In the Matter of:

STEPHAN W. DREW,

COMPLAINANT,

v.

ALPINE, INC.,

RESPONDENT.

ARB CASE NO. 02-044
02-079

ALJ CASE NO. 2001-STA-47

DATE: June 30, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paul O. Taylor, Esq., ***Truckers Justice Center, Eagan, Minnesota***

For the Respondent:
Lawrence C. Winger, Esq.,[1] ***Portland, Maine***

FINAL DECISION AND ORDER

These cases arise under the whistleblower protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105 (2000), and the implementing regulations found at 29 C.F.R. Part 1978 (2002). On May 22, 2001, Complainant Stephan W. Drew filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondent Alpine, Inc. violated the STAA when it discharged him on December 4, 1999, for refusing to operate his assigned vehicle. On April 26, 2001, OSHA found his claim to be without merit. Drew objected to the ruling and requested a hearing before an Administrative Law Judge (ALJ). The ALJ conducted the hearing on September 6, 2001.

On January 28, 2002, the ALJ issued a Recommended Decision and Order (R. D & O.)

[1] As noted below, Mr. Winger submitted a Notice of Withdrawal of Appearance dated August 15, 2002, which was received by the Board on August 26, 2002. No other counsel has been substituted.

finding that Alpine's termination of Drew's employment violated the STAA. The ALJ recommended that Alpine be ordered to reinstate Drew, provide backpay, and "post a copy of the final Decision and Order in this case at its terminal for a period of 120 days after receipt of that decision." R. D. & O. at 11. The ALJ also allowed Drew's counsel to file a motion for attorney's fees. In response to that motion on April 22, 2002, the ALJ issued an R. D. & O. awarding Drew's counsel attorney's fees totaling $11,982.20.

On March 1, 2002, Alpine informed this Board that it did not intend to appeal the January 28 R. D. & O. but instead "respectfully reserves the right to move, if necessary, for a modification of said Order with regard to the back pay, reinstatement, and notice posting provisions thereof" because Alpine ceased operating bus tours on December 10, 2001. *See* March 1, 2002 Letter to the Board from Lawrence C. Winger, Counsel of Record for Alpine.

On August 26, 2002, the Board received a Notice of Withdrawal of Appearance from Lawrence C. Winger, Esq., Counsel of Record for Alpine, advising that "I no longer represent Respondent Alpine, Inc. and have no agreement with Respondent Alpine, Inc. to represent it." The Notice also informed the Board that, "[o]n information and belief, the affairs of Respondent Alpine, Inc. are subject to the jurisdiction of the U.S. Bankruptcy Court in Maine in bankruptcy Case No. 01-21473, Debtor ABP [sic] Group, Inc. et al. Two bankruptcy notices from said case are annexed hereto." Neither of the bankruptcy notices appended specifically mentions Alpine.

On June 10, 2003, the Board issued an Order to Show Cause requiring the parties to demonstrate why the Board should not proceed to rule on the merits of this case and to submit documents of public record and affidavits from individuals with personal knowledge establishing "whether, and if so when, Alpine ceased operations, was dissolved, or was placed in bankruptcy, and the status of any court actions relevant thereto." Copies of this Order were sent to Attorney Winger, John C. Turner (who was identified by Winger as the Trustee in the APB Group Bankruptcy case), Jocelyn Deraspe (Vice-President of Alpine), Drew, and Paul O. Taylor (Drew's counsel).

On June 23, 2003, the Board received a letter from Winger indicating again that he no longer represents Alpine. "To assist the Board," Winger submitted the information that "Alpine went out of business in or about December, 2001," and that "all of its assets were sold on or about February 1, 2002 to an unrelated company." He also stated, "Alpine, Inc. never filed for bankruptcy, so there is no bankruptcy automatic stay in effect for actions against Alpine, Inc." He advised that this information was conveyed "in the form of a letter and not in the form of an affidavit because I do not have personal knowledge of any facts stated herein." Winger Response to Show Cause Order in form of letter dated June 18, 2003.

The Board also received an affidavit from the Trustee in Bankruptcy for the debtor APB Air Group, Inc., stating the following: APB Air Group was not affiliated with Alpine, but both corporations were owned by the same individuals. APB Air Group owned the building in which Alpine operated. Alpine owed APB money for back rent. The amount due was determined uncollectible, except $4,000 that was paid to the Bankruptcy Estate. Bankruptcy Trustee Turner

Response to Show Cause Order in form of affidavit dated June 16, 2003. No other responses to the Show Cause Order were received.

Finding that there is no evidence before this Board that would preclude adjudication of this case on the merits, we proceed.

STANDARD OF REVIEW

We have jurisdiction to decide this matter by authority of 49 U.S.C. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1). *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002).

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) (2002); *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 Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

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). 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).

DECISION

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) (2002). The record also supports the ALJ's thorough, well-reasoned legal conclusions. Accordingly, we adopt the findings of fact and conclusions of law in the attached ALJ's Recommended Decision and Order (ALJ January 28, 2002 R. D. & O.). We also adopt in full the ALJ's April 22, 2002 R. D. & O. (attached) with respect to attorney's fees. In view of the information supplied to the Board, we adopt the remedies set forth in the ALJ's January 28, 2002 R. D. & O. with modification as set forth below.

IT IS ORDERED that:

1. If Alpine is still operating buses in the surface transportation business, Alpine shall immediately reinstate Drew to his part-time position.

2. Alpine shall, if in the surface transportation business, post a copy of this Final Decision and Order at its place of business for a period of 120 days after receipt of this Decision.

3. Alpine shall pay Drew back wages in the amount of $260 per month, from December 5, 1999, to the date upon which it ceased operating buses in the surface transportation business or the date of Drew's reinstatement, whichever is earlier. Alpine shall pay pre-judgment interest calculated pursuant to 26 U.S.C. § 6621.

4. Alpine shall pay to Drew's counsel $11,982.20 in attorney's fees for work performed by Drew's counsel before the ALJ. Drew's counsel shall have 20 days from the date of this Decision and Order to submit to this Board an itemized petition for additional attorneys' fees and other litigation expenses incurred in this case on or after January 28, 2002. Drew's counsel shall serve the petition for fees and expenses on Alpine, which shall have 30 days from issuance of this Decision and Order to file objections to the petition with this Board.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

U.S. Department of Labor **Office of Administrative Law Judges**
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue date: 28Jan2002

In the Matter of

STEPHAN W. DREW,
Complainant

v.

ALPINE, INC.,
Respondent

Dated: January 25, 2002

Case No.: 2001-STA-00047

Paul Taylor, Esq.
Eagan, Minnesota
For the Complainant

Lawrence C. Winger, Esq.
Portland, Maine
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER[1]

This case arises under the Surface Transportation Assistance Act of 1982 ("the Act"), codified as amended at 49 U.S.C. §31101 *et seq*., and the applicable regulations at 20 C.F.R. Part 1978. Stephan W. Drew ("Complainant") filed a complaint with the Occupational Safety and Health Administration ("OSHA") of the United States Department of Labor on May 22, 2001 contending that he was wrongfully discharged from his job with Alpine, Inc. ("Respondent") on December 4, 1999 in violation of §31105 of the Act. Complainant contends that Respondent terminated his employment because he refused to drive his truck in violation of the Act. Specifically, Complainant allegedly refused

[1]Citations to the record of this proceeding will be abbreviated as follows: CX–Complainant's Exhibit; RX–Respondent's Exhibit; ALJX–Administrative Law Judge's Exhibit; TR–Hearing Transcript.

to operate his vehicle when doing so would not have given him sufficient rest time between trips; counseled a fellow employee to do the same; and called in sick when he claims he could not have safely operated his vehicle. Respondent maintains that Complainant did not engage in activity protected under the Act and that it terminated Complainant for "demonstrated unreliability." *See Respondent's Post-Hearing Brief*, at 1. The Boston OSHA Regional Office Area Director found the claim to be without merit, and Complainant requested a hearing before an administrative law judge.

A hearing was held on September 6, 2001 in Portland Maine. At the hearing, Complainant's Exhibits 1-21 and 26 and Respondent's Exhibits 3 and 5-8 were admitted into evidence. However, Complainant's hand-written notes contained on Complainant's Exhibits 15, 17 and 18 were not admitted into the record (TR 105,194, 206), and pages 1, 5-8 and 9-14 of Complainant's Exhibit 20 were also rejected (TR 128).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

At the time of the hearing, Complainant was 39 years old and married. His wife, Sherry Lynn Drew, was also employed with Respondent as a tour director during the relevant time period. Complainant has an extensive employment background, including both military and civilian positions. He entered the U.S. Army in 1978, was released in 1980, and entered the reserves in 1983 (TR 49; CX 1). There, he trained to become a combat medical specialist and x-ray technician (TR 49-50; CX 1). He also received training to drive trucks for the army (TR 50; CX 1). He was honorably discharged from the army in July 1991 after being diagnosed with a mild arrhythmia, bradycardia and a second degree atrial ventricular block (TR 50-51; CX 1, at 14). Complainant also has a significant amount of experience as a truck driver. He received his commercial driver's license in 1980 (TR 54; CX 1, at 1), and he has held numerous positions as a truck driver since this time (CX 1, at 3-4). At the time of the hearing, he held a commercial driver's license with several endorsements, and had never been involved in an accident (TR 55, 58; CX 1, at 1).

Respondent is in the business of operating tour buses. Complainant applied for a position with Respondent as a tour bus driver in the summer of 1999. Respondent hired Complainant in late July with service to begin on August 2, 1999, but noted on his employment agreement that, "due to unfavorable past employment references close attention will be paid to punctuality and dependability in reference to reporting and completing job tasks" (CX 2, at 1). At the hearing, Jocelyn Deraspe, the Vice President of Alpine, Inc., testified that this notation was made because Complainant had held many jobs, which indicated that he may leave the position soon after taking employment, and because Bayles Tours had given him a poor recommendation and said that he owed money to the company (TR 212). Complainant expounded on his reference from Bayles Tours, stating that he believed the reference was retaliatory. He explained that he had refused to falsify a log sheet to indicate that he had

had a sufficient time off-duty between shifts, and had quit the job over this conflict (TR 186). When he quit, he did not repay money he owed to the company because it had initially refused to pay him unless he falsified his log sheet (TR 185-86).

Complainant's employment with Respondent began smoothly, and continued without incident until late September. In fact, Respondent added to his duties after he was hired, giving him the responsibility for road training other drivers (TR 62). Further, Complainant was the only employee sent to an October seminar in Nevada on service and maintenance of buses (CX 5; TR 74). Ms. Deraspe acknowledged that the company sent Complainant to the seminar because he had a mechanical background, but also contended that the company sent Complainant to the seminar because he was the only employee available to go (TR 258).

Although Respondent appeared to be more than satisfied with Complainant's performance, it is notable that Complainant twice asserted his or other employees' rights under relevant Department of Transportation regulations. *See* 49 C.F.R. Part 392. The first such incident occurred on September 19, 1999. Complainant contended that he had returned from five hours of driving that day (CX 8; TR 83). He was scheduled to road train Don Beauchesne the following day, but believed that he would have insufficient time to sleep and return to work by 4:30 a.m. (TR 86-87).[2] Complainant discussed his concerns with his supervisor, Lori Lewis, and he was not sent out on September 20. A similar incident occurred on November 30, 1999, just a week before he was terminated. On that day, Complainant and Mr. Beauchesne drove on the same tour. When they arrived back from the trip, Mr. Beauchesne expressed concern that he would have insufficient time off before his next scheduled trip (TR 110).[3] Complainant advised him to call Ms. Deraspe and inform her of his problem (TR 110-11). Mr. Beauchesne did so with Complainant standing nearby. He apparently became confused while speaking with Ms. Deraspe, and turned the phone over to Complainant. Complainant testified that he told Ms. Deraspe that he did not believe Mr. Beauchesne should drive the following day, particularly in light of an earlier Department of Transportation report finding violations by Respondent (TR 112-13). Complainant testified that Ms. Deraspe then said that she was coming down to the bus station to address the situation in person (TR 114). Complainant asked her if he should stay at the station, to which she replied, "no, you've done enough, you go" (TR 114). Ms. Deraspe testified that she had no memory of the September 19 incident, did not recall speaking with Complainant on November 30, and that neither incident contributed to her decision to fire him (TR 215, 229).

The only notable performance failure in Complainant's record occurred on October 28, 1999,

---

[2] 49 C.F.R. § 395.3 sets forth the maximum driving time allowed under the regulations.

[3] Complainant explained that he understood "the 10 hour rule" to mean that after 10 hours of driving in a 24 hour period, the driver must have 8 consecutive hours off duty before he is legally able to drive again (TR 111).

when he erroneously read his schedule and arrived late to pick up a party (TR 89).[4] He was scheduled to arrive at the local civic center at 10:30 a.m. to pick up the Portland Pirates, a hockey team with whom Respondent had recently signed a transportation contract (CX 11; TR 88-89, 218).

Complainant and Respondent dispute the facts surrounding this incident. Complainant testified that he called Ms. Deraspe from home when he realized that he was running about one half hour late (TR 96) and called her again around 10:30 to tell her he was leaving the bus yard to go to the civic center (TR 97). He stated that, during the second phone call, Ms. Deraspe informed him that she had told the team manager that the bus was late because of maintenance issues (TR 97). Complainant also claimed that he never received any verbal or written discipline regarding the incident (TR 97-98). He maintained that he accurately completed his driver's log, which reflects that he arrived at the civic center at approximately 11:00, the team took one and a half hours to load their equipment, and they departed at 12:30 (CX 10; TR 89-95). Ms. Deraspe contended that Complainant falsified his time log to reflect that he arrived at the civic center at 11:00 when in fact he had arrived at 12:00 (TR 216). She stated that the team manager had called her repeatedly after 10:30 regarding the bus's whereabouts, and that he "absolutely" called her after 11:00 a.m. as well, although she testified at a hearing on a State claim that she received all calls from the team manager between 10:30 and 11:00 a.m. (TR 246-49). Ms. Deraspe also testified that Complainant never called her to tell her he was running late, and that she verbally disciplined him for the incident (TR 217-18).

In mid-November, Complainant resigned his full-time position and requested permission to move to part-time status so that he could pursue other professional goals. The record contains an eight page letter of resignation (CX 13), although Ms. Deraspe contended at the hearing that Complainant had written the letter after the present action commenced (TR 149, 226-28). Regardless of when Complainant wrote the letter, Respondent granted his request to work part-time (RX 8). Ms. Deraspe stated that part-time drivers had to be among the most reliable employees; she considered Complainant among the most reliable drivers when she moved him to part-time work; and she allowed Complainant to change his status knowing that he had been late picking up the Portland Pirates and knowing that he had allegedly called in sick on November 15 (TR 241-243). However, she later stated that she was concerned about his reliability when she allowed him to move to part-time work (TR 262).

---

[4] Respondent maintains that Complainant had several other problems in his performance, which I do not discuss in the body of this decision because they do not impact the outcome of this case. First, Ms. Deraspe testified that Complainant offended some passengers with an off-color joke. She stated that making jokes of any kind was "against company policy" and that she discussed the incident with Complainant (TR 224, 252; RX 7). Complainant counters this example with numerous glowing client evaluations (CX 20). Respondent also maintains that Complainant called in sick before a November 15 trip claiming to be "drenched" and unable to work (TR 220). Complainant maintains that he was simply rescheduled on this day, and that he did not call in sick (TR 146-47).

Complainant's last day of full-time work was scheduled for December 5, when he was to leave the station at 6:00 a.m. and return at 9:00 p.m. However, he had experienced a chronic cough throughout the fall of 1999 which worsened significantly on the evening of December 4 (TR 19-20, 114-15). He testified that he experienced sweating, headache, body aches, fits of coughing, shortness of breath and chest pain (TR 115-16). He also felt that he had a temperature, and his wife estimated that he had a fever of around 101 degrees (TR 20, 115). He and Mrs. Drew also testified that he coughed up blood-tinged sputum around 10:00 that evening (TR 20, 115). After 10:00 p.m., Complainant began to feel that he could not safely drive the following morning (TR 116). Mrs. Drew either called or paged Ms. Deraspe between 10:15 and 10:45 that evening[5] and told her that Complainant had a "bad cough" and was unable to work the following day (TR 21, 238). She testified that she told Ms. Deraspe that Complainant was coughing up blood, but Ms. Deraspe stated that she was not told this fact (TR 24, 233-34). Ms. Deraspe testified that she could hear fake coughing in the background of the conversation and that she did not believe that Complainant was sick, although she never expressed her disbelief to Mrs. Drew (TR 38, 235). She told Mrs. Drew that she would call her back, and arranged to have another employee take the assignment (TR 231). Ms. Deraspe again called Mrs. Drew, who was scheduled to work with Complainant on the December 5 trip, and asked whether she would be working the following day (TR 232). Mrs. Drew told Ms. Deraspe that she was planning to take Complainant to the emergency room the following morning and could not work (TR 24; 232). Without further discussion, Ms. Deraspe told Mrs. Drew "that they were done" and terminated both of them (TR 232, 233). She explained at the hearing that she made the decision to fire the Drews impulsively while she was on the phone (TR 233). She felt that the Drews were "unreliable" (TR 235). She understood that Complainant was professing to be too sick to drive (TR 239). She simply did not believe that Complainant was ill – although she asked no questions regarding his condition (TR 235, 258) – and she did not believe that Mrs. Drew was planning to drive him to the hospital because she knew that Mrs. Drew did not have a license (TR 235). Ms. Deraspe did say that if Complainant were actually ill, that he did the right thing to call in sick (TR 256).

Despite Ms. Deraspe's belief that he was fabricating an illness, Complainant did in fact have an upper respiratory infection (CX 21, at 1; TR 121). He did not, however, go to the emergency room the following day to receive this diagnosis, but waited until December 6 to visit a doctor at the Veteran's Hospital. The Drews testified that Mrs. Drew wanted to drive Complainant to a hospital on Saturday, but that Complainant refused to go because he did not believe that his illness was life-threatening and because she rarely drove and did not possess a license (TR 41-42, 119, 176-77). They further testified that Complainant did not go to the emergency room on Saturday because he needed pre-authorization to visit a doctor outside the veteran's hospital, and had no other medical insurance (TR 25-26, 177). After visiting the veteran's hospital, Complainant was prescribed

---

[5] The parties disputed the exact time and method of contact. The precise details of the contact are immaterial to the outcome of this matter, beyond noting that Ms. Deraspe was clearly displeased that she was contacted late at night at her home.

antibiotics and his condition improved throughout the month of December, although he remained symptomatic when he visited the hospital on December 30 (CX 21).

B. Discussion

49 U.S.C. § 31105 prohibits an employer from discharging an employee because the employee has refused to operate a vehicle in violation of a "regulation, standard, or order of the United States related to commercial motor vehicle safety or health." 49 U.S.C. § 31105(B)(i). To prevail under the Act, Complainant must show that: (1) he engaged in an activity protected under the act; (2) he was subject to an adverse employment action following this activity; and (3) that the adverse employment action was caused all or in part by the protected activity. *BSP Trans., Inc. v. U.S. Dept. of Labor*, 160 F.3d 38, 46 (1st. Cir 1998). The Administrative Review Board has "repeatedly" held that once a case under the Act "has been fully tried on the merits, it is not necessary to determine . . . whether Complainants established a *prima facie* case, and whether Respondents rebutted that showing." *Somerson v. Yellow Freight System, Inc.*, 1998-STA-9 (February 18, 1999). Rather, "the relevant inquiry is whether Complainants prevailed by a preponderance of the evidence on the ultimate question of liability." *Id.* Complainant maintains that he engaged in protected activity throughout the fall of 1999 and was terminated for this activity. Respondent maintains that Complainant did not engage in protected activity throughout the fall of 1999, and that, even if he did engage in some protected activity, Ms. Deraspe was not aware of it at the time of his termination.

Although Complainant presented evidence of several allegedly protected activities throughout the fall of 1999, I will not discuss whether Respondent took an adverse action as a result of these activities because it is not necessary to support the outcome of this case. While the incidents appeared to involve protected activity and Respondent may have considered them when firing Complainant, I find that Respondent's decision to terminate Complainant was based overwhelmingly on the events of December 4, and that Complainant prevails based solely on the testimony and evidence surrounding that incident.

49 C.F.R. §392.3 provides that

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle . . . .

This regulation, sometimes called the "fatigue rule," "protects workers who refuse to drive when their ability or alertness is or will become substantially impaired." *Stauffer v. Wal-Mart Stores, Inc.*, 1999-

STA-21 (ARB Nov. 30, 1999).

Complainant maintains that he engaged in a protected activity when his wife called Ms. Deraspe stating that he could not work the following day. Complainant states that he was too ill to safely operate a commercial vehicle on December 4 and 5, and supports this contention with his own and his wife's testimony regarding the extent of his illness and his hospital records from December 6 and 30 establishing that he was suffering from an upper respiratory infection (CX 21). Respondent strongly contests this evidence, asserting that Complainant was simply not too ill to operate a commercial vehicle on December 4 and 5, and thus engaged in no protected activity on these days.

Suffering from an upper respiratory infection accompanied by incessant coughing and fever can provide grounds for refusal to drive due to fatigue or illness, as driving while so ill clearly could pose a danger to the driver himself and others on the road. Respondent notes that Complainant must provide more than a mere good faith belief that his alertness was impaired. *See Respondent's Post-Hearing Brief*, at 3. However, Respondent's own witness, Ms. Deraspe, also accurately summarized the fatigue rule when she testified that if Complainant was as ill as he was claiming to be on December 4, then he acted correctly by calling in sick (TR 256-57). Thus, the case turns on whether Complainant was legitimately sick on December 4, and therefore protected under the Act, or whether he was greatly exaggerating his illness to avoid work.

Complainant and Mrs. Drew testified consistently regarding the extent of his illness on December 4, both stating that he had suffered from a hacking cough which worsened on the evening of December 4, that he felt feverish and that he coughed up sputum tinged with blood. Respondent rightly notes that Complainant did not cough up significant amounts of blood. However, Complainant and his wife did not contend that he did so. Additionally, Complainant's medical records from December 6 establish that he was not pretending to cough, as Ms. Deraspe contended at the hearing, but that he in fact had an upper respiratory infection. Further, after taking a course of antibiotics, he remained symptomatic almost a month later at his December 30 hospital visit, indicating that his illness was serious, although not life-threatening. The medical evidence is therefore consistent with Complainant's and Mrs. Drew's testimony regarding his condition on December 4 and 5.

Respondent offers several arguments to cast doubt on the extent of Complainant's illness on December 4. It claims that Mrs. Drew did not inform Ms. Deraspe of all the symptoms Complainant alleges he was experiencing and that Complainant's hospital records from late December are more detailed than the notes taken on December 6, indicating that Complainant fabricated more serious symptoms later in the month after he had decided to bring suit. I reject Respondent's argument for several reasons. First, Ms. Deraspe's memory was quite fallible. She testified inconsistently (TR 238, 246, 255; CX 17) and admitted to having no recollection of several events, including Complainant's initial interview and an incident in which she was summoned to work late at night (TR 211, 215, 229, 250, 255). Conversely, Mrs. Drew testified consistently with her husband regarding the extent of his

illness on December 4, indicating that her memory of the incident was sound. Additionally, even if Mrs. Drew had not gone into detail regarding Complainant's illness as she spoke with Ms. Deraspe, Ms. Deraspe testified that she never indicated her skepticism regarding Complainant's illness. Therefore, Mrs. Drew would not necessarily feel the need to expound on her husband's symptoms. Respondent's argument regarding the relative detail in Complainant's medical records also fails, because the objective evidence in the medical reports support that Complainant was ill through the month of December.

To refute Complainant's claims of illness, Respondent also stresses that Claimant did not go to the emergency room on Saturday, as his wife told Ms. Deraspe he would. On its face, this evidence might indicate that Complainant was not as ill as he professed. However, both Complainant and his wife explained his failure to seek immediate medical treatment. While Mrs. Drew wanted to drive him to the hospital, Complainant refused to go because she did not have a driver's license and was an inexperienced driver. He felt it would be more dangerous for her to drive than for him to wait another day before seeking medical attention. The Drews also explained that he needed to visit a veteran's hospital to ensure that his insurance would pay for the visit. I find this testimony reasonable, despite Respondent's counsel's suggestion that the Drews "could go to any outside doctor [they] wanted to, as long as [they] were willing to pay the bill . . .," and simply chose not to go to the emergency room because they were unwilling to spend money (TR 43). Thus, Complainant's behavior was entirely consistent with the level of illness that he claims; his condition was not life-threatening, but he was too sick to drive on Saturday, whether for his job or to visit the hospital.

Having established that Complainant's act of calling in sick was a protected activity, there is no dispute that he was subject to an adverse action – his termination – and there can be little doubt that the adverse employment action was caused by the protected activity. Ms. Deraspe's own testimony clearly indicates that she fired Complainant because he called in sick. She testified that she made her decision to fire him spontaneously, as she was speaking with Mrs. Drew on December 4 (TR 233). She was also displeased that Mrs. Drew called her at home, stressing that Mrs. Drew called her at 10:45 at her home rather than paging her (TR 230, 233), and that Complainant should have called her earlier in the day, even if he did not think he was too ill to drive at that time (TR 252-53).[6] Therefore, Ms. Deraspe appears to have been annoyed that she was disturbed at home, and fired Mr. Drew because she was angry and disbelieved his claim of sickness.

Complainant's letter of termination written by Ms. Deraspe states that "[v]ery late at night on December 4, 1999 you called to tell us that you would not be able to work on December 5, 1999 because of a bad cough. Because of your unreliability as shown by that act and your excessive tardiness on previous trips, we cancelled your part-time work after December 5, 1999" (CX 17). Although Respondent attempted to paint Complainant as a generally unreliable employee, the evidence

---

[6] Ms. Deraspe admitted that drivers typically call in sick immediately before their shift, however (TR 253).

does not show this to be the case. Respondent gave him additional responsibilities after it hired him and sent him to a seminar in Nevada, indicating it was pleased with his performance. Most notably, Respondent allowed Complainant to change his employment status to part-time at the end of November. Ms. Deraspe testified that part-time drivers needed to be the most reliable, and that she considered Complainant to be one of the most reliable employees at the time that he was allowed to move to part-time status (TR 241). It is difficult to believe that her opinion could have changed entirely only two weeks later when she fired Complainant.

Respondent fired Complainant because Ms. Deraspe did not believe he was actually sick on December 4. While employers may legitimately require employees to provide some proof that they were too ill to drive on a given day, Ms. Deraspe never requested any proof of illness, such as a physician's note (TR 254), or even questioned Mrs. Drew on the extent of Complainant's illness. Rather, she simply terminated him because she did not trust his honesty. However, she made an error in judgement; the medical evidence and testimony show that Complainant was legitimately too ill to drive. Therefore, when he informed Respondent that he was unable to drive a vehicle the following morning, he engaged in a protected activity. Respondent admitted that Complainant's calling in sick was a basis for his termination. Further, Respondent was unable to articulate any other reason for his termination. I conclude that Complainant's protected activity was the reason for the adverse employment action. Therefore, Complainant was terminated in violation of § 31105 of the Act.

C. Damages

Once it is determined that there has been a violation of the Act, appropriate damages and remedies are to be determined according to § 31105(b)(3)(A), which reads in pertinent part:

> [T]he Secretary of Labor shall order [the Respondent] to –
>
> (i) take affirmative action to abate the violation;
> (ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and
> (iii) Pay compensatory damages, including back pay.

Complainant has requested to be reinstated as a part-time driver for Respondent, and he shall be reinstated immediately. *See* 29 C.F.R. § 1975.109(b).

In regard to the amount of back wages due Complainant, the Secretary has held that in determining back wages in cases governed by whistleblower protection statutes, unrealistic exactitude is not required. *Lederhaus v. Paschen*, 91-ERA-13, slip. op. at 9-10 (Sec'y October 26, 1992) (*Decision and Order* adopting Administrative Law Judge's calculation of back wages). In addition, any uncertainties in calculating back pay are to be resolved against the discriminating party. *Kovas v.*

Morin Transportation, Inc., 92-STA-41 (Sec'y October 1, 1993) (*Final Decision and Order*). Respondent is entitled to an offset for wages earned by Complainant, if any, from his termination until his reinstatement.

Complainant requests back pay of $260 per month from the date of his termination until reinstatement. He bases this figure on Respondent's hourly wage of $10 for part-time drivers, the average day being 13 hours of work, and an estimated two days of work per month for part-time drivers. Respondent's brief does not address the issue of part-time earnings for part-time drivers. However, Ms. Deraspe testified that part-time drivers earn $10 per hour, work 12 to 13 hours a day, and work approximately two days per month[7] (TR 237; 265-66). Because there appears to be no significant dispute regarding the amount of time worked and the hourly pay, I accept Complainant's proposed figures regarding the amount of back pay he is owed, starting on December 4, 1999, and extending until his reinstatement.

Additionally, Complainant is entitled to pre-judgment interest on the amount of back wages he receives pursuant to a final order in this case. Decisions by the Secretary awarding back pay under the Act calculate interest in accordance with 26 U.S.C. §6621 (1988), which specifies the rate for use in computing interest charged on underpayment of federal taxes. *Phillips v. MJB Contractors*, 92-STA-22 (Sec'y Oct. 6, 1992) (*Final Decision & Order*).

Complainant further requested that I direct Respondent to post a copy of the final decision in this case at its terminal for 120 days after it is issued, stating that this is an appropriate remedy under *Scott v. Roadway Express, Inc.*, 1998-STA-8 (ARB July 28, 1999). I agree that it is appropriate to inform Respondent's other employees of their rights and obligations regarding driving while fatigued or ill.

Finally, Complainant has requested and will be entitled to attorney's fees in this case pursuant to §31105(c)(2)(B) of the Act. Complainant's counsel requested time to file a fee petition, and he is directed to file his fee petition within 30 days of receipt of this decision. When the fee petition is filed, Respondent shall file any objections within 15 days of receipt.

---

[7] Ms. Deraspe testified at different times that part-time workers work between one and four days per month (TR 237-38, 264-65). This supports Complainant's estimate that he would work two days a month as a part-time worker.

RECOMMENDED DECISION AND ORDER

IT IS ORDERED that:

1. Respondent shall immediately reinstate Complainant to a part-time position.

2. Respondent shall pay Complainant back wages in the amount of $260 per month, from December 5, 1999 to the date when Complainant is reinstated to his former job. Pre-judgment interest calculated pursuant to 26 U.S.C. § 6621 shall be paid.

3. Respondent shall post a copy of the final *Decision and Order* in this case at its terminal for a period of 120 days after receipt of that decision.

4. Complainant's counsel shall file a fee petition within 30 days of receipt of this decision. Respondent shall file any objections to the fee petition within 15 days thereafter.

JEFFREY TURECK
Administrative Law Judge

U.S. Department of Labor **Office of Administrative Law Judges**
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue date: 22Apr2002

In the Matter of	:	
	:	
STEPHAN W. DREW,	:	Case No.: 2001-STA-00047
Complainant	:	
	:	
v.	:	
	:	
ALPINE, INC.,	:	
Respondent	:	

RECOMMENDED ORDER AWARDING ATTORNEY'S FEE

On January 25, 2002, I issued a *Recommended Decision and Order* in this case, which arose under the Surface Transportation Assistance Act of 1982 ("STAA" or "the Act"), in which I ordered the respondent to reinstate the complainant and recommended that it pay him back wages. As provided in the recommended order, complainant's counsel filed a petition for an attorney's fee, and respondent filed timely objections to the fee petition.

Complainant's counsel requests a fee in the amount of $11,982.20 for services to the complainant in this case. That fee is comprised of 48.1 hours of services billed at $225.00 an hour, and the reimbursement of $1,159.70 in expenses. Respondent objects to the hourly rate of $225.00, contending that a rate of $175 an hour is more appropriate for Southern Maine. In addition, respondent objects to complainant's counsel's billing in quarter-hour increments, and to paying any extra expenses resulting from complainant's retaining an attorney from Minnesota rather than one in Maine.

First, I find that $225.00 an hour is reasonable. Complainant's counsel's law practice is called the *Truckers Justice Center*. He specializes in transportation law in general and in representing complainants in cases under the STAA in particular, and based on his work in this case it is clear he has great expertise in this arcane area of the law. Further, he represents that $225.00 an hour is his usual billing rate, and he has been awarded fees at that rate by at least two of my colleagues. *See Johnson v. Roadway Express*, 99-STA-5 (*Order Granting Attorney Fees* Sept. 3, 1999) (Morgan, ALJ); *Bettner v. Daymark Foods, Inc.*, 97-STA-23 (*Recommended Decision and Order Awarding Attorney Fees* June 25, 1998) (Jansen, ALJ). Moreover, unlike respondent's counsel, who represents

that he bills at a rate of $175.00 an hour, complainant's counsel only gets a fee if he is successful.

I find that $225.00 is a reasonable hourly billing rate in this case.

Respondent also represents that complainant's counsel bills in increments of one-quarter hour rather than in tenths of an hour, implying that on four occasions he billed for more time than he actually spent. But complainant's counsel did bill for only a tenth of an hour on January 9, 2002, indicating that when he spent less than one-quarter of an hour of his time providing a service to complainant he only billed the amount of time he spent. Accordingly, this objection is overruled.

Finally, respondent objects to the costs expended by complainant's counsel arising from the location of his practice in Minnesota. Respondent contends that complainant has not shown that competent counsel could not be located in Maine, and respondent should not be held responsible for complainant's decision to hire an attorney located halfway across the country. Complainant's counsel is seeking a fee for the 14 hours he spent traveling between Minnesota and Maine for the hearing at his usual billing rate of $225.00 an hour; his airfare of $202.00 for travel between St. Paul, Minnesota and Boston; $45.00 for ground transportation between Boston and Portland, Maine; $63.49 for a rental car from Alamo; $199.90 for meals and other expenses (presumably including a hotel room); and a $22.00 cab fare in Minneapolis (presumably to get to the airport there).

Respondent has not cited any case law in support of its position that such charges are not allowable; and my own research did not disclose any decisions in DOL whistleblower cases in which this issue was discussed. Under the circumstances of this case, I believe the charges are justified.

Complainant was *pro se* when the notice of hearing was issued. He attempted to find local counsel to represent him, but was unsuccessful. Complainant's difficulty obtaining counsel is not unusual for cases brought under the STAA. There do not appear to be many attorneys who have expertise in bringing cases under the Act, perhaps because relatively few cases are brought under it each year and the cases are widespread. In any event, there probably are not many attorneys in Southern Maine who have ever represented a complainant in an STAA case.

I do not know how complainant came to be represented by Mr. Taylor, but in selecting him complainant retained an attorney who is familiar with cases under the STAA and who did an excellent job representing him. Not permitting complainant's counsel to be paid for the hours he spent in travel and for his travel expenses might make it economically infeasible for him to continue to represent complainants located a significant distance from St. Paul, Minnesota, to the detriment of future complainants. Moreover, since complainants' counsel only collect a fee if they are successful, they have a significant incentive to minimize their travel costs, as it appears complainant's counsel did here.
Therefore, I overrule respondent's objections to complainant's counsel's fee and expenses associated with his travel to the hearing site in Portland, Maine.

In sum, I have overruled all of respondent's objections to the fee petition, and ***IT IS ORDERED*** that respondent shall pay to complainant's counsel, Paul O. Taylor, an attorney's fee, including expenses, totaling $11,982.20.

JEFFREY TURECK
Administrative Law Judge