In the Matter of:

JAMES E. DICKEY, **ARB CASE NO. 06-151**

COMPLAINANT, **ALJ CASE NO 2006-STA-026**

v.

WEST SIDE TRANSPORT, INC.,

RESPONDENT.

and

LORI J. DICKEY, **ARB CASE NO. 06-150**

COMPLAINANT, **ALJ CASE NO. 2006-STA-027**

v. **DATE: May 29, 2008**

WEST SIDE TRANSPORT, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
James E. Dickey, *pro se,* Crystal Springs, Florida

For the Respondent:
Chris J. Scheldrup, Esq., *Scheldrup Law Firm, P.C.,* Cedar Rapids, Iowa

FINAL DECISION AND ORDER (ARB NO. 06-151)

FINAL DECISION AND ORDER OF REMAND (ARB NO. 06-150)

West Side Transport, Inc., a commercial motor carrier located in Cedar Rapids, Iowa, employed James E. Dickey and his wife, Lori J. Dickey, as truck drivers. The Dickeys team drove, that is, they drove the same truck together, alternating shifts. The Dickeys filed separate complaints with the United States Department of Labor alleging that West Side terminated their employment in violation of the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA).[1]

After hearing the cases together, a Department of Labor Administrative Law Judge (ALJ) issued recommended decisions and orders (R. D. & O.) denying James Dickey's claim, but favoring Lori Dickey's claim.[2] Both cases are now before this Board pursuant to the STAA's automatic review provisions.[3] We are bound by the ALJ's findings of fact if those findings are supported by substantial evidence on the record considered as a whole.[4] For the following reasons, we accept the ALJ's recommended decision in the James Dickey case. In Lori Dickey's case, we accept the ALJ's conclusion that West Side violated the STAA, but we remand because the ALJ erred as to the recommended remedy.[5]

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[1] 49 U.S.C.A. § 31105 (West 2008). Regulations that implement the STAA are found at 29 C.F.R. Part 1978 (2007). Congress has amended the STAA since the Dickeys filed their complaints. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). It is not necessary for us to determine whether the amendments are applicable to this case because even if they were, they would not affect our decision since they are not applicable to the issues presented for our review.

[2] *James E. Dickey v. West Side Transp., Inc.*, 2006-STA-026 (ALJ Sept. 15, 2006); *Lori J. Dickey v. West Side Transp., Inc.*, 2006-STA-027 (ALJ Sept. 15, 2006).

[3] "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee." 29 C.F.R. § 1978.109(a). The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under the STAA and its implementing regulations. Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. Part § 1978.

[4] 29 C.F.R. § 1978.109(c)(3). The Board reviews questions of law de novo. *See Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993).

[5] In view of the substantial identity of the legal issues and the commonality of much of the evidence, and in the interest of judicial and administrative economy, we have consolidated these cases. *See Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114, 04-115, ALJ Nos. 2004-SOX-020, 2004-SOX-036, slip op. at 6 (ARB June 2, 2006).

DISCUSSION

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activities. These protected activities are making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;" "refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;" and "refus[ing] to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition."[6]

To prevail on a STAA claim, the employee must prove by a preponderance of the evidence that he or she engaged in protected activity; that the employer was aware of the protected activity; that the employer discharged, disciplined, or discriminated against the employee; and that protected activity was the reason for the adverse action. If the employee does not prove one of these requisite elements, the entire claim fails.[7]

James E. Dickey (ARB No. 06-151)

Background

The ALJ made detailed findings of fact concerning Mr. Dickey's case.[8] Substantial evidence in the record as a whole supports all of these findings. We paraphrase the relevant findings.

West Side hired the Dickeys in February 2005 to team drive company-owned trucks. The Dickeys had previously worked for West Side, driving their own truck. In September 2005 West Side gave the Dickeys a new truck (#26080) to drive. They had no problems until November 11, 2005, when Mr. Dickey momentarily lost consciousness and almost crashed. Mrs. Dickey drove the truck back to Cedar Rapids.

Mr. Dickey went to the VA hospital on November 14. He told the doctor that he had suffered blackouts for the past two months. Mr. Dickey was advised to undergo various medical tests, and his doctor ordered him not to drive. Dickey informed West Side that he could not drive until he had undergone the medical testing. He was reminded that West Side's sick leave policy mandated that if a driver missed 14

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6 49 U.S.C.A. § 31105(a).

7 *See West v. Kasbar, Inc. /Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005).

8 *James E. Dickey v. West Side Transp., Inc.*, slip op. at 2-4.

consecutive work days due to a non-work related condition, he would be automatically terminated. But if the driver presented West Side with a doctor's approval to return to work, he could reapply for employment. Mr. Dickey was aware of this policy.

After Mr. Dickey completed some of the medical tests, he was released back to work on November 21. But on December 12, 2005, he experienced another blackout and almost rear-ended another vehicle. He returned to the VA, underwent tests, and was restricted from driving until he underwent a sleep study test. Mr. Dickey informed Laura Watson, West Side's Claims Director, about his work restriction and also told her that carbon monoxide from truck # 26080 might be causing his blackouts. Watson reminded Mr. Dickey about the sick leave policy. Mr. Dickey then returned home to Florida to undergo the recommended sleep testing.

On December 29, 2005, West Side terminated Mr. Dickey because he had been off work for more than 14 consecutive days. At the time of the hearing, Mr. Dickey had not been released to return to work.

Mr. Dickey Engaged in STAA Protected Activity

The ALJ found that Mr. Dickey engaged in STAA protected activity when he told Watson that truck # 26080 might have been emitting carbon dioxide that he suspected was causing him to black out. As noted earlier, the STAA protects employees who file a complaint related to a violation of a commercial motor vehicle regulation, standard, or order.[9] An "internal complaint to superiors conveying [an employee's] reasonable belief that the company was engaging in a violation of a motor vehicle safety regulation is a protected activity under the STAA."[10] To warrant protection under this section, the employee must "at least be acting on a reasonable belief regarding the existence of a safety violation."[11] The record supports a finding that Mr. Dickey reasonably believed that truck # 26080 was emitting carbon dioxide fumes.

Mr. Dickey's complaint to Watson related to a Federal Motor Carrier Safety Administration regulation that prohibits driving a commercial motor vehicle when an occupant has been affected by carbon monoxide, or where carbon monoxide has been detected in the vehicle's interior, or when a mechanical condition is discovered which would likely produce a carbon monoxide hazard.[12] Therefore, the record fully supports

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[9] *See* 49 U.S.C.A. § 31105(a)(1)(A).

[10] *Dutkiewicz v. Clean Harbors Envtl. Servs., Inc.*, ARB No. 97-090, ALJ No. 1995-STA-034, slip op. at 3-4 (ARB Aug. 8, 1997).

[11] *Bethea v. Wallace Trucking Co*., ARB No. 07-057, ALJ No. 2006-STA-023, slip op. at 8 (ARB Dec. 31, 2007).

[12] *See* 49 C.F.R. § 392.66.

the ALJ's finding that when Mr. Dickey complained to Watson about the possibility that truck # 26080 emitted carbon monoxide fumes, he engaged in STAA protected activity.

West Side Did Not Terminate Mr. Dickey Because of Protected Activity

The ALJ found that Mr. Dickey did not prove that West Side terminated him because of his protected complaint to Watson. Substantial evidence supports this finding. Mr. Dickey adduced no evidence that West Side retaliated because of his protected complaint. Rather, the ALJ found, and the record bears out, that "the only reason that [Mr. Dickey] was terminated was that he was, and still remains, medically disqualified from driving commercial vehicles."[13] Moreover, in his brief to us, Mr. Dickey does not explain why the ALJ erred in making this finding.

Lori J. Dickey (ARB No. 06-150)

Background

As with Mr. Dickey's case, the record supports the ALJ's detailed findings of fact in his R. D. & O. for Mrs. Dickey's case.[14] And, again, we summarize only the relevant findings.

After her husband informed Watson that truck # 26080 might be causing him to suffer blackouts and went home to Florida to undergo sleep testing, West Side assigned truck # 25093 to Mrs. Dickey in mid-December 2005. She delivered several loads and then drove that truck home to Florida for the holidays.

In 2002, the Dickeys had filed a lawsuit against Freightliner, a truck manufacturer. A mediation session pertaining to that suit was scheduled for January 9, 2006, in Philadelphia. Mrs. Dickey had arranged her delivery schedule so that she could be in Philadelphia. She drove truck # 25093 from Florida to Chicago and on to Philadelphia, arriving January 9. Meanwhile, Mr. Dickey drove his personal vehicle from Florida to Philadelphia. Mrs. Dickey testified that shortly before she arrived in Philadelphia, fumes inside the truck caused her to suffer facial burns, blackheads, and burning eyes.

On January 10, 2006, Mrs. Dickey contacted her dispatcher and reported that she was concerned about carbon monoxide fumes in truck # 25093. She told him, "I cannot drive this truck until it is fixed." The dispatcher told her to call the shop, and the shop in turn told her to drive the truck to the TA truck stop in New Jersey, 11 miles away. Mrs.

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13 R. D. & O. at 5.

14 *Lori J. Dickey v. West Side Transp., Inc.*, slip op. at 2-5.

Dickey drove to the truck stop where a mechanic advised her that a hose was causing the fume problem.

Mrs. Dickey called her dispatcher again and the dispatcher told her not to get the truck fixed at the TA truck stop because the company did not feel a danger existed. The dispatcher then asked Mrs. Dickey to drive the truck to Kingsport, Tennessee, a distance of 530 miles. She refused, telling him she would not drive the truck "until it's fixed." She then talked by phone to Watson, West Side's Claims Director. She told Watson the fumes were making her sick and that she would not drive the truck. Watson told her to take the truck to West Side's secure drop lot in Bordentown, New Jersey, about 20 miles away. Mrs. Dickey again refused to drive the truck. At that point, according to Mike Hershberger, West Side's vice president of Operations, he decided to fire her.

Mrs. Dickey Engaged in STAA Protected Activity

The ALJ concluded that when Mrs. Dickey refused to drive truck # 25093 to Kingsport or Bordentown, she engaged in STAA protected activity under the "reasonable apprehension" portion of the statute. The STAA protects an employee who refuses to operate a commercial motor vehicle because of a "reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition"[15] It states that "an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health."[16] To qualify for protection under the "reasonable apprehension" section, the employee "must have sought from the employer, and been unable to obtain, correction of the unsafe condition."[17]

Therefore, to prevail under the "reasonable apprehension" clause, the employee must prove by a preponderance of evidence that: (1) his apprehension of serious injury [or impairment to health] to himself or the public due to the unsafe condition of his vehicle was objectively reasonable, and (2) he sought, but was unable to obtain, a correction of the unsafe condition.[18]

The record fully supports the ALJ's finding and conclusion that Mrs. Dickey engaged in protected activity under the "reasonable apprehension" section. The ALJ found that because of her husband's experiences in November and December 2005 and

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15 49 U.S.C.A. § 31105(a)(1)(B)(ii).

16 49 U.S.C.A. § 31105(a)(2).

17 *Id.*

18 *Calhoun v. UPS*, ARB No. 04-108, ALJ No. 2002-STA-031, slip op. at 24-25 (ARB Sept. 14, 2007).

her burning eyes and face burns, Mrs. Dickey "truly believed that carbon monoxide or some other dangerous fumes were leaking into the cab of truck # 25093."[19] These objective indications of a problem with truck 25093 and, especially, Mrs. Dickey's uncontroverted testimony that the truck stop mechanic had advised her that the fume problem was due to a hose problem, constitute substantial evidence that Mrs. Dickey was afraid that the condition of the truck would cause her serious harm. Furthermore, the record clearly indicates that when Mrs. Dickey took the truck to the TA truck stop and sought to have the hose replaced, West Side officials refused to permit her to do so.

West Side Terminated Mrs. Dickey for Refusing to Drive Truck # 25093

West Side argues that Mrs. Dickey quit her job and that, therefore, it did not terminate her.[20] The company contends that Mrs. Dickey planned to quit while in Florida before the January 9, 2006 mediation in Philadelphia. It points to evidence that Mrs. Dickey removed her personal items from the truck before she left Florida and that she never complained about the fumes until January 10. West Side also cites the dispatcher's deposition testimony that when Mrs. Dickey called him on January 10, she told him that "she was going to have to quit because she couldn't stand driving the truck anymore like that."[21]

The ALJ rejected this argument, and so do we. The context of Mrs. Dickey's statement that she "was going to have to quit" was that she was suffering from the fumes and would not drive unless the problem was corrected. And West Side's argument that she had planned to quit has, at best, weak circumstantial support. Moreover, the company's vice president, Hershberger, testified, "She refused to do that [drive the truck to the Bordentown drop lot] and at that time, I made the decision to terminate her employment . . . ."[22] Added to this is a January 10, 2006 letter to Mrs. Dickey from Will Miers, West Side's Executive Director of Human Resources. The letter states, in part: "Your refusal to accept either work assignment [drive to Kingsport and drive to Bordentown] . . . constitutes insubordinate behavior and misconduct . . . and warrants that your employment be terminated. Based on this you have left West Side Transport with no alternative but to terminate your employment effective immediately."[23]

Therefore, substantial evidence, in fact, direct evidence, supports a finding that West Side terminated Mrs. Dickey, and that it terminated her because she refused to drive to Kingsport and Bordentown.

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19 R. D. & O. at 8.

20 Respondent's Brief at 18-20.

21 Respondent's Exhibit H, at 33.

22 Transcript 163.

23 Complainant's Exhibit 3, p. 4.

The ALJ Erred By Not Ordering Reinstatement

Because she prevails on her STAA complaint, Mrs. Dickey is entitled to an order that West Side "take affirmative action to abate the violation," reinstate her to her "to her former position with the same pay and terms and privileges of employment," and "pay compensatory damages, including back pay."[24] The ALJ ordered West Side to expunge any adverse or derogatory statements pertaining to her January 10, 2006 protected activity and termination from Mrs. Dickey's employment records. The ALJ also awarded her back pay from the date of termination until the date she resumed work, 16 weeks later. But the ALJ did not order West Side to reinstate Mrs. Dickey because "Complainant does not want to be restored to her previous position with Respondent." He reasoned that her "desire not to return to employment with Respondent seems appropriate" because at the time of the hearing she had a comparable job and her husband could no longer accompany her.[25] Here the ALJ erred.

Reinstatement is an automatic remedy under the STAA. Reinstatement must be ordered unless it is impossible or impractical.[26] In *Dutile v. Tighe Trucking, Inc.*, the Secretary of Labor scrutinized the previous Department of Labor policy of honoring a discharged employee's statement that he does not seek reinstatement. The Secretary found that "a complainant who is not ordered to be reinstated may gain a windfall as back pay continues to accrue during the pendency of remanded issues such as the calculation of back pay and related benefits." Therefore, he determined that the better policy was for the ALJ to order reinstatement which, in turn, would obligate the respondent employer to "make a bona fide reinstatement offer."[27]

Three years later, relying on *Dutile*, the Administrative Review Board found that an ALJ erred when, on remand, he had ordered the complainant to advise him whether he would be seeking reinstatement. The employee advised the ALJ by letter that he preferred to remain at his new employment "unless certain circumstances change." The Board held that the ALJ "wrongfully relieved [the employer] of its obligation to make a *bona fide* offer of reinstatement." Furthermore, the employee's letter to the ALJ did not constitute a valid waiver of reinstatement because the employer had not unconditionally offered him reinstatement.[28]

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[24] 49 U.S.C.A § 31105(b)(3)(A).

[25] R. D. & O. at 11.

[26] *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 4-5 (ARB Mar. 31, 2005).

[27] 1993-STA-031, slip op. at 4-5 (Sec'y Oct. 31, 1994).

[28] *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-055, ALJ No. 1995-STA-043, slip op. at 3 (ARB May 30, 1997). *See also Heinrich Motors, Inc. v. NLRB*, 403 F.2d 145, 150

On remand, the ALJ should therefore order West Side to reinstate Mrs. Dickey unless the parties demonstrate that circumstances exist under which reinstatement would not be appropriate. Furthermore, this record contains no evidence whether a bona fide offer of reinstatement was made or, if made, was rejected. And since back pay liability does not end when the employee obtains comparable employment, but when the employer makes a bona fide, unconditional offer of reinstatement or, in very limited circumstances, when the employee rejects a bona fide offer, the ALJ may have to recalculate the amount of back pay to which Mrs. Dickey is entitled.[29]

CONCLUSION

James E. Dickey's claim (ARB No. 06-151) is **DENIED** because West Side did not terminate him because he filed a complaint about truck # 26080 emitting fumes but because he was medically unfit to drive.

As for Lori J. Dickey's claim (ARB No. 06-150), we conclude that West Side violated the STAA because it terminated her when she refused to drive truck # 25093 out of a reasonable apprehension that she would be injured or her health impaired. Therefore, we **AFFIRM** the ALJ's order that West Side violated the STAA, that the company expunge Mrs. Dickey's records, and that West Side pay, with interest, the $569.00 that it withheld. But we **REMAND** on the issues of reinstatement and back pay as discussed above.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

(2d Cir. 1968) (remarks indicating a disinterest in reinstatement are "of little value" when made before a company has offered reinstatement).

[29] *See Dale*, slip op. at 6; *Michaud v. BSP Transp., Inc.*, ARB No. 97-113, ALJ No.1995-STA-029, slip op. at 5-6 n.3 (ARB Oct. 9, 1997).