U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 10 November 2009

In the Matter of
CARL B. BEDWELL, SR.
Complainant

v. Case Number 2009-STA-00060

SPIRIT MILLER NE, LLC
Respondent

APPEARANCES:
Carl B. Bedwell, Sr.
Pro Se

Carol C. Barnett, Esq.
For the Respondent

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

DISMISSAL OF CLAIM

This case arises from a complaint filed under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 ("the Act" or "STAA"), 49 U.S.C. § 31105, and the implementing regulations promulgated at 29 C.F.R. § 1978. Section 405 of the STAA protects a covered employee from discharge, discipline or discrimination due to the employee's engagement in protected activity pertaining to commercial motor vehicle safety and health matters. This matter is before me on the Complainant's request for a hearing and objection to findings issued on behalf of the Secretary of Labor by the Regional Administrator of the Department of Labor's Occupational Safety and Health Administration ("OSHA") after investigation of the complaint.

Procedural History

Complainant filed a complaint against the Employer with OSHA on March 11, 2009. *See* EX 4. After investigating the matter, OSHA found that the complaint was untimely and that Complainant did not convey his alleged protective activity to the Employer. EX 4 at 1. Accordingly, OSHA dismissed the complaint. *Id.* On July 15, 2009, Complainant objected to OSHA's findings and requested a hearing before the Office of Administrative Law Judges.

On September 22, 2009, a hearing was held in Birmingham, Alabama. *See* September 22, 2009 Transcript ("9/22/09 TR"). During the hearing, I received live testimony from the Complainant and Mr. Kevin Helzer. I also I admitted into evidence Administrative Law Judge

Exhibit ("ALJX") 1 through 2, Complainant's Exhibit ("CX") 1 through 2, and Employer's Exhibit ("EX") 1 through 4. *See* 9/22/09 TR at 34, 36-38, 113, 122, 127. At the conclusion of the hearing, the record was left open for ten (10) days for the parties to submit additional evidence. *Id.* at 80, 82.

On October 2, 2009, Employer submitted Ms. Susan Stanton's deposition transcript. There are four exhibits attached to the transcript, which were referenced during the deposition. The deposition transcript and four exhibits are admitted into evidence and designated EX 5 through 9, respectively.

On October 16, 2009, Complainant filed a Certificate of Liability Insurance to be included as part of his case. On October 29, 2009, Employer filed a motion to strike Complainant's submission for being filed out of time. Complainant's submission is technically untimely; however, I afforded him some procedural relief because he is *pro se*. ***Flener v. H. K. Cupp Inc.***, 90-STA-42 (Oct. 10, 1991). I do not find the Employer to be prejudiced by the inclusion of this exhibit. Therefore, Complainant's post-hearing submission is admitted into evidence and designated CX 3.

Prior to the hearing, on September 9, 2009, the Employer filed a Motion to Dismiss Based on Issue Preclusion. Due to time constraints and difficulty reaching the Complainant, I was unable to have a telephone conference regarding this motion prior to the hearing. At the hearing, I instructed the Complainant to respond to the motion within ten (10) days. *See* 9/22/09 TR at 5-6, 12-13, 124-25, 128-29. On October 1, 2009, I issued an Order to Respond giving Complainant until October 15, 2009 to respond. Complainant filed his response on October 15, 2009. On November 3, 2009, Employer replied to Complainant's response.

Timeliness and Issue Preclusion

Issue preclusion, commonly known as collateral estoppel, refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law litigated and resolved in a valid court determination essential to the prior judgment. ***New Hampshire v. Maine***, 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968, (2001). Under the principles of issue preclusion, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." ***Robinson v. Volkswagenwerk AG***, 56 F.3d 1268, 1272 (10th Cir. 1995) (citing ***Allen v. McCurry***, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980)). "Under the doctrine of collateral estoppel . . . the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." ***Parklane Hosiery Co. v. Shore***, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 649 n. 5, 58 L.Ed.2d 552 (1979).

Four requirements must be met before a finding in a previous action can be collaterally estopped in the instant action: (1) the issue must be identical to that involved in the prior proceeding; (2) the issue must have been litigated; (3) the issue must have been determined by a valid and final judgment; and (4) the determination must have been essential to the judgment. *See* ***Farmland Indus. Inc. v. Morrison Quirk Grain Corp***., 987 F.2d 1335, 1339 (8th Cir.1993).

Employer argues that Complainant should be collaterally estopped from relitigating the issue of timeliness because the matter was fully addressed in his previous STAA complaint, ***Bedwell v. Spirit Millier NE, LLC***, 2009-STA-00029, *aff'd*, ARB No.09-094 (ARB Aug. 27, 2009). Employer argues that "[t]he issue in the instant case, the Complainant's allegation of driver disqualification in 2006 and the untimeliness finding associated with this STAA claim, is

the same allegation that led to the dismissal of the Complainant's September 12, 2008 claim as untimely." Employer's Motion to Dismiss Based on Issue Preclusion ("E. MTDI") at 3. Employer further argues that the issue of timeliness was "fully litigated and served as the basis for final resolution as provided in the Administrative Review Board's Final Decision and Order." *Id.* Employer states that this was a valid and final judgment in which the issue of timeliness was essential. *See id.*

Complainant response did not address the issue of collateral estoppel. *See* Complainant's Response to Employer's Motion to Dismiss ("C. RMTDI"). In his response, Complainant argued that the Employer "negated [his] employment protection rights under the (STAA) by concealing the material fact that they had no valid certificate of authority granted by the Federal Motor Carrier Safety Administration, U.S. Department of Transportation . . . ." *Id.* at 1. Complainant also alleged that the Employer committed identity theft against him. *Id.* at 2.

Employer replied by stating that the Complainant did "not dispute any of the allegations in Respondent's Motion to Dismiss . . . thereby conceding that the previous decision rendered by the Administrative Review Board . . . is an appropriate basis for estoppel, or issue preclusion, in the instant case. Employer Reply to Motion to Dismiss ("E. Rep.MTDI") at 1.

Upon reviewing the arguments, relevant law, and evidence of record, I find that the Complainant may also be barred from arguing the issue of timeliness due to the "law of the case doctrine." This doctrine "is a prudential principle that 'precludes relitigation of the legal issues presented in successive stages of a single case once those issues have been decided.'" ***Field v. Mans***, 157 F. 3d 35, 40 (1st Cir. 1998) (quoting ***Commercial Union Ins. Co. v. Walbrook Ins. Co., Ltd***., 41 F.3d 764, 770 (1st Cir. 1994)). The doctrine requires a lower adjudicatory body to conform its proceedings in a case to the principles set forth in an appellate opinion unless there is compelling reason to depart. *See* ***Law v. Medco Research, Inc***., 113 F.3d 781, 783 (7th Cir. 1997). Essentially, administrative law judges are bound to follow the Board's rulings on questions of law decided in each individual case.

Having been fully advised in the premises, I find that Complainant is barred by the doctrines of collateral estoppel and the law of this case from rearguing the issue of timeliness, which is a jurisdictional question that cannot be bypassed. Like in his prior case, Complainant must prove that his complaint to OSHA was timely.

A complaint under the STAA is timely if it is filed within 180 days of the date of the Employer's alleged adverse action. 29 C.F.R § 1978.102. In ***Bedwell v. Spirit Millier NE, LLC***, 2009-STA-00029, Judge Kaplan determined that the Complainant's OSHA complaint—filed ten months after the Employer's alleged adverse action—was untimely and could not be tolled. *See* ALJX 1. In rendering his decision, Judge Kaplan considered that Employer's alleged adverse action took place on December 31, 2005, and that Complainant complained to OSHA on October 31, 2006. *Id.* These facts remain unchanged in the present case. Judge Kaplan's dismissal for untimeliness was affirmed by the ARB. *See* ALJX 2. Complainant did not appeal the ARB's affirmance. As such, the ARB's decision became final.

I find the issue of timeliness decided by Judge Kaplan, and affirmed by the ARB, to be identical to that presented in this claim. The issue, which was fully litigated, was essential to Judge Kaplan's and the ARB's valid and final judgment. Moreover, I find that the ARB has already determined that Complainant's complaint as to Employer's alleged December 31, 2005 action was untimely. Accordingly, I find that Complainant is barred by the doctrines of issue preclusion and the law of this case from re-litigating whether his claim is timely. *See* ***Sawyers v. Baldwin Union Free School District***, No. 85 TSC 00001, slip op. at 18 (Sec'y Oct. 24, 1994);

Agosto v. Consolidated Edison Co., ARB Nos. 98 007, 98 152, ALJ Nos. 96 ERA 2, 97 ERA 5, slip op. at 6 (ARB July 27, 1999). Based on Judge Kaplan's and the ARB's findings, I am compelled to dismiss this complaint for being untimely.

Assuming *arguendo* that these doctrines did not apply, I note that Complainant has not advanced any argument, or presented any new evidence, to establish that he filed a timely complaint. Accordingly, Complainant's case is dismissed for being untimely. While this case is dismissed based on timeliness, in an abundance of caution, I shall make alternative findings as to the substance of the complaint.

APPLICABLE LAW

The employee protection provisions of the Surface Transportation Assistance Act provide in relevant part:

> (a) Prohibitions:
>
> (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because:
>
> (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding;
>
> (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 [or prospective employee] has a reasonable apprehension of serious injury to the employee [or prospective employee]or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a).

Under the Statute:

> 'employee' means a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who--
>
> > (A) directly affects commercial motor vehicle safety in the course of employment by a commercial motor carrier; and
> >
> > (B) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.
>
> 'employer'--
>
> > (A) means a person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce; but
> >
> > (B) does not include the Government, a State, or a political subdivision of a State.

49 USC § 31101 (2) and (3).

PRIMA FACIE CASE

Claims under the STAA are generally adjudicated pursuant to the standard articulated in ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792 (1973). Under that framework, the

Complainant must initially establish a *prima facie* case of a refusal to hire, which raises an inference that the protected activity was likely the reason for the adverse action. ***Moon v. Transport Drivers, Inc.***, 836 F.2d 226, 229 (6th Cir. 1987); *see also* ***Texas Dep't of Community Affairs v. Burdine***, 450 U.S. 248, 253 (1981). To establish a *prima facie* case under the Act, the Complainant must prove: (1) that he engaged in protected activity under the STAA; (2) that he was the subject of an adverse employment action; and (3) that there was a causal link between his protected activity and the adverse action of the employer. ***Moon***, *supra*.

FACTUAL BACKGROUND

Testimonial Evidence

Complainant's Live Testimony:

Complainant testified that he is a CDL, Class A driver, and his last job was with the Employer. 9/22/09 TR at 21. Complainant stated that he has not worked since he was "disqualified [on] December 31, 2005." *Id.* Complainant alleged that the Employer "assumed the authority of the DOT officer" and disqualified him. *Id.* at 39.

Complainant testified that this is the third proceeding and the third administrative law judge in which he has presented a case against the Employer. *See id.* at 22. Asked what the circumstances of his prior cases were, Complainant responded, "The circumstances was [sic] the Respondent's liability insurance lapsed [on December 1, 2005]. In other words, they changed the insurance carriers. The general liability lapsed. . . . I complained because it forced dispatch for uninsured vehicles. . . . [and then] [t]hey disqualified me." *Id.*

Complainant believes that the Employer, one of his former employers MAMO Transportation, and their safety directors colluded in trying to get rid of him. *Id.* at 26. Complainant explained that he had an accident on January 1, 2004, while working for MAMO Transportation. *Id.* at 23. Complainant believes that MAMO Transportation committed insurance fraud and identity theft in relation to this accident. *See id.* at 23-24. He stated, "The owners [of MAMO and Spirit Miller] got together and the Safety Directors got together and they said, 'Get rid of Bedwell.'" *Id.* at 26. Complainant believes he was blacklisted. *Id.* at 28. Asked how he knew this actually happened, Complainant responded, "Because I know my former employers." *Id.* at 26.

Upon further questioning, Complainant testified that he applied to work for the Employer on August 18, 2005. *Id.* at 30. Complainant claimed that they "disqualified" him in December of 2005. *Id.* Complainant stated that he made around sixty or eighty trips for the Employer. *See id.* Complainant claimed that prior to disqualifying him, on December 1, 2005, Employer's liability insurance lapsed when it changed carriers. *Id.* at 31.

Complainant testified that he first complained to OSHA in May of 2006, when he called their Birmingham office. *Id.* at 32. However, he also filed and EEOC complaint on May 12, 2006. *Id.* Complainant's EEOC compliant was admitted into evidence. *See* CX 1. The complaint stated,

> I began my employment on September 21, 2005 as a CDL truck driver. On January 1, 2006, I was disqualified from my employment with the above referenced employer. I was informed by the dispatcher that there was a lack of work. I believe this is an act in retaliation for me having filed a previous charge against another truck company.

Id. at 34.

Complainant alleged that he lost "somewhere in the neighborhood of forty thousand dollars ($40,000)" as a result of the Employer's actions. *Id.* at 38.

On cross-examination, Complainant was handed a copy of his employment agreement with the Employer. *See id.* at 49-50. Complainant testified that the document he was presented was not a true and accurate copy of his employment agreement with the Employer. *Id.* at 50. He stated that his signatures were fraudulently transferred onto the document. *Id.* at 50-51. He also stated that the document he signed was only three pages and the document presented at the hearing is eleven pages. *Id.*

Complainant denied being employed as an independent contractor for the Employer as of September of 2005. *Id.* at 53. Complainant acknowledged that he worked for the Employer, but stated that it was not in accordance with the agreement presented to him at the hearing. *Id.* at 53-54. Complainant stated that he is currently a "disqualified employee" of Spirit-Miller Northeast, not an independent contractor. *See id.* at 56, 59, 61. However, he acknowledged that he did not perform "any services of any value [for] Spirit Miller in either calendar years 2007, 2008 or 2009." *Id.* at 63.

On redirect, Complainant stated that there were discrepancies with his IRS 1099 forms. *Id.* at 68. He stated that he should have received a W-2 form, because he was hired as an employee and not an independent contractor. *Id.* He also contended that the amounts reflected in the 1099 were inaccurate. *See id.* at 68-69. Claimant maintained that the amounts of income listed in his 1099s were inflated and that the Employer did not reimburse him for several expenses he incurred during his employment. *See id.* at 69-74. Complainant stated that the Employer agreed to pay expenses such as his cell phone bill and fuel. *See id.* at 70.

Upon further testifying, Complainant stated that he last talked to Ms. Stanton, Employer's divisional manager, in May of 2006. *Id.* at 74. Complainant stated that he asked Ms. Stanton to come to Birmingham to retrieve the company's property and explain why he was being disqualified. *Id.* at 75. Complainant further testified that when he asked Ms. Stanton why he was being "disqualified," she referred him to Mr. Howard Miller, who advised Complainant to get a lawyer. *Id.* at 76.

Asked if he told anybody at the company that they were in violation of any kind of safety rule or any kind of federal rule involving their status, Complainant responded, "It was concealed form [me] . .. I didn't find out till March 9." *Id.* at 77-78. Complainant explained that he did not find out about Employer's safety or federal violations until March 9, 2009, when he received the OIDA records from the Department of Transportation, Federal Motor Car Safety Administrations. *Id.* at 78.

Rebuttal Testimony

Complainant believes the Employer used his request for time off during the winter holidays as an "excuse to cover up the disqualification." 9/22/09 TR at 116. Complainant stated that the Employer is trying to make it look like he quit. *Id.* at 118. Complainant testified that he never voluntarily quit working for the Employer. *Id.* However, he did tell his dispatcher, Mr. Louis Stanton, that he "wasn't going to drive anymore after 12/31 without insurance." *Id.* Complainant stated that he had already worked from December 1 to December 31 without insurance. *Id.*

<u>Mr. Kevin Helzer's Live Testimony:</u>

Mr. Helzer testified that he is an accountant for the Employer. 9/22/09 TR at 85. As an

accountant, Mr. Helzer prepares financial statements, including the drivers' tax returns. *Id.* He acknowledged preparing the two 1099s in evidence designated EX 2 and EX 3.

Asked to explain the nature of Employer's business, Dr. Helzer stated,

> We are drive away truck services. We do not own any trucks or trailers. Our drives do not own trucks or trailers. Our customers are manufacturers of or lessors of specialty built trucks normally, for instance, utility type trucks or railroad trucks. Our customers call us when they have a truck leased and the lessee wants it delivered.
>
> We then—we have a pool of drivers, independent contract drivers, a couple hundred (200) or more, that we start calling. We tell them we have a trip from point A to point B do they want it. As soon as we have a driver that says yes . . . we give him instructions to—they need to pick up the truck. Tell them the dates it has to be delivered by. Then they turn in when the truck is delivered they turn in their paperwork and are paid.

Id. at 86. Mr. Helzer further explained that drivers are paid after turning in paperwork detailing the miles they traveled. *Id.* at 86-87. The paperwork is submitted through PC Miller, which is the Employer's computer system. *Id.* Mr. Helzer explained that the drivers are also required to submit fuel receipts in accordance with the International Fuel Tax Agreement. *Id.*

Mr. Helzer explained that Employer utilizes two methods of compensating its employees. *Id.* An employee can either be paid a higher flat rate or a lower rate based on miles traveled and expenses incurred. *Id.* Employee choosing the higher flat rate will not be able to claim expenses. *Id.*

During his testimony, Mr. Helzer was handed Complainant's employment contract with the Employer to review. *See id.* at 87. Mr. Helzer stated that, to the best of his knowledge, the document he was handed is a true and accurate representation of the agreement between Complainant and the Employer. *Id.* at 88. Mr. Helzer stated that he was not aware of Complainant's allegations that the agreement was doctored. *Id.* Mr. Helzer testified that the document is a standard form agreement used for Employer's independent contractors. *Id.*

Mr. Helzer stated that, to the best of his knowledge, Complainant became an independent contractor for the Employer on or about September 2, 2005. *Id.* Mr. Helzer stated that there were no other agreements between the Complainant and the Employer. *Id.* at 89.

According to Mr. Helzer, Complainant performed services for the Employer in 2005. *Id.* Mr. Helzer explained that the Employer hires drivers on a yearly basis. *See id.* at 97. Drivers can accept as much as like during that year. *Id.* At the end of the year the drivers are sent renewal agreements. *Id.* Mr. Helzer was not aware of any record indicating that the Complainant renewed his contract. *Id.* at 97-98. Mr. Helzer explained that he is normally aware of whether an employee renewed his or her contract. *Id.* at 98. To the best of his knowledge, Complainant was no longer an independent contractor for the Employer as of January 13, 2006. *Id.* at 99. Moreover, he was no longer utilized by the Employer after the Christmas holidays in December of 2005. *Id.*

Mr. Helzer identified EX 3 as Complainant's 2005 IRS1099 form and the Employer's cash disbursement journal for the Complainant. *Id.* at 90. He explained that the 1099 and the Employer's journal indicates that Complainant had gross earnings of $12,954.89 between September 3, 2005 and December 28, 2005. *Id.* at 91.

Mr. Helzer identified EX 2 as Complainant's 2006 IRS 1099 form. *Id.* at 94. Mr. Helzer stated that the income reported on this form was for the services Complainant performed in 2005.

Id. at 94. He explained that it was reported in 2006, because Complainant was paid for these services performed in 2005 after the New Year, in 2006. *See id.* Mr. Helzer testified that Complainant was not issued any other 1099s by the Employer. *Id.*

Upon further questioning, Mr. Helzer testified that the Employer has always been insured for accidents and has never allowed their insurance to lapse. *Id.* at 92. Mr. Helzer does not personally issue the Employer's insurance payments, but he supervises clerks who are responsible for making these payments. *Id.* Mr. Helzer stated that he ultimately makes sure they are issued. *Id.*

Mr. Helzer testified that Complainant was utilized by the Employer as an independent contractor. *Id.* at 95. He further testified that his understanding is that Complainant requested not to assigned work around Christmas of 2005, so that he could spend time with his family. *Id.* at 96.

Mr. Helzer stated that he did not receive any complaints from Complainant regarding safety or insurance issues until 2006, when Complainant filed his EEOC complaint. *Id.* at 96-97. Mr. Helzer stated that he was not aware of MAMO Transportation until he heard Complainant testify. *Id.* at 98. He is not aware of any connection between MAMO Transportation and the Employer. *Id.*

Mr. Helzer testified that, to the best of his knowledge, no one in his company blackballed the Complainant. *Id.* at 100. He is not aware of anyone in the company circulating negative information about the Complainant. *Id.* He is also not aware of any prospective employers contacting the Employer regarding Complainant's employment history. *Id.* at 111.

<u>Ms. Susan Stanton's Deposition Testimony:</u>

Ms. Stanton testified that she works as the Employer's divisional manager. EX 5 at 7-8. She has been working for the Employer for about nine years. *Id.* at 8. She explained that the Employer is a drive-away trucking business. Asked to describe how the business operates, Ms. Stanton responded,

> . . . the customer will call and say I have a truck at point A going to point B. We then looked to see if we have a driver in the area. If we do not, we will put one in that area, whether it be plane, car, bus, and like I say the driver then gets into the truck and takes it to the driver's location, point B, and then the driver then will call in and find out what his or her next assignment may be if there are any. . . .

Id. at 21. Ms. Stanton stated that it is up to the individual drivers to determine whether they want to accept an assignment. *Id.* at 22.

Ms. Stanton stated that she first knew of Complainant's affiliation with the Employer in August of 2005. *Id.* at 9. On August 13, 2005, she reviewed a handwritten letter[1] addressed from the Complainant to the Employer. *Id.* at 9-11. Ms. Stanton acknowledged that Complainant made several complaints in the letter about his former employer, Mamo Transportation Company, not complying with federal motor carrier safety regulations. *Id.* at 11. She also acknowledged that Complainant mentioned an accident which occurred while working for Mamo Transportation. *Id.* at 15-16. Ms. Stanton confirmed that she reviewed this letter before hiring Complainant and did not find it to be particularly concerning. *Id.* at 12.

Ms. Stanton was next asked about the Employer's employment application process. *See id.* at 13. Ms. Stanton responded,

> We send the independent contract agreement through the mail or through the fax.

[1] The letter was admitted into evidence as EX 6.

> They get them. They read it over. Decide whether or not to become an independent contractor with us. If they do decide to become an independent contractor, they fill it out. And then they send it back and it's their choice. They can send back the whole contract or they can send back just where they had to if I am out and sign.

Id. at 13. Ms. Stanton testified that the employment contract sent out to potential drivers is twelve pages. *Id.* at 14. She confirmed that the Complainant signed the eighth page of this contract. *Id.* Ms. Stanton further testified that the Employer kept a copy of this contract in Complainant's file as part of its regular course of business. *Id.* at 15.

Presented with EX 7, Ms. Stanton described it as a letter from the Employer, written by Richard Stadler, to the Complainant. *Id.* at 17. According to Ms. Stanton, Mr. Stadler is the Employer's safety manager. *Id.* at 18. Ms. Stanton confirmed that the letter is Mr. Stadler's response to Complainant's questions concerning Mamo Transportation's response to a safety performance history inquiry. *Id.* Ms. Stanton explained that Mr. Stadler was assisting Complainant in his dispute with Mamo Transportation. *Id.* at 19. She confirmed that Complainant was utilized by the Employer as an independent contractor after receiving this letter and while Mr. Stadler assisted him with his inquiries about Mamo Transportation. *Id.*

Responding to general questions about Employer's business, Ms. Stanton stated that delivering the trucks in a courteous and timely manner is important. *Id.* at 22. She stated, "That's what keeps us in business." *Id.* According to Ms. Stanton, Complainant had some issues making timely deliveries. *See id.* Ms. Stanton described two occasions when Complainant missed a deadline and the customer complained. *See id.* at 24-26. The first incident took place in early fall and the second incident took place in December of 2005. *Id.* at 27. Ms. Stanton described a phone conversation she had with the Complainant after the first incident. She stated,

> The conversation was that I explained to him the first time that the customer had personally spoken with me. That the truck was delivered late. He said he did the best he could do. And that was that.

Id. at 25. Ms. Stanton stated that the second time she spoke to the Complainant "he gave [her] the impression that that's just too bad . . . I picked the truck up. It's delivered. Can't help that it's late." *Id.* at 26. Ms. Stanton explained that Complainant's responses gave her pause, because if Complainant felt that later deliveries were not a big concern, he would not represent the company well. *See id.*

Despite his late deliveries, Ms Stanton testified that Complainant still received assignments in 2005. *Id.* at 27. She stated that they were giving him the benefit of the doubt. *Id.* Ms. Stanton stated that Claimant continued to work on assignments through December of 2005. *Id.* at 27-28. According to Ms. Stanton, they were not able to assign Complainant any jobs in January of 2006. *Id.* She explained that the Employer's business typically declines after the Christmas holidays. *See id.* Ms. Stanton also stated that Complainant indicated that he would be going to Maryland to spend approximately two weeks with his family after he finished his delivery on December 30, 2005. *Id.* at 28-29. Ms. Stanton testified that Employer provided Claimant with a company car in Massachusetts after he finished his delivery, so that he could drive to Maryland to see his family. *See id.* at 29. The trips to Massachusetts were the last Complainant made for the Employer. *Id.* at 34.

According to Ms. Stanton, Complainant called the Employer after he returned home, in January of 2006, asking for new assignments. *Id.* at 34-35. Ms. Stanton explained that, typically, drivers call at least once a day inquiring about available assignments. *Id.* at 35. Ms.

Stanton stated that there were some assignments available when Complainant called, but they were given to other drivers. *Id.*

Ms. Stanton further testified that at the end of the month in January of 2006, Complainant left a voice mail message expressing that he was upset they were not giving him jobs. *Id.* at 36. According to Ms. Stanton, Complainant "made accusations that the reason [they] had not used him was concerning his past history with Mamo Transportation." *Id.* Ms. Stanton stated that this was not the case. *Id.* She explained,

> From that point he called in, I personally then spoke with him. And explained that at that point in time the work had slowed down. He had asked to, requested two weeks off which we had given him the two weeks. And he said well, I haven't worked for the whole month of January. But it was his request that he did not work the first two weeks of January. The third week there was nothing moving. The fourth weeks when he started leaving the messages at night and at that point I did speak with Carl myself and explained to him that the work had slowed down. We had nothing for him He then said my past history with Mamo is what's causing this. I explained to him that he was wrong. He started to get irate on the phone and I proceeded to hang the phone up.

Id. at 36-37. Ms. Stanton further stated,

> If I have a driver that's disgruntled with me requesting his trips that are there or not there, I can't imagine what a driver would do if a customer was upset because that driver delivered the truck late. How would he or she carry themselves in front of this customer? So at that point that's when I hung up the phone and said, Mr. Bedwell, we're done.

Id. at 37. Ms. Stanton testified that the reason Complainant stopped receiving jobs after January 2006 was because of his irate behavior and had nothing to do with Mamo Transportation. *Id.* at 37.

Ms. Stanton was not aware of any workers' compensation or unemployment claims filed by the Complainant against the Employer. *Id.* at 38. She further testified that she has never contacted Mamo Transportation regarding the Complainant. *Id.* at 38-39. She is also not aware of Employer conveying any negative information about the Complainant to other companies. *Id.* at 39.

On cross-examination, Ms. Stanton was not able to answer whether Employer was issued a certificate of authority from the U.S. Department of Transportation. *Id.* at 40-41. Ms. Stanton acknowledged that her position affords her hiring power. *Id.* at 43. She also acknowledged that Mr. Howard L. Miller is the Employer's administrator. *Id.* Ms. Stanton stated that she was not aware of a letter from the Anderson Law Firm about any disqualification issues. *Id.* at 50. Last, Ms. Stanton testified that she usually sends out tags and registration renewals and operating permits within seven days of their expiration. *Id.* at 51.

Administrative Law Judge Exhibits

As noted above, at the hearing, I admitted into evidence the ALJ and ARB decisions from Complainant's prior complaint against the Employer. On December 27, 2006, Judge Kaplan dismissed Complainant's case as untimely. *See* ALJX 1. Judge Kaplan found that Employer's alleged adverse action took place on December 31, 2005, and Complainant did not complain to OSHA until October 31, 2006. *Id.* He found no basis for tolling. *Id.* at 2. The ARB affirmed Judge Kaplan's decision. ALJX 2.

Complainant's Exhibits

Complainant's EEOC Complaint against the Employer (CX 1):

On May 12, 2006, Complainant filed discrimination charges against the Employer with the EEOC. Complainant alleged that Employer "disqualified" him on January 1, 2006. Complainant acknowledged that Employer's dispatcher told him there was a lack of work; however, he believes his disqualification was an act of retaliation for having filed charges against another trucking company. Complainant also alleged age discrimination.

Compilation of Various Pieces of Evidence Submitted by Complainant (CX 2):

This exhibit is comprised of Complainant's Owner-Operator Independent Drivers Association membership card and documentation of Employer's authority and insurance history with the Federal Motor Carrier Safety Administration.

Employer's Certificate of Liability Insurance (CX 3):

The certificate documents Employer's coverage effective December 1, 2005, through December 1, 2006.

Employer's Exhibits

Driver-Away Service Independent Contractor-Driver Agreement (EX 1):

This is an independent contractor agreement entered into between the Complainant and the Employer on September 2, 2005.

Complainant's 2006 IRS Form 1099-MISC (EX 2):

The 1099 form indicates that, in 2006, Employer compensated Complainant $2,384.26.

Complainant's 2005 IRS Form 1099-MISC & Employer's Cash Disbursement Journal (EX 3):

The 1099 form indicates that, in 2005, Employer compensated Complainant $12,954.89. Employer's cash disbursement journal details Employer's payments to Complainant for the services he performed between January 1, 2005 and December 31, 2005.

OSHA's Investigation & Findings (EX 4):

Complainant filed a complaint against the Employer with OSHA on March 11, 2009. After investigating the matter, OSHA found that the complaint was untimely and that Complainant did not convey his alleged protective activity to the Employer. Accordingly, OSHA dismissed the complaint. *Id.*

Ms. Susan Stanton's Deposition Transcript (EX 5):

A summary of Ms. Stanton's testimony is provided above.

Letter from Complainant to Employer dated August 13, 2005 (EX 6):

In this letter, Complainant informed Employer of issues he was having with his former employer, Mamo Transportation. Complainant described an accident he had while working for Mamo Transportation and alleged that the police accident report was falsified. He informed Employer that he would need one or two days around September or October to resolve his legal issues. Complainant further informed Employer that the injuries he sustained in his accident do

not disqualify him under the Department of Transportation standards.

Complainant also alleged that Mamo Transportation blocked his employment with Dealers Choice from September 12, 2004 to May 6, 2005. He stated that Mamo Transportation is "concealing abuse of and noncompliance to Federal D.O.T. mandated regulations" by not complying with Dealer Choice's inquires. He further stated that Mamo Transportation would likely not respond to any of the Employer's inquiries.

Letter from Employer to Complainant dated November 2, 2005 (EX 7):

By letter, Mr. Richard Stadler forwarded Mamo Transportation's response to Employer's safety performance history inquiry to the Complainant. The response verified that Complainant worked for Mamo Transportation as an independent contractor from September 2002 to June 2004. The document indicates that the Complainant had non-DOT reportable accidents, but does not list the details of those accidents.

Fax from Complainant to Employer dated November 15, 2005 (EX 8):

Complainant faxed a copy of the November 2, 2005 letter with notations back to Mr. Stadler. In the notations, Complainant alleged that Mamo Transportation was attempting to conceal an act of insurance fraud and noncompliance with Department of Transportation regulations.

Employer's Mileage and Fuel Log for December 25, 2005 Assignment (EX 9):

The log documents Complainants mileage, route, and fuel from December 25, 2005 to December 30, 2005, when he traveled from Louisiana to Massachusetts.

FINDINGS OF FACT

The STAA provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. 49 U.S.C. § 31105(a)(1)(A). Protected activity includes filing a complaint or beginning a proceeding "related to a violation of a commercial motor vehicle safety regulation, standard, or order." *Id*. The Act further provides that an employer may not retaliate against an employee-driver if "the employee refuses to operate a vehicle because the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or 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)(1)(B)(i)-(ii).

As previously noted, to prevail, Complainant must first establish a *prima facie* case of discrimination. That is, the Complainant must adduce evidence that he engaged in STAA-protected activity, that the Employer was aware of this activity, and that the Employer took adverse action against the Complainant because of the protected activity. Evidence of each of these elements raises an inference that the Employer violated the STAA. At the evidentiary hearing, the Complainant initially must merely adduce some evidence as to each of these elements. ***Smith v. Sysco Foods of Baltimore***, ARB No. 03-134, ALJ No. 2003-STA-32 (ARB Oct. 19, 2004); ***Regan v. National Welders Supply***, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 5-6 (ARB Sept. 30, 2004). While a *pro se* Complainant may be held to a lesser standard than that of legal counsel in procedural matters, the burden of proving the elements necessary to sustain a claim of discrimination is no less. *See* ***Flener v. H. K. Cupp Inc.***, 90-STA-42 (Oct. 10,

1991).

Only if the Complainant makes this *prima facie* showing does the burden shift to the Employer to articulate a legitimate, nondiscriminatory reason for the adverse action. At that stage, the burden is one of production, not persuasion. If the Employer carries this burden, the Complainant must prove by a preponderance of the evidence that the reasons offered by the Employer were not the true reasons, but were a pretext for discrimination. ***Calhoun v. United Parcel Serv***., ARB No. 00-026, ALJ No. 99-STA-7, slip op. at 5 (ARB Nov. 27, 2002). The ultimate burden of persuasion that the Employer intentionally discriminated because of the Complainant's protected activity remains at all times with the Complainant. ***St. Mary's Honor Ct***r., 509 U.S. at 502; Poll, slip op. at 5; ***Gale v. Ocean Imaging and Ocean Res., Inc.***, ARB No. 98-143, ALJ No. 97-ERA-38, slip op. at 8 (ARB July 31, 2002).

Although Employer does not dispute coverage under the Act, nor allege that Complainant was not an employee within the scope of the Act, I find it appropriate to address whether the Act is applicable. *See* ***Minne v. Star Air, Inc***. ARB No. 05-005, ALJ No. 2004-STA-00026 (ARB Oct. 31, 2007). Based on my review of the evidence, I find that Employer is a commercial motor carrier and Complainant operated commercial motor vehicles. *See* EX 1; EX 5 at 9, 21-22; 9/22/09 TR at 21. Therefore, I find that the provisions of STAA are applicable to the underlying dispute.

Since I find the parties' dispute to fall under the provisions of the Act, I shall now examine whether Complainant establishes a *prima facie* case. Employer argues that Complainant fails to establish a *prima facie* case because he did not prove that he was engaged in protected activity. *See* Employer's Amended Proposed Findings of Fact and Conclusions of Law ("E. APFFCL") at 10. More precisely, Employer states, "[t]here is no support in the law for [Complainant's] assumption that a complaint about an alleged insurance lapse, a complaint to the IRS about alleged insurance fraud, an age discrimination allegation, or a charge related to Complainant's difficulties with Mamo constitute protective activities related to safety concerns under Section 405 of the [STAA]." *Id.* at 10-11.

Protected activity includes filing a complaint in relation to a violation of a commercial motor vehicle safety regulation. The Board has established that "the filed a complaint" language protects an employee from discrimination who communicates a violation of a commercial motor vehicle regulation, standard or order to any supervisory personnel." ***Harrison v. Roadway Express, Inc.***, ALJ No. 1999-STA-00037 (Mar. 30, 2000) (*aff'd*, ARB No. 00048 (Dec. 31, 2002); *See also* ***Clean Harbors Environ. Serv. Inc v. Herman***, 146 F.3d 12(1st Cir. 1998)(internal complaints are covered under the STAA.

Moreover, protection under the Act for raising a complaint does not depend on proving an actual violation of a commercial vehicle safety regulation; the complaint need only relate to such a violation. ***Yellow Freight System, Inc. v. Martin***, 954 F.2d 353, 356-357 (6th Cir. 1992). A complaint need not explicitly mention a commercial motor vehicle safety standard to be protected under the STAA's whistleblower provision. The Secretary has stated:

> As long as the complaint raises safety concerns, the layman who usually will be filing it cannot be expected to cite standards or rules like a trained lawyer. The statute requires only that the complaint 'relate' to a violation of a commercial motor vehicle safety standard. Finally, the plain language of section 2305(a) protects all complaints, whenever filed relating to any commercial motor vehicle safety standard. There is no basis in either the Act or its legislative history to read the limitation of section 2305(b) (refusing to operate a vehicle when doing so

would violate a Federal safety standard) into subsection (a).

*Nix v. Nehi-RC Bottling Company, Inc.***,** 84-STA-1 (Sec'y July 13, 1984), slip op. at 8-9.

Where the complainant in an STAA action makes complaints to his supervisor "relating to" alleged violations of Department of Transportation regulations, these complaints constitute protected activity under the STAA. ***Hernandez v. Guardian Purchasing Co.***, 91-STA-31 (Sec'y June 4, 1992). The Secretary has held that a complainant need only show that he reasonably believed he was complaining about a safety hazard to be protected by the Act. ***Schuler v. M & P Contracting, Inc.***, 1994-STA-14 (Sec'y Dec. 15, 1994). A complaint related to a safety violation is protected under § 31105(a) of the STAA even if the complaint is ultimately determined to be meritless. ***Barr v. ACW Truck Lines, Inc.***, 91- STA-42 (Sec'y Apr. 22, 1992); ***Moyer v. Yellow Freight System, Inc.***, 89-STA-7 (Sec'y Sept. 27, 1990).

Complainant made several allegations as to why Employer "disqualified" him. Complainant's primary basis for this complaint is that during his employment with the Employer, the Employer violated Department of Transportation regulations by not having legal authority to operate. Complainant also alleges that he was "disqualified" because he complained and refused to drive during a period of time when Employer's liability insurance lapsed. 9/22/09 TR at 39, 118. Complainant further alleges that he was "disqualified" as a result of Employer and his former employer, Mamo Transportation, conspiring to get rid of him.

I find the latter allegation to be baseless. The evidence clearly establishes that Employer was aware of Complainant's relationship with Mamo Transportation prior to hiring him. *See* EX 5 at 9-16. Moreover, Employer was well aware of Complainant's issues with Mamo Transportation. *See id.* In fact, Employer assisted Complainant in gathering information regarding his dispute with Mamo Transportation. *See id.* at 17-19; EX 6.

However, I find that Complainant's first two allegations do fall under purview of "protected activity" under the Act. Regardless of the merit of his complaint, Complainant reasonably believed that he was fired based on Employer's alleged lack of operating authority and liability insurance in violation of Department of Transportation regulations. Therefore, I find that Complainant establishes that he was engaged in protected activity under the Act.

Complainant also establishes that Employer took adverse action against him. Ms. Stanton, Employer's divisional manager, testified that she purposely stopped assigning Complainant jobs while his employment contract was active. *See* EX 5 at 36-37. Employer does not argue this point. *See* E. APFFCL at 11.

However, Complainant fails to prove that Employer's adverse action was due to his alleged protected activity. Complainant testified that he did not inform the Employer of its violations until 2009. *See* 9/22/09 TR at 77-78. Complainant stated that the Employer concealed the violations from him and he did not discover Employer's safety or federal violations until March 9, 2009, when he received the OIDA records from the Department of Transportation, Federal Motor Car Safety Administration. *Id.* at 78. If this is true, Employer could not have possibly retaliated against Complainant for reporting these violations as Employer's adverse action took place three years prior to Complainant discovering the violations.

There is also no evidence to support Complainant's testimony that, prior to his "disqualification," he complained to the Employer about its lapse of liability insurance. All of the evidence Complainant produced to support this allegation was collected after the fact, in 2009. *See* CX 2. Moreover, due to Complainant's inconsistent testimony and vague responses, I find Ms. Stanton's account of Complainant's employment termination to be more credible. I find Complainant's testimony that he refused to drive after December 31 because of Employer's

lapse of insurance to conflict with Ms. Stanton's more credible testimony that Complainant called for new job assignments in January of 2006. I find no evidence that Complainant reported Employer's lapse of liability insurance.

Therefore, after thorough consideration of all the evidence, I find that Complainant fails to establish a *prima facie* case because he does not prove that Employer retaliated against him due to his protected activity. ***Smith v. Sysco Foods of Baltimore***, *supra*.

ARTICULATION OF NONDISCRIMINATORY REASON

Alternatively, if Complainant were to have established a *prima facie* case, his case may be rebutted by the Employer providing a nondiscriminatory reason for taking the adverse action. ***Luckie v. United Parcel Service, Inc***., ARB Nos. 05-026, 05-054, ALJ No. 2003-STA-39 (ARB June 29, 2007), citing to ***Carroll v. Bechtel Power Corp***., No. 1991-ERA-46, slip op. at 11 (Sec'y Feb. 15, 1995). The Employer "need not persuade the court that it was actually motivated by the proffered reasons." ***Texas Dept. of Community Affairs v. Burdine***, 450 U.S. 248, 254 (1981). The evidence, however, must be sufficient to raise a genuine issue of fact as to whether the Employer discriminated against the employee. "The explanation provided must be legally sufficient to justify a judgment for the [employer]." *Id.* at 255.

Ms. Stanton testified that during his employment, Complainant was late in delivering two of his trucks. EX 5 at 24-26. She also testified that delivering the trucks in a courteous and timely manner is an important aspect of the Employer's business. *Id.* at 22. Additionally, Ms. Stanton described a specific incident that led to Complainant receiving no other jobs from the Employer. Complainant called several times in January of 2006 asking for jobs. *Id.* at 34-35. After a couple weeks, when he was not assigned a job, Complainant called and left an irate voice mail message. *Id.* at 36. According to Ms. Stanton, Complainant "made accusations that the reason [they] had not used him was concerning his past history with Mamo Transportation." *Id.* At one point, Ms. Stanton personally talked to Complainant and tried to explain that he was not receiving assignments because business was slow. *Id.* at 36-37. Ms. Stanton testified that Complainant began to get irate, so she hung up the phone. *Id.* at 36-37. Ms. Stanton explained that she could not give Complainant any more jobs because she questioned his behavior in front of customers. *Id.* at 37. She stated,

> If I have a driver that's disgruntled with me requesting his trips that are there or not there, I can't imagine what a driver would do if a customer was upset because that driver delivered the truck late. How would he or she carry themselves in front of this customer? So at that point that's when I hung up the phone and said, Mr. Bedwell, we're done.

Id. at 37.

I accept Ms. Stanton testimony that Complainant stopped receiving jobs after January 2006 because of his irate behavior. I find Employer's reasons for taking adverse action against the Complainant to be business related and nondiscriminatory. Complainant does not provide any credible evidence to refute Employer's explanation.

RECOMMENDED ORDER

Based upon the foregoing findings of fact, conclusions of law, and upon the entire record, I enter the following **Recommended Order**.

1. Pursuant to the doctrines of collateral estoppel and the law of this case, Judge

Kaplan's determination that this complaint is untimely must be followed. On October 31, 2007, the ARB affirmed Judge Kaplan's dismissal for untimeliness. Complainant did not appeal the ARB decision, which, as a result, became final. The facts of this case are identical to the previous complaint. Complainant did not file the present complaint until March 11, 2009, almost two years after the ARB decision.

2. Timeliness is a jurisdictional matter. I have no jurisdiction over this matter since I am compelled to follow the prior ruling that Complaint's case is untimely. Therefore, it is recommended that this case be DISMISSED.

Alternatively,

3. The parties underlying dispute falls under the provision of the STAA as the Employer is a commercial motor carrier and Complainant operated commercial motor vehicles.
4. Complainant established engaging in protected activity under the Act.
5. Complainant established that the Employer took an adverse action against him by not assigning him any jobs after January 2006.
6. Complainant did not establish a connection between his protective activity and Employer's adverse action. Therefore, Complainant failed to establish a *prima facie* case and this compliant should be DISMISSED.
7. Employer articulated a legitimate business related and nondiscriminatory reason for taking adverse action against the Complainant.

Therefore, it is hereby **ORDERED** that the claim is DISMISSED.

A

Daniel F. Solomon
Administrative Law Judge

NOTICE OF REVIEW: The 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 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 inquiries and correspondence in this matter should be directed to the Board.