In the Matter of:

ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH,

ARB CASE NO. 04-014

ALJ CASE NO. 2003-STA-36

PROSECUTING PARTY,

DATE: June 30, 2005

and

DOMICO R. BRYANT,

COMPLAINANT,

v.

MENDENHALL ACQUISITION CORPORATION, d/b/a BEARDEN TRUCKING COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Howard M. Radzely, Esq., Joseph M. Woodward, Esq., Katie M. Streett, Esq., ***United States Department of Labor, Washington, D.C.***

For the Respondent:
James D. Calmes, III, Esq., ***Greenville, South Carolina***

FINAL DECISION AND ORDER OF REMAND

Domico R. Bryant filed a complaint under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified,

49 U.S.C.A. § 31105 (West 1997).[1] He alleged that his employer, Bearden Trucking Company (Bearden), terminated his employment when he refused to drive more than the maximum number of hours federal regulations permit. A United States Department of Labor (DOL) Administrative Law Judge (ALJ) awarded Bryant back pay after concluding that Bearden violated the STAA when it fired Bryant. We affirm the liability ruling, modify the back pay award, and remand the case for further proceedings.

BACKGROUND

Bryant started driving for Bearden Trucking in May 2001 but bought his own truck in March 2002 and became an independent contractor. He contracted with Bearden on August 5, 2002, as an owner-operator (i.e., driving his own, rather than the company's, truck) and began hauling trailers. PX 3.

On November 26, 2002, after a series of loading and traffic delays, Bryant arrived in Greenville, South Carolina, Bearden's headquarters, at 10:30 p.m. He had been driving for more than 11 hours. Bearden's dispatcher asked him to take another load, starting at 3:00 a.m. the next day. Bryant explained to Bearden's owner, Frank Mendenhall, that he "was running over hours" and refused the job. Transcript (TR) at 29-37. United States Department of Transportation (DOT) regulations prohibited certain commercial drivers such as Bryant from driving "[m]ore than 10 hours following 8 consecutive hours off duty."[2] Thus, since Bryant had accumulated at least 10 hours of driving, he could not drive again until he had eight hours of rest. Therefore, had he started driving again at 3:00 a.m. on November 27, 2002, he would have violated the regulation. TR at 32-38; ALJ's October 31, 2003 Recommended Decision and Order (R. D. & O.) at 25.

The next day Bryant called Mendenhall to ask about his earnings for the week. Mendenhall told Bryant he was fired because he had refused the load. TR at 40. Bryant then went to the Greenville office, and Mendenhall repeated that he was terminating Bryant's contract because he had refused the load. TR at 41. Thereafter, on December

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[1] The employee protection provisions of the STAA prohibit employment discrimination against any employee for engaging in protected activity, including filing a complaint or beginning a proceeding "related to" a violation of a commercial motor vehicle safety regulation, standard, or order or testifying or intending to testify in such a proceeding. 49 U.S.C.A. § 31105(a)(1)(A). Protected activity also includes a refusal to operate a commercial motor vehicle because "(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." 49 U.S.C.A. § 31105(a)(1)(B).

[2] 49 C.F.R. § 395.3(a)(1) (2002).

16, 2002, Bryant filed a complaint with DOL's Occupational Safety and Health Administration (OSHA), alleging that Mendenhall had fired him in retaliation for refusing to drive more than the federally-mandated number of hours.[3]

After Bearden terminated his employment, Bryant found work as an owner-operator with Thomas Enterprises and worked for that company from December 16, 2002, until February 21, 2003. He left Thomas due to lack of work. Bryant's truck license tags expired at the end of February. He could not make the payments on his tractor truck and returned the rig to the dealer on March 27, 2003. Bryant then went to work on March 30, 2003, for Hardaway Concrete as an employee driver (i.e., drove its trucks). On April 4, 2003, Bryant declined Bearden's offer of reinstatement as an employee driver because he thought he could make more money with Hardaway.

Then, in May 2003, the OSHA investigator found that Bearden had violated the STAA by firing Bryant and ordered the company to pay him $18,582.05 as compensation for lost wages. Bearden objected and requested a hearing before a DOL ALJ, which was held on July 14, 2003.[4]

The ALJ concluded that Bearden violated the STAA when Mendenhall fired Bryant because he refused to drive due to the DOT hours-of-service rule. The ALJ determined that reinstatement was not feasible and that Bearden had not established that Bryant had failed to mitigate his damages. R. D. & O. at 43-44, 48. He ordered Bearden to pay back pay damages of $7,363.50 plus interest but denied Bryant's claim for front pay and compensatory damages due to the loss of his truck. R. D. & O. at 49.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her jurisdiction to decide this matter to the ARB. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c)(2004).

Under the STAA, the ARB is bound by the ALJ's findings of fact if substantial evidence on the record considered as a whole supports those findings. 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as

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[3] STAA complaints are filed with and investigated by OHSA. 29 C.F.R. §§ 1978.102, 1978.103.

[4] Pursuant to 29 C.F.R. § 1978.107 (2003), the Assistant Secretary for OSHA became the prosecuting party after Bearden objected to the investigator's finding that it had violated the STAA.

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 ARB, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1996). Therefore, we review the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

DISCUSSION

The Legal Standard

To prevail on a STAA claim, the complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity, that the employer discharged, disciplined, or discriminated against him or her, and that there is a causal connection between the protected activity and the adverse action. *BSP Transp., Inc. v. United States Dep't of Labor,* 160 F.3d 38, 47 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. National Welders Supply,* ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003).

The ALJ correctly found that Bearden violated the STAA.

We have reviewed the record and conclude that substantial evidence supports the ALJ's findings of fact. R. D. & O. at 2-28. We agree with the ALJ that Bryant, an independent contractor who owned a tractor truck, engaged in protected activity when, on November 26, 2002, he informed Bearden's managers that he could not drive because he would be violating the DOT commercial vehicle safety regulations governing hours of service. 49 U.S.C.A. § 31105(a)(1)(B); 49 C.F.R. § 395.3(a)(1). *See Regan v. Nat'l. Welders Supply*, ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 5 (ARB Sept. 30, 2004) (protected activity may result from "purely internal complaints to management, relating to a violation of a commercial motor vehicle safety rule, regulations, or standard"). Thus, Bearden was aware of Bryant's protected activity, and terminating his contract on November 27, 2002, was an adverse action.

Furthermore, since the record shows that Mendenhall, Bearden's owner, fired Bryant the day after he refused to drive and then later admitted firing him because he refused to drive, we affirm the ALJ's conclusion that Bearden violated STAA's employee protection provision. R. D. & O. at 31-33. Moreover, the record supports the ALJ's finding that Bearden did not prove that it would have fired Bryant even if he had not refused to drive on November 26. *Id.* at 33-36. Finally, substantial evidence supports the

ALJ's finding that Bearden's retaliatory discrimination was "a critical factor" in Bryant's financial inability to renew his owner-operator license and make the payments on his truck. R. D. & O. at 45.[5]

Since substantial evidence on the record as a whole supports the ALJ's findings, they are conclusive. 29 C.F.R. § 1978.109(c)(3). Moreover, Bearden does not contest the ALJ's conclusion that it violated the STAA. Respondent's Brief at 1.

While we are affirming the ALJ's conclusion that Bearden is liable, we must remand this case for further proceedings. As a successful litigant, Bryant is entitled to an order requiring Bearden to take affirmative action to abate the violation, to reinstate him to his former position with the same pay, terms and privileges of employment, and to pay him compensatory damages, including back wages. 49 U.S.C.A § 31105(b)(3)(A).[6] Here, the ALJ erred as a matter of law because he incorrectly calculated the amount of back pay due to Bryant and did not award Bryant front pay in lieu of reinstatement.

The ALJ erred in determining the amount of back pay owed to Bryant.

A wrongfully terminated employee is entitled to back pay. 49 U.S.C.A. § 31105(b)(3). "An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA." *Assistant Sec'y & Moravec v. HC & M Transp., Inc.*, 90-STA-44, slip op. at 10 (Sec'y Jan. 6, 1992). The purpose of a back pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 99-STA-5, slip op. at 13 (Dec. 30, 2002), citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418-421 (1975).

Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in Title VII of the Civil Rights Act, 42 U.S.C.A. § 2000e et seq. (West 1988). *Fuhr v. School Dist. of City of Hazel Park*, 364 F.3d 753, 760 (6th Cir. 2004). *See, e.g., Polgar v. Florida Stage Lines*,

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[5] The ALJ did not award Bryant compensatory damages for the loss of his truck because he found that Bryant "did not present any evidence on the amount of equity he may have lost due to the repossession of his truck." R. D. & O. at 45-46. We affirm this finding because the record supports it.

[6] That subsection provides that the company shall "reinstate the complainant to the former position with the same pay and terms and privileges of employment" as he or she held before the retaliatory action. The implementing regulation provides that the ALJ's "decision and order concerning whether the reinstatement of a discharged employee is appropriate shall be effective immediately upon receipt of the decision" by the company. 29 C.F.R. § 1978.109(b).

ARB No. 97-056, ALJ No. 94-STA-46, slip op. at 3 (ARB Mar. 31, 1997). Ordinarily, back pay runs from the date of discriminatory discharge until the complainant is reinstated or the date that the complainant receives a bona fide offer of reinstatement. *Polewsky v. B&L Lines, Inc.*, 90-STA-21, slip op. at 5 (Sec'y May 29, 1991). While there is no fixed method for computing a back pay award, calculations of the amount due must be reasonable and supported by evidence; they need not be rendered with "unrealistic exactitude." *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-005, ALJ No. 95-STA-43, slip op. at 14 n.12 (ARB May 30, 1997), citing *Pettway v. Am. Cast Iron Pipe Co., Inc.*, 494 F.2d 211, 260-61 (5th Cir. 1974).

In this case, the fact that Bryant worked as an owner operator for Bearden and Thomas Enterprises and ended up as an employee driver for Hardaway led the ALJ to note that determining Bryant's back pay was "an apples and oranges problem." The ALJ stated that he would have to compare Bryant's gross receipts as an owner-operator with his net income as an employee driver. Therefore, to determine Bryant's economic loss due to the retaliatory termination, the ALJ used "estimates of his average weekly disposable income that remained after all reasonable expenses and required deductions have been applied to both his owner-operator gross receipts and his company driver gross income." R. D. & O. at 36-37. From Bryant's average weekly income at Bearden, the ALJ deducted Bryant's truck payment, operating expenses, license renewal fee, and his social security, Medicare, and income taxes. He thus found that Bryant's average weekly disposable income was $503.00. R. D. & O. at 40-42. The ALJ used similar deductions from Bryant's income while he worked for Thomas Enterprises and Hardaway Concrete. R. D. & O. at 42-48.

But the ALJ erred when, in determining the back pay award, he deducted the truck payment, taxes, operating expenses, and license fees from the gross income that Bryant received from Bearden, Thomas, and Hardaway. Indeed, as the Solicitor points out, taxes are not to be deducted from weekly income because back pay awards are subject to income tax. Brief of the Assistant Secretary at 22-23. *See Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 627 (6th Cir. 1983). The ALJ seems to have based his calculations on a belief that Bryant's income as an owner-operator was very different from his income as an employee driver. Thus, he, the ALJ, had to determine a "disposable" weekly income. But neither the STAA nor its implementing regulations mention "disposable weekly income." Therefore, Bryant's earnings before mandatory payroll deductions, whether as an independent contractor or an employee, are the basis for the back pay (and front pay) award.

To calculate Bryant's back pay, we first determine the average weekly amount that Bearden paid to him. He worked for Bearden from August 5 until November 27, 2002, which is 16.3 weeks (114 days divided by 7). *See Cook*, slip op. at 14 n.12 (use of calendar weeks, rounded to the closest full week, is a reasonable basic computation unit).

Bearden submitted evidence that it paid Bryant $17,898.06 during that time.[7] RX 4. Therefore, we find that Bryant was earning an average of $1,098.04 a week while at Bearden. ($17,898.06 divided by 16.3).

The number of weeks from November 27, 2002, the termination date, until April 4, 2003, when Bearden offered Bryant reinstatement, is 18.3. But Bearden did not, indeed could not, offer Bryant reinstatement to his former position as owner-operator because his truck had been repossessed on March 27, 2003. PX 2. Therefore, we conclude that back pay should be tolled as of that date, rather than the date reinstatement was offered. *See Mulanax v. Red Label Express*, 95-STA-14, 15, slip op. at 5 n.9 (Sec'y Nov. 1, 1995) (the determination concerning the date on which back pay is to be tolled will turn on the particular circumstances surrounding the offer of reinstatement in each case). The number of weeks between November 27, 2002, and March 27, 2003, is 17. That figure multiplied by Bryant's average weekly income of $1,098.04 equals $18,666.68, which is the gross amount of back pay owed to Bryant.

Bryant's interim earnings with Thomas are determined just as simply. Between December 16, 2002, and February 21, 2003, Bryant received a total of $4,633.01. PX 6. This amount is deducted from the $18,666.68 in gross back pay, leaving Bryant a net back pay award of $14,033.67. *See Sprague v. Am. Nuclear Res., Inc.*, 92-ERA-37, slip op. at 7 (Sec'y Dec. 1, 1994) (under Energy Reorganization Act, 42 U.S.C.A. § 5851, back pay award offset by interim earnings), *rev'd on other grounds sub nom. Am. Nuclear Res., Inc. v. United States Dep't of Labor*, 134 F.3d. 1292, 1296 (6th Cir. 1998).

Reinstating Bryant was impossible.

Victims of discrimination are presumptively entitled to instatement or reinstatement. *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1171 (6th Cir. 1996); *Shore v. Fed. Express Corp.*, 777 F.2d 1155, 1159 (6th Cir. 1985). Under the STAA, reinstatement is an automatic remedy designed to re-establish the employment relationship. *Jackson v. Butler & Co.*, ARB Nos. 03-116, 03-144, ALJ No. 03-STA-26, slip op. at 7 (ARB Aug. 21, 2004). *See Palmer v. W. Truck Manpower*, 85-STA-6, slip op. at 10 (Sec'y Jan. 16, 1987) (an order of reinstatement is not discretionary). Reinstatement not only vindicates the rights of the complainant who engaged in protected

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[7] The ALJ calculated that Bryant drove 28,772 miles for Bearden during the relevant period, generating $25,285.00 at 82 cents a mile, which resulted in a disbursement to Bryant of $17,877.00 after deductions for fuel and handling fees. R. D. & O. at 39. As the Solicitor argued, the ALJ erroneously computed Bryant's earnings for one week, which accounts for the numerical discrepancy. Brief of the Assistant Secretary at 21-22. The ALJ also erred in determining the number of weeks Bryant worked for Bearden. The fact that Bryant did not earn any money during most of a two-week period does not affect his average weekly income, contrary to the argument the Solicitor makes. *See* Brief of the Assistant Secretary at 22, 25.

activity, but also provides concrete evidence to other employees, through the return of the discharged employee to the jobsite, that the legal protections of the whistleblower statutes are real and effective. *Hobby v. Georgia Power Co.,* ARB Nos. 98-166, 98-169, ALJ No. 1990-ERA-30, slip op. at 8 (ARB Feb. 9, 2001) (under analogous provisions of the Energy Reorganization Act, 42 U.S.C.A. § 5851).

Bryant, as a victorious complainant, is entitled to be restored to the same or a similar position that he would have occupied but for the discrimination, with the same pay and terms and conditions of employment. *See Hobby*, slip op. at 50 (a "substantially equivalent position" provides the same promotional opportunities, compensation, job duties, working conditions, and status). Nevertheless, circumstances may exist in which alternative remedies are necessary. For example, front pay in lieu of reinstatement may be appropriate where the parties have demonstrated "the impossibility of a productive and amicable working relationship." *Creekmore v. ABB Power Sys. Energy Servs., Inc.,* 93-ERA-24, slip op. at 9 (Sec'y Feb. 14, 1996). Front pay is appropriate where reinstatement is not possible. *See Berkman v. United States Coast Guard Academy,* ARB No. 98-056, ALJ No. 1997-CAA-2, 9, slip op. at 27 (ARB Feb. 29, 2000) (under the Clean Air Act, 42 U.S.C.A. § 7622); *Doyle v. Hydro Nuclear Servs., Inc.*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 89-ERA-22, slip op. at 7-8 (ARB Sept. 6, 1996) *rev'd on other grounds sub nom. Doyle v. United States Sec'y of Labor*, 285 F.2d 243, 251 (3d Cir. 2002) (under Energy Reorganization Act, 42 U.S.C.A. § 5851, reinstatement impractical because company no longer engaged workers in the job classification complainant occupied, and had no positions for which he qualified).

Bryant rejected Bearden's April 4, 2003 offer to reinstate him as an employee driver (that is, driving Bearden trucks) because he believed that he would make more money with Hardaway Concrete, for whom he began working on March 30, 2003. PX 4-5. Moreover, Bryant's refusal to accept Bearden's offer of reinstatement as an employee driver was reasonable because that position was not comparable to that of an owner-operator. R. D. & O. at 47; TR at 54. *See Rasimas,* 714 F.2d at 624 (a post-discharge job that is substantially lower-paying and considerably dissimilar does not constitute comparable employment). Besides, reinstatement to his former position as an owner-operator was impossible because Bryant no longer owned a truck. Therefore, we find that Bearden's back pay liability ends on March 27, 2003, the date Bryant turned in the truck, not April 4, 2003, the date Bearden offered reinstatement to a lesser position. This means that Bryant is entitled to front pay beginning on March 28, 2003.

Bryant is entitled to front pay.

Front pay is used as a substitute when reinstatement is not possible. *See Berkman*, slip op. at 27. *See also Michaud v. BSP Transp., Inc.*, ARB No. 97-113, ALJ No. 95-STA-29, slip op. at 5-6 (ARB Oct. 9, 1997) (reasonable refusal of offer of reinstatement ends employer's back pay liability but may subject it to front pay liability); *Doyle*, slip op. at 7-8 (front pay appropriate since reinstatement either impossible or impractical).

Front pay is the functional equivalent of reinstatement because it is a substitute remedy that affords the complainant the same benefit (or as close an approximation as possible) as he or she would have received with reinstatement. *Williams v. Pharmacia*, 137 F.3d 944, 952 (7th Cir. 1998). Front pay is designed to place the complainant "in the identical financial position that he would have occupied had he been reinstated." *Avitia v. Metro. Club of Chicago, Inc.*, 49 F.3d 1219, 1231 (7th Cir. 1995). And though the STAA does not specify front pay as a remedy, we have held that it is available to a successful litigant. *See Michaud*, slip op. at 5-6.

Before the ALJ, Bryant sought front pay of $266.54 a week "for a reasonable period of time." Prosecuting Party's Post-Hearing Brief at 20. But the ALJ denied front pay because he found that Bryant was "economically better off in terms of average weekly disposable income at Hardaway Concrete as a company driver than when he worked for Bearden Trucking as an owner-operator." R. D. & O. at 48. The ALJ erred in making this finding because, again, as we have already discussed, he used the "weekly disposable income" test to support the finding. Since the record demonstrates that Bryant's weekly income at Bearden exceeded his weekly income at Hardaway, we find that Bryant is entitled to front pay. R. D. & O. at 39-40, 47-48.

The record contains evidence of Bryant's earnings from March 30 until July 5, 2003. PX4-5. His gross income at Hardaway for that period, before mandatory deductions, was $9,063.72. That figure divided by the 14 weeks he worked there yields an average weekly income of $647.41. Subtracting that amount from the $1,098.04 average weekly income he earned at Bearden leaves a weekly amount of front pay of $450.63, which multiplied by the 14 weeks yields a front pay award of $6,308.82 through July 5, 2003.

While Bryant is entitled to this amount of front pay, almost two years have passed since the ALJ heard evidence concerning Bryant's employment circumstances. We do not know Bryant's present circumstances, such as whether he now owns a truck. Thus, we are unable to order an award that would make him whole. Therefore, we must remand this case to the ALJ to determine a current amount of front pay owed to Bryant and how long front pay should continue. *See Berkman*, slip op. at 26 (since the record on the complainant's condition was stale, the ARB ordered the ALJ to reopen the record to determine whether he would ever be able to work and, if so, when and at what); *Price v. Marshall Erdman & Assocs., Inc.*, 966 F.2d 320, 324 (7th Cir. 1992) (entitlement to and the amount of front pay are equitable issues that the judge decides).

The ALJ should reopen the record to take evidence on Bryant's employment since the hearing in July 2003, including whether he bought another truck, whether he continued to work for Hardaway and for how long, whether he became unemployed and why, and whether his gross earnings before mandatory deductions ever equaled the $1,098.04 he earned at Bearden.

We note that a litigant who seeks an award of front pay must provide the district court "with the essential data necessary to calculate a reasonably certain front pay

award." *McKnight v. General Motors Corp.*, 973 F.2d 1366, 1372 (7th Cir. 1992). Such information includes the amount of the proposed award, the length of time the complainant expects to work, and the applicable discount rate. *Id.* Moreover, front pay awards, while often speculative, cannot be unduly so. The longer a proposed front pay period, the more speculative the damages become. *Hybert v. Hearst Corp.*, 900 F.2d 1050, 1056 (7th Cir. 1990). Therefore, on remand, we expect the parties to submit relevant evidence demonstrating both the amount and the duration of a front pay award. If on remand, the ALJ considers the issue of future earnings, we refer him to *Doyle*, slip op. at 7-8, for guidance on computing the present value of future earnings.

Furthermore, on remand the ALJ should determine the interest on both back and front pay awards. On the back pay award, Bryant is also entitled to post-judgment interest (calculated in the same manner as pre-judgment interest) for the period between the issuance of this final order and the payment of the award. *Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 99-STA-34, slip op. at 9 (ARB Dec. 29, 2000).

In calculating the interest on back pay awards under the STAA, the rate used is that charged for underpayment of federal taxes. *See* 26 U.S.C.A. § 6621(a)(2) (West 2002); *Drew v. Alpine, Inc.*, ARB No. 02-044, 02-079, ALJ No. 2001-STA-47, slip op. at 4 (ARB June 30, 2003). Moreover, the interest accrues, compounded quarterly, until Bearden pays the damages award. *Ass't Sec'y & Cotes v. Double R. Trucking, Inc.*, ARB No. 99-061, ALJ No. 98-STA-34, slip op. at 3 (ARB Jan. 12, 2000); *see Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 89-ERA-22, slip op. at 18-19 (ARB May 17, 2000) (outlining the procedures to be followed in computing the interest due on back pay awards).

CONCLUSION

We **AFFIRM** the ALJ's conclusion that Bearden violated the STAA's employee protection provision because substantial evidence in the record as a whole supports the findings underlying his conclusion. We **MODIFY** the ALJ's back pay award and order Bearden to pay $14,033.67. We **REMAND** the case for the ALJ to reopen the record and take evidence to determine the current amount and duration of the front pay award due to Bryant, considering, along with any other relevant evidence, the circumstances of his employment with Hardaway or other employers and his ability to acquire another truck if he has not already done so. On remand, the ALJ should also properly calculate the amounts of pre-judgment and post-judgment interest owed to Bryant.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge