



In the Matter of:

CHARLES L. DALTON,

COMPLAINANT,

v.

COPART, INC.,

RESPONDENT.

ARB CASE NOS. 04-027
04-138

ALJ CASE NO. 1999-STA-46

DATE: June 30, 2005

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Robert S. Coffey, Esq., Tulsa, Oklahoma

For the Respondent:
**Steve A. Broussard, Esq., Monica Goodman, Esq., Hall, Estill, Hardwick, Gable,
Golden & Nelson, P.C., Tulsa, Oklahoma**

FINAL DECISION AND ORDER

This matter arises under the whistleblower protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (West 1997), and the implementing regulations at 29 C.F.R. Part 1978 (2004).¹ In this decision, we address:

¹ The employee protection provisions of 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

(1) the Administrative Law Judge's (ALJ) November 21, 2003 Attorney Fee Order, (2) additional fee requests, and (3) the ALJ's July 1, 2004 Recommended Decision and Order on Remand Denying Motions to Reopen Record (R. D. & O. on Rem. Den. Mot. to Reopn. Rec.). Because this case's history is convoluted, we provide a procedural overview.

BACKGROUND

Complainant Charles Dalton worked as a "salvage hauler" for Respondent Copart, Inc. (Copart) at its Tulsa, Oklahoma, facility. On March 4, 1999, Copart fired Dalton. Dalton filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that, in violation of STAA, Copart had fired him because he refused to drive an unsafe truck. OSHA investigated and dismissed the complaint as meritless. Dalton requested a hearing and an ALJ held it on May 10, 2000, in Tulsa. R. D. & O. (Nov. 27, 2000) at 1 and 2.

The ALJ concluded that Copart violated STAA when it fired Dalton, and he invited Dalton to petition for attorney's fees. Dalton filed his petition in December 2000, but before the ALJ ruled on the petition, the Administrative Review Board (ARB) reversed the ALJ's liability finding. *Dalton v. Copart*, ARB No. 01-020, ALJ No. 99-STA-46 (ARB July 19, 2001). Dalton appealed the ARB's decision to the United States Court of Appeals for the Tenth Circuit, and on February 19, 2003, that Court reversed the ARB and remanded for further proceedings. *Dalton v. United States Dep't of Labor*, 2003 WL 356780 (10th Cir. 2003).

As a result of the Tenth Circuit Court's ruling that Copart was liable, Dalton asked the ALJ to reconsider his earlier-filed fee petition, and on November 21, 2003, the ALJ awarded Dalton \$21,035 in attorney's fees.

After the appeals court remand, the parties moved the Board to reopen the record to admit additional evidence. On January 16, 2004, we remanded the substantive case to the ALJ for further proceedings consistent with the Tenth Circuit Court's opinion and for a decision on whether the record should be reopened. In his July 1, 2004 recommended order, the ALJ restated his findings regarding Dalton's damages and denied the parties' motions to reopen the record.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to decide this matter by authority of 49 U.S.C.A. § 31105(b)(2)(C). *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). Pursuant to 29 C.F.R. § 1978.109(c)(1), the ARB "shall issue the final decision and order

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).

based on the record and the decision and order of the administrative law judge.” The regulations also set out this Board’s jurisdiction. 29 C.F.R. § 1978.109(c).

The ALJ’s findings of fact, if supported by substantial evidence on the record considered as a whole, shall be considered conclusive. 29 C.F.R. § 1978.109(c)(3).

In reviewing the ALJ’s conclusions of law, the ARB, as the designee of the Secretary, acts “with all the powers [the Secretary] would have in making the initial decision” 5 U.S.C.A. § 557(b) (1996). Therefore, we review the ALJ’s conclusions of law de novo.

DISCUSSION

Attorney’s Fees

ALJ Award

In his November 27, 2000 initial decision that Copart was liable, the ALJ invited Dalton, as the winning party, to petition for attorney’s fees. On December 20, 2000, Dalton requested reimbursement for 124.9 hours of attorney work at \$175 per hour for a total of \$21,857.50. Copart objected on two grounds, namely, that too many hours were spent on discovery, and that the attorney’s hourly rate was too high. Copart argued that the rate should have been \$125 per hour because the attorney was inexperienced and because “this was an administrative proceeding and not federal court litigation.” Attorney Fee Order at 2.

After reviewing Dalton’s submission and Copart’s objections, the ALJ issued his Attorney Fee Order in November 2003. The ALJ agreed with Copart that reimbursement for a telephone call regarding subpoenas was improper and that the hours claimed for general discovery were too high. Accordingly, he disallowed these claims and reduced the total reimbursable hours from 124.9 to 120.2.

The ALJ did not, however, agree with Copart that the hourly rate should be reduced. He found that the \$175 rate was within the normal range for experienced attorneys. Specifically, he ruled that Dalton’s attorney “was a well-prepared and articulate” advocate for his client and was sufficiently experienced to command \$175 per hour. Attorney’s Fee Order at 2. Nor was the ALJ swayed by what he called Copart’s “rather condescending” position that attorneys engaged in administrative litigation deserve less than those in federal court litigation. Noting that, because Copart failed to provide any valid legal precedent compelling such a position, he would not reduce the hourly rate on this account.

Authorization for the award of attorney’s fees as well as the standard for ascertaining the fee amount is set out in the statute.

If the Secretary issues an order [finding a STAA violation] and the complainant requests, the Secretary may assess against the person against whom the order is issued the costs (including attorney's fees) *reasonably incurred* by the complainant in bringing the complaint. The Secretary shall determine the costs that *reasonably* were incurred.

49 U.S.C.A. § 31105(a)(3)(B) (emphasis added). Reasonableness is key. Thus, using the lodestar method, we determine the amount of the award by multiplying the number of hours reasonably expended by a reasonable hourly rate. *Scott v. Roadway Express*, ARB No. 01-065, ALJ No. 98-STA-8 (ARB May 29, 2003); see *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

We find that the ALJ's fee award is reasonable.² As the attorney's fee figure is reasonable and unopposed, we affirm the award of \$21,035.

Fee Enlargement

Dalton also requests that we enlarge the fee award to compensate him for the delay in receiving those fees. Dalton's Brief in Support of ALJ's Rec. Dec. and Ord. (attorney's fees) at 4. In other words, if the ARB had not reversed the liability finding in July 2001, Dalton would have received the fee award years ago. Therefore, he wants compensation for the loss of the use of the money between July 2001, and the date of the final order on fees. *Id.* at 5.

Courts have authorized the enlargement of attorney's fees to compensate for delayed payment. "Clearly compensation received several years after the services were rendered . . . is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed . . ." *Missouri v. Jenkins*, 491 U.S. 274, 283-284 (1989). The Secretary of Labor has enlarged attorney's fees to compensate for delay. See *Spinner v. Yellow Freight Sys.*, 1990-STA-17, slip op. at 2 (Sec'y, Sept. 23, 1992). We grant Dalton a fee enhancement because nearly five years have passed since he first requested them.

The ARB's method for determining the amount of the enlargement is set out in *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 89-ERA-22, slip op. at 15-16 (ARB May 17, 2000), *overturned on other grounds*, *Doyle v. United States Sec'y of Labor*, 285 F.3d 243 (3d Cir. 2002). An addition to an attorney fee award should be the **lesser** of the additions calculated as follows:

² Copart does not argue the award is unreasonable; in fact, it presents no argument at all. Copart specifically notified the Board that it would not file a brief either in support of or in opposition to the award. Copart's Notice Regarding the November 21, 2003 Attorney Fee Order of the Administrative Law Judge dated January 20, 2004.

(1) the number of hours multiplied by the current rates of the attorneys, or

(2) the award multiplied by the percentage change in Consumer Price Index – All Urban Consumers, U.S. city average (CPI-U).

Id. at 15-16. Therefore, we calculate as follows:

Method 1 - Hours x Current Hourly Rate. Dalton's attorney's hourly rate in December 2003, when he filed his brief with the ARB, was \$200 rather than the \$175 used in the initial calculation. Dalton's Brief in Support of ALJ's Rec. Dec. and Ord. (attorney's fees) at 5. Thus, $120.2 \times \$200 = \$24,040$.

Method 2 - Fee Award x Percentage CPI Change. In order to make this calculation, we must determine the starting date. Dalton, as noted above, suggests that we use July 2001, the date the ARB issued its Final Decision overturning the liability finding. We find, however, that the more reasonable date is February 2003, the date the Tenth Circuit Court reinstated the liability finding. Using the February 2003 date, the award figure is \$22,339.17 ($\$21,035 \times 6.2\%$, the percentage increase in CPI from February 2003 through May 2005).³

The CPI calculation method produces the lesser amount. Accordingly, we increase the amount by \$1,304.17 and award Dalton a total of \$22,339.17 in attorney fees.⁴

Additional Fees

Dalton has notified this Board that he will be requesting additional attorney fees for work performed after the ALJ's decision. Dalton's Brief in Support of ALJ's Rec. Dec. and Ord. (attorney's fees) at 5. STAA permits the award of "all costs reasonably incurred," and accordingly, this Board has frequently awarded attorneys' fees for work that the successful party has performed after the ALJ decision. *See Pettit v. American*

³ The percentage change in the CPI can be found at the Department of Labor's Bureau of Labor Statistics website (www.dol.gov). With the assistance of the BLS staff, one can have the CPI change automatically calculated using the web program.

⁴ Copart requested that it be permitted to submit objections should we decide to entertain Dalton's request for an enlargement of fees. Copart's Notice Regarding the November 21, 2003 Attorney Fee Order of the Administrative Law Judge dated January 20, 2004. We deny the request since Copart chose to withhold its views during the briefing period.

Concrete Prods., ARB No. 00-053, ALJ No. 99-STA-047 (ARB Jan. 29, 2003); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19 (ARB Feb. 6, 2004). As is our practice, we are, by this order, notifying Dalton that he has 30 days in which to submit a petition for additional attorneys' fees and other litigation expenses. We further instruct that he serve any such petition on Copart, and that Copart will be permitted 30 days in which to file objections to the petition.

Recommended Decision on Remand

On July 1, 2004, the ALJ issued his order on remand. R. D. & O. on Rem. Den. Mot. to Reopn. Rec. In it he denied the parties' motions to reopen the record and restated the remedies which he had ordered in his November 27, 2000 decision. We affirm the ALJ's decision on each of these issues.

Reopen the Record

The parties requested that the ALJ reopen the record to permit them to introduce additional evidence. Dalton wanted to make a claim for compensatory damages so he requested permission to submit information as to his emotional and mental suffering. R. D. & O. on Rem. Den. Mot. to Reopn. Rec. at 2. Copart requested permission to show that since it was no longer in the trucking business and since Dalton posed a threat to the safety of its employees, it should not have to reinstate him. *Id.*

The ALJ denied Dalton's request because he had given Dalton ample opportunity at hearing to present evidence pertaining to any and all damages which he had suffered, and Dalton simply had failed to do so. *Id.*

Copart claimed that, because it no longer owned trucks or employed truck drivers except at its Detroit facility, it could not rehire Dalton. *Id.* at 2-3. The ALJ rejected this claim because Dalton submitted evidence that Copart operated more than 650 tow trucks in its salvage business, and also because Copart could, even if no Tulsa operation was available, rehire Dalton for work at its Detroit facility. *Id.* at 3.

For its argument that Dalton posed a threat to its employees, Copart asked the ALJ to consider hostile letters Dalton had written to Copart employees and several ex parte protective orders issued against Dalton. Copart argued that this evidence showed that Dalton had been "harassing and threatening" Copart staff members and that he had a history of violence against others. *Id.* at 2. In the ALJ's view, however, the letters demonstrated only Dalton's frustration at being fired. And the ALJ found that since the protective orders were merely the result of unsubstantiated allegations, they did not justify reopening the record.

Granting leave to reopen the record is committed to the sound discretion of the trial judge. *Zenith Radio Corp. v. Hazeltine Res.*, 401 U.S. 321, 330-331 (1971)(equating discretion to reopen record with discretion to permit amendment of pleadings). Thus, the ALJ's decision not to reopen the record was clearly within his discretion, and we find that

he did not abuse that discretion because he fully and fairly considered both the arguments presented and the evidence the parties sought to introduce.

Furthermore, according to the rules that govern practice and procedure before ALJs, “Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record.” 29 C.F.R. § 18.54(c) (2004). We find that the evidence pertaining to emotional and mental pain and suffering that Dalton sought to admit was available prior to closing the record. Evidence about Dalton’s violent nature and his antipathy toward Copart employees that the ex parte protective orders purportedly contain was also available earlier. Further, Dalton’s letters to Copart executive, Willis Johnson, are not material to whether Dalton should be reinstated. Copart Br. in Opp. to ALJ’s Dec. at 3. Finally, the fact that it still operates in Detroit undercuts Copart’s purported new evidence that it cannot reinstate Dalton because it no longer employs truck drivers. Therefore, the ALJ did not err in refusing to reopen the record.

Remedies

The ALJ recommended that Copart reinstate Dalton to his previous position with the same pay schedule and benefits as of the date of the termination; award back pay in the amount of \$531 per week beginning on March 4, 1999, and extending until the date of reinstatement or the date of a bona fide offer of reinstatement; and award interest on all accrued benefits computed at the treasury bill rate in effect on November 27, 2000. R. D. & O. on Rem. Den. Mot. to Reopn. Rec. at 3.

STAA provides that, if the Secretary decides on the basis of a complaint that a person violated STAA, the Secretary shall order the person to (1) take affirmative action to abate the violation; (2) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and (3) pay compensatory damages, including back pay. 49 U.S.C.A. § 31105(b)(3)(A). Since the ALJ recommended remedies consistent with STAA, we affirm the suggested relief.

Interest on the back pay award is to be calculated from the date back pay begins to accrue using the rate for the underpayment of Federal income taxes, which consists of the Federal short-term rate determined under 26 U.S.C.A. § 6621(b)(3) (West 2002) plus three percentage points. *See also* 26 U.S.C.A. § 6621(a)(2). Finally, such interest is to be compounded quarterly. *See Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5, slip op. at 18 (ARB Mar. 29, 2000); *Ass’t Sec’y and Cotes v. Double R Trucking, Inc.*, ARB No. 99-061, ALJ No. 98-STA-34, slip op. at 3 (ARB Jan. 12, 2000).⁵

⁵ The meaning of the ALJ’s reference to the treasury bill rate “in effect in November 2000” is unclear. To the extent that it refers to something other than the interest calculation method set out above, it is error.

CONCLUSION

For the reasons set out above, Copart is **ORDERED** to:

1. Reinstate Charles Dalton to his previous position as driver, with the same pay schedule, health, welfare and pension benefits as of the date of termination;
2. Pay Charles Dalton back pay in the amount of \$531 per week beginning at the date of termination, March 4, 1999, until the date of reinstatement, or the date of a bona fide offer of reinstatement if Dalton declines reinstatement;
3. Pay Charles Dalton interest on the back pay beginning on March 4, 1999, using the Federal short term rate specified at 26 U.S.C.A. § 6621 and compounded quarterly; and
4. Pay Charles Dalton \$22,339.17 in attorney's fees.

It is **FURTHER ORDERED** that Charles Dalton has 30 days in which to submit a petition for additional attorneys' fees and other litigation expenses. He is to serve any such petition on Copart, and Copart will be permitted 30 days in which to file objections to the petition.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge