



In the Matter of:

KEITH A. WATERS,

ARB CASE NO. 02-083

COMPLAINANT,

ALJ CASE NO. 02-STA-3

v.

DATE: August 26, 2003

**EXEL NORTH AMERICAN
ROAD TRANSPORT,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Keith A. Waters, pro se, Senoia, Georgia

For the Respondent:

David L. Smith, Esq., Constangy, Brooks & Smith, LLC, Atlanta, Georgia

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C. § 31105 (2000). Complainant Keith A. Waters alleges that Respondent Exel North American Road Transport (Exel) violated the STAA by terminating his freight-hauling contract in retaliation for making safety complaints to Exel's managers. On June 4, 2002, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) recommending dismissal of Waters' complaint. The R. D. & O. is now before the Administrative Review Board pursuant to 49 U.S.C. § 31105(b)(2)(C) (2000) and 29 C.F.R. § 1978.109(c)(1).

STANDARD OF REVIEW

Under the STAA, the Administrative Review Board is bound by the factual findings of the ALJ if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Transp., Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is that which is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Clean Harbors Env'tl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). We accord special weight to an ALJ's demeanor-based credibility determinations. *Becker v. West Side Transp., Inc.*, ARB No. 01-032, ALJ No. 00-STA-4, slip op. at 5 (ARB Feb. 27, 2003); *Trachman v. Orkin Exterminating Co., Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-3, slip op. at 2 (ARB Apr. 25, 2003).

In reviewing the ALJ's conclusions of law, the Board, as the designee of the Secretary, acts with “all the powers [the Secretary] would have in making the initial decision . . .” 5 U.S.C. § 557(b) (2000). *See also* 29 C.F.R. § 1978.109(b). Therefore, the Board reviews the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

The fundamental issue in this case is whether Exel terminated Waters's contract in retaliation for making safety complaints or, alternatively, Waters abandoned his contract by not returning to work following a meeting with Exel management on February 27, 2001. The ALJ found that Waters abandoned his contract by walking away from the February 27 meeting, failing to give assurance that he would not engage in further threatening behavior, and failing to return to work. He noted that it was Exel's policy not to contact contractors to be dispatched, and Waters chose not to be dispatched by not reporting to work. Only after Waters confirmed that he had secured work elsewhere was he directed to return Exel's equipment. R. D. & O. at 5.

We have reviewed the record and find that the ALJ's factual findings are supported by substantial evidence on the record as a whole and are therefore conclusive. 29 C.F.R. § 1978.109(c)(3). *See* R. D. & O. at 2-4, and record citations therein. The record fully supports the ALJ's thorough, well-reasoned decision, and with the exception discussed below, we adopt the ALJ's decision in all respects.

The ALJ concluded that “[s]ince respondent did not subject complainant to adverse action, complainant is unable to establish a prima facie case.” R. D. & O. at 4. We note that in a case fully tried on the merits, such as this, the issue is not the establishment of a prima facie case. Rather, the relevant inquiry here is whether Waters established, by a preponderance of the evidence, that the reason for the termination of his contract was protected safety complaints. *See, e.g., Frechin v. Yellow Freight Systems*,

Inc., ARB No. 97-147, ALJ No. 96- STA-34, slip op. at 1 (Jan. 13, 1998), citing *Andreae v. Dry Ice, Inc.*, ARB No. 97-087, ALJ No. 95-ALJ-24, slip op. at 2 (Jul. 17, 1997).

Since the ALJ found, and we agree, that Waters abandoned his contract and Exel did not discharge him, Waters did not meet his burden of proving by a preponderance of the evidence that Exel subjected him to adverse action in retaliation for protected activity. Accordingly, with the exception noted above, we adopt the R. D. & O. of the ALJ and **DENY** the complaint.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge