
For Respondent

Before:

Janice K. Bullard,  
Administrative Law Judge

**RECOMMENDED DECISION AND ORDER ON REMAND**

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (“the Act” or “STAA” hereinafter), and implementing regulations set forth at 29 C.F.R. part 1978. The pertinent provisions of the Act prohibit the discharge, discipline, or discrimination of employees who report violations of commercial motor vehicle safety rules or refuse to operate a commercial motor vehicle when such operation constitutes a violation of federal motor vehicle safety regulations or because of reasonable apprehension of serious injury due to unsafe conditions or health matters.

**I. PROCEDURAL HISTORY**

This matter involves a remand to me by the Administrative Review Board (ARB) of a Decision and Order (ALJ D&O) that I issued on January 17, 2006, in which I denied the complaint of Joshua Israel (“Complainant”, hereinafter) against Schneider National Carriers, Inc.

(“Respondent, hereinafter). My original Decision and Order is adopted herein by reference, including the complete procedural history of this case as set forth therein. Complainant appealed the ALJ D&O to the ARB, which issued its Decision and Order of July 31, 2008 (ARBD&O) remanding the matter to me. Specifically, the ARB held that I had abused my discretion and prejudiced Complainant when I consolidated Complainant’s complaints regarding his termination with the matter pending before me, which involved Complainant’s suspension. I had consolidated the matters because the suspension and the termination involved the same underlying facts. In doing so, I believed that I was exercising authority vested in me by 29 C.F.R. §18.11, which states:

When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Chief Administrative Law Judge or the administrative law judge assigned may, upon motion by any party or on his or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings may be made and the evidence introduced in one matter may be considered as introduced in the others, and a separate or joint decision shall be made, at the discretion of the administrative law judge as appropriate.

29 C.F.R. §18.11 (Rules of Practice and Procedure Before the Office of Administrative Law Judges (“OALJ”)). I am aware of the procedure for investigating complaints brought under the Act, but believed that where the adverse actions were intertwined, and common evidence and parties were involved, that the interests of the parties and administrative economy would be served by consolidating the complaint with Complainant’s anticipated complaint regarding his termination. As I stated in my colloquy with Complainant at the initial hearing, he would have a quicker decision on his complaints through their consolidation.

The ARB noted that Complainant had objected to the consolidation because he wanted to file a complaint regarding his termination with the Occupational Safety and Health Administration (OSHA) for investigation, and was not prepared to respond to Employer’s defense of its adverse action against him. In deference to Complainant’s objection, I ordered that the record remain open post hearing to allow Complainant to submit additional evidence to rebut any of Respondent’s claims. See, HTR<sup>1</sup> at 113. However, the ARB concluded that I did not provide sufficient opportunity for Complainant to address his complaints. The ARB concluded that Complainant may be entitled to reopen the record, and remanded the matter to me to make a determination about whether the record should be reopened. The ARB observed:

Although we can conclude that there was clear prejudice at the hearing, we are not convinced from the filings before us that Israel is entitled to a re-opening of the record. Therefore, we remand for the ALJ to conduct an inquiry giving Israel the opportunity to indicate what additional discovery or evidence Israel would seek if the ALJ were to decide to re-open the

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<sup>1</sup> In this D&O, “HTR” denotes references to the first hearing transcript; “TTR” denotes references to the telephone hearing; “RCX” denotes references to Complainant’s evidence and “REX” denotes references to Respondent’s evidence.

record. Therefore, the ALJ can determine if any further proceedings are necessary. The burden is on Israel to put forward facts or witness that, if true, could result in a successful legal conclusion. If he cannot do this, the ALJ may conclude he is not entitled to a hearing and dismiss the case.

D&O at pages 13-14. In a footnote, the ARB stated that in conducting this “inquiry”, I may “choose to proceed by teleconference, preliminary hearing, show cause order or some other appropriate means”. Fn. 73 of ARBD&O.

In compliance with the ARBD&O, by Order issued August 25, 2008, I directed Complainant to state in detail and in writing, the facts, witnesses and other evidence upon which he would rely in pursuing the claim that I heard over his objection. Complainant responded to my Order<sup>2</sup> with a request to reopen the record and submit additional evidence and testimony, but did not describe the nature and extent of the anticipated evidence. By Order issued September 23, 2008, I directed Complainant to more specifically describe the evidence that would support re-opening the record. By Order issued October 21, 2008<sup>3</sup>, I granted Complainant’s request for a supplemental hearing, and concluded that a telephone hearing was appropriate for any further testimony that Complainant deemed necessary. I originally set the hearing for December 19, 2008, but by Order issued on November 28, 2008, I rescheduled the hearing for the previous day, December 18, 2008 due to a conflict on my calendar.

I held a hearing by telephone on December 18, 2008, in which both parties participated. Immediately upon commencement of the hearing, Complainant objected to holding the hearing, noting the one day change in hearing date. He alleged that he did not receive the notice rescheduling the hearing and said that he had to report to work. I rejected Complainant’s contention regarding receiving the notice<sup>4</sup>, as Complainant had provided a member of my staff with a telephone number where he would be available on December 18, 2008. During that conversation, Complainant did not advise my staff that he would not be available, or state that he did not receive notice. I also rejected Complainant’s contention that he was not prepared to proceed, as Complainant’s pre-hearing submissions reflected that he intended to offer only his testimony, and he had filed pre-hearing motion and argument that demonstrated his preparedness. I also found that the change of hearing to one day earlier than originally scheduled was negligible under the circumstances. I noted Respondent’s objection to continuing the hearing, as individuals had been assembled to testify. In addition, I was concerned that the encroaching holiday season, together with my busy hearing schedule in the new year, would cause undue delay in supplementing the record.

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<sup>2</sup> Part of Complainant’s response was to move for recusal, which I declined to do.

<sup>3</sup> In this Order, I also denied Complainant’s motion for my recusal.

<sup>4</sup> I noted on the record that Complainant had received every other notice and Order issued by me at the address used for the notice of rescheduled hearing, as evidenced by his responses to Orders and other communications from my office. TTR at 8. I note herein that Complainant did not express surprise that he was contacted on the date of the supplemental hearing.

With respect to Complainant's contentions regarding his need to go to work, I initially advised that I would not commence the hearing for only a brief time. When it was established that he was expected to report to work later in the day, I ruled that the hearing would proceed until Complainant needed to leave. I advised that any unfinished testimony would be elicited at a rescheduled date. Complainant stated that he was willing to proceed until he was required to leave for his job. See, TTR at 9. I anticipated the telephone hearing to end well before he needed to leave for work, as I expected to hear only Complainant's testimony and Respondent's evidence on what I perceived to be limited issues.

Complainant also argued that unresolved pre-hearing motions prevented him from going forward. TTR at pp. 3-16. I did not find this argument compelling, as I intended to address those motions at the hearing. As I advised the parties, I had not ruled on the motions before the hearing because many of Complainant's contentions were unclear. I believed that ambiguities, as well as legal mis-constructions on Complainant's part, would be best addressed during colloquy with the parties at the hearing. As I advised Complainant that I would reconvene to complete unfinished testimony, and keep the record open to address any discovery dispute that remained unresolved, I concluded that the parties' rights to due process were protected.

Complainant repeatedly asserted in post-hearing pleadings that "a time constraint limitation" at the telephone hearing "did restrain Complainant's full and fair opportunity to demonstrate pretext..." See, Complainant's Pleadings dated January 5, 2009; Complainant's brief. His contention that he was "time-constrained" is without merit. An Administrative Law Judge has authority to direct the conduct of the hearing 29 C.F.R. §§18.27 and 29. In addition, I note the permissive nature of the instant proceedings, in that the Board's remand instructed me to determine whether Complainant should be permitted to supplement the record. This supplemental hearing provided ample time for that purpose. The hearing commenced at 9:00 o'clock a.m. CST and continued, without break<sup>5</sup>, until approximately 1:05 p.m. Complainant had represented that he needed to leave for his job at 1:45 p.m. at the latest. TTR at 10. At approximately 1:05 p.m., Complainant was asked if he had anything else to offer and he said no. TTR at 163. Complainant had an additional 40 minutes by his own reckoning to offer more evidence or argument. In addition, at the beginning of the hearing, I advised the parties that I would reconvene a telephone hearing for additional testimony, and I held the record open post-hearing for the submission of evidence.

Moreover, the manner in which Complainant participated in the instant proceedings contradicts his contention that he was not given a full and fair opportunity to demonstrate pretext. Upon the presentation of each witness, Complainant undertook questioning and appeared to fully explore all of his theories. Complainant did address his concern that he was not prepared to address all of Ms. Collar's testimony, but I pointed out that since Ms. Collar was a rebuttal witness and was not identified as part of Respondent's case in chief, her testimony could not strictly be prepared for, and

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<sup>5</sup> The only individual who suggested a break in the proceedings was Complainant, who wanted to break for lunch. TTR at 139.

therefore, the difference of one day hardly mattered. TTR at 109. It is significant that Ms. Collar's direct testimony consists of approximately two pages of the hearing transcript (TTR at 100-102) and her cross-examination lasted for sixteen pages of the transcript (TTR at 102-118), though her testimony included exchanges between Complainant and me. Complainant ended his questioning by informing us that he "had no further questions". TTR at 118. Similarly, after two pages of direct testimony (TTR at 119-121), Complainant questioned Mr. Jefferson at length (TTR at 121-139), again with exchanges with me interspersed throughout. Complainant filed pre-hearing statements, pleadings, motions, post-hearing argument, and a post-hearing brief. Complainant has had every opportunity to advance any argument and present any evidence in support of his complaint.

I overruled Complainant's objection to Respondent's proposed witnesses, both of whom were expected to give relevant testimony addressing issues raised in Complainant's pre-hearing statement. I addressed Complainant's motion to compel discovery. As colloquy with the parties reveals, I noted that Respondent had cooperated with Complainant's discovery requests, but also could not provide some information because of vague language. Each of Complainant's discovery requests was discussed at length, and I directed Respondent to provide a DAC report<sup>6</sup> which allegedly addressed Complainant's termination. I denied Complainant's request for a copy of Respondent's current termination policy, finding that it had little relevance to the events underlying the instant matter, which transpired in 2005.

Complainant asked that Respondent be directed to provide a copy of a letter that an employee of Respondent's had recommended be sent to Complainant. The evidence adduced at the first hearing indicated that Respondent did not act on the recommendation and such correspondence did not exist. This was confirmed at the telephone hearing through discussion with the parties and testimony. Similarly, discussions with the parties revealed that other documents requested by Complainant did not exist. Complainant asked for envelope information confirming when his termination letter was sent. Since he acknowledged that he received the letter, I denied that request as immaterial.

I denied Complainant's demand to compel Respondent to respond to an interrogatory about whether another individual had been disciplined in relation to loading and unloading a truck. After discussion about this issue, Respondent, through counsel, admitted that an individual with an amputation performed work assignments with some accommodation. I limited discussion about this issue, noting that much of the proffered evidence was hearsay. I advised Complainant that he needed to produce the individual for testimony, to avoid hearsay implications. I directed Respondent to help Complainant accomplish that task. At the conclusion of the hearing, I confirmed that I believed that discovery on this tangential issue was over, and moreover, advised Complainant that the information sought had already been admitted by Respondent. Nevertheless, I provided Complainant with the opportunity to present the testimony of the individual. Complainant advised that he would not be able to contact the individual because "he's an

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<sup>6</sup> The DAC report was described as a form by trucking companies to track drivers' records. The report is sent to, and the information is maintained by, a private entity.

over the road driver and he doesn't have time to participate in anything." TTR at 140. As the individual is not now employed by Respondent, I could not coerce or otherwise mandate his testimony.

I excluded from the record evidence in the form of admissions proffered by Respondent for the purpose of establishing that Complainant has developed a pattern of accusations by Mr. Israel filed in other forum regarding other claims. TTR at 59.

I concluded upon receipt of the TTR that an additional Order regarding submission of evidence was not necessary, as I had specifically provided timeframes for the submission of evidence and written closing arguments. Both Respondent and Complainant submitted a DAC report, which is identified as REX 1 and is hereby admitted to the record. In addition, Complainant submitted additional documentary evidence. Respondent objected to some of the evidence by motion filed January 20, 2009. I hereby overrule Respondent's objection to the admission of a Safe Track Road Training Form provided by Complainant, dated March 25, 2005. Although Complainant did not propose admitting this document post hearing, I find no prejudice to Respondent, as the document corroborates uncontested testimony adduced at the telephone hearing. Similarly, I find the copy of Complainant's telephone logs is potentially relevant, since Respondent's case largely rests upon its assertion that Complainant failed to honor the requests of his supervisors for communication. I identify these documents as RCX 1 and 2 respectively, and hereby admit them to the record. I also admit to the record the correspondence dated June 22, 2005, which questions Complainant's eligibility for unemployment benefits. I have identified this document as RCX 3. I admit to the record over objection the correspondence dated October 3, 2005, regarding a fraud audit, and I infer from the names of the correspondents that it relates to the earlier correspondence regarding Complainant's unemployment compensation. That document is identified as RCX 4. Documents relating to Complainant's workers' compensation claim are identified as RCX 5 and admitted to the record.

I sustain Respondent's objection to Complainant's numbering of proffered evidence, wherein he continued a sequence of numbering established at the initial proceeding in this matter. Although Complainant's numbering is technically correct (I note Complainant's acknowledgement that the findings in my initial D&O were not overturned by the Board), I nevertheless find administrative convenience is served by segregating the evidence offered at the initial and supplemental hearings. I note Respondent's objection to Complainant's arguments that were not related to his motion, and I relieve Respondent of responsibility for addressing each argument in a response to the motion. I accord some latitude to Complainant because of his pro se status, and have considered all of his pleadings and arguments, regardless of form.

Both parties filed post-hearing written closing arguments on February 27, 2009. In addition, I have considered the various arguments made by the parties in motions and pre-hearing statements.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The evidence summarized in the ALJD&O is adopted herein and included by reference in this D&O on remand. In addition, the following evidence was adduced at the hearing and submitted by the parties.

### 1. Testimony

#### **Joshua Israel**

Complainant testified that he was terminated by Respondent in response to his involvement in proceedings before OALJ on the denial of his complaint with OSHA. TTR at 67-80. Complainant alleged that his participation in the proceedings constituted an additional protected activity under the Act.<sup>7</sup> Complainant testified that he was terminated a short time after Respondent was served with pleadings involving the evidentiary hearing, and asserted that the temporal connection between the events demonstrates that Respondent's stated reasons for his termination were pretextual. TTR. at 80. Complainant understood that Respondent had stated that he was discharged for failing to communicate with company representatives and for not returning tractor keys to the company. Id. Complainant asserted that he received no formal prior notice to communicate with the company or return the keys. He testified that he tried to communicate with the company, but could never reach anyone, and only had a number for a fax. TTR. at 80-81. Complainant testified that he did not receive a letter that a case manager recommended be sent to him. TTR at 81. He believed that Respondent's failure to send the letter was not consistent with Respondent's employee policy, and testified as follows:

WITNESS: So, any effort that I have to find out what they were wanting could not be made. They never sent me a written letter what I was directed to.

JUDGE BULLARD: What do you mean by that?

WITNESS: This case manager, Karen Belowski (ph) or whatever her name is, she told them to send a three day letter to me, but they never sent me the letter.

JUDGE BULLARD: What is your understanding of a three day letter?

WITNESS: Well, they have to send a three day letter because it's their words.

JUDGE BULLARD: How significant is that to you?

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<sup>7</sup> Extensive colloquy was held with Complainant regarding this issue, regarding whether it constituted a new allegation. The parties agreed to address the issue, which is a legal argument, and does not stem from different factual underpinnings than are the subject of the instant inquiry.

WITNESS: They were supposed to demonstrate that they gave me notice of what they wanted. They never gave me notice of what they wanted. They just up and terminated my employment. Therefore, day after protected activity, it can be heard that they retaliated against me for protected activity because they gave me no prior warnings, no prior notice, no prior indications that is what they wanted.

JUDGE BULLARD: I'm sorry, what is what they wanted?

WITNESS: To communicate with them in what way, some how, whatever and to return the keys to the truck.

JUDGE BULLARD: You were aware that--- you just said that you tried to call someone. So you were aware they wanted to communicate with you.

WITNESS: When they called me and I tried to return the call, I could not contact them.

TTR at 81-82.

Complainant testified that he believed that he had communicated with his supervisors by sending his driver's logs to them. TTR at 93-94. He testified that he had only one conversation with his supervisors, Mr. Jefferson and Ms. Collar, after refusing to load and did not speak to his supervisors before his eventual discharge. TTR at 91. Complainant believed that Ms. Collar deceived him by not telling him that Mr. Jefferson was operations manager. Complainant explained:

WITNESS: Well, okay. I did not--- Kimani Jefferson, when he talked to me on the phone that day, he did not tell me he was my operations manager. He did not tell me that he was Becky Collar's supervisor.

JUDGE BULLARD: Okay, how is that significant?

WITNESS: Well, how do I know who to communicate with when I am trying to communicate with Bruce Wilkinson because I think he's the person I should communicate with when he's not the person to communicate with. I don't know who is.

JUDGE BULLARD: Why wasn't Becky Collar enough to communicate with? Wasn't she your immediate supervisor at this point?

WITNESS: She was deceiving me also because she did not tell me these things anyway.

JUDGE BULLARD: Wasn't she your immediate supervisor?

WITNESS: Yes, she was the first one I made contact with, yes, but I'm off duty now and I'm supposed to be under workers' compensation jurisdiction. I was to communicate with her when I'm on duty. She referred me to Rachel Wanda.

JUDGE BULLARD: Okay.

WITNESS: -- and workers' comp. So, at this point, I'm under the jurisdiction of the workers' compensation adjuster.

JUDGE BULLARD: Would the workers' compensation adjuster be able to talk to you about getting their truck back?

WITNESS: Well, I don't think so, but the workers' compensation adjuster has got to complete the process. Okay, these are things that I don't really know exactly how they operate because they did not tell me.

TTR at 92-93.

Complainant alleged that Respondent also discriminated against him by requiring him to load and unload trucks despite their awareness of his back injury. TTR at 89. Complainant asserted that his work assignments were changed, and that he had not been required to load or unload trucks before May. TTR at 90. When Complainant refused to load and unload his truck, Respondent sent him to see a doctor. TTR at 91. Complainant asserted that he was qualified to drive his truck, and had passed a road test that demonstrated his driving ability. TTR at 94-95. He believed that Respondent did not have a good reason to take him off the road, because he was able to drive despite his back problems, although he could not load or unload a truck. TTR at 96. Complainant acknowledged that loading and unloading were duties that were included in his job description. TTR at 97. He believed that Respondent could have made a reasonable accommodation for his back injury and reassigned him to other work. Id.

Complainant denied that his suspension and eventual termination stemmed from his inability to perform his duties due to his back impairment, but related Respondent's actions to his safety complaints. TTR at 98. Complainant acknowledged that he made his first safety complaint in January, and was given work assignments that did not involve loading and unloading in the months of January, February and March. TTR at 99. Complainant stated that he sent a complaint to Human Resources in May, complaining about the company's discrimination against him for making safety complaints and he believed that Respondent's actions were retaliation for that complaint. TTR at 99-100.

Complainant testified that he believed that Respondent discriminated against him by refusing to accommodate his impairment by assigning him hauls that did not involve loading or unloading. TTR at 142. Complainant pointed to another employee with an impairment that he believed was accommodated by being assigned jobs that did not involve loading and unloading. Complainant pointed out that during his first few months of employment, his jobs did not involve loading, and then, after he made complaints, he was assigned jobs that involved loading and unloading.

Complainant acknowledged filing a claim for unemployment benefits in June, 2005, despite his belief that he still worked for Schneider. TTR at 146. Complainant testified that he "told them that I was on a non-work injury leave or something like that. Let me get a hold of that now that you're asking me that. I told them that they had filed a false statement against me. That's one thing I told them. I told them I was not receiving workers' compensation benefits..." TTR at 147. Complainant again reiterated that he told the Unemployment Office that "I was on a non-work injury leave". TTR at 147.

Complainant acknowledged that on June 22, 2005, Mr. Jefferson requested information from his doctor, which Complainant later forwarded to him by fax. TTR at 148. Complainant disagreed that Mr. Jefferson had told him that Respondent wanted to decommission and reassign the truck, and stated that Ms. Collar had discussed that plan. TTR at 149. Complainant could not explain why the company asked for medical information on June 22, 2005 if they did not intend to keep him on as a driver, and he explained that he filed for unemployment benefits on June 24, 2005 because he had no money. TTR at 149-151. Complainant was convinced that he would not be assigned jobs because he asked Ms. Collar if he could return to work and perform it as he had previously, without loading and unloading. TTR at 151. Complainant admitted that he did not have a conversation with Mr. Jefferson or Ms. Collar after faxing the doctor's report that restricted his ability to lift and carry. TTR at 153-154. He testified that he could not make contact with them. *Id.* Complainant started to collect unemployment benefits in July, 2005.

### **Rebecca Collar**

Ms. Collar was Complainant's supervisor, and she testified that she had discussions with Complainant in which she directed him to clean out his tractor and return the keys. TTR at 101. She recalled that Complainant expressed concerns about his employment, but her focus during the conversation was returning the truck to service. Ms. Collar and Mr. Jefferson both tried to contact Complainant by telephone, but without success. *Id.* She left messages asking him to call, and left a contact number. TTR at 102. Ms. Collar explained that she wanted the truck keys

returned, but she did not get them. Eventually, a letter terminating Complainant's employment was sent on August 16, 2005. TTR at 101. Ms. Collar believed that she had told Complainant who his team operations manager was during telephone conversations. TTR at 106. Ms. Collar could not recall how many conversations she had with Complainant, but she said that she expected him to call her "on a daily basis". TTR at 107. She recalled that she advised Complainant that Mr. Jefferson was on the line during the conversation regarding cleaning the truck and returning the keys. TTR at 108. As his team leader, Ms. Collar expected to hear from Complainant even when he was in non-working status. TTR at 109-100.

Ms. Collar stated that not every expectation for employee performance is in writing, and she explained that she communicates expectations through conversation and through a business partnership established with her teams. TTR at 111. She testified about her role in Complainant's employment discharge, saying that she provided Mr. Jefferson with information about his failure to communicate with her and failure to return keys. TTR at 112. She denied that there is a company rule requiring written documentation of conversations regarding employment conversations. TTR at 115. Ms. Collar also stated that there is no written company policy requiring employees to contact supervisors while out of work on medical leave. TTR at 117. However, Ms. Collar testified that she communicated her expectation that Complainant keep in contact with her to him during phone conversations and in telephone messages she left for him. *Id.* Ms. Collar observed that the termination letter sent to Complainant on August 16, 2005 referred to attempts made to contact Complainant.

Ms. Collar disagreed with Complainant's testimony regarding the June 22, 2005 telephone conversation, and stated that she specifically advised Complainant that he was still employed with Respondent, but that the truck needed to be returned to service so that the company would not lose money.

### **Kimani Jefferson**

Mr. Jefferson recalled that Complainant was directed in a telephone conversation to clear the tractor assigned to him of his personal items and return the keys. TTR at 119. Mr. Jefferson recalled trying to contact Complainant after receiving only a fax cover sheet, instead of a letter advising of Complainant's expected return to work. TTR at 120. Mr. Jefferson stated that he called and left a message for him, but Complainant did not respond, other than sending the complete fax. *Id.*

Mr. Jefferson signed the termination letter based on Complainant's lack of communication and failure to return the key. TTR at 120. Mr. Jefferson denied that Complainant was discharged for any other reason. *Id.* Mr. Jefferson never met Complainant in person, but spoke with him on the phone. TTR at 121. Mr. Jefferson was not fully aware of the nature of Complainant's injury, and he stated that accommodations for injuries were handled in conjunction with Respondent's workers' compensation department. *Id.* He recalled speaking with Complainant on June 22, 2005, at which time Complainant advised him that he could drive. Mr. Jefferson described the conversation as follows:

WITNESS: The conversation on June 22<sup>nd</sup> regarding actually there was no decision made to take the truck back because he was supposed to have a doctor's appointment two days later. So, I made the decision that we would not take the truck off of him and make it a loaner because it was possible that just in two days, he would be allowed to work again. So, we were going to wait.

JUDGE BULLARD: And was the document about that doctor's visit that you only got the cover sheet for?

WITNESS: Well, actually, I got the document two days later and he said he needed to go to the doctor again.

JUDGE BULLARD: Oh, okay.

WITNESS: And there was another appointment set up and so we even waited longer to take the truck off of him.

TTR at 122-123.

Mr. Jefferson testified that he has accommodated injuries reported by employees upon their request. TTR at 125. He did not recall that Complainant made a specific request for an accommodation during his conversation with him on June 22, 2005. He testified:

WITNESS: I don't recall whether he asked specifically for an accommodation. What I do recall is without any documentation in front of me or anyone else, it's difficult to determine what an accommodation is. That was the purpose of waiting the two days to get information.

JUDGE BULLARD: And did you have any further discussions with Mr. Israel to discuss the potential accommodation?

WITNESS: No, I did not have the opportunity to because Mr. Israel would not let me help him by not communicating.

MR. ISRAEL: Your Honor, it is specifically in the record that I did tell Kimani Jefferson that I could return to my duties and performed them the way that I had done them in the last three months.

JUDGE BULLARD: I heard that. Mr. Jefferson, when you make an accommodation upon the request of the injured individual, what does that accommodation look like?

WITNESS: If and again, it depends on the documentation, but if the documentation states they are able to drive the truck, however, there's a limit to the amount that they can pick up, then we may not put them on hand load and hand unload loads.

JUDGE BULLARD: And what does that documentation consist of? Would it be the statement of the employee alone?

WITNESS: It would be from a physician. It wouldn't just be the employee saying, "I can't pick up 50 pounds". We would have to get something from a physician that says they can't pick up 50 pounds because what if the employee miscalculated and it's actually less than that, 25 pounds versus 50? Then we put them in a situation where we can get in trouble.

JUDGE BULLARD: All right. I know that neither of the parties can [ask] the question, but Mr. Jefferson, had you received information from Mr. Israel's doctor that limited him to lifting and loading and unloading, would you have considered assigning him jobs that did not involve that?

WITNESS: I would have approached it by comparing it to the essential functions of the job and we would have made a decision based on that. Your Honor, I'm just going to say, had there been more communication, it's very possible that Mr. Israel would not

have been terminated and I don't even look at it as a termination. He pretty much resigned by not communicating.

TTR at 125-127.

Mr. Jefferson explained that it was important to get the tractor keys back because the tractor is a big investment that deprives Respondent of revenue when not in service. TTR at 127. He testified that although he could have reassigned the truck without Complainant's copy of the keys, it was a matter of quality control and company policy to account for all keys to an asset as valuable as a tractor. TTR at 128.

Mr. Jefferson recalled that Karen Belowski recommended that the company send a "three day letter", but he decided not to send one because Respondent's attempts to communicate with Complainant had been ignored. TTR at 129. Mr. Jefferson stated that there is no formal policy regarding sending a three day letter, and he explained that when she made her recommendation, Ms. Belowski was unaware of the many attempts that had been made to contact Complainant. Id.

Mr. Jefferson acknowledged that he did not request the keys to the truck during his conversation with Complainant on June 22, 2005, because he was waiting to get information from Complainant's doctor. TTR at 130. He left phone messages later requesting that the keys be returned, and asking Complainant to contact him. TTR at 131. Mr. Jefferson testified that his messages included two contact numbers, one of which was a fax number. TTR at 132. He did not recall whether the number he called had a voice message identifying the number as Complainant's, but he believed that he used a phone number provided by Complainant. Id. Mr. Jefferson could not recall the exact date on which he left a message to Complainant requesting the return of keys. TTR at 136. He was certain that both he and Complainant's supervisor Becky Collar made that request, and that he personally left two messages regarding the keys. TTR at 136-137.

At the time he left his messages, Mr. Jefferson was not aware that Complainant had filed a complaint with OSHA or had requested a hearing before OALJ. TTR at 133. Mr. Jefferson was aware that his workers' compensation claim had been denied by Respondent, but he played no role in that decision. Id. Mr. Jefferson believed that he first became aware of Complainant's complaints about his instructor and equipment was during his phone conversation with Complainant on June 22, 2005. TTR at 133-134. Mr. Jefferson was not aware in June, 2005 that Complainant had filed for unemployment benefits, and he doubted that he would have been, since Complainant's employment had not been terminated at that time. TTR at 138. Mr. Jefferson was not aware of a situation where an employee would file for unemployment benefits while still employed by Respondent. TTR at 139.

## 2. Documentary Evidence

All of the documentary evidence that was considered in my previous D&O is hereby admitted by reference.

The following additional new evidence is admitted to the record:

**Safe Track Road Training Form (RCX 1)**

A form dated March 25, 2005, identifies Complainant as having successfully demonstrated his driving skills.

**Complainant's July 2005 telephone records (RCX 2)**

**Correspondence from ADP dated June 22, 2005 (RCX 3)**

**Correspondence from ADP dated October 3, 2005 (RCX 4)**

**Complainant's workers' compensation benefits documents (RCX 5)**

**DAC (Drive A Check) Report (REX 1)**

Copy of an employment record originally received by DAC on September 1, 2005.

3. Discussion and Analysis

**Protected Activity**

In my initial decision, I concluded that Complainant engaged in protected activity under the Act when he reported concerns about the conduct of his training instructor and about the condition of equipment. Respondent acknowledged its awareness of Complainant's protected activity. Those findings remain intact.

In the instant supplemental proceeding, Complainant has argued that his filing of a complaint with OSHA and participation in proceedings before OALJ constituted separate protected activities which were not fully addressed at the initial hearing. Complainant maintained that this activity would have been the basis for a second complaint before OSHA, which would have asserted that his discharge from employment was due to these protected activities. Complainant also maintained that he was targeted for adverse action because he sent a complaint to Respondent's Human Resources Department in May, in which he complained that he was retaliated against for making safety complaints.

I find that the record demonstrates that Complainant engaged in protected activity by filing his complaint with OSHA on June 4, 2005, and by requesting a hearing before OALJ on July 28, 2005. I further find that Complainant's complaints to Human Resources constitute protected activity. Internal safety complaints are protected under the Act. See, Davis v. H.R. Hill, Inc., 86 -STA-18 (Sec'y March 18, 1987) slip. Op. at 3-4; Reed v. National Minerals Corp., 91-STA-34 (Sec'y July 24, 2005).

## **Adverse Action**

Under the STAA, discrimination “regarding pay, terms or privileges of employment” constitutes a prohibited adverse action. Section 31106(a)(1)(A). It has been determined that an adverse action occurs when complainant has shown that he suffered a “tangible job consequence”. Shelton v. Oak Ridge Nat’l Labs, ARB No. 980100, ALJ No. 980CAA-19, slip op. at 8. (ARB March. 30, 2001), citing Oest v. Illinois Dep’t of Corrections, 240 F.3d605, 612-613 (7<sup>th</sup> Cir. 2001).

In my initial D&O, I found, for the reasons stated therein, that the evidence failed to establish that Complainant was subjected to harassment and reprisal because of his protected activity. I found no support for Complainant’s allegations that Respondent changed pick up sites, assigned poorly maintained equipment, failed to accommodate his personal schedule, or interfered with his time at home. I found that the evidence demonstrated that Respondent attempted to resolve Complainant’s concerns, and attempted to assign him more remunerative loads. No additional evidence has been presented in this supplemental proceeding to countermand the findings that I set forth in my initial Decision and Order.

In the supplemental proceedings, Complainant appears to allege that Respondent’s failure to provide him with advance notice of his termination constitutes a separate adverse action, as Complainant argued that he believed he was entitled to such notice. Complainant pointed to evidence that a human resource employee of Respondent recommended that he be sent a “three day letter”. I accord probative weight to Mr. Jefferson’s testimony at the telephone hearing that he was not required to act upon Ms. Belowski’s recommendations. I find it reasonable that Mr. Jefferson rejected the recommendation, and I credit his testimony that Ms. Belowski was unaware of management’s attempts to communicate with Complainant at the time she made her recommendation. The evidence does not show that company policy established a progressive discipline program, or any other policy that required prior notice of termination. There is no evidence of a management-labor agreement establishing such a policy, and Complainant admitted that his employee handbook was silent regarding such a policy. Complainant has failed to establish how Respondent’s rejection of a personnel recommendation constitutes an adverse action.

I decline to find that Respondent’s inquiry into Complainant’s unemployment claim constitutes an adverse action. As reflected in the correspondence, Complainant was collecting workers’ compensation benefits at the time, and therefore, I find an objection to an award of dual benefits does not constitute an adverse action. RCX 3. I reject Complainant’s argument that the inquiry into potential fraud contradicts Mr. Jefferson’s testimony that he was unaware of when Complainant filed a claim for unemployment compensation. There is nothing in the documents to suggest that Mr. Jefferson authored them or was involved in their generation. RCX 3; RCX 4. In fact, the documents bear the letterhead of a company that acted as agent for Respondent, as inferred from the substance of the correspondence. Complainant offers no evidence to support his conjecture that only Mr. Jefferson had sufficient information regarding this issue. In fact, Complainant’s own contradictory conduct and testimony regarding his applications for benefits supports a finding that Respondent’s inquiry into his application for unemployment benefits was a legitimate and rational business decision. As noted, Complainant had filed for workers’

compensation benefits, which were awarded at some point. The correspondence responds to an earlier inquiry by Respondent's agent, which corroborates Complainant's testimony that he had applied for unemployment benefits without any evidence of termination of his employment. Both Jefferson and Collar have credibly testified that on June 22, 2005, they considered Complainant an employee of Respondent who could not be assigned work until he was medically cleared. Complainant testified that when he filed the unemployment claim, he advised that he was out of work on a non-work related injury, but the application itself reflects that Complainant wrote that he is not unemployed.

Complainant suggests that Respondent's completion of a DAC report (RCX 1) constitutes an adverse action. Complainant argues that Respondent provided false information that affects Complainant's future employment prospects. Complainant maintains that Respondent falsely claimed that he violated company policy. I continue to accord full credibility to the testimony of Jefferson and Collar that they expected Complainant to communicate with management, and his failure to do so violated company policy. However, Complainant fails to establish how the reporting of that valid information affected his potential for employment. The report reflects that Complainant's employment with Respondent ended because he "resigned/quit or driver terminated lease", and not because of any violation of company policy. In addition, the report reflects that 0 accidents and no accident/incident information were recorded. I disagree with Complainant's characterization of the language of the DAC report that states "was involved in an occurrence or act that produced unintended injury, death and property damage". What Complainant perceived as a report of an accident/incident is actually a description of what sort of accident/incident should be reported on the DAC report. I find that the DAC report does not represent an adverse action. I note that the report was originally made in September, 2005.

In my initial D&O, I found that Complainant's termination from employment constitutes an adverse action under the Act. It is axiomatic that the loss of employment constitutes a tangible job consequence, and therefore, an adverse action.

In the instant supplemental proceedings, Complainant has alleged that he was additionally subjected to adverse action when Respondent failed to accommodate his impairment. Although I addressed this allegation in my initial D&O, additional evidence and claims by Complainant warrant further discussion. The record clearly demonstrates that Complainant sustained an injury to his back. The record also demonstrates that Respondent declined to assign Complainant hauls that did not involve loading and unloading. As Complainant's pay was dependent on how many hauls he completed, the absence of assignments resulted in a loss of remuneration. As I noted in my initial Decision and Order, Respondent's removal of Complainant from assignments of hauls is tantamount to a work suspension, and thus constitutes an adverse action. Moreover, I fully credit the testimony that Complainant was asked to return the keys to his tractor for reassignment, which demonstrates that Respondent did not intend to assign him loads in the tractor he had used. An administrative law judge's credibility findings are due deference unless they are inherently incredible or patently unreasonable. See, Johnson v. Rocket City Drywall, ARB No. 05-131, ALJ No. 2005-STA-24 (ARB Jan. 31, 2007).

Complainant suggested that Respondent's objection to his claim for workers' compensation benefits constituted another adverse action. I agree that the denial of benefits constitutes a tangible consequence of the job in these circumstances, because Complainant was denied benefits, and was also denied work assignments. Consequently, Complainant had no income.

By establishing a *prima facie* case, a complainant creates an inference that the protected activity was the likely reason for the adverse action. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). As I observed in my initial D&O, when a case is fully tried on its merits, the proper inquiry is whether Complainant met his burden of proof of establishing liability. U.S.P.S. Bd. Of Governors v. Aikens, 460 U.S. 711, 713-714 (1983); Roadway Express, Inc. v. Dole, 929 F.2d 1060, 1063 (5<sup>th</sup> Cir. 1991). Although Complainant retains his burden of establishing a *prima facie* case, the practical application of the legal standard serves to suspend inquiry into whether the complainant presented a *prima facie* case. Ciotti v. Sysco Foods of Philadelphia, 97-STA-30 at 5 (ARB July 8, 2003). Accordingly, in the present circumstances, the focus on liability requires an examination of whether Respondent has presented evidence of a nondiscriminatory justification for the adverse employment action and whether that articulated legitimate reason is pretext for discrimination. Moon v. Transport Drivers, Inc., 836 F. 2d 226 (6<sup>th</sup> Cir. 1987); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

#### **Legitimate Business Reason for Adverse Action**

In my initial D&O, I credited Respondent's articulated reason for Complainant's discharge, which was based upon his failure to comply with management's requests for him to communicate with them. I pointed to the corroborated testimony of Ms. Collar and Mr. Jefferson and noted that the duration of Complainant's employment with Respondent was marked, by Complainant's own admission, by his failure to meet Respondent's expectations regarding communication. Despite instructions to make contact by phone, Complainant did not want to use the telephone to communicate, and preferred to use Respondent's satellite communication system, which proved inadequate for relaying all pertinent information. At the supplemental hearing, Mr. Jefferson and Ms. Collar again testified consistently that they had advised Complainant to provide management with updated medical information, and that they had left messages on a telephone purportedly belonging to Complainant.

I fully credited Respondent's contention that Complainant was removed from driving a truck only until he produced evidence of physical fitness from his doctor. The record demonstrates that Respondent's actions complied with its policy regarding injured employees. The record reflects attempts by management to help Complainant get medical attention. The evidence presented at the supplemental hearing did not vary in any substantive way from that presented at the first hearing. I reject Complainant's argument that Respondent shifted its justification for terminating Complainant's employment. Ms. Collar's testimony that she left messages for Complainant to call her is credible. I find that she credibly testified that she had advised Complainant on June 22, 2005, that she considered him to still be employed by Respondent, but that his truck needed to be returned to service if he could not drive due to a medical condition. I find it reasonable that Respondent would not consider a request for accommodation for an injury until medical proof of physical limitations was presented.

I have no doubt that both managers made attempts to contact Complainant. I reject Complainant's contention that Ms. Collar's testimony is undermined because she could not specifically remember when she called Complainant and left messages about the return of the keys.<sup>8</sup> Neither is her testimony undermined by her uncertainty of whether she introduced Mr. Jefferson to Complainant during the telephone conversation of June 22, 2005. I find that the reliability and veracity of her testimony is no way compromised by her failure to document in a written fashion her communications with Mr. Jefferson regarding Complainant. I reject Complainant's contention that Mr. Jefferson offered contradictory testimony about the conversation wherein Complainant was asked to return the truck keys. I find that Mr. Jefferson credibly and reliably testified that he was present and part of the conversation that included Ms. Collar and Complainant, whereat Ms. Collar advised Complainant that he needed to return the keys. The absence of contemporaneous written documentation of his actions and phone calls does not taint Mr. Jefferson's testimony. I accord full credibility to Mr. Jefferson's explanation that he acted in compliance with company policy.

I reject Complainant's argument that he is being held accountable for an ambiguous company policy. It is clear from the most credible evidence that Complainant was instructed by his supervisors to contact them and to return the keys. Whether Complainant was aware of a policy regarding contact with supervisors, and the collection of keys is immaterial in the face of evidence that demonstrates that he failed to follow the instructions of his managers. Although Complainant eventually provided his doctor's report to Mr. Jefferson, I give great weight to Mr. Jefferson's testimony that explained why Complainant was not given light duty jobs. I find that Complainant failed to engage in a dialogue with his managers, and thereby prompted Respondent to conclude that he was not interested in working. When combined with the fact that Mr. Jefferson was aware that Complainant filed for workers' compensation benefits, it is reasonable to conclude that Complainant's failure to communicate with management signified that he was not entirely interested in accepting loads. It is clear from all of Complainant's arguments and his testimony that he believed he was entitled to work assignments that involved only driving, and that he was not a "laborer", despite his job description that clearly called for him to load and unload trucks.

Complainant has admitted that he was aware that he was instructed to communicate with his managers, but he provided several excuses for not doing so. Complainant alleged that he only had a fax number to call, and therefore could not return calls. Complainant then said that he had another number, but it was an "open line" and he could not leave a message. At the supplemental hearing, Complainant contended that he was unable to reach managers because, as he explained to Mr. Jefferson: "Yes, that is what you said and I also said that I tried to call the numbers and one was a fax machine and one was an open line, opened up and I couldn't do anything except listen to noise. So, I didn't..." TTR at 131. Complainant submitted telephone records<sup>9</sup> (RCX 2) in an attempt to demonstrate that he made calls. (I accord little weight to the

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<sup>8</sup> Interestingly, Complainant himself testified that he forgot "exactly what happened when I tried to call [Wilkerson]." TTR at 83.

<sup>9</sup> RCX 2 documents 39 phone calls that were charged to Complainant's telephone account during the period from July 8, 2005 through August 4, 2005. Some of the numbers are duplicated. Complainant did not discuss the possibility of offering those records at the supplemental hearing, and made no reference to those records in his pre-hearing report.

phone records, as there is no evidence of record that establishes which, if any, of the phone numbers belong to Respondent). Complainant testified in a contradictory manner at the first hearing that he called and reached his supervisor's phone, left no messages. TR at 130-131. Complainant's next excuse for not calling his supervisors is that he believed himself to be under the "jurisdiction" of workers' compensation". TTR at 94. Complainant made all communications with an individual in that department, even though he did not know if those communications would be shared with his supervisors. Id. This is consistent with his testimony at the first hearing that he did not talk with any manager during the month of July, 2005. Despite his contention that he wanted his supervisors to assign him lighter work, at the supplemental hearing, Complainant testified that he did not provide his second medical report of July, 2005, to his managers, but rather sent it to Respondent's workers' compensation adjuster. TTR at 85. He acknowledged that he did not share the information with his managers.

The preponderance of the evidence supports the conclusion that Complainant did not communicate with his managers. I further find that Respondent's demand for the return of the keys to an expensive asset is reasonable. Even if another set of keys was available for the truck, I fully credit the explanation that the company wanted all keys accounted for when a truck was in service.

Complainant suggests that Respondent's articulated business reason is not credible because "Kamani never initiated an 'interactive-process' that the employer is responsible after being informed of a physical injury impairment". Post hearing submission of Complainant dated January 5, 2009, at Paragraph 12; Complainant's Brief. Without addressing whether the employer is "responsible" for "initiat[ing] an interactive process" (Id.), I find that the evidence shows that Mr. Jefferson did get involved with Complainant and attempted to address the implications of his injury upon his work assignments. Complainant was urged to seek medical treatment, to consult workers' compensation, and was asked to provide a medical report of his fitness to perform his job.

Complainant further attacks Mr. Jefferson's credibility on the assumption that he consulted legal counsel. I find that the question of whether Mr. Jefferson sought counsel's advice about an employment matter is immaterial to his credibility.

I continue to find that Respondent has met its burden of articulating legitimate business purposes for its adverse actions. Accordingly, Complainant must establish that the stated reason constitutes pretext for discrimination.

### **Pretext**

An employer may discharge an employee who has engaged in protected conduct as long as the employer's decision is not motivated by retaliatory animus and is based upon reasonable grounds. Lockert v. U.S. Dept. of Labor, 867 F.2d 513, 519 (9<sup>th</sup> Cir. 1989). Complainant may demonstrate that Employer's stated reasons for his termination were a pretext for discrimination by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not credible. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). "The fact finder must both believe that Respondent's rationale for its action is not worthy of

credence, and also believe the Complainant's explanation of intentional discrimination." *Id.* See also, Blow v. City of San Antonio, Texas, 236 F. 3d 293, 297 (5<sup>th</sup> Cir. 2001).

Complainant made safety complaints about equipment and training early in his tenure with Respondent, and continued to be assigned work. At the initial hearing in this matter, Complainant had argued that he was subjected to retaliation in one form or another after each of his complaints to management, culminating in the suspension of work assignments and later discharge following his actions with OSHA and OALJ. As I noted in my initial D&O, I found no evidence to support Complainant's contention that changes in schedule, assignments to an onerous haul, refusal to accommodate his personal schedule, or the assignment of poorly maintained equipment constituted harassment of Complainant or retaliation for his protected activity. I accorded weight to Respondent's evidence that established that the problems that Complainant encountered were common to all drivers. I found no evidence that the problems resulted from retaliation rather than unfortunate circumstances. I also credited the evidence that management attempted to resolve problems that Complainant reported. I continue to find no evidence that Complainant was treated disparately after complaining about his supervisor and equipment in January, 2005, or in February when he made an internal complaint, or in March when he wrote to Human Resources. I find that the evidence does not demonstrate that Complainant was deprived of off-duty time in retaliation for complaints. Complainant's contentions are speculative and entitled to little weight.

I find no evidence to link Respondent's objection to Complainant's workers' compensation application with any protected activity. Complainant himself testified that he was directed by his supervisors to consult with workers' compensation about his back injury.

Complainant has also alleged that he was taken off active duty and then discharged because Respondent was aware that he had filed a complaint with OSHA and then participated in proceedings before OALJ, as well as made another internal complaint. In support of his contention, Complainant argued that his removal from duty and subsequent termination occurred contemporaneously with his formal complaint and involvement in the hearing process. It has been held that the temporal proximity between the adverse action and protected activity can allow an inference to be drawn between the events. See, Barry v. Specialty Materials, Inc., ARB No 06-005, ALJ No. 2005-WPC-3 (ARB Nov. 30, 2007). I find that the instant circumstances do not present evidence of temporal nexus. Complainant had made many complaints since the beginning of his employment with Respondent, and continued to be assigned work. Although Complainant points to the temporal relationship of his termination letter of August 16, 2008, and the filing of his Pre-hearing statement in the initial hearing, I find little basis for drawing an inference between those events because Complainant's involvement with OSHA began on June 4, 2005, when he filed his complaint, and new developments occurred with some frequency thereafter: OSHA issued its findings in Respondent's favor on July 20, 2005; Complainant requested a hearing on July 28, 2005; and on August 4, I issued notice of hearing. Clearly, Complainant was involved in the formal complaint process for some time before his employment was terminated.

I further find that there is no need to look for an inference of nexus where the preponderance of the evidence demonstrates that Complainant's change in work status emanated from his back injury and management's response to how that would affect his ability to perform his work. I give little credence to Complainant's contention that he was "locked out" of work due to his protected activity. I accord substantial weight to Mr. Jefferson's testimony that he first became aware of Complainant's safety and training complaints during his phone conversation of June 22, 2005. I credit his testimony that at the time he left his messages for Complainant, Mr. Jefferson was not aware that Complainant had filed complaints with OSHA, or had proceedings pending before OALJ. There is no evidence of record regarding whether Ms. Collar was aware of Complainant's activities before OSHA and OALJ when she consulted with Mr. Jefferson about Complainant's lack of communication.

Complainant alleges that he was retaliated against by being assigned "hard labor", which I construe to mean loading and unloading hauls. Complainant asserts that because he passed a test that demonstrated his driving skills, he would have been able to perform work that was limited to that function. I find that although Complainant's assignments may have changed, loading and unloading were tasks described in his job description. The preponderance of the evidence demonstrates that Complainant had no reasonable expectation to believe that all of his assignments would be limited to driving. In addition, I find that changes in work assignments were related to an internal reorganization within Respondent's management.

Complainant contends that Respondent further discriminated against him by not accommodating his impairment with lighter duty work. Complainant argued that he had hauled loads without loading and unloading them during the first three months of his employment. He contended that he was able to drive despite his back injury, if his work was limited to what he had done in his early days of employment with Respondent. As evidence of discrimination, Complainant testified that he was aware of an individual who had an impairment that Respondent accommodated by not requiring him to load or unload trucks. As I stated at the hearing, Complainant's arguments in this regard are redolent of an action alleging a violation of the Americans with Disabilities Act. As such, that issue is not before me.

In order to address these contentions within the context of the STAA, I found herein, supra., that Respondent's refusal to assign Complainant a lighter load is more easily understood as an additional adverse action. Respondent provided evidence that it followed company policy by not allowing Complainant to drive until a doctor authorized him to do so. Complainant contends that pretext has been established by the fact that another individual with an impairment was permitted to take assignments that did not include loading. I find that Complainant has failed to establish pretext. Although the evidence on this issue is not complete,<sup>10</sup> Respondent admitted that it had accommodated other individuals with impairments by adjusting work assignments. The evidence of record on this issue is sufficient to demonstrate that Complainant suffered a back injury, which the company handled according to its policy, and the other individual lost a foot through amputation. Moreover, the evidence demonstrates that Complainant's supervisor would have considered accommodating his back injury if Complainant

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<sup>10</sup> Complainant did not wish to avail himself of my instruction to Respondent to provide him with contact information for the other individual to whom Complainant referred.

had communicated with him. I find that no pretext has been established by the existence of an individual whose impairment was accommodated.

I reject Complainant's argument that pretext lies in Respondent's refusal to assign him work before he was cleared for all his duties by his physician. Moreover, I find that the preponderance of the evidence establishes that Respondent followed its policy regarding limitations on the duties of injured employees until cleared for work by a doctor. I accord credibility to Mr. Jefferson's testimony that he had asked Complainant to provide a statement from his doctor, which Complainant corroborates by his own testimony. The evidence shows that although directed by his managers to communicate with them, Complainant did not provide his physician's statement of July to anyone but a workers' compensation adjuster.

Complainant's refusal to contact his supervisors to discuss his situation was the motivating factor for his discharge. I accord weight to Mr. Jefferson's testimony that he has considered accommodating the physical limitations of employees if work assignments were available that met those limitations. I note that Mr. Jefferson delayed efforts to secure the keys and truck because Complainant had a doctor's appointment that could have potentially resulted in an evaluation clearing Complainant to return to work. Mr. Jefferson credibly testified that he believed that Complainant resigned his position by failing to communicate with his managers. This statement is corroborated by the DAC report, which reflects that Respondent reported that Complainant's employment terminated because he "resigned/quit or driver terminated lease". REX 1.

In summary, I find that Complainant has failed to establish that Respondent's stated rationale for adverse actions was pretext for discrimination.

#### 4. Damages

Since Complainant has not carried his burden of proof, the issue of damages is not relevant.

### III. CONCLUSION

The Complainant failed to establish that his protected activity contributed to his work suspension and eventual discharge. Complainant did not establish that the adverse actions that he experienced were a pretext for discrimination in retaliation for Complainant's protected activity. Accordingly, I find that Respondent did not violate the employee protection provisions of the Act.

## RECOMMENDED ORDER

The relief sought by JOSHUA J. ISRAEL is DENIED, and it is recommended that the complaint filed herein be dismissed.

A

Janice K. Bullard  
Administrative Law Judge

Cherry Hill, New Jersey

**NOTICE OF REVIEW:** The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquires and correspondence in this matter should be directed to the Board.