



In the Matter of:

KENNETH HOBSON,

**ARB CASE NO. 06-016,
06-053**

COMPLAINANT,

ALJ CASE NO. 2005-STA-035

v.

DATE: January 31, 2008

COMBINED TRANSPORT, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Randall D. Huggins, Esq., Jonathan E. Shook, Esq., *Shook, Huggins & Johnson, P.C.*, Tulsa, Oklahoma

For the Respondent:

David B. Schneider, Esq., *Schneider & Labarthe, P.A.*, Oklahoma City, Oklahoma

FINAL DECISION AND ORDER

Kenneth Hobson filed a complaint with the United States Department of Labor alleging that when his former employer, Combined Transport, Inc. (Combined), discharged him, it violated the employee protection section of the Surface Transportation Assistance Act (STAA) of 1982.¹ A Department of Labor Administrative Law Judge

¹ U.S.C.A. § 31105 (West 1997). Regulations implementing the STAA are found at 29 C.F.R. Part 1978 (2007). The STAA has been amended since Hobson filed his complaint. See Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). It is unnecessary for us to determine whether the amendments apply to Hobson's complaint because they are not implicated by the issues presented and

(ALJ) heard the case and concluded that Combined violated the STAA. He recommended that Hobson be reinstated and awarded Hobson back pay with interest and compensatory damages. We affirm in part and reverse in part.

BACKGROUND

Combined is a flatbed trucking company that transports raw glass throughout the United States and Canada. Combined hired Hobson as a driver in May 2000. Hobson had a good safety record, and Combined had not disciplined him before the termination.

Hobson began suffering anxiety in September 2004. His doctor prescribed Xanax, an anti-anxiety medication, and told him not to return to work until October 4, 2004. Combined placed Hobson on medical leave until that date.

Upon his return, Combined assigned Hobson a load to deliver. Hobson had to wait for the load and became very sleepy because of the Xanax. When the load finally arrived on October 5, Hobson loaded it onto the truck and then went home to take a short nap. Instead, he slept until 8:00 a.m. on October 6. Later that morning, on the way to pick up his truck to deliver the load, he received a phone call from Charles Godwin, his supervisor. Godwin told him that he was fired because he was late delivering the load.²

Godwin spoke to Hobson several times afterwards and suggested that Hobson consider changing his medication. Godwin had been instructed to ask Hobson to come back to work for Combined. On October 8 Hobson obtained his doctor's permission to stop taking the Xanax and told Godwin. Godwin told him that Combined had a load for him to pick up that day. But Hobson said that he could not immediately drive because he still had Xanax in his system and that it would be unsafe for him drive. Godwin testified that he then told Hobson, "Okay then . . . I don't need you."³ According to Hobson, Godwin said, "Well, just fuck it then. We don't need you."⁴

Hobson understood that he had been fired and began looking for a new job. He did not obtain substantially similar employment until June 8, 2005, when Moore Freight

thus, even if the amendments were applicable to this complaint, they would not affect our decision.

² Hearing Transcript (Tr.) 18.

³ Tr. 57.

⁴ Tr. 19. The parties agree that Hobson was discharged on October 6, rehired on October 8, and discharged again on October 8. Tr. 13, 19-20, 45, 56-57. Hobson's complaint pertains only to the October 8 discharge.

Service hired him. He testified that to drive for Moore, he had to purchase a tractor. He bought a tractor for \$20,000, which he leased to Moore, thereby making him an owner-operator.

Hobson filed his STAA complaint on January 6, 2005. The Department of Labor's Occupational Safety and Health Administration (OSHA) investigated and denied the complaint. Hobson objected and requested a hearing before an ALJ. At the hearing on August 18, 2005, Hobson was represented by counsel, while Combined was represented by Michael Bottjer, a recruiting manager for Combined, who is not an attorney.

The ALJ concluded that Combined violated the STAA when it discharged Hobson on October 8, 2004. He ordered Combined to reinstate Hobson and awarded him back pay, interest, \$20,000 in compensatory damages for the cost of the tractor, and \$5,000 compensation for emotional damages. The ALJ later awarded Hobson attorney's fees and costs.⁵

JURISDICTION AND STANDARD OF REVIEW

The case is now before the Administrative Review Board (ARB or the Board) which automatically reviews an ALJ's STAA decision.⁶ The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the STAA.⁷ Under the STAA, the ARB is bound by the ALJ's findings of fact if substantial evidence on the record considered as a whole supports those findings.⁸ Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁹ In reviewing the ALJ's conclusions of law,

⁵ January 31, 2006 Recommended Decision and Order Awarding Attorney's Fees and Costs.

⁶ 49 U.S.C.A. § 31105 (b)(2)(C); 29 C.F.R. § 1978.109 (c)(1) (2007).

⁷ Secretary's Order No. 1-2002, (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

⁸ 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 2001-STA-038, slip op. at 2 (ARB Feb. 19, 2004).

⁹ *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 2003-STA-012, slip op. at 3 (ARB Feb. 27, 2004).

the ARB, as the Secretary of Labor’s designee, acts with “all the powers [the Secretary] would have in making the initial decision”¹⁰ Therefore, we review the ALJ’s conclusions of law de novo.¹¹

DISCUSSION

Governing Law

The STAA protects employees who engage in protected activity from discharge, discipline, and discrimination. STAA protected activity occurs when the employee files a complaint or begins a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or when an employee testifies or will testify in such a proceeding. The STAA also protects employees who refuse to drive because to do so would violate a regulation, standard, or order of the United States related to commercial motor vehicle safety or health. An employee who refuses to drive because of a reasonable apprehension of serious injury to himself or the public because of the vehicle’s unsafe condition is also protected.¹²

To prevail on his STAA complaint, Hobson must prove by a preponderance of the evidence that he engaged in protected activity, that Combined was aware of the protected activity, that he suffered an adverse action (i.e., discharge, discipline, or discrimination), and that Combined took the adverse action because of his protected activity.¹³

Combined Violated the STAA

The record supports the ALJ’s finding that on October 8, 2004, Hobson reasonably apprehended the danger of driving because Xanax was still in his system. Substantial evidence also supports his finding that because Xanax was still in his system and its side effects caused drowsiness, Hobson would have violated the United States Department of Transportation’s “fatigue rule” had he driven on October 8.¹⁴ Therefore,

¹⁰ 5 U.S.C.A. § 557(b) (West 2004).

¹¹ *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 2001-STA-022, -029, slip op. at 2 (ARB Oct. 31, 2003).

¹² *See* 49 U.S.C.A. § 31105 (a).

¹³ *Ridgley v. C. J. Dannemiller*, ARB No. 05-063, ALJ No. 2004-STA-053, slip op. at 5 (ARB May 24, 2007).

¹⁴ 49 C.F.R. § 392.3 (“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”).

we accept the ALJ's conclusion that Hobson engaged in protected activity when he informed Godwin on October 8 that he could not drive because of the lingering effects of the Xanax.¹⁵

The record is very clear that Godwin discharged Hobson because he refused to drive on October 8. Although their accounts differ as to the exact language used during their conversation, both Hobson and Godwin testified about Hobson's concern with the medication and that Godwin discharged him after Hobson refused to drive.¹⁶ Therefore, the record supports the ALJ's conclusion that Combined violated the STAA when it discharged Hobson because of protected activity.

The ALJ's Back Pay Award

Because Hobson succeeded on his STAA claim, the ALJ, consistent with the STAA, ordered Combined to reinstate Hobson "to [his] former position with the same pay and terms and privileges of employment."¹⁷ Reinstatement is an automatic remedy under the STAA, though when reinstatement is impossible or impractical, alternative remedies such as front pay are available.¹⁸

Under the STAA, Hobson is also entitled to "compensatory damages, including back pay."¹⁹ In determining how much back pay to award, the ALJ first found that, prior to his discharge, Hobson's average weekly wage was \$1,200. The record supports this finding. The ALJ then held that Combined owed Hobson back wages during the period from October 8, 2004, the date of the discharge, until on or around June 8, 2005, the date Hobson obtained comparable employment. The ALJ therefore awarded Hobson \$38,400 in back pay (32 weeks x \$1,200) plus pre-judgment and post-judgment interest thereon.

Here the ALJ erred. Back pay liability ends when the employer makes a bona fide, unconditional offer of reinstatement or, in very limited circumstances, when the employee rejects a bona fide offer, not when the employee obtains comparable employment.²⁰ The record contains no evidence whether or when Combined made a bona fide offer to reinstate Hobson. Therefore, since the record does not show when

¹⁵ Recommended Decision and Order (R. D. & O.) at 6-8.

¹⁶ Tr. 18-19, 57.

¹⁷ See 49 U.S.C.A § 31105(b)(3)(A)(ii).

¹⁸ *Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 4-5 (ARB Mar. 31, 2005).

¹⁹ 49 U.S.C.A. § 31105 (b)(3)(A)(iii).

²⁰ 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).

Combined's back pay liability to Hobson ended, we must vacate the ALJ's back pay award.

Combined's Duty to Prove Mitigation

A STAA complainant like Hobson has a duty to exercise reasonable diligence to attempt to mitigate back pay damages. But the employer bears the burden to prove the complainant failed to mitigate. The employer can satisfy its burden by establishing that substantially equivalent positions were available to the complainant, and he failed to use reasonable diligence in attempting to secure such a position.²¹

Combined argues that the ALJ did not inform Bottjer, its non-lawyer representative at the hearing, that the company had the burden to prove mitigation. Therefore, Combined urges us to remand this case to the ALJ so that it may present evidence that Hobson failed to mitigate.²²

We reject this argument because the ALJ did at least attempt to assist Bottjer concerning mitigation. Recognizing that Bottjer was not an attorney, the ALJ cross-examined Hobson about his search for employment. "In the interests of justice" the ALJ asked Hobson whether he looked for work after the discharge, what kind of jobs he looked for, whether he applied at trucking companies and their names, whether he was physically capable of driving trucks, and what was his present income.²³ The ALJ also directed Bottjer to address the issue of damages, but Bottjer chose not to ask Hobson any questions.²⁴

In a related argument pertaining to the merits of the case, Combined contends that the ALJ erred in not informing the company at the outset of the litigation about "other essential elements of the case," such as the applicable rules of practice, the fact that the OSHA investigation findings and preliminary order were not part of the record, the company's burden of proof, and the need to order a transcript. Combined asserts that these failures denied it due process.²⁵

This argument has no merit. While we have acknowledged that adjudicators must accord a party appearing pro se fair and equal treatment, a pro se litigant "cannot

²¹ *Dale*, slip op. at 7.

²² Brief at 5-7.

²³ Tr. 24-26

²⁴ Tr. 77 (ALJ: "Okay. Mr. Bottjer, do you have anything to say about damages?" MR. BOTTJER: "It seems like a lot. I have no comment on the damages, Your Honor.")

²⁵ Brief at 8.

generally be permitted to shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance.”²⁶ Furthermore, affording a pro se complainant undue assistance in developing a record would compromise the role of the adjudicator in the adversary system.²⁷

The ALJ’s Compensatory Damage Award

As noted above, a successful STAA litigant like Hobson is also entitled to “compensatory damages.” The ALJ found that Hobson spent \$20,000 for the tractor and awarded him that amount in compensatory damages. Combined argues that this award unjustly enriches Hobson.²⁸ According to the ALJ, Hobson’s “long failure to find comparable employment eventually necessitated that he take riskier steps to secure employment.” He found that Combined’s “illegal discharge of [Hobson] placed him in the position where this tractor purchase became necessary to obtain employment.” Therefore, he concluded that Hobson was entitled to the cost of the tractor.²⁹ But the record contains no evidence to support these findings. Furthermore, the ALJ erred as a matter of law in awarding Hobson the cost of the tractor.

The STAA does not define “compensatory damages.” BLACK’S LAW DICTIONARY defines the term to mean “[d]amages sufficient in amount to indemnify the injured person for the loss suffered.” Compensatory damages is synonymous with

²⁶ *Griffith v. Wackenhut Corp.*, ARB No. 98-067, ALJ No. 1997-ERA-052, slip op. at 10 n.7 (ARB Feb. 29, 2000), quoting *Dozier v. Ford Motor Co.*, 707 F.2d 1189, 1194 (D.C. Cir. 1983).

²⁷ *See Young v. Schlumberger Oil Field Servs.*, ARB No. 00-075, ALJ No. 2000-STA-028, slip op. at 9 (ARB Feb. 28, 2003) citing Jessica Case, Note: *Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law an Excuse?*, 90 KY. L.J. 701 (2002). To support its due process argument, Combined moves us to reopen the record and admit two affidavits and three pages of additional exhibits it attached to its brief. In response Hobson submitted a Motion to Strike the affidavits and exhibits. When considering a motion to reopen the record, the Board relies upon the same standard found in 29 C.F.R. Part 18, the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges. *Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-010, slip op. at 6-7 (ARB Jan. 31, 2001). The applicable Rule of Practice states: “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)(2007). Since Combined has not demonstrated that the additional evidence was unavailable during the hearing, we deny the motion. In doing so, Hobson’s Motion to Strike becomes moot.

²⁸ Brief at 12.

²⁹ R. D. & O. at 11.

“actual damages,” which is the amount awarded to “compensate for a proven injury or loss; damages that repay actual losses.”³⁰ The purpose of a compensatory damage award is to make the complainant whole for the harm caused by the employer’s unlawful act.³¹ Put another way, compensatory damages are meant to restore the employee to the same position he would have been in if not discriminated against.³² Compensatory damages are designed to compensate discriminatees not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering.³³

The ALJ erred in awarding Hobson the \$20,000 he spent to buy the tractor because Hobson did not prove that he suffered the actual loss of a \$20,000 tractor as a result of being unlawfully discharged. Rather, he chose to buy the \$20,000 tractor to go to work for Moore Freight in June 2005. Awarding Hobson \$20,000 for the tractor does not restore Hobson to the same position he would have had but for the discharge. Instead, it amounts to a windfall.

The ALJ also awarded Hobson \$5,000 in compensatory damages for the stress and anxiety he suffered as a result of the discharge. The Secretary and the Board consistently have held that compensatory damages under the STAA include damages for pain and suffering, mental anguish, embarrassment, and humiliation.³⁴

Combined argues that the record contains “no evidence” that Hobson suffered emotional injury. But Hobson testified that he suffered emotional distress.³⁵ And although Hobson’s testimony was unsupported by medical evidence, it was also unrefuted and, according to the ALJ, credible. We have affirmed reasonable emotional distress awards based solely upon the employee’s testimony.³⁶ Therefore, since

³⁰ BLACK’S LAW DICTIONARY 416 (8th ed. 2004).

³¹ *Smith v. Esicorp*, ARB No. 97-065 and 97-112, ALJ No. 1993-ERA-016, slip op. at 5 n.4 (ARB Aug. 27, 1998).

³² *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-005, slip op. at 14 (ARB Mar. 29, 2000).

³³ *Hobby v. Georgia Power Co.*, ARB No. 98-166, ALJ No. 1990-ERA-030, slip op. at 31 (ARB Feb. 9, 2001).

³⁴ *See Michaud v. BSP Transp., Inc.*, ARB No. 97-113, ALJ No. 1995-STA-029, slip op. at 9 (ARB Oct. 9, 1997) and cases cited therein.

³⁵ Tr. 24-25 (“When I was terminated, I was terminated at a time when I was really stressed out and my nerves were messed up. My anxiety was real high. After I was terminated, the way I was, it just made it worse.”).

substantial evidence supports the ALJ's finding that Hobson suffered emotional injury as a result of the discharge, we affirm the \$5,000 compensatory damage award.

Attorney's Fees

Since Hobson has prevailed, he is entitled to "the costs (including attorney's fees) reasonably incurred."³⁷ In deciding the merits of attorney's fees petitions, we employ the "lodestar" method whereby we determine the number of hours reasonably spent on the litigation multiplied by a reasonable hourly rate.³⁸

Hobson submitted an application to the ALJ for \$6,440.00 in attorney's fees and \$251.22 in costs. The application included a supporting affidavit and an invoice describing the tasks that Hobson's counsel performed. Combined submitted an objection to \$800 of the attorney's fees and \$17.34 of the costs. In his January 31, 2006 Recommended Decision and Order Awarding Attorney's Fees and Costs, the ALJ found that Hobson's counsel's hourly rates were within the market rate range for the West South Central Region of the United States. He also found that the total fees requested were reasonable for the service rendered. He analyzed Combined's objection to the proposed fees and costs and found that it had no merit. Therefore, since the ALJ properly applied the lodestar method and substantial evidence supports his findings, we affirm the award.

CONCLUSION

1. Substantial evidence in the record as a whole supports the ALJ's finding that Hobson engaged in activity the STAA protects when he told Godwin that he would not drive on October 8, 2004. The record also supports the ALJ's finding that Combined discharged Hobson for refusing to drive on October 8. Therefore, we accept these findings and the ALJ's conclusion that Combined violated the STAA.

2. We reject Combined's argument that the ALJ denied it due process by not advising the company about essential elements of the case. We also reject Combined's argument that the ALJ erred in not advising Bottjer that he had the burden to mitigate back pay damages. But since the ALJ did not properly calculate the back pay owed to Hobson, we **VACATE** the ALJ's back pay award of \$38,400. We **ORDER** Combined to pay Hobson back pay at the rate of \$1,200 per month from October 8, 2004, until the date

³⁶ See, e.g., *Jackson v. Butler & Co.*, ARB Nos. 03-116 and 03-144, ALJ No. 2003-STA-026, slip op. at 9 (ARB Aug. 31, 2004); *Roberts v. Marshall Durbin Co.*, ARB Nos. 03-071 and 03-095, ALJ No. 2002-STA-035, slip op. at 17 (ARB Aug. 6, 2004).

³⁷ 49 U.S.C.A. § 31105(b)(3)(B).

³⁸ See *Jackson*, slip op. at 10 and cases cited therein.

Combined made, or makes, Hobson a bona fide, unconditional offer of reinstatement to his former position with the same pay, terms, and privileges of employment that he had before he was discharged. The back pay due to Hobson will be reduced by any money Hobson earned between October 8, 2004, and the date that Combined made or makes a bona fide offer of reinstatement. Furthermore, we **ORDER** that Combined pay to Hobson pre-judgment and post-judgment interest on the back pay owing according to the rate used for underpayment of federal taxes.³⁹

3. We **VACATE** the ALJ's order that Combined pay Hobson \$20,000 in compensatory damages because the cost of the tractor that Hobson bought does not constitute an actual pecuniary loss suffered as the result of the unlawful discharge.

4. We **AFFIRM** the ALJ's order that Combined pay Hobson \$5,000 compensatory damages for his emotional suffering.

5. We **AFFIRM** the ALJ's order that Combined pay Randall D. Huggins, Esq. of Shook, Huggins, and Johnson, P.C. the sum of \$6440.00 in attorney's fees and \$251.22 for expenses incurred.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

³⁹ See 26 U.S.C.A. § 6621(a)(2), *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 1989-ERA-022, slip op. at 18-21 (ARB May 17, 2000) (outlining the procedures to be followed in computing the interest due on back pay awards).