



In the Matter of:

CHRISTOPHER WAECHTER,

ARB CASE NO. 04-183

COMPLAINANT,

ALJ CASE NO. 04-STA-43

v.

DATE: December 29, 2005

**J.W. ROACH & SONS LOGGING AND
HAULING,**

JAMES D. ROACH,

and

AMY PAYTON,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

Christopher Waechter filed a complaint under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified at 49 U.S.C.A. § 31105 (West 1997). Waechter alleged that his employer, J. W. Roach & Sons Logging and Hauling and James D. Roach and Amy Payton (collectively, “Roach”) violated § 31105 by firing him and by filing a false complaint of felony theft against him.

On August 27, 2004, a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) granting Waechter’s Motion for Partial Summary Judgment and ordering reinstatement. On September 29, 2004, the ALJ issued a supplemental R. D. & O. awarding Waechter damages for lost wages and emotional distress, plus attorney fees and costs. The two recommended decisions are

now before the Administrative Review Board (ARB) pursuant to 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c)(1)(2005).¹

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board has jurisdiction to decide this matter by authority of 39 U.S.C.A. § 31105(b)(2)(C), Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002), and 29 C.F.R. § 1978.109(c)(1).

DISCUSSION

1. Sanctions

Rule of procedure 18.6(d)(2) applies to hearings on STAA complaints. 29 C.F.R. § 18.6(d)(2) (2005); 29 C.F.R. § 1978.100(b). Rule 18.6(d)(2) provides that if a party fails to comply with discovery or other orders of the ALJ, the ALJ may impose sanctions such as drawing adverse inferences and deeming factual matters to be admitted.

We review an ALJ's imposition of such sanctions for abuse of discretion. *See, e.g., Dickson v. Butler Motor Transit*, ARB No. 02-098, ALJ No. 01-STA-039, slip op. at 4 (ARB July 25, 2003) (ALJ acted within range of his discretion in dismissing STAA complaints after complainant repeatedly ignored the ALJ's discovery and other orders); *Canterbury v. Administrator*, ARB No. 03-135, ALJ No. 2002-SCA-11, slip op. at 3 (ARB Dec. 29, 2004) (Rule 18.6(d)(2)(ii) "authorizes an ALJ to impose sanctions for failure to comply with discovery requests and orders, including establishment as fact those matters not answered in discovery").

In this case, the ALJ issued several orders to the parties, none of which Roach answered. Roach also ignored Waechter's interrogatories, requests for admissions, and Motion for Partial Summary Judgment.

Accordingly, the ALJ ordered Roach to show cause why sanctions authorized by Rule 18.6(d)(2) should not be imposed. When Roach again failed to reply, the ALJ ordered that the factual matters addressed by Waechter's request for admissions be deemed admitted and that the factual matters asserted in Waechter's affidavit in support of his Motion for Partial Summary Judgment be deemed unopposed. The ALJ also ruled that Waechter would be afforded an opportunity to present argument and evidence in support of damages and attorney fees and costs and that Roach would not be permitted to oppose these submissions. Order issued Aug. 27, 2004.

Roach made no response to the August 27 order, either. Accordingly, this record fully supports the ALJ's exercise of discretion in applying sanctions authorized by Rule 18.6(d)(2).

¹ The Board issued briefing orders affording the parties an opportunity to file briefs in support of or in opposition to the ALJ's R. D. & O.s. Neither party chose to file a brief.

2. Grant of Summary Decision

We review a grant of summary decision de novo, i.e., under the same standard the ALJ employs. As set forth at 29 C.F.R. § 18.40(d) and derived from Rule 56 of the Federal Rules of Civil Procedure, that standard permits summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise show that there is no genuine issue as to any material fact and a party is entitled to summary judgment as a matter of law. *Eash v. Roadway Express, Inc.*, ARB No. 00-061, ALJ No. 1998-STA-00028, slip op. at 2 (Dec. 31, 2002).

To establish that an employer violated § 31105, the employee must prove by a preponderance of the evidence that he made a safety complaint or participated in a proceeding related to a violation of a commercial motor vehicle safety law or refused to drive for safety reasons. 49 U.S.C.A. § 31105(a). He must also prove by a preponderance of the evidence that his employer knew of his protected activity and took an adverse employment action against him at least in part for retaliatory reasons. *Roberts v. Marshall Durbin Co.*, ARB Nos 03-071, 03-095, ALJ No. 2002-STA-00035, slip op. at 7 (ARB Aug. 6, 2004).

Based on the factual matters that the ALJ deemed to be admitted, the unopposed sworn declaration of facts Waechter filed in support of his Motion for Partial Summary Judgment, and the absence of any countervailing evidence, we find that Waechter told J. W. Roach in February 2004 that the Roach-owned truck Waechter was driving had an exhaust leak and that he would not drive the truck unless it was repaired. Roach fired Waechter eleven days later. The proximity in time between Waechter's protected activity and Roach's adverse employment action, and the absence of any contrary evidence supports an inference that the termination was retaliatory. Having proved each element of a § 31105(a) complaint, Waechter established that he is entitled to judgment as a matter of law.

3. Relief

We review recommended orders for relief pursuant to 29 C.F.R. § 1978.109(c)(3) (2005). *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-055, ALJ No. 1995-STA-00043, slip op. at 2 (ARB May 30, 1997). Under that standard, we affirm findings of fact if they are supported by substantial evidence and review rulings of law de novo.

On September 29, 2004, the ALJ issued an R. D. & O. on damages. Based on figures submitted by Waechter in a sworn affidavit, the ALJ ordered Roach to pay Waechter back pay in the amount of \$13,890.94, plus interest, for the period February 13 through September 20, 2004, and \$602.14 per week until Waechter is fully reinstated.

STAA expressly provides that if the Secretary decides that the complaint should be affirmed, the employee is entitled to "compensatory damages, including back pay."

49 U.S.C.A. § 31105(b)(3)(A)(iii). Thus, back pay for the period February 13 through September 20, 2004, is authorized by law.

Although front pay is not expressly mentioned in § 31105, we have held that it is available under STAA when reinstatement is not feasible. *Michaud v. BSP Transp.*, ARB No. 97-113, ALJ No. 1995-STA-29, slip op. 5-6 (ARB Oct. 9, 1997). This record does not address Waechter's prospects for reinstatement, so it is not apparent whether infeasibility of reinstatement justifies a front pay award in this case. However, since Waechter requests reinstatement and Roach is the party that has refused to participate in the litigation of this complaint, we see no error of law in the ALJ's decision to award front pay until such time as Roach reinstates Waechter.²

The amounts of the wage awards are supported by substantial evidence inasmuch as they are based on Waechter's undisputed affidavit and nothing in Waechter's sworn averments is implausible on its face.

The ALJ also awarded Waechter \$20,000 for emotional distress. Compensatory damages under STAA include damages for pain and suffering, mental anguish, embarrassment, and humiliation. *Michaud*, slip op. at 9; 49 U.S.C.A. § 31105(b)(3)(A)(iii). Waechter requested damages for his emotional distress when he was arrested at Roach's behest and jailed for five hours. Waechter's affidavit and supporting documents show that Roach filed a complaint of felony theft against Waechter, accusing Waechter of stealing the truck he was driving when Roach fired him. Waechter's family bailed him out, and the county prosecutor dropped the charge.

We conclude that Waechter's unopposed averments and supporting documents constitute substantial evidence that he experienced emotional distress. The amount of the award, \$20,000, is appropriate, because it is consistent with awards made to employees who were fired without the extra ignominy of arrest and imprisonment. See *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 98-169, ALJ No. 1990-ERA-30, slip op. at 32 (ARB Feb. 9, 2001) ("a key step in determining the amount of compensatory damages is a comparison with awards made in similar cases"); *Bigham v. Guaranteed Overnight Delivery*, ARB No. 96-108, ALJ No. 1995-STA-00037, slip op. at 2 (ARB Sept. 5, 1996) (employee awarded \$20,000 for emotional distress caused by wrongful termination).

4. Attorney fees and costs

If the Secretary issues an order affirming a complaint, the complainant is entitled to reasonable attorney fees and costs. 49 U.S.C.A. § 31105(b)(C)(B). The ALJ granted Waechter's unopposed petition for attorney fees and costs in the amount of \$6,869.25. Because substantial evidence supports the ALJ's findings that the hourly rate Waechter's attorney charged and the number of hours he expended on this case were reasonable, we

² Waechter's entitlement to lost wages after September 20, 2004, must, of course be offset by any earnings from then until he is reinstated. Cf. *Roberts*, slip op. at 19 and n.12.

affirm the ALJ's award of attorney's fees. *Cf. Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-00030 (ARB Mar. 31, 2005).

CONCLUSION

For the reasons stated, we affirm the ALJ's conclusion that Roach violated the employee protection provision of the STAA by firing Waechter and making a false report of felony theft against him in retaliation for his protected activity pursuant to 49 U.S.C.A. § 31105(a). We also affirm the ALJ's award of back pay in the amount of \$13,890, front pay in the amount of \$602.14 per week, less any interim earnings, until reinstatement, compensatory damages for emotional distress in the amount of \$20,000, and attorney fees and costs in the amount of \$6,869.25. Lost wages payable under this order, except front pay accrued subsequent to issuance of this order and paid in a timely manner, shall be paid with interest at the rate specified in 28 U.S.C.A. § 1961.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge