



In the Matter of:

ROBERT MICHAUD,

ARB CASE NO. 97-113

COMPLAINANT,

ALJ CASE NO. 95-STA-29

and

DATE: October 9, 1997

**ASSISTANT SECRETARY OF LABOR
FOR OCCUPATIONAL SAFETY AND
HEALTH,**

INTERVENOR,

v.

BSP TRANSPORT, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C.A. §31105 (West 1996). After a hearing held February 20-22, 1996, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order on September 6, 1996 in which she found that Complainant, Robert Michaud, did not establish that Respondent, BSP Transport, Inc. (BSP), violated the STAA when it discharged him from his employment as a truck driver. In a Decision and Remand Order (Remand Order) issued on January 6, 1997, the Board reversed the ALJ and found that Michaud prevailed. We remanded to the ALJ for a recommended decision on the remedies to which Michaud is entitled

under the STAA. The ALJ^{1/} declined to hold an additional hearing and authorized the parties to submit argument concerning damages.

In the Recommended Decision and Order on Remand (R.D.O.R.) issued on June 12, 1997, the ALJ found that Michaud was entitled to back pay from the date of discharge until the date on which BSP pays the award to Michaud, plus prejudgment interest. The ALJ also found that reinstatement was not possible and ordered BSP to pay Michaud \$68,134.56, which represents front pay for two years. He also ordered payment of medical benefits and costs, compensatory damages of \$75,000, and \$48,838.39 to cover costs and an attorney's fee. Finally, the ALJ ordered BSP to expunge from its personnel records all derogatory or negative information relating to Michaud, to provide neutral employment references concerning Michaud, and to post a written notice advising its employees that the disciplinary action taken against Michaud has been expunged from his personnel record and that Michaud has prevailed on this complaint.

We affirm the majority of the ALJ's recommended remedies, with the exceptions noted below. We accept the ALJ's findings of fact, R.D.O.R. at 6-11, and provide an abbreviated version to aid in the discussion of the issues.

BACKGROUND

BSP fired Michaud on December 23, 1993, in violation of 49 U.S.C.A. §31105. Remand Order at 7. Upon termination, Michaud applied for numerous jobs, T. 140,^{2/} at least three per week during the time he received unemployment compensation, until June 1994. T. 141. Michaud continued to search for a job until February 1995, at which time, "something snapped," according to his testimony. T. 143-144. At that time, Michaud's mind started racing, he began to forget things, and he felt like he was not "capable of doing much anymore." T. 144.

Michaud's Depression

In February 1995, Michaud consulted a family practice physician, Merrill R. Farrand, Jr., for treatment of a scalp rash. T. 144. During a visit one month later, Dr. Farrand diagnosed a major depression, prescribed anti-depressant medication, and has since seen Michaud once every month or two months. CX 9. Dr. Farrand reported that Michaud suffered from severe to extreme depression according to the Zung scale for rating depression. CX 9 at 2. Farrand noted physical ailments, such as gastric distress and chronic headaches, as evidence of depression, but opined that these ailments may or may not have been worsened by the depression. T. 374. Farrand was more certain that Michaud's complaints of chest pains were related to anxiety

^{1/} A new ALJ was assigned to the proceeding on remand because the initial ALJ no longer worked for the Department of Labor.

^{2/} "T" refers to the transcript of the February 1996 hearing. Other references to the record are "CX" for Complainant's exhibit, and "RX" for Respondent's exhibit.

caused by the depression. T. 374-375. Based on reports from Michaud's wife and a family friend, Dr. Farrand stated that Michaud was depressed and agitated daily. CX 9 at 2. Michaud reported to Farrand his concern over lacking a job, lacking money, losing his house, and feeling shame over receiving public assistance. CX 9 at 1.

Concerning causation, Dr. Farrand believed that "[Michaud's] loss of employment as a truck driver is either the sole or a major contributor to this depression." CX 9 at 3; *see also* T. 375. The physician also believed that Michaud did not magnify the potential causes of his depression. T. 399-400.

Dr. Farrand also gave a prognosis in his report:

The prognosis for this depression ending soon seems quite guarded, as [Michaud] has failed to respond to several anti-depressive medications, as well as counseling. I anticipate that his continued feelings of worthlessness and inability to control his future are marked reasons for his depression continuing.

CX 9 at 2. Although Dr. Farrand acknowledged that depression usually is of a finite period, he did not "foresee, in the short term anyway, [Michaud's] depression resolving." T. 398.

Dr. Farrand referred Michaud for counseling. Delphine Palmer, a licensed master social worker, first evaluated Michaud on June 30, 1995 and saw him for 23 weekly therapy sessions until January 4, 1996, at which time Michaud was transferred to another clinician for treatment. CX 8. Palmer reported that Michaud was referred to her as the result of his "difficulty coping with the stressors of being fired from his job after his contact with DOT and OSHA." CX 8. Palmer noted that Michaud complained of feeling depressed and reported a poor sleep pattern with frequent waking, low motivation, helplessness, anger, shame, and fears of the future. *Id.*

Palmer found that Michaud met the criteria for a diagnosis of major depression according to the latest edition of the Diagnostic and Statistical Manual of Mental Disorders, DSM-IV, published by the American Psychiatric Association. T. 333; *see also* CX 9 at 3. During treatment, Michaud consistently presented symptoms of low motivation, hopelessness, helplessness, and poor concentration, and he also complained of fatigue. T. 345. Palmer opined that the causes of Michaud's depression were the loss of his job with BSP, the ensuing financial distress, and the foreclosure on his house. T. 344.

In August 1995, Palmer referred Michaud to a consulting psychiatrist, Dr. Michael Garnett, who stated that Michaud reported depressive symptoms since at least March 1994, which worsened significantly since December 1994. CX 8 at 20-23. Dr. Garnett's diagnosis was major depression of moderate proportions without psychotic features. *Id.*

Declination of Reinstatement Offer in 1995

BSP offered Michaud reinstatement to his former position or another suitable position in May 1995. RX 12. Michaud did not feel capable of performing his job duties correctly because he was forgetting things, was having difficulty getting tasks accomplished and reading small print, and his mind was racing. T. 170. He also worried that BSP would try to "get rid" of him again, which was a concern shared by his wife. *Id.*

Michaud consulted Dr. Farrand, who advised that it would not be in Michaud's best interest to return to work for BSP. T. 170. Farrand opined that the work environment would not be conducive to Michaud's well-being in view of the degree of his depression, the fact that he was fired because of unwillingness to drive extra hours, and BSP's treatment of him. T. 376-377, 381-382, 384, 396. Farrand acknowledged that while it would have made good economic sense for Michaud to return to work at BSP, it would not have made good psychological sense. T. 396. Farrand also believed that Michaud would drive a commercial vehicle unsafely because of his limited attention span. CX 9 at 2.

Dr. Farrand testified that although he believed Michaud could have worked for an employer other than BSP in May 1995, by the time of the hearing some nine months later, the physician believed that Michaud was not capable of working at all. T. 375, 382, 391. Farrand indicated that Michaud needed continued counseling to reestablish his sense of self-worth, some means to resolve his financial concerns, and a short term job involving limited hours that would allow him to function at his level. T. 391. Dr. Farrand testified that "without adjustments to a potential occupation to allow transition, [] Mr. Michaud would not be employable." T. 382. Regarding Michaud, the doctor noted a vicious cycle where he cannot work because he is depressed and yet he is depressed because he cannot work. T. 391. The treating social worker, Palmer, opined that Michaud was not capable of working at any job during the time he was in therapy with her. T. 345-346.

DISCUSSION

The Hearing Issue

The newly assigned ALJ issued a notice scheduling a hearing in the remanded proceeding. Ex. B. Michaud asked the ALJ to resolve the damages issues on the basis of the existing record, which included extensive testimony on damages. Ex. C and D. The ALJ canceled the hearing, Ex. E, prior to the expiration of the time for BSP to respond to Michaud's request.

BSP argues that the ALJ erred procedurally when he granted Michaud's motion prior to the expiration of the time for filing any opposition. Respondent's Brief in Opposition to Recommended Decision and Order (Resp. Br.) at 2-4. Although the ALJ should not have ruled upon Michaud's request until after BSP had an opportunity to respond, in this case the ALJ's premature ruling was harmless error. Our earlier Remand Order did not explicitly require the ALJ to hold a second hearing to resolve the issue of damages, and therefore he was not required to convene a second hearing with all its attendant formalities.

Future damages can never be ascertained with certainty. The existing record contained sufficient evidence to reasonably make a damage award. BSP had ample opportunity to present its evidence regarding the damages in the initial hearing and has no entitlement to a "second bite at the apple." We find no abuse of the ALJ's discretion in deciding the damages on the basis of the earlier hearing and existing record. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331-332 (1971) (district court's decision whether to reopen record to receive additional evidence is reviewable for abuse of discretion) and *Lussier v. Runyon*, 50 F.3d 1103, 1113 (1st Cir.), cert. denied, 116 S.Ct. 69 (1995) (same).

Back Pay/Front Pay

A wrongfully discharged STAA complainant must mitigate his damages through the exercise of reasonable diligence in seeking alternative employment. *Cook v. Guardian Lubricants, Inc.*, ARB Case No. 97-051, Second Dec. and Remand Order, May 30, 1997, slip op. at 5; *Hufstetler v. Roadway Express, Inc.*, Case No. 85-STA-8, Sec. Dec., Aug. 21, 1986, slip op. at 49-58, *aff'd sub nom. Roadway Express, Inc. v. Brock*, 830 F.2d 179 (11th Cir. 1987). The respondent has the burden of establishing a failure to mitigate on the complainant's part. *Cook*, slip op. at 6.

The ALJ found that BSP did not prove that Michaud failed to seek employment after his discharge, R.D.O.R. at 12, and BSP does not contest this finding. Resp. Br. at 4-5. Rather, BSP contends that its back pay liability ended when Michaud declined the company's offer of reinstatement extended in May 1995. Resp. Br. at 6-8.

A complainant's rejection of an unconditional reinstatement offer ends the respondent's responsibility for back pay. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 241 (1982). However, a reasonable refusal of an offer of reinstatement may subject the respondent to front pay liability. In a case similar to the instant one, the Eleventh Circuit held that an employee reasonably refused an offer of reinstatement because he was suffering from depression in response to the employer's discriminatory acts and his physician advised against taking the offer. *Lewis v. Federal Prison Indus.*, 953 F.2d 1277 (11th Cir. 1992). The *Lewis* court found that the former employee could not return to his work environment without suffering a return of debilitating symptoms and awarded front pay damages. *Id.* at 1281.

In this case there is unrefuted evidence of Michaud's major depression at the time the reinstatement offer was extended and of Dr. Farrand's advice that reinstatement would not be conducive to Michaud's recovery. Here, as in *Lewis*, the record demonstrates that rejection of the reinstatement offer was reasonable.

We affirm the long line of cases that hold that making a *bona fide* offer of reinstatement ends the employer's back pay liability. *E.g.*, *Ford*, 458 U.S. 219. In this case some testimony suggests that Michaud believed that the offer of reinstatement was not *bona fide*, but the ALJ

did not make a finding on the issue.^{3/} R.D.O.R. at 13. While we acknowledge Michaud's fear that the offer might not be *bona fide*, there is no evidence that there was more or less to the offer than BSP's letter indicates. We find that BSP's reinstatement offer was unconditional and was *bona fide*. See RX 12 (BSP's letter containing reinstatement offer).

The ALJ found that back pay would continue to accrue until the date on which the Respondent pays the award. R.D.O.R. at 14. We disagree. Since the reinstatement offer was *bona fide*, BSP's liability after making that offer more properly is characterized as front pay, as opposed to a continuation of back pay. See *Lewis*, 95 F.2d at 1281 (referring to front pay where plaintiff reasonably declined a *bona fide* offer of reinstatement). In this case the appropriate measure of front pay damages is the same as that for back pay.

We reject BSP's argument that front pay is not an available remedy under the STAA. Although the statutory text does not mention front pay as an available remedy, the statute contemplates fashioning relief that makes a complainant whole after discrimination has occurred. *Polgar v. Florida Stage Line*, ARB Case No. 97-056, Order Granting Back Pay and Attorney's Fee, Mar. 31, 1997, slip op. at 3. Therefore, under the STAA, we have ordered that front pay be considered as a substitute for reinstatement when the complainant contends that reinstatement is not possible because of enmity between the parties. See, e.g., *Nolan v. AC Express*, Case No. 92-STA-37, Sec. Dec. and Rem. Ord., Jan. 17, 1995, slip op. at 15-17 (remanding case to ALJ to determine entitlement to front pay "if reinstatement would cause a dysfunctional work environment."). We have also ordered front pay relief in lieu of reinstatement in a case under the similar employee protection provision of the Energy Reorganization Act of 1974, 42 U.S.C. §5851 (1988 and Supp. V 1993). *Doyle v. Hydro Nuclear Services*, Case No.89-ERA-22, ARB Final Dec. and Ord., Sept. 6, 1996, slip op. at 8.

On the basis of medical evidence submitted at the hearing, the ALJ projected that it would take two years to rehabilitate Michaud to the point that he could work again. R.D.O.R. at 15. We affirm that finding. However, we do not agree with the ALJ's finding that the front pay period begins when BSP pays the damages already due Michaud. The record evidence simply does not support such a conclusion.^{4/} The projected two year rehabilitation period

^{3/} The ALJ found that since the declination of the offer was reasonable, it was not necessary to determine if the offer was *bona fide*. We do not question the ALJ's logic in this case, but make the distinction between when back pay ends and front pay begins to clarify the issue for future reference and to emphasize to employers the advantage of offering reinstatement as soon as possible. Only in very limited factual circumstances, such as we have here, would an employer's liability for wages continue after a *bona fide* offer of reinstatement is made.

^{4/} We are making an assessment of damages based upon evidence adduced more than a year and a half ago. Michaud could have avoided this gap in the evidence by joining with BSP in seeking a supplemental hearing. As noted earlier, the ALJ did not abuse his discretion by not holding a supplemental hearing, but the ALJ did err in projecting a reasonable interpretation of Michaud's (continued...)

supported by the evidence of record rightfully begins on the day the hearing closed, February 22, 1996, and thus the front pay period ends on February 21, 1998.

Payment of future damages should be discounted to present value. *E.g.*, *Doyle*, slip op. at 8 and *Price v. Marshall Erdman & Assoc.*, 966 F.2d 320, 322 (7th Cir. 1992). In this case, only a few months will elapse between the date of this order and the end of the front pay period. For that reason, we will not order that the front pay award be reduced to present value.

^{4/}(...continued)

expert's opinion (that it would take two years for Michaud to be rehabilitated) from the time that opinion was given, off to some point in the future.

Medical Benefits

The ALJ found that Michaud is entitled to an award of medical expenses incurred because of the termination of medical benefits upon Michaud's discharge. R.D.O.R. at 16. The parties stipulated that Michaud would have benefitted from health insurance having a net value of \$369 per month and increasing to \$399 per month. *Id.* The ALJ ordered BSP to pay the stipulated amounts to Michaud and we affirm that order.

The ALJ also ordered BSP to reimburse Michaud for any health care costs incurred for himself or his family that would have been covered under BSP's health insurance program. R.D.O.R. at 16. BSP objects to paying these health care costs for Michaud or his family members because no such costs have been presented to BSP or proved in the record and these payments would be a double recovery in view of the net value of the health insurance premiums that BSP has been ordered to pay. Resp. Br. at 10-11. We agree.

With the exception of the health care costs associated with diagnosing and treating Michaud's depression, the award of payment of Michaud's and his family's actual medical expenses would constitute a double recovery. *See Moyer v. Yellow Freight Sys., Inc.*, Case No. 89-STA-07, Sec. Fin. Dec. and Ord., Sept. 27, 1990, slip op. at 8-9 (finding that it was inappropriate to require the respondent to reimburse the complainant for his medical expenses and also require payment of health and welfare fund premiums and ordering only payment of medical expenses incurred), *rev'd on other grounds sub nom. Yellow Freight Sys. v. Martin*, 954 F.2d 353 (6th Cir. 1992). Since we have ordered BSP to pay the value of health insurance premiums, we will not order it to pay Michaud's family medical expenses.

Finally, the ALJ ordered BSP to reimburse Michaud for any health care costs associated with the diagnosis and treatment of his depression, including counseling, "regardless of whether that care and treatment would have been covered" by BSP's health insurance program. R.D.O.R. at 16. Since we have found that BSP's wrongful conduct caused Michaud's depression, we agree that BSP shall be required to reimburse Michaud for all of the medical expenses concerning his depression, to the extent Michaud paid these medical costs himself.

BSP shall afford Michaud a reasonable amount of time to provide documentation of any out of pocket expenses for diagnosis and treatment of his depression, whether or not those expenses would have been covered by BSP's health insurance program.

Compensatory Damages

The STAA provides that upon finding a violation, the Secretary "shall order the [respondent] to pay . . . compensatory damages, including back pay" to the complainant. 49 U.S.C.A. §31105(b)(3)(A). BSP contends that the phrase, "compensatory damages, including back pay" does not include damages for emotional suffering, psychic injury, and medical expenses, but rather "covers only back pay (*i.e.*, lost wages, salary, or commissions), and (2)

other employment-related forms of compensation (*i.e.*, fringe benefits, vacation pay, bonuses, sick pay, disability benefits, etc.)." Resp. Br. at 12-13.

We believe that the statutory language is not so limited. The common meaning of the word "compensatory" is "serving to compensate; affording compensation." *The American Heritage Dictionary of the English Language*, Second College Edition, 1976. In turn, "compensate" is defined: "1. To make up for or offset; counterbalance. 2. To make equivalent or satisfactory reparation to; recompense or reimburse." *Id.* The common meaning of compensatory includes both back wages as well as damages for pain and suffering.

Moreover, 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. *E.g.*, *Nolan*, slip op. at 18 and *Dutkiewicz v. Clean Harbors Environmental Svcs., Inc.*, ARB Case No. 97-090, Final Dec. and Ord., Aug. 8, 1997 slip op. at 8. Reviewing courts have affirmed Secretarial orders pursuant to the STAA that required payment of compensatory damages. *E.g.*, *Yellow Freight System, Inc. v. Reich*, 38 F.3d 76, 80 (2d Cir. 1994) and *Yellow Freight System, Inc. v. Martin*, 983 F.2d 1195, 1198 (2d Cir. 1993).

BSP also challenges the compensatory damages award recommended by the ALJ on the ground that the discharge did not cause Michaud's depression, which arose after Michaud was rejected for employment by another employer some fourteen months after the discharge. Resp. Br. at 15. Like the ALJ, we find that the evidence establishes that BSP's discriminatory action was a proximate cause of Michaud's depression. The testimony and reports of Michaud's treating physician and the licensed clinical social worker who provided therapy, and the written report of a consulting psychiatrist, all agree that Michaud suffers from major depression as a result of BSP's unlawful discharge. CX 8 at 2, 22; CX 9 at 2; T. 343-345, 375. BSP submitted no evidence to rebut this evidence of causation. The rejection for employment by a different employer does not break the chain of causation, since BSP's discriminatory discharge was the reason that Michaud was seeking a job.

The evidence shows that prior to the discharge, Michaud had substantial savings, owned a house, had good credit, and a stable financial position. T. 171, 181. Michaud began defaulting on payments in December 1994, T. 171, after BSP's unlawful action. Since that time, Michaud lost his house through foreclosure, his savings, and his ability to obtain credit, and has received public assistance. T. 181. We affirm the award of \$75,000 in compensatory damages for the reasons given by the ALJ. R.D.O.R. at 17-22.

Attorney's Fee and Expenses

BSP does not object to the hourly fee claimed by Michaud's attorney, but rather to a few specific items. With one minor exception, we affirm the ALJ's implied finding that the challenged items were reasonable in light of the attorney's experience and the complexity of the case.

We approve the \$120 hourly rate for the attorney's travel time (45 minutes each way) to and from the hearing. *See* R.D.O.R. at 25. We find that the number of hours charged for preparing the post-trial brief is not excessive in light of the length of the record and complexity of the case. Likewise, we approve as reasonable the number of hours charged for preparing Michaud's appeal brief. We agree, however, that the 8.7 hours charged for preparing Complainant's motion for modification is excessive in light of the brevity of the motion and accompanying memorandum, and allow 5.0 hours as reasonable. Accordingly, we reduce the attorney's fee award by \$444 (\$120 X 3.7 hours).

We disagree with BSP's contention that the charges for photocopies and postage are included in "counsel's overhead reflected in counsel's hourly rate." Rather, under the STAA, we separately award these expenses, where documented. *E.g., Moyer*, slip op. at 40-41.

Order to Expunge

BSP objects to the order to expunge from Michaud's "personnel records all derogatory or negative information contained therein relating to Complainant's protected activity and that protected activity's role in Complainant's termination" because it is vague and Michaud has not identified any specific negative documents that should be removed. This order requires BSP to remove from Michaud's personnel records any documents that indicate that Michaud was discharged, since the discharge was unlawful. We affirm the order as sufficiently clear and will not place the burden on Michaud to identify specifically the documents.

On the basis of the passage of time since Michaud's 1993 discharge, the company objects to the order to post written notice advising that the disciplinary action taken against Michaud has been expunged and that Michaud prevailed on this complaint. This is a standard remedy in discrimination cases that notifies a respondent's employees of the outcome of a case against their employer. We affirm the order.

ORDER

Respondent shall pay immediately to Complainant:

1. Back pay/front pay in the amount of \$66,204.38 for the period of December 23, 1993 through December 31, 1995;
2. Front pay at the rate of \$655.14 per week for the period of January 1, 1996 through February 21, 1998;
3. Prejudgment interest on the back pay/front pay award, calculated in accordance with 26 U.S.C. §6621;

4. The net value of health insurance of \$85.15 per week for the period of January 1, 1994 through December 31, 1995, and of \$92.08 per week for the period of January 1, 1996 through February 21, 1998; and

5. Compensatory damages in the amount of \$75,000.00.

In addition, Respondent shall:

6. Pay to Complainant's attorney an attorney's fee and costs totaling \$48,694.39;

7. Afford Complainant a reasonable amount of time to provide documentation of his out of pocket expenses for health care associated with the diagnosis and treatment of his depression, whether or not these expenses would have been covered under BSP's health insurance program, and shall promptly pay Michaud such documented health care costs.

8. Immediately expunge from Complainant's personnel records all derogatory or negative information contained therein relating to Complainant's protected activity and that protected activity's role in Complainant's termination;

9. Designate an individual within Respondent's organization as the person to be contacted as Complainant's employment reference and this individual shall provide an employment reference free from reference to Complainant's protected activity; and

10. Post a written notice in a centrally located area frequented by most, if not all, of Respondent's employees for a period of thirty (30) days, advising its employees that the disciplinary action taken against Complainant has been expunged from his personnel record and that Complainant's complaint has been decided in his favor.

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member