U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

DANNY JOHNSON, **ARB CASE NO. 99-111**

COMPLAINANT, **ALJ CASE NO. 1999-STA-5**

v. **DATE: March 29, 2000**

ROADWAY EXPRESS, INC.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

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

For the Respondent:
Sally J. Scott, Esq., *Franczek Sullivan, P.C., Chicago Illinois*

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C. §31105 (1994). Complainant Danny Johnson (Johnson) claimed that his employer, Respondent Roadway Express, Inc. (Roadway), violated STAA when it discharged him on February 21, 1995, because he had been unavailable for dispatch on February 19, 1995. A Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order[1/] in which he concluded that Roadway had violated §31105. The ALJ issued a subsequent order recommending that Roadway pay Johnson's attorney for costs incurred and services rendered. Because substantial evidence supports the ALJ's conclusion that Roadway violated §31105 but does not support the ALJ's conclusion that Johnson

[1/] Citations to the record are as follows: Recommended Decision and Order (R. D. & O. ___); Hearing Transcript (Tr. ___); Joint Exhibit (JEX ___); Complainant Exhibit (CEX ___); Respondent Exhibit (REX ___).

failed to mitigate his damages, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** for further proceedings consistent with this opinion.

PROCEDURAL HISTORY

On March 30, 1995, Johnson filed a timely complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) pursuant to 29 C.F.R. §1978.102 (1999). He claimed that Roadway had violated STAA by discharging him after he was absent from work due to illness (and therefore refused to drive) from February 14 through February 19, 1995.

In accordance with 29 C.F.R. §1978.104, OSHA's Assistant Secretary issued written findings dismissing Johnson's complaint.[2/] Johnson filed timely objections to those findings and requested a hearing under 49 U.S.C. §31105(b)(2)(B) and 29 C.F.R. §1978.105. The ALJ assigned to the case held a hearing on May 11 and 12, 1999. On July 21, 1999, he issued an R. D. & O. ruling in Johnson's favor and recommending relief. Pursuant to 29 C.F.R. §1978.109(a), the ALJ forwarded his R. D. & O. to the Administrative Review Board (Board) for review.

We have jurisdiction under 49 U.S.C. §31105(b)(2)(C) and 29 C.F.R. §1978.109(c). Roadway filed a Brief in Opposition to the Administrative Law Judge's Recommended Decision and Order. Johnson filed a Brief in Support of and in Opposition to the Administrative Law Judge's Recommended Decision and Order.

BACKGROUND

The facts underlying this case are set forth in the R. D. & O. at 4-5 and 7-13, and are summarized here in relevant part.

Roadway employed Johnson as a commercial motor vehicle driver from 1978 until February 21, 1995. Johnson worked at Roadway's Chicago Heights, Illinois facility as a district bid run driver. As a district bid run driver Johnson would drive between the Chicago Heights facility and other Roadway terminals several times a day. Tr. 27-28. The Chicago Heights facility is a "less-than-trailer-load" distribution center where trailers deliver freight which is reloaded onto other trailers and redistributed across the country. Tr. 258.

Under Roadway's attendance policy, drivers have five contractual paid sick days per contract year. Drivers earn vacation time in accordance with the collective bargaining agreement,[3/] and a

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[2/] For reasons not reflected in the record, the Assistant Secretary did not issue his written findings until August 31, 1998. JEX 1.

[3/] The applicable agreement is the National Master Freight Agreement and the Central States Area Supplemental Agreement signed by Roadway and the Teamsters Union. Drivers get one week of vacation after their first year of employment. From two to seven years a driver earns two weeks per year. From eight to fourteen years a driver earns three weeks of vacation. From fifteen to twenty years a driver earns four (continued...)

driver is entitled to two floating holidays which can be added to his or her earned time off. Any other absences are considered unexcused. Tr. 261-62.

Roadway applies a progressive disciplinary policy to unexcused absences, *i.e.,* a warning letter for the first unexcused absence, followed by a second warning letter, a three-day suspension, and another letter of warning which would be followed by a letter of discharge for the fifth unexcused absence. Tr. 269. Article 46 of the Central States Area Supplemental Agreement provides that an employee must receive at least one warning notice prior to suspension or discharge and that warning notices remain in effect for no more than nine months. JEX 21 at 207-8; Tr. 278-79. Under the collective bargaining agreement and Roadway's progressive disciplinary policy Johnson received the following discipline for absenteeism: September 11, 1992, warning letter for absenteeism; October 31, 1992, warning letter for absenteeism; December 10, 1992, one-day suspension for absenteeism; July 7, 1993, warning letter for absenteeism; September 7, 1993, three-day suspension for absenteeism; October 17, 1993, warning letter for absenteeism; January 31, 1994, discharged for absenteeism (later reinstated); July 4, 1994, discharged for absenteeism (later reinstated with a final warning); November 14, 1994, discharged for absenteeism (later reinstated with discharge reduced to warning letter). REX 2 through 6.

1. Johnson's Discharge

On February 21, 1995, Roadway discharged Johnson because he had been unavailable for dispatch on February 19, 1995. The events leading up to Johnson's termination are as follows.

On Sunday, February 12, 1995, Johnson called Roadway[4/] to advise that he was ill with the flu and would not be able to drive. Johnson sought medical treatment from Dr. Nilda Durany on Tuesday, February 14. Dr. Durany provided Johnson with a return-to-work certificate stating that Johnson was suffering from pneumonia, and that he could return to work on the following Monday, February 20. JEX 9. On Wednesday, February 15, Johnson called Roadway[5/] to advise that he had pneumonia. On Thursday, February 16, Johnson came to the terminal to pick up his pay check and presented his supervisor, Jim Crowe, with the return-to-work certificate. Crowe spoke with Johnson and testified that Johnson looked "better than I've ever seen him look, better than what he looks today, and better than what I usually see him which [sic] I dispatched him." Tr. 447. Crowe testified that Johnson did not appear to be sweating, coughing, or suffering from a fever. *Id.* at 449. Crowe attached a post-it note to Johnson's return-to-work certificate on which Crowe noted that Johnson did not appear ill or hoarse.

[3/](...continued)
weeks of vacation per year. Beyond twenty years a driver earns five weeks of vacation per year. JEX 21 at 227-28.

[4/] Johnson could not recall the driver foreman with whom he spoke. Tr. 31-32.

[5/] Johnson did not identify with whom he spoke. Tr. 40; 116.

Johnson returned to work on Monday, February 20.[6/] Roadway discharged Johnson on February 21, stating in its written termination letter that he was discharged because he was unavailable for dispatch on February 19, 1995. JEX 4. Johnson unsuccessfully grieved his discharge, and it became final on March 29, 1995. R. D. & O. 5.

At the hearing before the ALJ Johnson testified about his illness. He stated that he was feverish when he returned from a dispatch to the Chicago Heights facility at 2 a.m. on Saturday February 11. He went home to bed, by which time he had become more sick. He had a high fever and chills, and he was coughing. All of his muscles were inflamed and hurting. Tr. 30-31; 41. He testified that he was too sick to drive. Tr. 37; 43-44; 46. Florence Cody, Johnson's fiancee at the time of his discharge, testified that Johnson was hot and pale and was sweating excessively. Tr. 186; 194-95. She testified that Johnson stayed in bed for four or five days, only getting up to go to the bathroom. Tr. 187. Johnson was so sick that Cody did not want him to drive her car, and she drove him to the terminal on February 16. Tr. 193-94.

2. Johnson's Post-Discharge Employment

In April or May following his discharge, Johnson applied for a truck driving position with Yellow Freight but was not offered a job. In May of 1995, Johnson interviewed with Burlington Truck Lines and was offered a job as a truck driver. After attending orientation, Johnson refused to accept the job because the position would have required him to drive all over the United States. R. D. & O. 18.

In November 1995, Johnson found employment setting up concrete forms with Arrowhead Construction, where he worked until September 1996. He then worked for Celadon Trucking from October 17, 1996, until March 15, 1997. Johnson then worked one to two weeks for EVI Services, Inc., as a truck driver. Beginning June 7, 1997, Johnson worked three weeks for DOT Leasing as a truck driver. On July 1, 1997, Johnson went to work as a driver with Aaron's Limousine Service, which continued until the company went out of business some two months later. From September 12 to October 24, 1997, Johnson worked as a truck driver for Laura Stewart, quitting when he was not paid. In January 23, 1998, Johnson began work as a truck driver for Landstar Poole, until he was discharged on March 7, 1998. Later that year, Johnson also worked as a truck driver for Trans-State Lines, CRST and DeKalb Transportation. He then began working as a truck driver for Chieftain Contract Service where he was still employed at the time of the May 1999 hearing. R. D. & O. 5.

THE ALJ'S RECOMMENDED DECISION AND ORDER

[6/] There is conflicting evidence in the record regarding whether Johnson returned to work on the 20th or the 21st. Roadway produced two documents regarding Johnson's work status on February 20, 1995. In response to Johnson's discovery request Roadway produced a list of Johnson's absences. Tr. 207; CEX 3. This document does not indicate Johnson was off duty on February 20. Roadway also produced another list of absences which it introduced as part of Respondent's Exhibit 7. This list indicates that Johnson was absent February 20, due to sickness (flu). Roadway officials could not conclusively state that Johnson did not work on February 20. Tr. 339-340; 389; 429-30. The ALJ found that Johnson worked that day. R. D. & O. 11 n.5.

The ALJ found that Johnson's absence from work from February 13 through February 19, 1995, was protected activity under STAA because during that period Johnson's ability or alertness was so likely to have been impaired through illness that driving a commercial motor vehicle would have violated the Department of Transportation's illness/fatigue rule.[7/] R. D. & O. 8. The ALJ concluded that Roadway had a dual motive for terminating Johnson:

> I find that Johnson was ultimately fired for his absence on February 19, 1995. However, I do believe that Johnson's overall work record, i.e. record of absenteeism, was a legitimate reason for the discharge. Therefore, I find that a dual motive existed in this case.

R. D. & O. 14. However, the ALJ concluded that Roadway had failed to prove, by a preponderance of the evidence, that it would have discharged Johnson in the absence of his protected refusal to drive on February 19. R. D. & O. 14-15.

The ALJ ordered Roadway to reinstate Johnson immediately[8/] and awarded Johnson back pay and costs. However, the ALJ concluded that Johnson's entitlement to back pay ended in May of 1995 when he did not accept a truck driving position with Burlington Truck Lines (Burlington). The ALJ found that the Burlington truck driving job was substantially equivalent to Johnson's former truck driving position with Roadway and that his refusal of the Burlington job offer showed a willful disregard for his own financial interest. The ALJ concluded that this resulted in a breach of Johnson's obligation to mitigate his damages. R. D. & O. 18.

In a September 3, 1999, Order Granting Attorney Fees, the ALJ recommended that Roadway pay Johnson's attorney $28,757.16 for costs incurred and services rendered.

STATEMENT OF ISSUES

1. Whether Johnson's refusal to drive between February 12 and February 19, 1995, was an activity protected by STAA §31105(a)?[9/]

[7/] DOT's ill or fatigued operator regulation provides in relevant part: "No driver shall operate a commercial motor vehicle . . . while the driver's ability or alertness is so 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." 49 C.F.R. §392.3 (1999).

[8/] This recommendation was made in the body of the ALJ's July 21, 1999, R. D. & O. *Id.* 17. The ALJ made the reinstatement order explicit in a subsequent Corrective Order issued July 26, 1999.

[9/] The employee protection provisions of STAA provide, in relevant part:

> (a) Prohibitions–
>
> (1) A person may not discharge an employee . . . because–
>
> * * *

(continued...)

2. Whether Roadway discharged Johnson in violation of STAA?

3. Whether Johnson was entitled to back pay and for what period?

4. Whether Johnson's attorney is entitled to fees and in what amount?

STANDARD OF REVIEW

Under the regulations implementing STAA, the 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); *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) (1994). *See also* 29 C.F.R. §1978.109(b). 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).

DISCUSSION

We decide this case with two principles in mind. First, in order to prevail, Johnson must prove that he engaged in protected activity, and that he was subjected to adverse employment action because of that activity. *Clean Harbors,* 146 F.3d at 21, *citing Moon v. Transp. Drivers, Inc.,* 836 F.2d 226, 229 (6th Cir. 1987).

Second, as noted above, the standard of review that we must follow, established in STAA implementing regulations, requires that we accept as conclusive the ALJ's findings of fact if they are "supported by substantial evidence on the record considered as a whole . . . ." 29 C.F.R.

[9/](...continued)

(B) the employee refuses to operate a 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.

(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health.

49 U.S.C. §31105.

§1978.109(c)(3). In this case, were we free to evaluate the evidence *de novo* we might reach a different result. However, as two different courts of appeals have recently emphasized, in a STAA case this Board is not free to engage in an independent evaluation of the facts. As the First Circuit stated "[t]he effect of STAA Rule 109(c)(3) is that the Board cannot simply disagree, unless no reasonable mind could accept as adequate the relevant evidence on which the ALJ's findings rested." *BSP Transp.,* 160 F.3d at 48. "If there is substantial evidence in the record to support the ALJ's findings," it would constitute reversible error for this Board to fail to treat them as conclusive. *Castle Coal,* 55 F.3d at 44. *Accord, Brink's Inc. v. Herman,* 148 F.3d 175 (2d Cir. 1998).

As we discuss below, given these constraints on our authority to evaluate the evidence in this case anew, we affirm the ALJ's findings of liability. We also affirm the ALJ's order of reinstatement. However we modify the award of back pay because Roadway did not sustain its burden of proving that Johnson did not use due diligence in pursuing suitable employment or that the Burlington truck driver position he declined to accept was substantially equivalent to his truck driver position with Roadway.

I. Protected Activity

The ALJ found that Johnson did not work, and therefore refused to drive a commercial motor vehicle, from February 13 through 19, 1995. The ALJ concluded that Johnson's refusal to drive was protected under STAA §31105(a)(1)(B)(i) because "his operation of a commercial motor vehicle would have amounted to actual violations [sic] of" the DOT fatigue/illness regulation.[10/] R. D. & O. 8. The ALJ based his conclusion[11/] on the following facts:

[10/] *See* n.7, *supra*. For reasons that the ALJ did not articulate, he ruled that the other STAA refusal to drive provision (commonly referred to as the "reasonable apprehension" provision (49 U.S.C.§31105(a)(1)(B)(ii)) "is . . . not applicable to this case." R. D. & O. 6. However, Johnson's refusal to drive may have been protected by that provision since he could have had a reasonable apprehension of serious injury if he had to drive in his ill state. 49 U.S.C. §31105(a)(1)(B)(ii). *See* n.9, *supra*; *see also Somerson v. Yellow Freight Sys., Inc.*, ARB Case Nos. 99-005, 036, ALJ Case Nos. 98-STA-9, 11, ARB Final Dec. and Ord., slip op. at 15, Feb. 18, 1999 ("§31105(a)(1)(B)(ii) also encompasses situations where a driver's physical condition causes an employee to have 'a reasonable apprehension of serious injury to the employee or the public'"). Because we conclude that Johnson's refusal to drive was protected under the "actual violation" provision (§31105(a)(1)(B)(i)), we do not decide whether it was also protected under the "reasonable apprehension" provision.

[11/] The ALJ first concluded that "complainant has demonstrated, by a preponderance of the evidence, a prima facie case of discrimination under Section 31105 of the Surface Transportation Assistance Act." R. D. & O. 13. This conclusion is problematic for two reasons. First, as we have stated repeatedly, in analyzing the evidence presented in a case such as this, which has been fully tried on the merits, it is not necessary to determine, as the ALJ did (R. D. & O. 13-14), whether Johnson established a *prima facie* case, and whether Roadway rebutted that showing. Once a respondent produces evidence in an attempt to articulate a legitimate, nondiscriminatory reason for its personnel action, it no longer serves any analytical purpose to determine whether the complainant presented a *prima facie* case. Instead, the relevant inquiry is whether complainant prevailed, by a preponderance of the evidence, on the ultimate question of liability. If he or she did not prevail on the ultimate question of liability, it matters not at all whether he or she presented a *prima*

(continued...)

- Johnson's "credible testimony that his ability or alertness was so likely to become impaired through illness as to make it unsafe for him to begin to operate the motor vehicle." R. D. & O. 8.

- The corroborating testimony of Florence Cody, which the ALJ also found credible. *Id.* at 12.

- Dr. Durany's return-to-work certificate, which stated that Johnson had pneumonia and could return to work on February 20. *Id.* at 8.

The ALJ specifically dismissed the conflicting testimony of Roadway driver supervisor Jim Crowe – who saw and spoke with Johnson on February 16 – because Crowe only observed Johnson "very brief[ly]." *Id.* at 8.

Substantial evidence supports the ALJ's conclusion that Johnson engaged in protected activity when he refused to drive a commercial motor vehicle from February 13 through 19. The ALJ chose between conflicting testimony and documentary evidence. He had an opportunity to observe Johnson, Cody, and Crowe, and specifically credited Johnson's description of his illness. R. D. & O. 8. There is more than a scintilla of evidence to support these findings. Johnson testified in some detail that he was too ill to drive. Cody corroborated that testimony and indicated that Johnson was so ill that she would not let him drive her car. In contrast, Crowe testified that Johnson was in good health. Given the conflict in the testimony, the ALJ would have been free to discount Johnson and Cody's testimony and to credit Crowe; however, he did not do so. In a situation such as this our authority to overturn factual findings is limited. Although we might have weighed the evidence on this issue differently if we were free to evaluate the record independently, given the restrictive standard of review under which we adjudicate STAA cases, we must treat these findings as conclusive.

Roadway argues that the ALJ erred in not making a specific finding that Johnson suffered from pneumonia. Such a finding is not necessary in order to uphold the conclusion that Johnson's refusal to drive was protected activity. What is determinative is not whether Johnson actually had pneumonia, but whether he was too ill to drive a commercial motor vehicle safely on the dates in

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[11/](...continued)
facie case. If he or she did prevail on the ultimate question of liability, *ipso facto* he or she presented a *prima facie* case. *Somerson*, ARB Case Nos. 99-005, 036 slip op. at 8 (and cases cited therein). In a case fully tried on the merits there is simply no reason for an adjudicator to dance what one court has aptly called "the judicial minuet." *Sime v. Trustees of the California State University and Colleges,* 526 F.2d 1112, 1114 (9th Cir. 1975).

Second, it is simply a misnomer to characterize the complainant's burden of persuasion as one of proving a *prima facie* case by a preponderance of the evidence. Complainant's ultimate burden, rather, is to prove **the elements of a violation** – here that Johnson engaged in protected activity and that Roadway took adverse action against him because of that activity – by a preponderance of the evidence.

question. The ALJ so found, and, as we concluded above, that finding is supported by substantial evidence. On February 12, Johnson advised Roadway that he had the flu. After he visited Dr. Durany on February 14 (and Dr. Durany diagnosed him), Johnson informed Roadway that he had pneumonia. Johnson is not a medical expert, and it was not necessary for him to know the exact medical diagnosis of his condition when he followed his doctor's order to remain away from work until February 20. JEX 9. Moreover, the ALJ credited Johnson's and Cody's testimony regarding the extent of Johnson's illness in addition to Dr. Durany's diagnosis. R. D. & O. 8. Given the substantial evidence in the record supporting the ALJ's findings, we may not disturb them.

Roadway also seeks to discredit the medical certificate prepared by Dr. Durany by noting "in March 1994, Dr. Durany's medical license was placed on indefinite probation[, and in] February 1995, Dr. Durany was issued a notice to show cause as to her failure to comply with the probationary order of March 1994." Roadway's Brief in Opposition to the Administrative Law Judge's Recommended Decision and Order (Resp't Brief) 21. However, we agree with the ALJ's determination that this information is immaterial to the outcome of this case. R. D. & O. 2. At the time she treated Johnson, Dr. Durany was licensed to practice medicine in the State of Indiana.[12/]

We are fully cognizant that Johnson's record as an employee is imperfect, and that a reasonable person might question the medical evidence supporting Johnson's claim that he was too ill to drive between February 13 and 19. However, the very limited evidence that Roadway introduced specifically relating to Johnson's physical condition while absent from work plainly did not persuade the ALJ that Johnson was merely feigning illness, and was absent from work for reasons unrelated to an inability to drive safely. In this regard, we emphasize that an employer is not without tools for dealing with chronically absent employees. As long as the absences are not the result of illness or fatigue which so debilitates a driver that driving would violate the DOT regulation, or are not the result of the driver's reasonable good faith belief that it would be unsafe for him to drive, those absences may provide a basis for discipline.

Moreover, where a driver's claim of illness is not legitimate, a refusal to drive is not protected activity. "STAA does not preclude an employer from establishing reasonable methods or mechanisms for assuring that a claimed illness is legitimate and serious enough to warrant a protected refusal to drive." *Ass't Sec'y of Labor for Occupational Safety and Health and Anthony Ciotti v. Sysco Foods of Philadelphia,* ARB Case No.98-103, ALJ Case No.97-STA-30, Final Dec. and Ord., slip op. at 8 n.8, July 8, 1998, *aff'd sub nom. Sysco Food Services v. DOL*, No. 98-6265 (3d Cir. 1999) (*Ciotti)*. In the present case, Roadway attempted to establish through the testimony of supervisor Jim Crowe that Johnson's illness from February 13 through 19 either was feigned, or

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[12/] Although Dr. Durany's medical license was put on indefinite probation by order of the Medical Licensing Board of Indiana dated March 18, 1994, she was not prohibited from practicing medicine. Resp't Brief Ex B. It is true that Dr. Durany received an Order to Show Cause for failure to comply with the Licensing Board's March 18, 1994 Order. However, the Order to Show Cause was dismissed by the Board's March 8, 1995 Order. While that Order did modify certain reporting requirements of the March 18, 1994 Order, it did not further restrict Dr. Durany's license to practice medicine. *Id.* The probation was lifted by Order dated September 24, 1996. *Id.* The fact that Dr. Durany's license was later suspended in 1998 is not relevant to her diagnosis of Johnson's condition some four years earlier.

was not serious enough to preclude driving a commercial motor vehicle. The ALJ, in his role of fact finder, credited the testimony of Johnson and Cody over that of Crowe. That does not mean that Roadway would never be able to defend a disciplinary action such as occurred here with other, or more substantial evidentiary support.

We conclude that substantial evidence supports the ALJ's finding that Johnson engaged in activity protected by STAA when he refused to drive a commercial motor vehicle from February 13 through 19 because he was sufficiently ill that to drive would have violated the DOT illness/fatigue rule.

II. Whether Roadway Retaliated Against Johnson for Engaging in Protected Activity

The ALJ concluded that Johnson proved that Roadway's decision to terminate Johnson was motivated in part by Johnson's protected refusal to drive from February 13 through 19. "Johnson's discharge letter specifically stated that he was terminated due to his unavailability for dispatch on February 19, 1995." R. D. & O. 13. However, the ALJ determined that Johnson's record of absenteeism also motivated Roadway to terminate Johnson: "I do believe that Johnson's overall work record, i.e. record of absenteeism, was a legitimate reason for the discharge." *Id.* at 14. Applying a dual motive analysis, the ALJ then concluded that Roadway had failed to prove by a preponderance of the evidence that it would have terminated Johnson even if he had not engaged in the protected refusal to drive from February 13 though 19.

The Supreme Court has used the dual motive analysis in cases where an employer's adverse employment action against the employee was motivated by both prohibited and legitimate reasons. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 286 (1977) (discharging school board not precluded from establishing that it would have reached the same decision not to grant tenure even in the absence of protected activity). In *Mt. Healthy* the Court noted "[a] rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of . . . protected conduct than he would have occupied had he done nothing." *Mt. Healthy,* 429 U.S. 285. *Accord Price Waterhouse v. Hopkins,* 490 U.S. 228, 258 (1989)(when a Title VII plaintiff proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account). "Under the dual motive analysis, when the complainant proves that retaliation was a motivating factor in the respondent's action, the burden then shifts to the respondent to show that it would have taken the same action against the complainant even in the absence of protected activities." *Somerson,* ARB Case Nos. 99-005, 036, slip op. at 22. *See, e.g., Shannon v. Consolidated Freightways,* ARB Case No. 98-051, ALJ Case No. 96-STA-15, Apr. 15, 1998 (respondent demonstrated it would have discharged complainant absent any protected activity); *Williams v. Carretta Trucking, Inc.,* Case No. 94-STA-07, Sec'y Final Dec. and Ord., Feb. 15, 1995 (Respondent's unequivocal policy that refusal of an assignment constitutes voluntary resignation established that it would have fired Complainant even if he never complained about the safety of vehicles or threatened to take assigned vehicles for a DOT inspection).

We agree with the ALJ that Johnson proved that his protected activity played a part in Roadway's decision to terminate him. We also concur with the ALJ's conclusion that Roadway failed to prove that it would have terminated Johnson on February 21 even if Johnson had not engaged in his protected refusal to drive from February 13 through 19. Therefore, we affirm the ALJ's finding that Roadway violated STAA when it terminated Johnson.

A. Whether Roadway was motivated to terminate Johnson, at least in part, by Johnson's protected refusal to drive from February 13 through 19.

The termination notice which Roadway gave to Johnson on February 21 stated that Johnson was being discharged because of his unavailability to drive on February 19.[13/] We have affirmed above the ALJ's finding that Johnson's "unavailability to drive" from February 13 through 19 was, in fact, a protected refusal to drive because he was so ill that he would have violated the DOT illness/fatigue rule had he driven. Roadway contends before us that it did not terminate Johnson because he was ill, but because his "frequent absences violate[d] Roadway's and the Union's mutually agreed upon absenteeism policy." Resp't Brief 28. It attempts to distinguish this "legitimate basis" from the protections provided by STAA, *i.e.,* "[t]he right not to drive when ill does not create a corresponding right not to be disciplined for excessive absenteeism." *Id.*

Roadway's argument has been raised and rejected in previous STAA cases. In *Ciotti v. Sysco Foods, supra,* a driver became sick during his run, and was subsequently absent from work for two days. Because Ciotti had several previous infractions of his employer Sysco System's attendance policy on his record, Sysco suspended him for one day. Sysco conceded that a driver engages in protected activity when he refuses to drive a commercial vehicle when he is too sick to do so safely. However, Sysco argued that Ciotti was punished because he ran afoul of the company's attendance policy, not because he was sick. We rejected that reasoning:

> Sysco's argument, although facially appealing, is fatally flawed. Here, there is no distinction, analytical or otherwise, between Ciotti's protected activity of refusing to drive while impaired by illness and his absence from work. They are the same thing. Ciotti's job is to drive a truck, and the regulations direct him not to drive when impaired. Therefore, for Ciotti to obey the law and refuse to drive while impaired *is* to be absent from work; they are two sides of the same coin. Taking adverse action against Ciotti because he was absent from work under these circumstances is the same as taking adverse action against him because of his protected activity.

Ciotti, ARB Case No.98-103, slip op. at 8. *See also, Scott v. Roadway Express, Inc.,* ARB Case No. 99-13, ALJ Case No. 98-STA-8, Final Dec. and Ord., slip op. at 11, July 28, 1999 (company's absentee policy presented ill driver with untenable choice between violating fatigue/illness rule or receiving a warning letter). We apply the same reasoning here: Roadway's termination of Johnson

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[13/] The February 21, 1995, Discharge Letter listed two previous violations of a similar nature, *i.e.,* a July 4, 1994, warning letter for absenteeism and a November 14, 1994, warning letter for absenteeism. JEX 4.

because Johnson refused to drive when he was too ill to do so safely amounts to a *per se* violation of STAA's employee protection provision. When a "driver's ability or alertness is so impaired, or so likely to become impaired, through . . . illness," an employer cannot lawfully discipline that driver for refusing to drive. 49 C.F.R. §392.3. Therefore, Johnson proved that Roadway's termination of Johnson was based, at least in part, on Johnson's protected refusal to drive.

B. Whether Roadway proved, by a preponderance of the evidence, that it would have terminated Johnson in the absence of his protected refusal to drive from February 13 though 19.

As we noted above, in a dual motive case, once the complainant has established that an illicit motive played a part in the adverse action taken by the respondent against the complainant, the burden of persuasion shifts to the respondent to prove by a preponderance of the evidence that it would have taken the adverse action in any event. We agree with the ALJ that Roadway failed to meet this burden.

Roadway produced ample evidence supporting a conclusion that Johnson had an abysmal attendance and disciplinary record. Under the collective bargaining agreement and Roadway's progressive disciplinary policy Johnson received the following discipline for absenteeism: September 11, 1992, warning letter for absenteeism; October 31, 1992, warning letter for absenteeism; December 10, 1992, one-day suspension for absenteeism; July 7, 1993, warning letter for absenteeism; September 7, 1993, three-day suspension days for absenteeism; October 17, 1993, warning letter for absenteeism; January 31, 1994, discharged for absenteeism (later reinstated); July 4, 1994, discharged for absenteeism (later reinstated with a final warning); November 14, 1994, discharged for absenteeism (later reinstated with discharge reduced to warning letter). REX 2 through 6.

In his decision, the ALJ listed twenty-two disciplinary actions Roadway took against Johnson in the five years prior to his February 21, 1995, discharge. R. D. & O. 9-10. The ALJ also discussed the circumstances related to Johnson's three-day suspension in September 1993; his February 1994 discharge; his July 1994 discharge; and his November 1994 discharge. R. D. & O. 10-11. These facts led the ALJ to conclude that Roadway had a dual motive for discharging Johnson: "I find that Johnson was ultimately fired for his absence on February 19, 1995. However, I do believe that Johnson's overall work record, i.e., record of absenteeism, was a legitimate reason for discharge." R. D. & O. 14.

To satisfy its burden, Roadway also presented testimony, which the ALJ credited, that it's long standing policy was to look at an employee's entire work record when determining whether to terminate an employee. However, the ALJ correctly held that Roadway failed to prove that it would have decided to discharge Johnson even if Johnson had not engaged in the protected refusal to drive from February 13 through 19. In fact, the evidence is quite to the contrary. Nothing in the record suggests that, had Johnson not refused to drive during that period, Roadway even would have considered discharging him on February 21. Under the dual motive analysis it is not sufficient for an employer to prove that it had good reason to take adverse action against an employee. Rather, the employer must prove by a preponderance of the evidence that it actually **would** have taken that

action, even if the employee had not engaged in protected activity. "[I]t is not a defense to a discrimination case that the plaintiff should have been fired, if he would not have been fired had it not been for discriminatory animus." *Coco v. Elmwood Care, Inc.,* 128 F.3d 1177, 1180 (7th Cir. 1997). *See Price Waterhouse,* 228 U.S. at 252 (employer's legitimate reason for discharge in dual motive case will not suffice "if that reason did not motivate it at the time of the decision"). Because Roadway failed to meet this evidentiary burden, we conclude that Roadway's termination of Johnson on February 21 violated STAA.

III. Relief

STAA provides that:

> If the Secretary decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary shall order the person 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.

49 U.S.C. §31105(b)(3)(A). STAA also provides for the award of "costs (including attorney's fees) reasonably incurred by the complainant in bringing the complaint." 49 U.S.C. §31105(b)(3)(B). The ALJ ordered reinstatement, back pay, restoration of health and retirement benefits, interest and attorney's fees and costs. We consider each of these aspects of relief in turn.

A. Reinstatement.

The ALJ directed Roadway "to immediately reinstate the Complainant." ALJ's Corrective Order at 2. The ALJ's reinstatement order was effective immediately upon receipt. *Spinner v. Yellow Freight Sys., Inc,* Case No. 90-STA-17, Sec'y Final Dec. and Ord., slip op. at 22-23, May 6, 1992, *aff'd sub nom. Yellow Freight Sys. v. Martin,* 983 F.2d 1195 (2d Cir. 1993); 29 C.F.R. §1978.109(b). Reinstatement provides an important protection for employees who report safety violations. "[T]he employee's protection against having to choose between operating an unsafe vehicle and losing his job would lack practical effectiveness if the employee could not be reinstated pending complete review." *Brock v. Roadway Express, Inc.,* 481 U.S. 252, 258-59 (1987). These protections also extend to employees who refuse to drive vehicles because of safety concerns such as illness or fatigue. 49 C.F.R. §392.3. Because we conclude Roadway's discharge of Johnson violated STAA, we affirm the order to reinstate Johnson.

B. Back Pay

The ALJ awarded Johnson back pay based upon Roadway's violation of STAA. However, the ALJ found that the entitlement to back pay ended in May of 1995 because "Johnson's refusal to

accept the trucking job with Burlington [Truck Lines] showed a willful disregard for his own financial interest and . . . resulted in a breach of his obligation to mitigate damages." R. D. & O. 18. We agree that back pay should be awarded. However, for the reasons we discuss below, we reject the ALJ's finding that back pay entitlement terminated when Johnson declined the Burlington Truck Lines job.

The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. *Clifton v. United Parcel Service,* ARB Case No. 97-45, ALJ Case No. 94-STA-16, Final Dec. and Ord., slip op. at 2, May 14, 1997, *rev'd on other grounds sub nom. United Parcel Services, Inc. v. Administrative Review Board,* 166 F.3d 1215 (6th Cir. 1998)(table); *accord Blackburn v. Metric Constructors, Inc.,* Case No. 86-ERA-4, Sec'y Decision and Order on Damages and Attorney Fee, slip op. at 8, Oct. 30, 1991, *aff'd in relevant part and rev'd in part sub nom. Blackburn v. Martin,* 982 F.2d 125 (4th Cir. 1992).

Once a complainant establishes that he or she was terminated as a result of unlawful discrimination on the part of the employer the allocation of the burden of proof is reversed, *i.e.,* it is the employer's burden to prove by a preponderance of the evidence that the employee did not exercise reasonable diligence in finding other suitable employment. *Timmons v. Franklin Electric Cooperative,* ARB Case No. 97-141, ALJ Case No. 97-SWD-2, ARB Final Dec. and Ord., slip op. at 11, Dec. 1, 1998. *See also Wheeler v. Snyder Buick, Inc.,* 794 F.2d 1228, 1234 (7th Cir. 1986) (it is employer's burden to prove, as an affirmative defense, that the employee failed to mitigate damages).

The employer may prove that the complainant did not mitigate damages by establishing that comparable jobs were available, and that the complainant failed to make reasonable efforts to find substantially equivalent and otherwise suitable employment. *Ass't Sec'y of Labor for Occupational Safety and Health and Johnny Lansdale and Donna Lee v. Intermodal Cartage Co., Ltd.,* Case No. 94-STA-22, Sec'y Final Dec. and Ord., slip op. at 6-7, July 26, 1995, *aff'd sub nom. Intermodal Cartage Co., Ltd. v. Reich,* 113 F.3d 1235 (6th Cir. 1997)(table). *See also U.S. v. City of Chicago,* 853 F.2d 572, 578 (7th Cir. 1988) (defendant must prove both that the plaintiff was not reasonably diligent in seeking other employment, and that with the exercise of reasonable diligence there was a reasonable chance that plaintiff might have found comparable employment); *Rasimas v. Michigan Dep't of Mental Health,* 714 F.2d 614, 624 (6th Cir. 1983)(employer may satisfy its burden only by establishing that there were substantially equivalent positions which were available and that the claimant failed to use diligence in seeking such positions). We find that Roadway failed to prove either of these two elements.

First, Roadway failed to prove that other comparable jobs were available. In an effort to meet the first prong of its affirmative defense, Roadway argued below that there was a "well-documented shortage of drivers." Respondent's Post Hearing Brief 29-30. However, the bald assertion that there was a need for drivers is not the sort of specific proof that Roadway needed to provide to show that there were substantially equivalent positions available. *See, e.g., Kawaski Motors Mfg. Corp. v. NLRB,* 850 F.2d 524, 528 (9th Cir. 1988) (employer's reliance on newspaper advertisements and hiring records to show the availability of jobs is not adequately convincing

because they were not evidence of employment specifically available). On this ground alone we could find that Roadway failed to prove failure to mitigate. However, we also find that Roadway did not prove that Johnson failed to exercise due diligence in mitigating his damages when he declined a position with Burlington Truck Lines.

The ALJ found that "the truck driving job offered to Johnson by Burlington Truck Lines was substantially equivalent to his former truck driving position with Roadway." R. D. & O. 18. As we discuss below, this finding is not supported by substantial evidence on the record as a whole. A substantially equivalent job offers "virtually identical promotional opportunities, compensation, job responsibilities, working conditions and status." *Rasimas,* 714 F.2d at 624.

There are substantial differences between Johnson's position with Roadway and the position he was offered with Burlington Truck Lines. Roadway is a unionized carrier which paid Johnson fringe benefits including a pension, major medical and hospitalization insurance. Tr. 58. Johnson testified that Roadway's benefit package was better than any of the other companies with whom he worked. Tr. 59. With Roadway, Johnson drove less-than-trailer load freight. Tr. 62. In addition, Johnson drove on a district bid run which involved driving from Chicago Heights to another terminal and back one or more times per day. Tr. 27-28.

Roadway offered no evidence or argument regarding Burlington Truck Lines' union status, and Johnson asserts that Burlington Truck Lines is a non-union company. Complainant's Brief in Support of and in Opposition to the Administrative Law Judge's Recommended Decision and Order 23. Roadway also failed to establish that the Burlington position paid the same as the position it discharged Johnson from. A lower-paying, non-union position would not constitute substantially equivalent employment. *Ass't Sec'y of Labor for Occupational Safety and Health and Victor Polewsky v. B & L Lines, Inc.,* Case No. 90-STA-21, Sec'y Final Dec. and Ord., slip op. at 3, May 29, 1991.

Roadway also failed to establish that the Burlington driver position offered working conditions substantially equivalent to the Roadway position. Unlike Roadway, Burlington was a trailer load carrier which would have required Johnson to drive throughout the United States. Dep. 58; R. D. & O. 18. With Roadway, Johnson drove less-than-trailer load freight on district bid runs, which entailed driving back and forth between terminals no more than 250 miles apart. Deposition of Danny Johnson (Dep.) 59.

As this discussion demonstrates, the differences between Johnson's Roadway position and that offered by Burlington Truck Lines are significant. Under the facts presented, we must conclude that Roadway failed to establish that the truck driving job offered to Johnson by Burlington Truck Lines was substantially equivalent to his former truck driving position with Roadway. Johnson's failure to take the position with Burlington Truck Lines did not terminate his entitlement to back pay.[14/] The ALJ's finding to the contrary is not based upon substantial evidence.

[14/] In its Statement of Facts, Roadway claims that Johnson did not use reasonable diligence in seeking employment after it discharged him. Resp't Brief 11. However, an employer must meet both prongs of the (continued...)

In light of our conclusion that Johnson's refusal to take the Burlington Truck Lines job did not terminate his entitlement to back pay, it is necessary to remand this case to the ALJ to determine if or when Johnson's back pay entitlement was tolled. The ALJ, in compliance with STAA, ordered that Johnson be temporarily reinstated. However, it is not clear from the record before us whether or when that reinstatement actually occurred. Of course, reinstatement would toll the running of back pay entitlement. Income earned by Johnson must also be deducted from any award of back pay. Moreover, Johnson testified that he was discharged from one of those positions (with Landstar Poole) because he violated company policy. Tr. 168-77. The ALJ should also determine whether the discharge by Landstar Poole affects back pay entitlement.

D. Restoration of Other Benefits.

Because the ALJ found that Roadway violated STAA when it discharged Johnson he "is entitled to any damages that flow from that unlawful discharge." *Hufstetler v. Roadway Express, Inc.,* Case No. 85-STA-8, Sec'y Final Dec. and Ord., slip op. at 52, Aug. 21, 1986, *aff'd on other grounds sub nom. Roadway Express, Inc. v. Brock,* 830 F.2d 179 (11th Cir. 1997). Once a complainant establishes that he or she was terminated as a result of unlawful discrimination on the part of the employer, a presumption in favor of full relief arises. *Gaddy v. Abex Corp.,* 884 F.2d 312, 318 (7th Cir. 1989). The ALJ ordered Roadway "to restore other benefits which Johnson was entitled to, including but not limited to health and welfare contributions to which Johnson would have been entitled to." R. D. & O. 19. On remand the ALJ should determine the amounts due Johnson in order to restore these benefits. In particular, the ALJ should determine: 1) whether and in what amount Roadway is responsible for payment of Johnson's medical expenses which would have been covered by the health and welfare fund;[15/] 2) whether and in what amount Johnson is

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[14/](...continued)
Rasimas test before the burden of going forward with evidence that he or she exercised due diligence shifts back to the employee. *OFCCP v. Cissell Mfg. Corp.,* Case No. 87-OFC-26, Ass't Sec'y Final Dec. and Ord., slip 18 n.13, Feb. 14, 1994. Roadway did not establish that there were substantially equivalent jobs available. In any event, although Johnson did not have to establish that he exercised reasonable diligence, his actions demonstrate that he did. *Donnelly v. Yellow Freight Sys., Inc.*, 874 F.2d 402, 411 (7th Cir. 1989) (complainant can satisfy mitigation requirement by demonstrating a continuing commitment to be a member of the work force). A complainant is only required to make reasonable efforts to mitigate damages, and is not held to the highest standards of diligence. *Rasimas,* 714 F.2d at 624. Such efforts include checking want ads, registering with employment agencies, discussing employment opportunities with friends and acquaintances. *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 392 (7th Cir. 1975). A review of the record reveals that Johnson satisfied the test for reasonable diligence. The day after his discharge, Johnson contacted his union business agent to see if there were jobs available. Tr. 60. He checked with the business agent frequently, once or twice a week. *Id.* He applied for a position with Yellow Freight System, a unionized company, but was not hired. Tr. 62-63. Johnson also looked for a non-union truck job and checked the want ads, Tr. 64; called all over the country looking for work, Tr. 64-66; and took jobs outside the trucking industry, Tr. 67, 74-75. These efforts demonstrate Johnson's "continuing commitment to be a member of the work force." *Donnelly*, 874 F.2d at 411.

[15/] The burden of proof for supporting payment of these expenses rests with Johnson. *Hufstetler,* Case No. 85-STA-8 slip op. at 48. In order to restore Johnson fully, Roadway also "must pay sufficient monies (continued...)

entitled to vacation pay for the period between his discharge and his reinstatement *(Moyer v. Yellow Freight Sys., Inc. [Moyer II],* Case No. 89-STA-7, Sec'y Final Dec. and Ord., slip op. at 36, Aug. 21, 1995, *rev'd on other grounds sub nom. Yellow Freight Sys., Inc. v. Reich*, 103 F.3d 132 (6th Cir. 1996)(table)); 3) whether and to what extent Johnson is entitled to vacation and holiday pay for the period for which he is entitled to back pay; and 4) whether and to what extent Roadway must contribute the necessary pension funds on behalf of Johnson for the period from the date of his discharge until the date of his reinstatement. *Moyer II*, slip op. at 41.

E. Interest.

Interest is due on back pay awards from the date of discharge to the date of reinstatement. Prejudgment interest is to be paid for the period following Johnson's termination on March 29, 1995, until the ALJ's order of reinstatement. Post-judgment interest is to be paid thereafter, until the date payment of the back pay is made. *Moyer I,* slip op. at 9-10. The rate of interest to be applied is that required by 29 C.F.R. §20.58(a)(1999) which is the IRS rate for the underpayment of taxes set out in 26 U.S.C.A. §6621 (1999). *Moyer II*, slip op. at 40. The interest is to be compounded quarterly. *Ass't Sec'y of Labor for Occupational Safety and Health and Harry D. Cotes v. Double R Trucking, Inc.,* ARB Case No. 99-061, ALJ Case No. 98-STA-34, Supplemental Dec. and Ord., slip op. at 3, Jan. 12, 2000.

IV. Attorney's Fees

The ALJ issued a September 3, 1999, Order Granting Attorney Fees. However, this was after the close of the briefing schedule before the Board. As a result, neither party had an opportunity to comment on the attorney fees award. Since we are remanding this case for further action by the ALJ, Johnson's attorney may submit to the ALJ an augmented fee petition for work before the Board and upon remand. The Board will review the entire attorney fee award after the ALJ's decision on remand and after the parties have briefed the attorney fee issue.

CONCLUSION

For the foregoing reasons we:

1. Affirm finding that Roadway violated STAA when it discharged Johnson;

2. Affirm the order to reinstate Johnson;

3. Affirm the award of back pay and benefits but remand to the ALJ to recalculate the back pay award and Johnson's entitlement to the other benefits discussed in Part III D of this decision.

[15/](...continued)
into the health and welfare fund to permit [Johnson's] immediate coverage upon reinstatement." *Moyer v. Yellow Freight Sys., Inc. [Moyer I],* Case No. 89-STA-7, Sec'y Final Dec. and Ord., slip op. at 9, Sept. 27, 1990, *rev'd on other grounds sub nom. Yellow Freight Sys., Inc. v. Martin,* 954 F.2d 353 (6th Cir. 1992).

The Board will review the award of attorney's fees in conjunction with its review of the ALJ's recommended decision on remand.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member