**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 19-2135**

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RODERICK A. CARTER,

Petitioner,

v.

CPC LOGISTICS, INC.; CPC MEDICAL PRODUCTS, LLC; HOSPIRA FLEET SERVICES, LLC; DEPARTMENT OF LABOR,

Respondents.

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On Petition for Review of an Order of the Department of Labor. (ARB 2018-0078)

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Submitted: March 26, 2020 Decided: April 7, 2020

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Before GREGORY, Chief Judge, WYNN, Circuit Judge, and SHEDD, Senior Circuit Judge.

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Petition denied by unpublished per curiam opinion.

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Roderick A. Carter, Petitioner Pro Se. Sarah Marie Roberts, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C.; Jerry Howard Walters, Jr., LITTLER MENDELSON PC, Charlotte, North Carolina; Michael Francis Harris, HARRIS DOWELL FISHER & HARRIS L.C., Chesterfield, Missouri, for Respondents.

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Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Roderick A. Carter petitions for review of the Administrative Review Board's (ARB) final decision and order affirming the Administrative Law Judge's (ALJ) decision and order on remand denying his complaint of retaliatory discharge filed pursuant to the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105 (2018). We deny the petition for review.

"Under the scheme established by Congress, the Secretary of Labor makes final determinations on [STAA] violations subject to appellate court review." *Calhoun v. United States Dep't of Labor*, 576 F.3d 201, 208 (4th Cir. 2009) (ellipses and internal quotation marks omitted); *see also* 49 U.S.C. § 31105(d) (establishing appellate court review). "When reviewing the Secretary's determination, we are bound by his legal conclusions unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and by his factual findings if they are supported by substantial evidence." *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 984 (4th Cir. 1993) (citation and internal quotation marks omitted). Regarding the latter, substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pac Tell Group, Inc. v. NLRB*, 817 F.3d 85, 90 (4th Cir. 2016) (internal quotation marks omitted). In reviewing the Secretary's ultimate decision, "[w]e are mindful . . . of the deference due the Secretary's interpretation of a statute Congress charged him with administering." *Yellow Freight Sys., Inc.*, 8 F.3d at 984.

As pertinent here, the STAA prohibits an employer from discharging an employee for refusing to operate a vehicle because "the operation violates a regulation, standard, or

order of the United States related to commercial motor vehicle safety, health, or security." 49 U.S.C. § 31105(a)(1)(B)(i). To prevail, an employee must first establish a prima facie case that "(1) he engaged in protected activity, (2) his employer took adverse employment action against him, and (3) there is a causal relationship between his protected activity and the adverse employment action." *Calhoun*, 576 F.3d at 209. The causal relationship prong is satisfied if the employee shows that the protected activity was a contributing factor to the adverse employment action. *See* 49 U.S.C. § 31105(b)(1) (stating that complaint filed under § 31105 is governed by "burdens of proof" in 49 U.S.C. § 42121 (2018)); *id.* § 42121(b)(2)(B)(i) (providing that employee must show that protected activity "was a contributing factor in the unfavorable personnel action").

We conclude that the ALJ properly considered the deficiencies in his initial decision that were highlighted in our opinion granting Carter's petition for review. *See Carter v. CPC Logistics, Inc.*, 706 F. App'x 794 (4th Cir. 2017) (No. 17-1095). We further conclude that substantial evidence supports the finding that there was one event when Carter engaged in protected activity, but that the event was not a causal factor in Carter's discharge from employment. Additionally, we conclude that substantial evidence supports the ALJ's adverse credibility finding and, with the exception of one event, the finding that Carter's delays were not due to reported fatigue breaks. Lastly, we conclude that there was ample evidence that Carter was discharged due to several factors, none of which involved a protected activity.

Accordingly, we grant leave to proceed in forma pauperis and deny the petition for review. We dispense with oral argument because the facts and legal contentions are

adequately presented in the materials before this court and argument would not aid the decisional process.

*PETITION DENIED*

**U.S. Department of Labor**

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

RODERICK A. CARTER,

COMPLAINANT,

v.

CPC LOGISTICS, INC.; CPC MEDICAL PRODUCTS, LLC; and HOSPIRA FLEET SERVICES, LLC,

RESPONDENTS.

ARB CASE NO. 2018-0078

ALJ CASE NO. 2012-STA-00061

DATE: SEP 26 2019

Appearances:

*For the Complainant:*
Roderick A. Carter, *pro se*, Hopkins, South Carolina

*For the Respondents:*
Michael F. Harris, Esq.; *Harris, Dowell, Fisher & Young, L.C.*, Chesterfield, Missouri

Before: James A. Haynes, Thomas H. Burrell, and Heather C. Leslie, *Administrative Appeals Judges*

## FINAL DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA) as amended.[1] Complainant

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1 49 U.S.C. § 31105(a) (2007); *see also* 29 C.F.R. Part 1978 (2018)(implementing the STAA).

Roderick A. Carter filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondents CPC Logistics, Inc., CPC Medical Products, LLC (collectively CPC) and Hospira Fleet Services, LLC (Hospira) violated the STAA by discharging him from employment. OSHA denied the complaint and Carter requested a hearing before an Administrative Law Judge (ALJ). After a hearing, the ALJ dismissed the complaint on the grounds that Carter failed to prove that his STAA-protected activity was a contributing factor in his discharge. Carter appealed to the Administrative Review Board (Board) and we affirmed the ALJ's dismissal of Carter's complaint. Carter then appealed our ruling to the United States Court of Appeals for the Fourth Circuit.

The Fourth Circuit determined that the ALJ overlooked evidence indicating that Carter had reported his need to take breaks from driving to CPC Supervisors and that this oversight may have adversely affected the outcome of this case.[2] The court remanded the case to the Board, and the Board remanded the case to the ALJ. On August 8, 2018, the ALJ issued a Decision and Order on Remand (D. & O. on Rem.), again denying the complaint, and Carter appealed the ALJ's decision to the Board. For the following reasons, we affirm the ALJ's D. & O. on Remand.

## BACKGROUND[3]

CPC hired Carter on February 27, 2007, as a tractor-trailer driver for a six-man relay crew based in Columbia, South Carolina. The crew transported shipping containers loaded with medical equipment from Rocky Mount, North Carolina, to Jacksonville, Florida, and back again to Rocky Mount. An hour before the end of a trip, one driver would call the relay driver with his estimated time of arrival (ETA) so that the other driver would be available to drive the tractor-trailer on the next

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2 *Carter v. CPC Logistics, Inc; CPC Medical Products, LLC; Hospira Fleet Services, LLC; Department of Labor, Administrative Review Board*, 706 Fed. Appx. 794, 797 (4th Cir. 2017).

3 On remand and as appealed to the Board, the facts of this case remain largely the same. With the exception of the findings vacated after remand, the ALJ affirmed the findings of fact in his first Decision and Order and incorporated those findings into his Decision and Order on Remand. *See* D. & O. on Rem. at 2, 5 ("In light of the Fourth Circuit's opinion, I vacate my previous findings (1) that Mr. Carter never mentioned fatigue breaks to his supervisors and (2) that Mr. Carter's rest breaks were not a factor in the decision to terminate ... After re-reviewing all of the evidence in the administrative file, I affirm my other findings of fact in the Decision and Order, and they are incorporated herein.").

leg. The goal was maintaining a synchronized schedule to keep Hospira's Rocky Mount facility operational.[4] CPC drivers were required to call in if they experienced significant delays, and Carter was aware of this policy.[5]

Carter started driving on the Columbia-Rocky Mount leg but subsequently acquired numerous warning letters about logging errors, violations of CPC's call-in procedures, and an accident in June 2008 that was found to be his fault and cost more than $4,400.00 in property damage.[6] CPC issued Carter more warning letters over the next two years, including a five-day suspension in August 2010 when a CPC audit revealed numerous discrepancies between the time entries in Carter's hours-of-service logs and the time he recorded on trip reports he submitted to payroll.[7]

In August 2010, CPC assigned Carter to the Columbia-Jacksonville-Columbia leg and teamed him with Kelvin Gordon, who then drove the Columbia-Rocky Mount-Columbia leg. The average driving time for each round-trip leg ranged from 10 to 13 hours. Gordon repeatedly complained to Ron Covert, CPC's Regional Manager, about Carter's excessive delays and lateness reporting to work. Covert kept a list of the delays reported by Gordon between June 27 and September 28, 2011. This list showed that Carter was taking up to 14 hours to make the same drive that had taken Gordon 11 to 12 hours. The excessive hours delayed Gordon's daily 4:00 p.m. start time by about an hour a day. The delay meant that by the end of the week Gordon could not start his run until 7:00 to 9:00 p.m. on Friday night, which shortened his time off.[8]

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[4] Transcript (Tr.) 217. The relay team worked five days a week and usually had the weekends off. Both leg drivers would be home in Columbia for their time off during the week.

[5] Respondent's Exhibits (RX) 1-3. *See also* RX 6 and 8 (informing Carter that he had failed to follow proper call-in procedures).

[6] D, & O. at 29-30 (describing disciplinary warnings and suspensions Carter received for violations of law and of CPC policies).

[7] RX 13.

[8] RX 35; Tr. 190. Gordon also complained that Carter was supposed to start his run at 2:00 a.m. on Mondays but was frequently late, up to three hours. Gordon gave his ETA times to Carter each afternoon but he was rarely there to take over the tractor-trailer on time.

In August 2011 Gordon sent an e-mail to Covert's supervisor, Divisional Manager Kenneth Pruitt, relaying his conversation with Carter about the scheduling problems and the importance of teamwork. During that conversation Carter had "started to yell and curse" and said that Gordon had done him "a favor" by complaining to Covert about his time delays because "now I'm gonna take my breaks and take my time coming back."[9] When Gordon asked Carter if he was concerned about putting his job in jeopardy, he replied, "Ron [Covert] can't fire me. If he could he would've by now."[10]

Gordon complained further in September 2011 that Carter was "taking over an hour in breaks on the way down and the same on the way back" and he asked Covert to "[p]lease intervene."[11] Covert reviewed Carter's logs and found prolonged periods when Carter was on duty but not driving. Covert asked Carter why he used so much time not driving and, according to Covert, Carter responded that he probably had to go to the bathroom or maybe he had not been feeling well.[12] Covert then prepared a recap of Carter's hours and forwarded it to Pruitt, who was in charge of about 600 CPC drivers.[13]

During his employment with CPC, Carter occasionally informed his supervisors that he was taking breaks from driving. Carter testified at the hearing that he told Covert, Pruitt, and a dispatcher that his extended run times were caused by rest breaks or fatigue breaks.[14] On July 15, 2011, in an e-mail exchange between Covert and a CPC dispatch supervisor, Covert told the dispatcher that Carter reported that he had been delayed because he wasn't feeling well and was entitled to a break.[15]

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9 RX 26.

10 *Id.*

11 *Id.*

12 Tr. 208.

13 RX 54. The logs show that Carter started taking breaks an hour or two into his shift. He would drive as little as 16 minutes and as long as three hours before taking a break. Most breaks came after 60 to 90 minutes of driving. RX 52. Covert disciplined another CPC driver for similar behavior on the grounds that he was not coming to work "properly rested." That driver improved his performance. RX 37, Tr. 195, 201.

14 Tr. 30-33.

15 RX 25.

CPC's submission to OSHA in response to Carter's complaint indicates that he mentioned fatigue breaks to two supervisors when questioned about his performance and claimed that he often got sleepy while performing his driving duties.[16] Carter had also asked Pruitt in a phone conversation if he could stop driving if he was sleepy and told Pruitt that he was allowed by the DOT to take rest breaks if he needed them.[17]

On August 6, 2011, Covert, with Pruitt's approval, sent a general memorandum to all Columbia drivers about reporting to work within an hour of the ETA of their partner; taking too frequent, extended rest breaks; making late deliveries; and ignoring the 2:00 a.m. Monday starting time.[18] After issuance of this letter, Carter's turnaround time got worse. One week before his discharge, Covert issued Carter a disciplinary letter regarding his failure to be available for work assignments.[19]

Pruitt compared Carter's manifest times with the logs of two other drivers on the Columbia team during July, August, and September 2011. Based on Carter's average times over those months, Pruitt recommended to his supervisor, Harold Wallis, Jr., vice president of CPC's eastern operations, that CPC fire Carter. Wallis reviewed Gordon's complaints about schedule delays and Carter's disciplinary history, particularly the warning letter concerning his falsification of his logs.[20]

Wallis concluded that the progressive disciplinary process had failed to correct Carter's insubordination toward his managers and dispatchers, his violation of CPC's call-in policy, or his excessive hours in driving the Columbia-Jacksonville-Columbia run, and approved Carter's discharge. On October 5, 2011, CPC issued Carter a letter terminating his employment due to his "continued poor job performance and insubordinate behavior." The letter stated that Carter "continuously delayed runs without reasonable explanation" and had "shown a pattern of insubordination." Carter's work record revealed more than 25 violations

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16 Complainant's Exhibit (CX) 3 at 8.

17 *Id.*

18 RX 28.

19 RX 31.

20 Tr. 249-251.

within the past 30 months for which he was disciplined, which showed "a complete disregard for improvement."[21]

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Board to issue final agency decisions in review or on appeal of matters arising under the STAA.[22] The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations if they are supported by substantial evidence.[23] We uphold an ALJ's credibility findings unless they are "inherently incredible or patently unreasonable."[24]

## DISCUSSION

The STAA provides that a person may not "discharge," "discipline," or "discriminate" against an employee "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activities.[25] The legal burden of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21) governs STAA complaints.[26] To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel

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21 RX 36.

22 Secretary's Order No. 1-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019); 29 C.F.R. § 1978.110(a).

23 29 C.F.R. § 1978.110(b); *Lachica v. Trans-Bridge Lines*, ARB No. 10-088, ALJ No. 2010-STA-027, slip op. at 2, n.3 (ARB Feb. 1, 2012).

24 *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 3 (ARB June 15, 2012) (quoting *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 13 (ARB Feb. 29, 2008)).

25 49 U.S.C. § 31105(a)(1).

26 49 U.S.C. § 31105(b)(1); *see* 49 U.S.C. § 42121.

action.[27] Failure to establish any one of these elements requires denial of the complaint.[28]

The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety or security regulation, standard or order." *Id.* In addition, it is a STAA violation for any person to retaliate against a driver who refuses to operate a commercial motor vehicle when the driver's ability or alertness is impaired due to fatigue, illness, or other cause.[29]

Carter engaged in STAA-protected activity and CPC subjected him to an adverse employment action by discharging him from employment. The issue before us on appeal is to determine if, after his reconsideration of the evidence, the ALJ's reiteration of his conclusion that Carter's protected activity did not contribute to his discharge is supported by the record.

On remand the ALJ reconsidered his rulings on Carter's asserted justifications for his delayed deliveries. The ALJ affirmed his ruling that Carter engaged in STAA-protected activity on July 15, 2011, when he refused to drive due to illness. The ALJ vacated his previous findings that Carter never mentioned fatigue breaks to his supervisors and instead found that "Carter told Mr. Covert and Mr. Pruitt that his extended run times were caused by rest breaks."[30] And the ALJ acknowledged CPC's statement to OSHA, which contains several statements admitting that Carter informed CPC of his right to refuse to drive if his alertness was impaired.[31]

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27 49 U.S.C. § 42121(b)(2)(B)(iii).

28 *Luckie v. United Parcel Serv. Inc.*, ARB Nos. 05-026, -054; ALJ No. 2003-STA-039, slip op. at 6 (ARB June 29, 2007). CPC did not dispute the ALJ's findings that Carter established that he engaged in protected activity and that his discharge was an adverse action. We affirm these findings. *Jackson v. Union Pac. RR Co.*, ARB No. 13-042, ALJ No. 2012-FRS-017, slip op. at 5 (ARB Mar. 20, 2015).

29 49 U.S.C. § 31105(a)(1)(B)(i); 29 C.F.R. § 1978.102(a), (c)(1)(i).

30 D. & O. on Rem. at 3. While CPC had no rule that drivers were required to contact the company every time they took a rest break, company rules did require drivers to report significant delays. *Id.* at 5.

31 *See* CX 3 at 8, 13-14 ("Mr. Carter told Mr. Covert that he ran late because he got sleepy and had to pull over to rest ... Mr. Carter asked CPC Division Manager Ken Pruitt over the phone whether Mr. Pruitt was saying he couldn't stop if he was sleepy ... Mr. Carter said that he was allowed by the DOT to take rest breaks if he needed them ... Mr. Carter also accused CPC of not caring about safety and threatened to report CPC ... Thus, CPC knew Mr. Carter had verbally claimed that he often got sleepy while performing his

The Fourth Circuit identified CPC's position statement to OSHA as containing evidence concerning conversations that the ALJ may have overlooked in his first decision.[32] The ALJ on remand discussed two conversations that Carter had with supervisors and found that Carter's additional statements to CPC to the effect that his delays were a result of fatigue breaks were untruthful for several reasons. D. & O. on Rem. at 3. First, the ALJ found it unbelievable that Carter suffered fatigue on nearly every run he made. Second, the ALJ found that Carter delayed his runs to annoy and harass his partner and disrupt his partner's schedule. D. & O. on Rem. at 3-4. Third, the ALJ found that Carter's untruthfulness was further evidenced by the fact that he admitted that he never recorded his rest breaks on his trip manifests despite his obligation to do so.[33] With the exception of July 15, 2011, Carter failed to inform CPC contemporaneously with any bouts of fatigue or illness.[34] We affirm the ALJ's findings that Carter's claim of having made additional statements concerning fatigue to CPC were not credible. We therefore affirm the ALJ's ruling that the only recorded incident of STAA-protected activity in this case occurred on July 15, 2011.[35]

After his review of the evidence, the ALJ again concluded that Carter failed to prove by a preponderance of the evidence that his STAA-protected activity was a contributing factor in CPC's decision to discharge him, and we agree. The ALJ again

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driving duties and therefore needed frequent rest breaks, and that Mr. Carter had referred to the DOT when stating he was entitled to such breaks.").

32 The Fourth Circuit did not identify specifically the evidence that the ALJ overlooked beyond a description of the conversations and that at least one of the conversations was referenced in CPC's statement to OSHA.

33 Tr. 65 ("I never, even when I was doing the other leg, for four and a half years of being there, I never put down that I stopped and took a rest break.").

34 *See* D. & O. on Rem. at 5 ("Mr. Carter may have told his supervisors that his long run times were caused by fatigue breaks, see CX 3, but Mr. Carter did not make those statements while he was suffering from a bout of fatigue. Because the statements were not made contemporaneous with any bout of fatigue, and I find Mr. Carter to be generally non-credible, I find those statements were merely post hoc excuses and give them no probative weight.").

35 In his Petition for Review Carter asserts that, in addition to July 15, 2011, he engaged in STAA-protected activity on September 9, and October 4, 2011. Petition for Review at 8. However, he did not indicate what he did or said on those days that would constitute protected activity. We note that we issued a briefing order after receipt of Carter's Petition for Review but he did not file a brief identifying record evidence supporting this assertion.

found that Carter was delayed by more than an hour on nearly all of his runs for three months prior to his discharge. The D. & O. included several charts summarizing the start and end times for each run by Carter and Gordon during the period from June 27, 2011, through October 5, 2011, and summarizing the times it took Carter to complete round trips compared to the times it took similarly situated drivers to complete similar trips on the same days.[36] The ALJ reexamined this evidence on remand:

> There were 44 days on which Mr. Carter and the team 1 driver drove the Jacksonville route. Decision and Order at 38. On 39 of those days, the team 1 driver made the run in less time than Mr. Carter did, averaging about 67 minutes less than it took Mr. Carter. *Id.* On each of the five days on which Mr. Carter took less time than the team 1 driver did, the team 1 driver was delayed in Jacksonville for one to three hours. *Id.* at 38-39. And, there were 44 days on which Mr. Carter and the team 2 driver (Walter Moore) drove the Jacksonville route. *Id.* at 39. On 38 of those days, Mr. Moore completed the trip in an average of 111 minutes less time than it took Mr. Carter. *Id.* On the other six days, Mr. Moore took longer than Mr. Carter, but Mr. Moore was waiting for the train at the Jacksonville railyard on each of those days. *Id.*[37]

CPC's admission that Carter's breaks from driving were a factor in the decision to fire him does not establish that CPC violated the STAA because, with one exception, Carter failed to prove that those breaks constituted STAA-protected activity. The evidence he offered in support of his alleged protected activity was not credible to the finder of fact. Instead, the overwhelming evidence shows that Covert reviewed Carter's job performance and Wallis made the decision to discharge Carter based on his disciplinary history, his failure to improve his performance, and his unexplained delays on the Jacksonville run. In sum, we agree with the ALJ's conclusion that CPC's termination of Carter's employment did not violate the STAA.[38]

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36 D. & O. at 31-38.

37 D. & O. on Rem. at 3.

38 *Id.* at 7, citing *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 987-88 (4th Cir. 1993) ("An employer obviously remains free to sanction an employee for chronically tardy conduct

## CONCLUSION

In accordance with the Fourth Circuit's ruling, we have examined the record to determine if Carter's STAA-protected activity was a contributing factor in his discharge from employment. The record fully supports the ALJ's conclusion that Carter engaged in STAA-protected activity by refusing to drive due to illness. The record also supports the ALJ's conclusion that Carter's protected activity did not contribute to his discharge. Carter was discharged because of his unexplained delays, disciplinary history, and failure to improve his performance. Accordingly, the ALJ's Decision and Order on Remand denying Carter's complaint is **AFFIRMED**, and the complaint is hereby **DENIED**.[39]

**SO ORDERED.**

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or indeed for any action not protected by the STAA. The STAA protects only a driver who may *unexpectedly* encounter fatigue on the course of a journey; it obviously does not protect delays unrelated to the statutory purposes of public and personal safety." (emphasis added)).

[39] 29 C.F.R. § 1978.110(e).

FILED: June 9, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 19-2135
(ARB 2018-0078)

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RODERICK A. CARTER

Petitioner

v.

CPC LOGISTICS, INC.; CPC MEDICAL PRODUCTS, LLC; HOSPIRA FLEET SERVICES, LLC; DEPARTMENT OF LABOR

Respondents

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ORDER

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The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Gregory, Judge Wynn, and Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

**UNPUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 17-1095**

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RODERICK A. CARTER,

Petitioner,

v.

CPC LOGISTICS, INC.; CPC MEDICAL PRODUCTS, LLC; HOSPIRA FLEET SERVICES, LLC; DEPARTMENT OF LABOR, Administrative Review Board,

Respondents.

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On Petition for Review of an Order of the Department of Labor. (ARB 15-050)

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Submitted: August 28, 2017 Decided: September 5, 2017

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Before GREGORY, Chief Judge, and DUNCAN and WYNN, Circuit Judges.

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Petition for review granted; case remanded by unpublished per curiam opinion.

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Roderick A. Carter, Petitioner Pro Se. Michael F. Harris, HARRIS DOWELL FISHER & HARRIS, L.C., Chesterfield, Missouri, for Respondents CPC Logistics, Inc. and CPC Medical Products, LLC. Jerry H. Walters, Jr., LITTLER MENDELSON, P.C., Charlotte, North Carolina, for Respondent Hospira Fleet Services, LLC. Nicholas C. Geale, Acting Solicitor of Labor, Ann S. Rosenthal, Associate Solicitor for Occupational Safety and Health, Heather R. Phillips, Allison Graham Kramer, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Respondent Department Of Labor.

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Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Roderick A. Carter petitions for review of the Administrative Review Board's (ARB) decision and order dismissing his complaint of retaliatory discharge filed pursuant to the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105 (2012). Carter initiated this action by filing a complaint with the Occupational Safety and Health Administration (OSHA) alleging that CPC Logistics, Inc., and CPC Medical Products, LLC (collectively, CPC), along with Hospira Fleet Services, LLC (Hospira), violated the STAA by terminating him from his job as a truck driver for engaging in the protected activity of taking breaks when he became too tired to safely drive.[1] After the OSHA Area Director dismissed Carter's complaint, Carter requested a hearing before an administrative law judge (ALJ) with the Department of Labor. The ALJ found that CPC was Carter's employer and dismissed Hospira.[2] The ALJ further determined that Carter engaged in STAA-protected activity on one occasion by refusing to drive while ill, but found incredible Carter's testimony that his delays during his trucking route were caused by STAA-protected fatigue breaks and that he reported this to two of his CPC supervisors. The ALJ then concluded that Carter's one instance of STAA-protected

[1] Carter also alleged that his protected activity included lodging complaints with his superiors about CPC's purported policy of not allowing drivers such breaks. However, we conclude that Carter abandoned this claim by failing to press it at his administrative hearing.

[2] Hospira contracted with CPC to provide trucking services for the delivery of Hospira supplies. Carter's informal brief does not challenge the ALJ's dismissal of Hospira, and we thus conclude that Carter has forfeited appellate review of that issue. *See* 4th Cir. R. 34(b) (limiting review to issues raised in informal brief).

activity was not a contributing factor in his termination and therefore dismissed Carter's complaint. The ARB agreed with the ALJ and affirmed the dismissal of Carter's complaint.

On appeal, Carter contends that the ALJ improperly discredited his testimony that he engaged in additional instances of protected activity by refusing to drive when fatigued and that he reported the need to take fatigue breaks to two supervisors when they questioned him about the purportedly excessive time that it took for Carter to complete his route. Our review of the record leads us to agree with Carter that the ALJ overlooked important evidence in considering this issue, and therefore, we grant Carter's petition for review and remand for further proceedings.

"Under the scheme established by Congress, the Secretary of Labor makes final determinations on [STAA] violations subject to appellate court review." *Calhoun v. United States Dep't of Labor*, 576 F.3d 201, 208 (4th Cir. 2009) (ellipses and internal quotation marks omitted); *see also* 49 U.S.C. § 31105(d) (establishing appellate court review). "When reviewing the Secretary's determination, we are bound by his legal conclusions unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and by his factual findings if they are supported by substantial evidence." *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 984 (4th Cir. 1993) (citations and internal quotation marks omitted). Regarding the latter, substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pac Tell Group, Inc. v. NLRB*, 817 F.3d 85, 90 (4th Cir. 2016) (internal quotation marks omitted). In reviewing the Secretary's ultimate decision, "[w]e are

mindful . . . of the deference due the Secretary's interpretation of a statute Congress charged him with administering." *Yellow Freight Sys., Inc.*, 8 F.3d at 984.

As pertinent here, the STAA prohibits an employer from discharging an employee for refusing to operate a vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security." 49 U.S.C. § 31105(a)(1)(B)(i). To prevail on a claim under § 31105(a)(1)(B), an employee must first establish a prima facie case that "(1) he engaged in protected activity, (2) his employer took adverse employment action against him, and (3) there is a causal relationship between his protected activity and the adverse employment action." *Calhoun*, 576 F.3d at 209. The causal relationship prong is satisfied if the employee shows that the protected activity was a contributing factor to the adverse employment action. *See* 49 U.S.C. § 31105(b)(1) (stating that complaint filed under § 31105 is governed by "burdens of proof" in 49 U.S.C. § 42121 (2012)); *id.* § 42121(b)(2)(B)(i) (providing that employee must show that protected activity "was a contributing factor in the unfavorable personnel action").

We have previously recognized that the "driver fatigue rule," 49 C.F.R. § 392.3 (2017), which prohibits a driver from operating a commercial motor vehicle while suffering from an unsafe level of fatigue, falls within the protection of the STAA. *Yellow Freight Sys., Inc.*, 8 F.3d at 984. We have explained that "[t]he STAA protects . . . a driver who may unexpectedly encounter fatigue on the course of a journey; [but] it obviously does not protect delays unrelated to the statutory purposes of public and personal safety." *Id.* at 988.

Here, Carter challenges the ARB's adoption of the ALJ's factual findings—based on a credibility determination—that Carter never told his CPC supervisors that his delays were caused by fatigue breaks and that Carter's delays were not actually caused by such breaks. We will only disturb an ALJ's credibility determination under exceptional circumstances—for example, when that "credibility determination is unreasonable, contradicts other findings of fact, or is based on an inadequate reason or no reason at all." *NLRB v. CWI of Md., Inc.*, 127 F.3d 319, 326 (4th Cir. 1997) (internal quotation marks omitted).

After observing the demeanor of the witnesses at the administrative hearing and comparing the testimony with certain documentary evidence, the ALJ provided several good reasons for finding that Carter's testimony was generally unbelievable. However, we conclude that the ALJ's particular credibility finding on Carter's claim that he reported the need to take rest breaks to his supervisors does not enjoy the same record support. Although the ALJ acknowledged that Carter made general statements that he was entitled to rest breaks during his employment with CPC, the ALJ did not make a finding as to whom these statements were made. Further, the ALJ declined to credit Carter's testimony that Carter told two of his supervisors that his delays were caused by rest breaks—a finding that may conflict with the ALJ's determination that Carter made general statements on the topic because Carter testified that he made those general statements regarding fatigue breaks to only three men, including the two supervisors.

Aside from these potentially conflicting findings, there is a significant problem with the ALJ's determination that Carter never mentioned fatigue breaks to his

supervisors: CPC's position statement to OSHA, which Carter introduced at the administrative hearing, acknowledges that Carter mentioned fatigue breaks to two supervisors when questioned about his performance. In fact, CPC and Carter agreed that Carter mentioned fatigue breaks during a telephone conversation with a supervisor about one month before he was fired, but the ALJ inexplicably found that fatigue breaks were never mentioned during that conversation. Given CPC's concession that Carter mentioned fatigue breaks to his supervisors when questioned about his delays, we conclude that the ALJ's finding that Carter never told his supervisors that his delays were caused by such breaks is not supported by substantial evidence.[3] Furthermore, because the ALJ's finding that Carter's delays were not truly caused by fatigue breaks rested on this factual error, we also conclude that finding is not supported by substantial evidence.

We further conclude that the ALJ's flawed factual analysis, adopted by the ARB, prejudiced Carter. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 253 (4th Cir. 2016) (recognizing that we generally apply harmless error rule to administrative adjudications). The evidence overlooked by the ALJ and the ARB is significant given CPC's admission that Carter's delays were a factor in his termination, and thus, it is impossible to determine that the ALJ's error "did not adversely affect the outcome of th[is] case." *Sparks v. Gilley Trucking Co.*, 992 F.2d 50, 53 (4th Cir. 1993). Because the

[3] The ALJ's credibility analysis on this issue also cited Carter's failure to call dispatch when he took a rest break "as he was required to do," but the ALJ neglected to cite any evidence indicating that a driver was required to notify dispatch each time he took a break.

impact of the ALJ's error on Carter's ability to establish a prima facie case of retaliation cannot be measured, remand is required.

Accordingly, we grant Carter's petition for review and remand for the Secretary to reconsider Carter's refusal to drive claim against CPC in light of CPC's statements that Carter reported taking fatigue breaks to CPC management when asked about his delays and that Carter's delays were a factor in his termination. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*PETITION FOR REVIEW GRANTED;*
*CASE REMANDED*

**U.S. Department of Labor**

Office of Administrative Law Judges
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**Issue Date: 08 August 2018**

Case No.: 2012-STA-00061

*In the Matter of:*

RODERICK A. CARTER,
*Complainant,*

*v.*

CPC LOGISTICS, INC.,
CPC MEDICAL PRODUCTS, LLC, and
HOSPIRA FLEET SERVICES, LLC,
*Respondents.*

## DECISION AND ORDER ON REMAND

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act ("STAA" or "the Act"), 49 U.S.C. § 31105 et seq., and the implementing regulations found at 29 C.F.R. Part 1978. Complainant Roderick A. Carter alleges that he was terminated after refusing to drive while fatigued. On remand, and after reconsideration of the evidence in the record, I find that Respondents did not violate the Act.

### Procedural History

On February 28, 2014, I held a hearing in Columbia, South Carolina into Mr. Carter's allegations. At the conclusion of Mr. Carter's case-in-chief, Respondents moved for a directed verdict. Finding that Hospira was not a joint employer of Complainant, I granted Hospira's motion for a directed verdict and denied Mr. Carter's complaint against Hospira. I denied CPC's motion for a directed verdict.

On April 16, 2015, I issued a Decision and Order Denying Complaint ("Decision and Order"), concluding that Respondents did not violate the STAA. On December 22, 2016, the Administrative Review Board issued a Final Decision and Order, affirming the Decision and Order. Mr. Carter petitioned the United States Court of Appeals for the Fourth Circuit for review, and the Court granted his petition. Upon review of the matter, the Fourth Circuit remanded the case back to the Secretary for reconsideration of Mr. Carter's refusal to drive claim. *Carter v. CPC Logistics*, No. 17-1905, ARB No. 15-050, ALJ No. 2012-STA-00061 (4th Cir. Sept. 5, 2017).

## Fourth Circuit Opinion

On review of the record, the Fourth Circuit concluded that I had made inconsistent findings of fact which prejudiced Mr. Carter.

In the Decision and Order, I found that Mr. Carter's general demeanor demonstrated that he believes he was unfairly wronged, and his belief caused inaccurate recollection as well as exaggerated or untruthful testimony. Decision and Order at 28. As such, I credited the testimony of Respondents' witnesses over Complainant's testimony. *Id.* In doing so, I credited the testimony of Ron Covert and Ken Pruitt. Mr. Covert testified that Mr. Carter could not explain his delay on September 26, 2011 when asked, stating vaguely he might have been sick. Mr. Pruitt testified that he was not told that Mr. Carter was taking rest breaks. Believing Mr. Covert's and Mr. Pruitt's version of the events, I declined to credit Mr. Carter's testimony that he told Mr. Covert, Mr. Worthington, and Mr. Pruitt that his delays were caused by fatigue breaks. *Id.* at 41.

The Fourth Circuit ruled my finding that Carter never mentioned fatigue breaks to his supervisors was not supported by substantial evidence. *Carter*, No. 17-1905, slip op. at 6. First, the Court noted, this finding may conflict my determination that Mr. Carter made only general statements that he was entitled to rest breaks. *Id.*; Decision and Order at 40. Second, the Court stated in a footnote that my credibility analysis on this issue cited Mr. Carter's failure to call dispatch "as he was required to do," but noted that I "neglected to cite any evidence indicating that a driver was required to notify dispatch each time he took a break." *Carter*, No. 17-1905, slip op. at 7, n.3. Third, and most importantly, this finding directly contradicts CPC's position statement to OSHA. In its statement to OSHA, CPC acknowledges that Mr. Carter mentioned fatigue breaks to two supervisors when questioned about his performance and that Mr. Carter's rest breaks were a factor in the decision to terminate. *Id.* at 6-7.

The Court furthermore ruled my finding that Carter's delays were not actually caused by fatigue breaks, rested on the flawed factual analysis discussed above, and was not supported by substantial evidence. *Id.* at 7. Given CPC's admission that Mr. Carter's delays were factor in the decision to terminate, the Court concluded that Mr. Carter was prejudiced by the flawed factual analysis. Accordingly, the Court remanded the case back to the Secretary for reconsideration.

## Reconsideration of the Evidence and New Findings

In light of the Fourth Circuit's opinion, I vacate my previous findings (1) that Mr. Carter never mentioned fatigue breaks to his supervisors and (2) that Mr. Carter's rest breaks were not a factor in the decision to terminate.

CPC, in its position statement to OSHA, wrote:

> Mr. Carter was repeatedly late returning to Columbia, and CPC Regional Manager Ron Covert discussed this job performance deficiency with Mr. Carter. Mr. Carter told Mr. Covert that he ran late because he got sleepy and had to pull over to rest. Mr. Covert responded that if Mr. Carter was getting sleepy while driving so frequently he must not be getting adequate rest.
>
> In another conversation about Mr. Carter's late arrivals, Mr. Carter asked CPC Division Manager Ken Pruitt over the phone whether Mr. Pruitt was saying he

couldn't stop if he was sleepy. Mr. Pruitt said he was not saying that. But Mr. Pruitt also told Mr. Carter that it was his responsibility to get proper rest, and that if he repeatedly needed such frequent and extensive rest breaks he must not be doing so. Mr. Carter said that he was allowed by the DOT to take rest breaks if he needed them.

...

In this conversation with Mr. Pruitt, Mr. Carter also accused CPC of not caring about safety and threatened to report CPC. Mr. Carter also made a couple of veiled threats, such as, "You don't want to come down here and see me; you don't know what I'm like." Mr. Pruitt finally told Mr. Carter it just came down to whether or not he was going to do his job. Mr. Carter said his lawyers would "take care of" Mr. Pruitt and Mr. Covert, and then he hung up.

Thus, CPC knew Mr. Carter had verbally claimed that he often got sleepy while performing his driving duties and therefore needed frequent rest breaks, and that Mr. Carter had referred to the DOT when stating he was entitled to such breaks.

...

**Mr. Carter's termination was definitely not based solely on his excessive breaks and delays**, as shown by the detailed review of Mr. Carter's extremely long and unsatisfactory disciplinary record, above. **However, these breaks and delays were a significant factor.**

CX 3 at 8, 13-14 (emphasis added). In light of these admissions, I find (1) Mr. Carter told Mr. Covert and Mr. Pruitt that his extended run times were caused by rest breaks, and (2) his rest breaks were a factor in the decision to terminate Mr. Carter. I do not, however, change my previous finding that Mr. Carter's delays were not caused by fatigue breaks. Even though Mr. Carter told multiple individuals from CPC and Hospira that his delays were a result of fatigue breaks, I find that Mr. Carter was untruthful in making those statements for a number of reasons.

First, I find it unbelievable that Mr. Carter suffered from fatigue on nearly every run he made. As I have previously found, Mr. Carter routinely took significantly longer to complete his runs than other drivers. *See* RX 53; Decision and Order 31-40 (summarizing and discussing RX 53). There were 44 days on which Mr. Carter and the team 1 driver drove the Jacksonville route. Decision and Order at 38. On 39 of those days, the team 1 driver made the run in less time than Mr. Carter did, averaging about 67 minutes less than it took Mr. Carter. *Id.* On each of the five days on which Mr. Carter took less time than the team 1 driver did, the team 1 driver was delayed in Jacksonville for one to three hours. *Id.* at 38-39. And, there were 44 days on which Mr. Carter and the team 2 driver (Walter Moore) drove the Jacksonville route. *Id.* at 39. On 38 of those days, Mr. Moore completed the trip in an average of 111 minutes less time than it took Mr. Carter. *Id.* On the other six days, Mr. Moore took longer than Mr. Carter, but Mr. Moore was waiting for the train at the Jacksonville railyard on each of those days. *Id.*

Second, the evidence demonstrates that Mr. Carter delayed his runs to spite his partner, Mr. Gordon. Mr. Gordon became frustrated with Mr. Carter because Mr. Carter was disrupting his schedule. Mr. Carter was taking 14 hours to complete his runs and was leaving at a later time

each day, which, in effect, added an hour to Mr. Gordon's start time each day. TR at 150-52. Mr. Gordon, hoping to remedy the problem, spoke to Mr. Carter about leaving at 2:00 a.m., the predetermined departure time observed by other drivers; Mr. Carter was leaving at 3:00 a.m. *Id.* at 153-54. Mr. Carter stated that he was going to leave at a time that allowed him proper rest. *Id.* Mr. Gordon interpreted his response as a refusal to cooperate. *Id.* at 154. Mr. Gordon, frustrated by Mr. Carter's response, got Mr. Covert involved. Mr. Gordon advised Mr. Covert of the days that it took an extended time for Mr. Carter to make his run, as well as mornings that Mr. Carter was not there to take over the truck when Mr. Gordon arrived at the terminal. *Id.* at 156. Mr. Gordon eventually told Mr. Covert that he thought Mr. Carter was being spiteful because he complained about Mr. Carter not starting on time. Before Mr. Gordon complained, Mr. Carter was not extending his run; Mr. Carter was just delaying his start times. But after Mr. Gordon complained, Mr. Carter was both delaying his start times and extending his run. Eventually, the problem between Mr. Gordon and Mr. Carter reached a tipping point one Friday evening when Mr. Carter ran out of drive time. Mr. Gordon told Mr. Carter over the phone to be more reasonable with his time, and stop what he was doing. During the course of their argument, Mr. Carter said some things that made Mr. Gordon feel that he should not engage with Mr. Carter at the side of the road, and made Mr. Gordon concerned for his safety. *Id.* at 157. That same evening, Mr. Gordon reported their argument to Mr. Covert and Mr. Pruitt, and was told describe the event in an email. *Id.* at 158. He did so, and RX 26 is the email he sent. *Id.* at 159. That email reads:

> Hello Ken. I'll begin by apologizing for the disturbance that occurred on Friday evening. It started when Carter called me stating that he was out of drive time about five miles from the terminal and he had arranged for someone to drive me to the truck. I mistakenly thought that I could use this as an opportunity to discuss with him the importance of teamwork and maybe resolve the issue we were having with our schedule. **He then started to yell and curse making statements like "you did me a favor by complaining about my times so now I'm gonna take my breaks and take my time coming back." I asked him if he was not concerned about putting his job in jeopardy, his reply was "no, Ron can't fire me, if he could he would have by now."** At this point I realized that his tone was not very friendly and I told him that I would not meet him at the truck for fear of verbal or physical altercation. At this point I phoned dispatch.

RX 26 (emphasis added).

Mr. Carter's statements demonstrate that his delays were not caused by fatigue. Rather, Mr. Carter purposefully extended his run times to spite Mr. Gordon. Mr. Carter believed that he could take his time without consequence and did not have to consider how his actions affected those around him. Those statements are characteristic of his relationships with colleagues at CPC. *See, e.g.*, RX 47 at 15 (Catherine Kiely testified, "I don't believe I ever spoke to him where he was pleasant...I don't recall ever having a conversation with Mr. Carter that he was not rude and snippy."); RX 10-2 (Catherine Kiely wrote in an email, "I prefer not to talk to [Mr. Carter] with his bad attitude, condescending manner" and asked for permission to not be required to take phone calls from Mr. Carter); TR at 186 (Ron Covert testified, "I had received complaints from dispatch folks of [Mr. Carter's] belligerence. And just he was a hard person to get along with, very argumentative over policy, basically."); TR at 234-35 (Ron Covert testified that from

personal experience, Mr. Carter was a rude and belligerent person, and that they have engaged in shouting matches); TR at 249 (Ken Pruitt testified that during a phone call with Mr. Carter, Mr. Carter was rude and belligerent and made veiled threats to Mr. Pruitt).

Third, CPC had a policy requiring its drivers call in if the driver experienced any significant delays. RX 1-2 ("CPC Logistics Inc. Truck Operator Job Description") (CPC requires its truck drivers, among other things, to "[p]romptly **report any delays** due to breakdowns, weather or traffic conditions or other emergencies, or in the event of irregularities relating to pickup or delivery of products") (emphasis added); RX 2-7 ("CPC Uniform Rules and Regulations for Drivers Providing Services for Hospira, Inc.") (prescribing progressive discipline for failing to call in). Furthermore, the evidence clearly demonstrates that Mr. Carter was aware of CPC's call-in policy. RX 3 (acknowledgement of receipt of CPC Uniform Rules and Regulations for Drivers Providing Services for Hospira, Inc. signed by Mr. Carter); RX 6 (warning letter from Mr. Covert to Mr. Carter, dated August 12, 2009, for failure to follow call-in procedures) ("Every team is required to call-in to dispatch...when experience **delays** of more than one hour...") (emphasis in the original); RX 8 (second warning letter from Mr. Covert to Mr. Carter, dated March 3, 2010, for failure to follow call-in procedures); RX 22 (memorandum from Mr. Covert to all CPC Logistics drivers assigned to Hospira, Columbia, SC, dated April 29, 2011, regarding call-in procedures).

Despite being required to promptly report his delays, there is no evidence to suggest Mr. Carter ever did so. The rules required Mr. Carter report delays of more than one hour, *see* RX 6, and the evidence, discussed above, shows that Mr. Carter was delayed by more than an hour (on average, relative to his counterparts) on nearly all of his runs, *see* RX 53. Mr. Carter may have told his supervisors that his long run times were caused by fatigue breaks, *see* CX 3, but Mr. Carter did not make those statements while he was suffering from a bout of fatigue. Because the statements were not made contemporaneous with any bout of fatigue, and I find Mr. Carter to be generally non-credible, I find those statements were merely *post hoc* excuses and give them no probative weight.

After re-reviewing all of the evidence in the administrative file, I affirm my other findings of fact in the Decision and Order, and they are incorporated herein.

## Discussion

To prevail under the STAA, Mr. Carter must show: (1) that he engaged in protected activity, (2) that he was subject to an adverse employment action, and (3) that his protected activity was a contributing factor in the adverse employment action. If a complainant establishes each factor by a preponderance of the evidence, then CPC can avoid liability only if it shows by clear and convincing evidence that it would have taken the same adverse action even in the absence of protected activity.

### *Protected Activity*

Mr. Carter identified the sole protected activity upon which he bases his complaint: refusal to operate his truck while fatigued. Under 49 C.F.R. § 398.4(c), no driver may be required to operate a vehicle when "his/her ability or alertness is so impaired through fatigue,

illness, or any other cause as to make it unsafe for him/her to begin or continue to drive...." Thus, if Mr. Carter refused to operate his vehicle because he was ill or fatigued, then he engaged in protected activity.

Mr. Carter has shown by preponderance of the evidence that he engaged in protected activity on one occasion. The evidence is clear that he took much longer than other drivers did to complete the Jacksonville run, but, as discussed above, Mr. Carter has not established that the extra time he took was caused by taking rest breaks due to fatigue.

The only recorded incident of protected activity occurred on July 15, 2011. On that date, Peter Millar sent an email to Ron Covert informing him that "Roderick was almost an hour late again getting into work this morning and at 0600 stopped at a rest area for an hour." RX 25. Mr. Millar sent a follow-up email shortly thereafter stating, "Roderick called in and Christie [Olson] asked about his delay. He said he wasn't feeling well and he is entitled to a break." *Id.* Based on this email, I find that Mr. Carter engaged in one instance of protected activity on July 15, 2011. This email is the only contemporaneous report of Mr. Carter refusing to drive because of illness or fatigue. For reasons discussed above, Mr. Carter did not stop due to fatigue, as he claims; rather, on that one occasion, he stopped due to illness, which is protected activity as driving under those conditions would have constituted a violation of 49 C.F.R. § 398.4(c).

*Adverse Employment Action*

It is undisputed that Mr. Carter suffered an adverse employment action when he was terminated on October 5, 2011, and I so find.

*Contributing Factor*

Mr. Carter has the burden to show by a preponderance of the evidence that his protected activity was a "contributing factor" in the decision to terminate his employment. Engaging in protected activity is a contributing factor if it "alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Warren v. Custom Organics*, ARB No. 10-092, ALJ No. 2009-STA-030, slip op. at 11 (ARB Feb. 29, 2012). A complainant can show contribution by either direct or indirect proof. *Id.* If Mr. Carter "does not produce direct evidence, he must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating his employment." *Id.* One method indirect proof is evidence of "temporal proximity" between the protected activity and the adverse action. *Id.*, citing *Reiss v. Nucor Corp.*, ARB No. 08-137, ALJ No. 2008-STA-011 (ARB Nov. 30, 2010).

The sole protected activity in which Mr. Carter engaged was his report of illness on July 15, 2011. He was terminated about two and a half months later; this is sufficiently close in time that, in the absence of other factors, it could be assumed that he was terminated for refusing to drive when he fell ill in July. However, there is no such absence of other factors. After July 15, Mr. Carter continued to take far longer than other drivers to complete his runs, and he continued to be the subject of complaints by Mr. Gordon throughout August and September. Mr. Carter engaged in behavior that Mr. Gordon found threatening on August 5, 2011, three weeks after the protected activity occurred. Additionally, Mr. Carter had a threatening demeanor during his conversation with Mr. Pruitt on September 9, 2011. After Mr. Covert issued his letter to all

drivers in early August, Mr. Carter's turnaround time got worse rather than better. One week before his termination, Mr. Carter received a disciplinary letter from Mr. Covert regarding his failure to be available for work assignments.

Rather than Mr. Carter's engaging in a single protected activity, it was Mr. Covert's review of Mr. Carter's manifest – motivated by Mr. Gordon's continuing complaints – that led to his recommendation for Mr. Carter's termination. Mr. Wallis made the decision to terminate Mr. Carter based on his disciplinary history, his failure to improve his performance, and his unexplained delays on the Jacksonville run. CPC, in its position statement to OSHA, stated that "Mr. Carter's termination was definitely not based solely on his excessive breaks and delays," and "these breaks and delays were a significant factor." CX 3 at 13, 14. However, these statements should not be construed to mean that Mr. Carter's one instance of refusing to drive while ill contributed to the decision to terminate his contract. These statements should be interpreted to mean that one factor CPC used in its decision to terminate Mr. Carter was that he took excessive breaks. As previously discussed, these breaks were not due to fatigue and thus are not protected by the Act. *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 987-88 (4th Cir. 1993) ("An employer obviously remains free to sanction an employee for chronically tardy conduct or indeed for any action not protected by the STAA. The STAA protects only a driver who may unexpectedly encounter fatigue on the course of a journey; it obviously does not protect delays unrelated to the statutory purposes of public and personal safety.").

## ORDER

Based on the foregoing, IT IS ORDERED that the complaint of Roderick C. Carter under the Surface Transportation Assistance Act is DENIED.

**SO ORDERED.**

Digitally signed by Paul Johnson Jr
DN: CN=Paul Johnson Jr, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Newport News, S=VA, C=US
Location: Newport News VA

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ, Jr./PML/ksw
Newport News, Virginia

# Appendix

- **Roderick Carter v. CPC Logistics, Inc., No. 17-1095 (4th Cir. 2017)**

## *Opinion of the 4th Cir.* September 5, 2017

However, we conclude that the ALJ's particular credibility finding on Carter's claim that he reported the need to take rest breaks to his supervisors does not enjoy the same record support. Although the ALJ acknowledged that Carter made general statements that he was entitled to rest breaks during his employment with CPC, the ALJ did not make a finding as to whom these statements were made. Further, the ALJ declined to credit Carter's testimony that Carter told two of his supervisors that his delays were caused by rest breaks—a finding that may conflict with the ALJ's determination that Carter made general statements on the topic because Carter testified that he made those general statements regarding fatigue breaks to only three men, including the two supervisors. Aside from these potentially conflicting findings, there is a significant problem with the ALJ's determination that Carter never mentioned fatigue breaks to his supervisors: CPC's position statement to OSHA, which Carter introduced at the administrative hearing, acknowledges that Carter mentioned fatigue breaks to two supervisors when questioned about his performance. In fact, CPC and Carter agreed that Carter mentioned fatigue breaks during a telephone conversation with a supervisor about one month before he was fired, but the ALJ inexplicably found that fatigue breaks were never mentioned during that conversation. Given CPC's concession that Carter mentioned fatigue breaks to his supervisors when questioned about his delays, we conclude that the ALJ's finding that Carter never told his supervisors that his delays were caused by such breaks is not supported by substantial evidence. Furthermore, because the ALJ's finding that Carter's delays were not truly caused by fatigue breaks rested on this factual error, we also conclude that finding is not supported by substantial evidence. We further conclude that the ALJ's flawed factual analysis, adopted by the ARB, prejudiced Carter. See Sea "B" Mining Co. v. Addison, 831 F.3d 244, 253 (4th Cir. 2016) (recognizing that we generally apply harmless error rule to administrative adjudications). The evidence overlooked by the ALJ and the ARB is significant given CPC's admission that Carter's delays were a factor in his termination, and thus, it is impossible to determine that the ALJ's error "did not adversely affect the outcome of this case." Sparks v. Gilley Trucking Co., 992 F.2d 50, 53 (4th Cir. 1993). Because the impact of the ALJ's error on Carter's ability to establish a prima facie case of retaliation cannot be measured, remand is required. Accordingly, we grant Carter's petition for review and remand for the Secretary to reconsider Carter's refusal to drive claim against CPC in light of CPC's statements that Carter reported taking fatigue breaks to CPC management when asked about his delays and that Carter's delays were a factor in his termination.

- **CARTER v. CPC LOGISTICS, INC.; CPC MEDICAL PRODUCTS, LLC; HOSPIRA FLEET SERVICES, LLC; DEPARTMENT OF LABOR, No. 19-2135**

***Opinion of the 4th Cir.*** April 7, 2020: We conclude that the ALJ properly considered the deficiencies in his initial decision that were highlighted in our opinion granting Carter's petition for review. See Carter v. CPC Logistics, Inc., 706 F. App'x 794 (4th Cir. 2017) (No. 17-1095). We further conclude that substantial evidence supports the finding that there was one event when Carter engaged in protected activity, but that the event was not a causal factor in Carter's discharge from employment. Additionally, we conclude that substantial evidence supports the ALJ's adverse credibility finding and, with the exception of one event, the finding that

Carter's delays were not due to reported fatigue breaks. Lastly, we conclude that there was ample evidence that Carter was discharged due to several factors, none of which involved a protected activity. Accordingly, we grant leave to proceed in forma pauperis and deny the petition for review.

- **RODERICK A. CARTER V. CPC LOGISTICS, INC.; CPC MEDICAL PRODUCTS, LLC; and HOSPIRA FLEET SERVICES, LLC**

## DATE: September 26, 2019

## ARB CASE NO. 2018-0078

## ALJ CASE NO. 2012-STA-00061v

**Opinion of The ARB:** In accordance with the Fourth Circuit's ruling, we have examined the record to determine if Carter's STAA-protected activity was a contributing factor in his discharge from employment. The record fully supports the ALJ's conclusion that Carter engaged in STAA-protected activity by refusing to drive due to illness. The record also supports the ALJ's conclusion that Carter's protected activity did not contribute to his discharge. Carter was discharged because of his unexplained delays, disciplinary history, and failure to improve his performance. Accordingly, the ALJ's Decision and Order on Remand denying Carter's complaint is AFFIRMED, and the complaint is hereby DENIED.