



In the Matter of:

**RICHARD HOFFMAN,**

**ARB CASE NO. 96-091**

**COMPLAINANT,**

**ALJ CASE NO. 94-CAA-004**

**v.**

**DATE: January 22, 1997**

**W. MAX BOSSERT and BOSS  
INSULATION AND ROOFING, INC.**

**RESPONDENTS.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD<sup>1/</sup>

### **FINAL DECISION AND ORDER**

The Secretary of Labor issued a Decision and Remand Order (Remand Order) in 1995 in which he found that Respondents violated the employee protection provision of the Clean Air Act, 42 U.S.C. § 7622 (1988) (CAA), and the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9610 (1988) (CERCLA), when they laid off Complainant, Richard Hoffman. Respondent W. Max Bossert is the principal of Respondent Boss Insulation and Roofing, Inc. Both Respondents will be referred to collectively as Boss. The Secretary ordered Boss to reinstate Hoffman to the employment status he occupied on the date of the unlawful layoff with no loss of seniority or other status and privileges of his employment. The Secretary also remanded the case to the Administrative Law Judge (ALJ) for a recommended decision on the remedy to which Hoffman is entitled.

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<sup>1/</sup> On April, 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under this statute to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations (61 Fed. Reg. 19982) implementing this reorganization were also promulgated on this date.

In a Recommended Decision and Order Upon Remand (R. D. O. R.), the ALJ found that, because of a dwindling need for roofers, Boss legitimately would have laid off Hoffman soon after the discriminatory layoff. The ALJ did not mention the Secretary's order to reinstate Hoffman. The ALJ found that Hoffman was entitled to only one day's back pay and recommended an award of costs of \$5,585.36 and an attorney's fee of \$5000.

We find that the ALJ did not apply certain longstanding principles governing the calculation of back pay and attorney's fees. Accordingly, we set forth the proper calculation below.

### **I. Back Pay**

As a victorious complainant, Hoffman is entitled to be restored to the position he would have occupied but for the discrimination. *Smith v. Littenberg*, Case No. 92-ERA-52, Sec. Dec. and Ltd. Rem. Ord., Sept. 6, 1995, slip op. at 5. The Secretary determined that Boss unlawfully laid off Hoffman on August 12, 1993 because he had engaged in protected activities concerning asbestos in a roof that he was removing from a school. Remand Order at 12. The Secretary recognized, however, that roofing is a seasonal business and that it was possible that Boss legitimately would have laid off Hoffman at some time after August 12, 1993 due to a reduced need for roofers. Remand Order at 12-13. Therefore, the Secretary directed the ALJ to determine if and when Hoffman would have been laid off in order to calculate the amount of back pay to make Hoffman whole. *Id.* at 13.

The ALJ found that, because of lack of work, Hoffman would have been laid off legitimately either on August 15 or August 22, 1993. R. D. O. R. at 1. The ALJ concluded that Hoffman is entitled to back pay reflecting layoff on the earlier date. *Id.* We reject that conclusion because the ALJ failed to apply the principle that any uncertainties in calculating back pay are resolved in favor of the complainant. *See, e.g., Johnson v. Bechtel Constr. Co.*, Case No. 95-ERA-0011, Final Dec. and Ord., Sept. 25, 1995, slip op. at 3; *Nichols v. Bechtel Constr., Inc.*, Case No. 87-ERA-0044, Final Dec. and Ord., Nov. 18, 1993, slip op. at 10, *aff'd sub nom. Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926 (11th Cir. 1995).

Moreover, the ALJ's finding is contrary to evidence that the Secretary discussed in the earlier Remand Order. Co-worker Dave Lenig had lower seniority than Hoffman and voluntarily resigned shortly after Hoffman's layoff. Remand Order at 7. When Lenig picked up his final pay check on August 21, Bossert told him that there were two other high paying roofing jobs available should he wish to return to Boss. *Id.* In addition, after Hoffman's layoff, Bossert told a Wage and Hour Investigator that business was good, he was short handed, and could use more roofers for current jobs. *Id.* at 7-8. For all these reasons, we reject the ALJ's conclusion that Hoffman would have been laid off on August 15, 1993 because of lack of work.

We find that Hoffman is entitled to back pay continuing after August 15 because Boss continued to employ other roofers after that date. *See Nichols*, slip op. at 10 (back pay continues until last worker of temporary crew laid off) and *Pillow v. Bechtel Constr., Inc.*, Case No. 87-

ERA-35, Sec. Dec. and Rem. Ord., July 19, 1993, slip op. at 27 (back pay continues until last of workers hired for a specific outage at a nuclear plant was laid off), *aff'd*, *Bechtel Constr. Co. v. Sec'y of Labor*, 98 F.3d 1351 (11th Cir. 1996). Boss employed eight roofers on September 15, 1993, R. D. O. R. at 1, the date Hoffman had surgery because of an injury he had received while working the previous June. Thus, Hoffman is entitled to back pay from August 13 through September 14, 1993.

We turn now to calculation of the back pay for that period. Hoffman's hourly rate was \$21.90 for prevailing wage jobs, and he was working on such a job at the time of his discriminatory layoff. T. 174. Boss does not dispute that Hoffman is entitled to eight hours pay at that rate for August 13, 1993, or \$175.20.

For the week of August 15-21, Hoffman sought \$733.65 in back pay, calculated by multiplying the prevailing wage rate times the average number of hours worked by the other Boss employees that week (33.5). Claimant's Brief on Remand, Nov. 22, 1995, at 3. *See Sprague v. American Nuclear Resources, Inc.*, Case No. 92-ERA-37, Sec. Dec., Dec. 1, 1994, slip op. at 12 (approves use of average number of hours worked by co-workers to calculate the complainant's back pay). Although Boss objected to awarding any back pay for that week, it did not object to the calculation method Hoffman used. We find that the use of the average hours worked is a valid way to calculate Hoffman's back pay and award \$733.65 in back pay for August 15-21.

Hoffman used the weekly wage information provided by Respondent, Resp. Ex. 5, and determined that the average gross wages for Boss employees for the period from August 22 - September 14, 1993 were 79 percent of their average gross wages for the week of August 15-21. Br. at 9. Hoffman calculated his average back pay for this period by taking 79 percent of his wages for August 15-21, or \$579.58 per week, for a total of \$1,970.57 for 3.4 weeks. Again, although Boss objected to the award of any back pay for this period, he did not object to Hoffman's method of calculation. We find the method appropriate and award \$1,970.57 for this period.

Hoffman included in his request for back pay the \$800 Boss paid for each worker who attended asbestos certification school. For the reasons explained by the ALJ, R. D. O. R. at 2, we find that Hoffman is not entitled to the \$800 as back pay.<sup>2/</sup>

Hoffman seeks no back pay for the period September 15, 1993 through June 22, 1995, during which time he received workers' compensation payments. *See* Claimant's Br. at 5.

Hoffman sought back pay for the time since his full recovery on June 22, 1995, on the basis that he would have returned to work full time at Boss upon recovering. Claimant's Br. at

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<sup>2/</sup> Boss agrees that upon Hoffman's reinstatement the company will pay for him to attend asbestos certification school.

12. The ALJ denied back pay for the time since recovery because Hoffman “has not made himself available for reinstatement with Respondent.” R. D. O. R. at 2. Hoffman’s failure to present himself for reinstatement is irrelevant because Boss had the obligation to offer reinstatement to Hoffman. *See Creekmore v. ABB Power Systems Energy Services, Inc.*, Case No. 93-ERA-24, Second Supp. Order Concerning Remand, June 20, 1996, slip op. at 3 (named respondent has the obligation to offer reinstatement to prevailing complainant). Boss has not done so.

Alternatively, the ALJ denied back pay for the period since recovery because he found that Hoffman “would not have worked continuously from June 1995 until November of 1995.” R. D. O. R. at 3. The ALJ noted that there had been a decrease in Boss’ work force between June and September of that year and that Hoffman lacked the certification needed to work on the roofing job that was ongoing during that time. *Id.*

To overcome the presumption that Hoffman is entitled to back pay for the time since his recovery, Boss’ evidence would have to establish that, absent the discriminatory layoff, Hoffman nevertheless would have remained on layoff status. For example, if Boss demonstrated that it laid off workers strictly according to seniority, and Hoffman’s seniority was such that he definitely would have remained on layoff at all times since his recovery in June 1995, Boss would have overcome the presumption.

Boss’ evidence did not establish, however, that Hoffman would have remained on layoff since June 1995. In an affidavit, Boss stated that its work force went from 18 workers in June 1995, to 8 employees in August and September, up to 12 employees in October and returned to 18 employees in November 1995. Resp. Br., Ex. A. But Boss did not show that its layoffs were based strictly on seniority, or establish the seniority of the employees who were laid off and those who were retained. Therefore, we find that Boss has not overcome the presumption of Hoffman’s entitlement to back pay for the period since his full recovery.

In calculating back pay for this period, Hoffman used his average weekly wage while working for Boss, as reported on his workers’ compensation form: \$296.90. Claimant’s Supp. Br. at 3; RX 6; T. 272. We find the use of this average weekly wage appropriate.

We also find that Hoffman properly mitigated his damages by seeking suitable employment. *Doyle v. Hydro Nuclear Services, Inc.*, Case No. 89-ERA-22, Final Dec. and Ord., Sept. 6, 1996, slip op. at 6 and cases there cited, *pet. for review filed*, No. 96-3660 (3d Cir. Nov. 2, 1996). Hoffman correctly deducted the amount he earned in alternate employment from the gross amount of back pay. Hoffman’s evidence showed that he earned \$200 per week in alternate employment from June 22 through October 1995. Hoffman Mar. 15, 1996 Aff., attached to Claimant’s Supp. Br. on Remand. He also earned \$2,800 in alternate employment in November and December, 1995 and deducted that amount. *Id.*

Hoffman became self-employed as a partner in a landscaping business on January 1, 1996 and stated that he did not earn any business income, other wages, or salaries between that date

and March 15, 1996. Hoffman Aff. dated Mar. 15, 1996, attached to Claimant's Supp. Br. on Remand. This raises the issue whether self-employment cuts off Hoffman's back pay.

In discrimination cases, although a complainant has a duty to exercise reasonable diligence in attempting to mitigate damages by finding comparable work, the defendant "has the burden of proving that the plaintiff has failed to discharge its duty." *Smith v. Great American Restaurants, Inc.*, 969 F.2d 430, 438 (7th Cir. 1992). A court has noted that "[s]elf employment can constitute employment for purposes of mitigating damages, as long as the self-employment was a reasonable alternative to finding other comparable employment." *Id.*

This record lacks sufficient evidence to determine whether Hoffman's self-employment was a reasonable alternative to finding other employment. Respondent Boss had the burden to establish that Hoffman's self-employment constituted a failure to mitigate damages, but introduced no evidence on the subject. Therefore, employing the applicable burden of proof, we find that Boss has not established that Hoffman failed to discharge his duty of mitigation when he became self-employed. Accordingly, the back pay continues to accrue at the rate of \$296.90 per week, plus interest, until Hoffman's reinstatement or his declination of a *bona fide* offer. See *Creekmore v. ABB Power Systems Energy Services, Inc.*, Case No. 93-ERA-24, Dec. and Rem. Ord., Feb. 14, 1996, slip op. at 19-20. Hoffman has the obligation to inform Boss if he has earned any business income, wages, or salaries since March 15, 1996, and if so, the amount of any such earnings shall be deducted from the gross amount of back pay owed.

## II. Attorney's Fees and Costs

Under the CAA, a successful complainant is entitled to payment of "all costs and expenses (including attorneys' and expert witness fees) reasonably incurred . . . for, or in connection with, the bringing of the complaint. . . ." 42 U.S.C. § 7622(b)(2)(B). See also the similar provision of the CERCLA at 42 U.S.C. § 9610(c). Hoffman provided two itemized records of the attorney's fees incurred through March 15, 1996, totaling \$40,727.86. See Claimant's Br., Attach. B. and Claimant's Supp. Br. on Remand.

The ALJ found the requested attorney's fees unreasonable in light of the small amount of back pay at issue and awarded \$5000 instead. We do not agree that it was "an attorney injustice" to expend a larger amount of attorney's fees than the amount of back pay sought. See R. D. O. R. at 3. The ALJ proposes a standard that would chill attorneys from taking moderately complicated cases where the complainant earned modest wages and hence the back pay sought would be small in relation to the attorney time expended. Moreover, in discrimination cases, the Supreme Court has rejected any requirement of proportionality between the damages and the attorney's fees awarded. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). See also *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1221 (3d Cir. 1995).

Claimed hours may not be reduced by an arbitrary percentage. *Smith*, 969 F.2d at 440. Reductions in the fee request may be appropriate if they are explained with reasonable specificity as duplicative, excessive, unnecessary, unproductive, or not sufficiently related to

representation of the Complainant in this litigation. *Pogue v. Dep't of the Navy*, Case No. 87-ERA-21, Final Dec. and Ord. on Rem., Apr. 14, 1994, slip op. at 24.

Consistent with judicial and Secretarial decisions, we will examine the reasonableness of the billing rates charged by Hoffman's attorneys and of the number of attorney hours expended in bringing the complaint. *See, e.g., Washington v. Philadelphia County Court of Common Pleas*, 89 F.3d 1030 (3d Cir. 1996); *Chalmers v. Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986); *Pogue, supra*.

Two of the three attorneys who represented Hoffman charged for their time in this case. The more senior partner charged \$125 per hour and the more junior partner charged \$110 per hour. These fees are reasonable for attorneys of similar experience in Philadelphia, where Hoffman's attorneys practice. *See Washington*, 89 F.3d at 1035 (approving hourly fees of \$250 for partners in civil rights case heard in Philadelphia). Moreover, Hoffman submitted the affidavit of an attorney attesting that these fees were reasonable for attorneys of similar experience practicing in the area. *See Claimant's Br., Attach. B., Affidavit of Alvin B. Marshall, Esq.* We accept the validity of this affidavit, especially in light of the absence of any countervailing information from Respondents on market rates. *Washington*, 89 F.3d at 1035; *Pogue*, slip op. at 24 and cases there cited.

Concerning the tasks for which fees are sought, we do not agree with the ALJ that the only real issue was whether Hoffman engaged in protected activity under the CAA and the CERCLA. R. D. O. R. at 4. The issue of Respondents' motivation for laying off Hoffman was actively litigated as well. We also do not agree that Hoffman's attorneys unnecessarily complicated and confused the case. *Id.* at 3. Rather, as the Secretary noted earlier, the confusion at the hearing was caused by the Respondents' attorney: "[t]he ALJ found the testimony about Hoffman's rude behavior so confusing that he questioned [Respondents'] counsel at length about Respondent's theory of the case." Remand Order at 9, citing T. 332-339. We find that Hoffman's counsel competently represented him.

The ALJ correctly noted that fees for investigating, discussing, or copying the rules concerning asbestos and roofing were not reasonably incurred in bringing this complaint because the existence of asbestos on the roof was not an issue in this case. R. D. O. R. at 4. Therefore, we will not approve payment of those fees. Other items are disallowed because they are not sufficiently described to permit us to determine whether they pertain to representing Hoffman in this case. The list of disallowed items is set forth below.

<u>Date</u>	<u>Hours</u>	<u>Fee</u>	<u>Description of Services Rendered</u>
9-1-93	1	110	Research CERCLA and CAA . . . regulations. <sup>3/</sup>

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<sup>3/</sup> Hoffman's counsel concedes that a portion of the charges on September 1, December 14, and December 16, 1993 were for investigating, discussing, or copying the rules concerning asbestos and  
(continued...)

9-2-93	1	110	Reviewed deposition transcript (prior to taking of depositions in this case).
9-07-93	.5	110	Telephone call to Pennsylvania Dept. of Labor; added information on Pennsylvania laws and regulations.
9-07-93	.2	125	Review transcript.
10-08-93	.1	125	Review . . . other cases.
12-13-93	1	110	Research . . . asbestos regulations.
12-14-93	.5	110	Telephone call to USEPA re Clean Air Act regulations and related articles on asbestos in roofs.
12-15-93	.1	125	Discuss. . . nature of asbestos problems.
12-15-93	1	110	Copied new exhibits including federal and state laws and regulations. Telephone call from USEPA Region 3 re EPA policy memos on asbestos.
12-16-93	1	110	Telephoned roofing experts. Telephone call to USEPA and picked up documents on asbestos from USEPA. Received technical documents on roofing and asbestos from PSI.
12-17-93	.5	110	Received new information on asbestos felts.

The items above represent 6.5 hours at \$110 per hour, for a subtotal of \$715, and 0.4 hours at \$125 per hour, for a subtotal of \$30. The total amount of disallowed attorney fees is \$745.

In a supplemental petition, Hoffman's attorneys presented an itemized record showing additional attorney's fees incurred through March 15, 1996 in the amount of \$1,441.00. We find that these additional fees reasonably were incurred in bringing the complaint and award them. The total attorney's fee award for work through March 15, 1996 is \$39,982.86.

Turning to the costs claimed by Hoffman, we affirm the ALJ's award of \$5,585.36 in costs incurred through March 15, 1996 (the time of the supplemental petition).

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<sup>2</sup>(...continued)  
roofing. Claimant's Brief before Board at 16.

Hoffman's attorneys also are entitled to payment of the fees and costs incurred since March 16, 1996. During that time, the attorneys have prepared two briefs that Hoffman submitted before this Board. Hoffman's counsel shall have 20 days after the issuance of this Order to submit to this Board a supplemental petition itemizing the additional attorney's fees and costs incurred in bringing this complaint. Respondents shall have 30 days after issuance of this Order to submit any response. After receipt of the petition and response, we will issue a supplemental order setting forth the additional fees and costs awarded.

### **ORDER**

1. Respondents shall reinstate Complainant to his former position, with no loss of seniority or other status and privileges of his employment.

2. Respondents shall pay for Complainant to attend asbestos certification school.

3. Consistent with this decision, Respondents shall pay Complainant back pay until reinstatement or Complainant's declination of an offer of reinstatement. The back pay for August 15 through September 14, 1993 is \$2,879.42. For the period since June 22, 1995, Complainant is entitled to back pay at the rate of \$296.90 per week, until reinstatement or declination of an offer of reinstatement, less interim earnings. Respondents shall pay interest on the back pay at the rate specified in 26 U.S.C. § 6621.

4. Respondents shall pay to Complainant's attorneys \$39,9982.86 in attorney's fees and \$5585.36 in costs for the period through March 15, 1996.

5. Complainant shall have 20 days from the date of this Order to submit to this Board an itemized petition for additional attorney's fees and costs incurred on or after March 16, 1996. The petition shall be served on Respondents, who shall have 30 days after issuance of this Order to submit any response. This Board will issue a supplemental order setting forth the additional attorney's fees and costs to which Complainant is entitled.

**SO ORDERED.**

**DAVID A. O'BRIEN**

Chair

**KARL J. SANDSTROM**

Member

**JOYCE D. MILLER**

Alternate Member