



**In the Matter of:**

**ROBERT PALMER,**

**ARB CASE NO. 06-072**

**COMPLAINANT,**

**ALJ CASE NO. 2003-STA-28**

**v.**

**DATE: August 30, 2006**

**TRIPLE R TRUCKING,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearance:**

***For the Complainant:***

**Robert Palmer, *pro se*, Avalon, California**

**FINAL DECISION AND ORDER**

Robert Palmer filed a complaint under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 1997), alleging that Triple R Trucking fired him in violation of the STAA. A United States Department of Labor Administrative Law Judge (ALJ) concluded that Triple R violated the STAA and ordered Triple R to pay damages. On appeal, the Administrative Review Board (ARB) affirmed the ALJ on the issue of liability, but vacated the damages award and remanded the case for further proceedings. *Palmer v. Triple R Trucking*, ARB No. 03-109, ALJ No. 03-STA-28 (Aug. 31, 2005).

The ALJ's March 10, 2006 Recommended Decision and Order (R. D. & O.) on Remand is now before the ARB pursuant to the automatic review provisions of 49

U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(a)(2004).<sup>1</sup> We affirm the ALJ's damages award but modify the monetary amount.

### JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her jurisdiction to decide this matter to the ARB. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c). Under the STAA, the ARB is bound by the ALJ's fact findings if substantial evidence on the record considered as a whole supports those findings. 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004).

In reviewing the ALJ's conclusions of law, the ARB, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1996). Therefore, we review the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 29, slip op. at 2 (ARB Oct. 31, 2003).

### BACKGROUND

Palmer, an owner-operator truck driver located in California, made three deliveries for Triple R, headquartered in Mississippi, between February 7 and 17, 2003. Triple R's president, Charles Richard, refused to engage Palmer's services after Palmer threatened to complain to the United States Department of Transportation (DOT) that Triple R had failed to arrange for him to take the DOT-required road driving test, drug screen, and physical examination.<sup>2</sup> Following an evidentiary hearing at which Triple R did not appear, the ALJ found that Palmer engaged in activity the STAA protects by threatening to report the company's failure to provide the DOT-required tests, 49 U.S.C.A. § 31105(a)(1)(B)(ii), and concluded that Triple R terminated its relationship with Palmer in retaliation for his protected activity.

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<sup>1</sup> This regulation provides: "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee."

<sup>2</sup> The regulations of the Federal Motor Carrier Safety Administration, DOT, require that new employees be administered a drug test, 49 C.F.R. § 382.301 (2005), and have a valid certification of road test, 49 C.F.R. § 391.31, and a valid certificate of physical examination, 49 C.F.R. § 391.43.

We affirmed the ALJ's conclusion that Triple R violated the STAA, but remanded the case for the ALJ to consider reinstatement and to obtain additional evidence on damages. *Palmer*, slip op. at 5. We noted that the ALJ might have to recalculate the amount of damages to which Palmer is entitled, given the scant evidence of Palmer's earnings with Triple R, his ten-day employment, the lack of any agreement for future work, and the passage of considerable time since the complaint. *Id.*

On remand, the ALJ notified Palmer and Triple R of a supplemental hearing, which was held on October 27, 2005. Palmer appeared at the hearing, but again Triple R did not, and therefore his version of the facts remains unchallenged. Palmer testified that he would not have gone back to work for Triple R because of the "acrimonious dealings" with Richard over the required DOT testing. Hearing Transcript (TR) at 51, 53, 59. Palmer added that he was then 60 years old and would have kept on driving until he reached 75, if he had not been forced to sell his truck after Richard terminated his services. TR at 58, 63.

The ALJ asked Palmer to submit documents showing his earnings to support the calculation of his damages. TR at 69-70. Palmer testified that he had tax returns and W-2 forms for 1999, 2000, and 2001, TR at 68, as well as 1040 forms for 2002, 2003, and 2004, TR at 71-72. Palmer later submitted only a 2005 W-2 showing gross wages of \$29,250.99 from his maintenance job, which he had held since April 2003.

The ALJ found that reinstatement was impossible or impractical because of the animosity between Palmer and Triple R. R. D. & O. at 6-7. He found that Palmer had honestly and diligently sought suitable alternative employment, R. D. & O. at 3, and ordered Triple R to pay Palmer (1) back pay of \$70,875.00; (2) front pay of \$46,829.20, covering the period from April 1, 2003 until June 19, 2003; and (3) front pay of \$88,653.00 from June 19, 2003 until August 31, 2005. The ALJ also ruled that front pay would continue at the monthly rate of \$5,250.00 less actual earnings until Palmer repurchased his truck, Triple R had paid all the damages due, including interest, or Palmer reached age 65. R. D. & O. at 7-8.

## DISCUSSION

As a successful litigant under the STAA, Palmer is entitled to an order requiring Triple R to reinstate him "to [his] former position with the same pay and terms and privileges of employment." 49 U.S.C.A § 31105(b)(3)(A)(ii).<sup>3</sup> *See Dale v. Step 1*

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<sup>3</sup> That subsection provides that the company shall "reinstatement the complainant to the former position with the same pay and terms and privileges of employment" as he or she held before the retaliatory action. The implementing regulation provides that the ALJ's "decision and order concerning whether the reinstatement of a discharged employee is appropriate shall

Continued . . .

*Stairworks, Inc.*, ARB No. 04-003, ALJ No. 02-STA-30, slip op. at 4 (Mar. 31, 2005) (reinstatement under the STAA is an automatic remedy designed to re-establish the employment relationship). While reinstatement is the statutory remedy, circumstances may exist in which reinstatement is impossible or impractical. *Assistant Sec’y & Bryant v. Bearden Trucking Co.*, ARB No. 04-014, ALJ No. 03-STA-36, slip op. at 7-8 (ARB June 30, 2005), appeal docketed, No. 05-1965 (4th Cir. Sept. 6, 2005). See *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, 93-ERA-24, slip op. at 9 (Sec’y Feb. 14, 1996) (front pay in lieu of reinstatement may be appropriate where the parties have demonstrated “the impossibility of a productive and amicable working relationship”).

Initially, the ALJ failed to address or order reinstatement. On remand, only Palmer testified about his business relationship with Triple R. Based on Palmer’s uncontested testimony, the ALJ concluded that the animosity between the parties would make reinstatement impossible or impracticable.<sup>4</sup> R. D. & O. at 7. We affirm the ALJ’s finding as supported by substantial evidence and unchallenged.

The STAA also provides that a complainant is entitled to compensatory damages, including back pay. 49 U.S.C.A § 31105(b)(3)(A)(iii). Back pay liability begins when the employee is wrongfully discharged and ends when the complainant is reinstated or declines the employer’s bona fide, unconditional offer of reinstatement. See *Michaud v. BSP Transp., Inc.*, ARB No. 97-113, ALJ No. 95-STA-29, slip op. at 5-6 (ARB Oct. 9, 1997) (reasonable refusal of offer of reinstatement ends employer’s back pay liability but may subject it to front pay liability). When the ALJ finds reinstatement impossible or impractical, front pay needs to be considered.

On remand, the ALJ stated that the “ARB bound itself” to a number of facts in his previous decision, among them that Palmer’s “salary” with Triple R was \$5,250.00 a month. R. D. & O. at 3. The ALJ is incorrect. We did not find that Palmer received a salary from Triple R – he was paid by the load and mileage. He drove a total of 3,964 miles for Triple R, which grossed him \$3,567.60 at 90 cents a mile, although he submitted a 2002 tax form, which he contested, showing income from Triple R of \$7,418.10. Complainant’s Exhibits 1-2. The \$5,250.00 figure was the ALJ’s construct, the monthly income that the ALJ had found Palmer to have “averaged driving his truck the previous five years,” based on his uncontested testimony that he had netted about

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be effective immediately upon receipt of the decision” by the company. 29 C.F.R. § 1978.109(b).

<sup>4</sup> The ALJ also found that reinstatement was impossible because Triple R had no suitable alternative employment to offer Palmer, who was forced to sell his truck when he could no longer make the payments. R. D. & O. at 7.

\$63,000.00 annually as a self-employed owner-operator.<sup>5</sup> *Palmer v. Triple R Trucking*, ALJ No. 03-STA-28, slip op. at 6 (June 19, 2003).

In remanding this case for further proceedings, we expected the ALJ to obtain additional evidence on the terms and conditions of Palmer's business relationship with Triple R as an owner-operator of his truck, as well as financial documents that would support an accurate measure of damages. While the ALJ indicated that Palmer should submit tax documents showing his earnings, only a 2005 W-2 form was admitted into the record. Palmer testified that he intended to work exclusively for Triple R, TR at 61-63, but the record still contains scant evidence of a contractual arrangement between Palmer and the company.

Following the hearing on remand, the ALJ again found that Palmer was entitled to \$70,875.00 in back pay for the period from February 17, 2002, the date of Palmer's last delivery for Triple R, until April 1, 2003, when he found another job. R. D. & O. at 7. The record shows that Palmer made only three trips for Triple R and submitted a tax form showing income of \$7,418.10, which he claimed was fraudulent because Triple R never paid him. TR at 21, 32; CX 1; ALJ Exhibit 5. We decline to endorse the ALJ's methodology of using five years of previous net earnings to calculate a \$5,250.00 monthly income as a preferred measure of damages. Nonetheless, we affirm the back pay amount of \$70,875.00 for thirteen months as uncontested and not clearly erroneous.

We turn to front pay, where we make several adjustments in the ALJ's calculations. The ALJ awarded Palmer front pay from April 1, 2003, until June 19, 2003, the date of his initial decision. He subtracted from the monthly \$5,250.00 earnings the amount Palmer actually earned as a maintenance worker during that period of 11 weeks and three days, which was \$1,213.00 a month. The ALJ then erroneously multiplied the difference of \$4,037.00 by weeks instead of months, and arrived at a total of \$46,829.20. R. D. & O. at 7. This figure is obviously incorrect. The correct duration is 80 days, which is 11.4 weeks or 2.66 months (assuming an average 4.3 weeks in each month). The correct amount of front pay for this period then is \$10,738.42 (2.66 months times \$4,037.00).

Next, the ALJ awarded front pay from June 19, 2003, to August 31, 2005, the date of the ARB's decision remanding the case. The ALJ again decreased the monthly amount of \$5,250.00 by Palmer's earnings during that time, and reached a total of \$88,653.00. But the ALJ apparently did not consider Palmer's hourly pay increases during that period. And it appears that the ALJ did not factor in the 2005 W-2 statement.

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<sup>5</sup> Palmer's testimony that he had grossed \$122,000.00 to \$128,000.00 over the five years prior to 2002 and netted about \$63,000.00 annually was uncontested. TR at 23-24, 36, 66.

To try to arrive at more correct amounts,<sup>6</sup> we consider five calculation periods, starting from June 19, 2003.

For the first period, Palmer earned \$1,213.00 a month until April 1, 2004. R. D. & O. at 3. Thus, from June 19, 2003, to April 1, 2004, Palmer was earning \$1,213.00 a month or \$11,365.81 (9.37 months times \$1,213.00) for that period. Subtracting that amount of earnings from \$49,192.50 (9.37 times the monthly earnings of \$5,250.00) yields \$37,826.69 in front pay from June 19, 2003, until April 2004.

For the second period from April 1, 2004, when Palmer received a raise to \$8.50 an hour, until October 1, 2004, Palmer earned \$1,470.00 a month or \$8,820.00 (6 times \$1,470.00). Subtracting that amount from \$31,500.00 (6 months times \$5,250.00) yields \$22,680.00 in front pay for that period.

Third, from October 1, 2004, until January 2005, Palmer testified that he had been paid \$10.00 an hour or about \$1,730.00 a month. TR at 55; R. D. & O. at 3. From October 1, 2004, until 2005, Palmer earned \$5,190.00 (3 months times \$1,730.00). Subtracting that amount from \$15,750.00 (3 months times \$5,250.00) yields \$10,560.00 in front pay for that period.

Fourth, Palmer submitted the 2005 W-2 showing gross income of \$29,250.99. Subtracting that amount from \$63,000.00 (12 months times \$5,250.00) totals \$33,749.01 in front pay for 2005.

Fifth, we consider the period from January 1, 2006, until the date of the ALJ's decision, March 10, 2006. The record contains no evidence of Palmer's earnings during this period. If he was still being paid \$10.00 an hour or \$1,730.00 a month, Palmer earned \$3,961.70 (2.29 months times \$1,730.00). Subtracting this amount from \$12,022.50 (2.29 times \$5,250.00), yields \$8,060.80.

In sum, the correct amount of front pay is \$123,614.92 from April 1, 2003, through March 10, 2006. That amount added to the back pay award of \$70,875.00 equals a total monetary award of \$194,489.92, plus interest. See 26 U.S.C.A. § 6621(a)(2) (West 2002); *Ass't Sec'y & Cotes v. Double R. Trucking, Inc.*, ARB No. 99-061, ALJ No. 98-STA-34, slip op. at 3 (ARB Jan. 12, 2000).

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<sup>6</sup> We realize that the monthly figure of \$5,250.00 was based on Palmer's net earnings as an independent trucker, while the wages he earned in 2003-06 were as an hourly employee. These figures produce an apples/oranges comparison, but given the inadequacy of this record and Triple R's lack of participation throughout these proceedings, we will accept the record as it is. We note further that the ALJ found Palmer's approximate monthly earnings to be \$1,213.00, \$1,470.00, and \$1,730.00. R. D. & O. at 3. Multiplying the respective hourly rates of \$7.00, \$8.50, and \$10.00 by 40 hours a week and those sums by 4.3 weeks, the monthly figures would have been \$1,204.00, \$1,462.00, and \$1,720.00.

Finally, we now address the ALJ's order on the duration of the front pay award. The ARB has required both parties in a whistleblower case, in which the employer has been found liable, to "submit relevant evidence demonstrating both the amount and the duration of a front pay award," which "while often speculative, cannot be unduly so." *Bryant*, slip op. at 9.

At the October 27, 2005 supplemental hearing, Palmer submitted only the 2005 W-2. Although asked to do so, he did not submit any pay stubs or other evidence of his net earnings. Triple R, which had ample notice of both the first and second hearings, failed to appear at either one and has waived any opportunity to contest Palmer's evidence. Without deciding whether the ALJ properly determined the duration of Palmer's front pay based on three contingencies – Palmer's repurchase of a truck, Triple R's payment of the award, or Palmer's reaching age 65, we agree at least that Palmer's reaching retirement age is an appropriate end point. We affirm the ALJ's order regarding duration of front pay as uncontested and not clearly erroneous.

#### CONCLUSION

We **AFFIRM** the ALJ's order regarding the amount of the back pay award and the duration of Palmer's front pay as uncontested and not clearly erroneous. We **MODIFY** the monetary amount of front pay as calculated to be \$194,489.92, as of the ALJ's March 10, 2006 decision, plus interest, and continuing at \$5,250 a month less the amount of Palmer's monthly earnings.

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**