U.S. Department of Labor

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

In the Matter of:

SHANNON T. DOYLE,

COMPLAINANT,

v.

HYDRO NUCLEAR SERVICES,

RESPONDENT.

ARB CASE NOS. 99-041, 99-042, and 00-012

ALJ CASE NO. 89-ERA-22

DATE: May 17, 2000

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Stephen M. Kohn, Esq., *Kohn, Kohn & Colapinto, P.C., Washington, D.C.*

For the Respondent:
Hope A. Comisky, Esq., *Pepper Hamilton LLP, Philadelphia, Pennsylvania*
Robert E. Frankel, Esq., *Anderson Kill & Olick, P.C., Philadelphia, Pennsylvania*

FINAL DECISION AND ORDER ON DAMAGES AND DENIAL OF STAY PENDING JUDICIAL REVIEW

These cases arise under the employee protection provision of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. §5851 (1988).[1/] Complainant, Shannon T. Doyle (Doyle), alleged in 1988 that Respondent, Hydro Nuclear Services (Hydro), violated the employee protection provision when it first declined to hire him and then blacklisted him from employment in the nuclear power industry. In 1994, the Secretary of Labor found that Doyle prevailed on the merits of his complaint. March 30, 1994 Secretary Final Decision and Order (1994 Sec'y D&O). The Secretary ordered Hydro to offer Doyle a position similar to the one for which he had been considered and to pay back pay.

[1/] The 1992 amendments to the ERA do not apply to this case because the complaint was filed prior to 1992.

After several interim proceedings before an Administrative Law Judge (ALJ) and this Board, the ALJ issued a Final Recommended Decision and Order on Damages (FRD&O) on February 12, 1999. In that decision, the ALJ recommended amounts of back pay, front pay, prejudgment and postjudgment interest, lost benefits, and compensatory damages that Hydro shall pay to Doyle. Both parties have petitioned us for review of the FRD&O.[2/]

In a subsequent Recommended Order Awarding Attorney Fees (1999 Fee Order), the ALJ ordered Hydro to pay attorney fees and costs for legal work that was performed after December 11, 1995.[3/] Doyle has petitioned for review of the 1999 Fee Order.[4/]

We consolidate the three petitions for review for purposes of issuing one administratively final decision. Concerning the ALJ's recommendations on damages, we accept them in large part and explain our disagreement in a few instances. Concerning the 1999 Fee Order, we fully accept the ALJ's recommended award of attorney fees and costs.

I. PRIOR PROCEEDINGS

A. Genesis of the Complaint

We recite here briefly the facts that pertain to our resolution of the damages issues. A more complete recitation of the facts of this case is contained in the November 7, 1995 Recommended Decision and Order on Damages (1995 RD&O).

In 1988, Hydro, which at that time was a division of Westinghouse Electric Corporation (Westinghouse), held a contract with the D.C. Cook Nuclear Power Plant in Michigan to supply year-round and temporary decontamination technicians for work at the plant. Complainant's Exhibit (CX) 5 at 14.[5/] Hydro considered Doyle for employment as a temporary senior decontamination technician during the 1988 outage at the plant. T. 110. At Hydro's expense, Doyle traveled to the D.C. Cook plant. 1995 RD&O at ¶17. Doyle spent one day attending training sessions and several days being screened for employment. *Id.* at ¶¶17, 18.

At the conclusion of the screening and training, Hydro asked Doyle to complete an employment application, including an "Authorization for Release of Information and Records" pertaining to prior employment, among other things. *Id.* Hydro routinely used the release form for

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[2/] We assigned ARB No. 99-041 to Hydro's petition and ARB No. 99-042 to Doyle's petition.

[3/] In an earlier order, we had awarded Doyle the payment of costs and attorney fees expended through that date. See page 23, *infra.*

[4/] We assigned ARB No. 00-12 to Doyle's petition for review of the 1999 Fee Order.

[5/] Reference is to the exhibits introduced at the December 1994 hearing; "T." refers to the transcript of that hearing.

all applicants. 1994 Sec'y D&O at n.5. Doyle signed the release, but crossed out the following sentence:

> Further, I hereby release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing or receiving any information pertaining to me from any and all liability or claim as results of [sic] furnishing or receiving such information pursuant to this authorization.

Id. at 1. Doyle, who had been a whistleblower in a prior job at a different nuclear plant, told a Hydro manager about his earlier whistleblowing and objected to the language because it constituted a waiver of his rights under the ERA. *Id.* at 2. Doyle refused to sign the form if it contained the language to which he objected.

Hydro did not hire Doyle because he refused to sign the release as it was written. 1994 Sec'y D&O at 5. In addition, Hydro notified Equifax Corporation that it had denied Doyle access to the D.C. Cook Nuclear Power Plant. 1995 RD&O at ¶46. Doyle timely filed a complaint with the Department of Labor alleging that Hydro's actions violated the ERA's employee protection provision.

B. The First ALJ Decision and the Secretary's Reversal

In a July 1989 Recommended Decision and Order (1989 RD&O), the ALJ granted Hydro's motion for summary judgment. The ALJ found that Doyle had misconstrued the release as jeopardizing whistleblower remedies that Doyle might be pursuing against entities other than Hydro. 1989 RD&O at 5. The ALJ further found that Hydro had a right to insist that all employees sign the release, and that it was legitimate to refuse to hire Doyle when he refused to sign it. *Id.*

On review of the ALJ's recommended decision, the Secretary of Labor disagreed with the ALJ's legal findings. The Secretary found that Hydro's refusal to hire Doyle violated the ERA, and ordered Hydro to hire Doyle as a senior decontamination technician or in a similar position. *Id.* at 5.[6/] The Secretary also ordered Hydro to pay back pay, with interest, from November 21, 1988, until the date of hire or the date of an offer of employment if Doyle declined the offer. *Id.*

The Secretary's 1994 Decision and Order was appealed, but the Court of Appeals dismissed the petition for review as premature and remanded the case for a computation of damages. In turn,

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[6/] Although the Secretary would not have enforced such a waiver, 1994 Sec'y D&O at 4, merely asking Doyle to sign it was a violation of the ERA's whistleblower provision. *See Connecticut Light & Power Co. v. Sec'y of Labor*, 85 F.3d 89 (2d Cir. 1996) (employer's proffer of a settlement that would have restricted employee's access to judicial and administrative agencies violated the ERA). *Accord Pace v. Kirshenbaum Investments*, No. 92-CAA-8, Sec'y Final Order Approving Settlement Agreement, Dec. 2, 1992, slip op. at 1 (waiver of a person's ERA protected rights based on future employer action was contrary to public policy and would not be enforced).

in September 1994 the Secretary remanded the case to the ALJ for further proceedings on the damages to which Doyle was entitled.

C. The ALJ's Recommended Decisions after the First Remand

A hearing was held in December 1994. Subsequently, the ALJ issued the November 1995 RD&O, in which he found that Hydro's report to Equifax that the company had denied Doyle access to the D.C. Cook nuclear plant subsequently had foreclosed Doyle from finding other employment in the nuclear field. Consequently the ALJ recommended that Hydro pay back pay to Doyle, less interim earnings, through the date of the ALJ's decision. The ALJ also awarded interest on the back pay at the rate specified in 26 U.S.C. §6621. Further, the ALJ recommended certain affirmative action to abate Hydro's violation of the whistleblower provision.

In the November 1995 decision, the ALJ found that reinstatement was not possible because Westinghouse had sold its decontamination services divisions in 1991 and claimed that it no longer employed decontamination technicians and did not have any positions for which Doyle was qualified. 1995 RD&O at 19. In lieu of reinstatement, the ALJ recommended that Hydro pay five years' front pay to Doyle. *Id.*

Finding that Doyle suffered from emotional distress, anxiety and depression as a result of not being hired and not obtaining other work in the nuclear industry, the ALJ ordered Hydro to pay $40,000 in compensatory damages. 1995 RD&O at 22. Further, the ALJ awarded payment of the medical expenses Doyle had incurred as a result of not being hired. *Id.*

In a subsequent Recommended Attorney Fee Order (1996 Fee Order), the ALJ recommended that Hydro pay Doyle an attorney fee of $150,181.75 and expenses of $15,450.03, which were the fees and costs reasonably incurred pursuing the complaint through December 11, 1995.

D. The Administrative Review Board's September 1996 Decision

On review of the ALJ's recommended decisions on damages and attorney fees, the Administrative Review Board (ARB or Board) issued a Final Decision and Order in September 1996 (Sept. 1996 D&O). The Board noted that a psychologist, Dr. Carter, testified that the effect of losing his career in the nuclear industry was so devastating to Doyle that he was not likely to find any employment in the next five years. Dr. Carter gave the opinion that Doyle needed four to five years of therapy, as well as education or training, to be employable again. Consequently, we concurred with the ALJ's recommendation that Doyle was entitled to five years' front pay. *Id*. Explaining that it is necessary to discount the front pay award to a present value in order to make a lump-sum award, the Board encouraged the parties to agree on the appropriate discount rate and the resulting front pay award. *Id.*

As for back pay, the Board determined that Doyle was entitled to six months' back pay per year, at the average hourly wage for itinerant decontamination technicians in the nuclear industry, less interim earnings, plus interest at the rate specified in 26 U.S.C. §6621. Sept. 1996 D&O at 6.

Again, the Board encouraged the parties to agree on the average hourly wage to be used for the years since 1988, and asked the parties to give notice if they could not agree. *Id.* at n.6.

The Board accepted the ALJ's recommended award of $40,000 in compensatory damages and an unspecified amount of medical expenses, to the extent that Doyle bore the medical expenses himself. Sept. 1996 D&O at 9-10. The Board also agreed with the ALJ's affirmative remedies, including requiring Hydro to post the decision at the nuclear operations of Westinghouse. *Id.* at 11. Finally, the Board affirmed the recommended award of attorney fees and costs. *Id.*

Doyle sought judicial review of the ARB's September 1996 Decision in the United States Court of Appeals for the Third Circuit, and Hydro sought review of it in the Sixth Circuit. After the two cases were consolidated in the Third Circuit, that court remanded the case to the Secretary on the ground that the decision was not administratively final.

E. The ARB's 1997 Remand Order

Subsequent to the court's remand order, the parties were unable to agree on either the discount rate needed to calculate front pay or on the average hourly wages needed to calculate the back pay. Consequently, Doyle asked us to remand the case to the ALJ for further proceedings. Hydro asked us to clarify certain aspects of our September 1996 D&O, including whether the front pay period had begun upon the issuance of that decision. Hydro otherwise agreed with the suggested remand of the case.

The Board issued a Remand Order in November 1997 (1997 Rem. Ord.), addressing some of the concerns raised by Doyle and Hydro. We disagreed with Hydro's suggestion that the front pay period began in September 1996. Rather, we noted that the front pay period would not begin until Doyle was able to obtain the therapy, education, and training that he needed to become employable again. Consequently we ordered the ALJ to take evidence and make findings on the issue as a means to determine the start of the front pay period. 1997 Rem. Ord. at 4.

In the 1997 Remand Order we also directed the ALJ to take evidence and make findings on the unresolved issues: the average hourly wages and the discount rate. *Id.* at 5. We also noted that Doyle had incurred additional attorney fees and costs since the cut-off date for the fees we earlier had awarded (December 11, 1995), and therefore ordered the ALJ to make a recommendation on the additional fees and costs to which Doyle was entitled.

F. Proceedings After the 1997 Remand Order

Following the ARB's remand, the parties sought the help of a different ALJ to serve as a mediator and reached agreement on certain of the remanded issues. June 1998 Stipulation (1998 Stip.).[7/] The parties stated that the stipulation should not be construed as an admission regarding liability or the appropriateness of any payment of damages, and they reserved the right to seek judicial review of the final administrative decision. 1998 Stip. at 2 and ¶8. Hydro and Doyle agreed

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7/ The 1998 Stipulation is attached to the FRD&O issued February 12, 1999.

that the back pay period ended on June 30, 1997, and that the front pay period began on July 1, 1997, and ends on June 30, 2002. 1998 Stip. at ¶¶3, 4. They also agreed on the average hourly wages to be used in calculating back and front pay and on the discount rate to be used in calculating the front pay. *Id.* at ¶¶1, 2. Although the stipulation listed the hourly wages, it did not include the calculation of the back pay or the front pay.

After reaching these partial agreements, Doyle moved for summary judgment before the ALJ, supporting the motion with the affidavit of an experts' who calculated the back and front pay and interest. Doyle also included a personal affidavit supporting an additional payment to make up for the increase in federal income tax that he would incur because he would receive the monetary damages award as a lump sum payment (a tax enhancement).

Hydro moved to strike portions of the summary judgment motion on the ground that some of the claimed monetary damages were outside the scope of the 1997 Remand Order. Hydro also sought discovery concerning the experts' calculation of damages.

The ALJ denied Doyle's motion for summary judgment and granted Hydro's requested discovery. September 3, 1998 Order Denying Complainant's Motion for Summary Judgment and Granting Respondent's Request for Discovery and Motion to Strike Portions of Complainant's Motion for Summary Judgment (Sept. 1998 Order) at 3. The ALJ agreed with Hydro that some of the monetary requests Doyle made were not within the scope of the remanded proceedings, particularly the requested tax enhancement. Sept. 1998 Order at 4. The ALJ granted Hydro's motion to strike the related portions of the summary judgment motion.[8/] Concerning the calculations of back pay, front pay, and interest, the ALJ found that Hydro was entitled to discovery and an opportunity to present its own calculations. *Id.* at 3.

After the parties engaged in discovery, Hydro also moved for summary judgment, relying upon the calculations of its own experts concerning the amount of back pay, front pay, and interest at issue. In a December 1998 Partial Order on Summary Judgment Motions (Dec. 1998 Part. Ord.), the ALJ ruled on most of the damages calculations at issue. The ALJ granted summary judgment to Hydro on the calculation of most of the back pay and all of the front pay, reasoning that the calculations made by Hydro's experts more closely followed the Board's earlier rulings on calculating damages. Dec. 1998 Part. Ord. at 9-14. Concerning the prejudgment interest, the ALJ rejected the use of compound interest and ordered that simple interest accrue on both the back pay and front pay. The ALJ further found that the simple interest shall be calculated quarterly. *Id.* at 15-

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[8/] By striking the portions of the motion that concern tax enhancement, the ALJ removed from the record the argument and attached exhibit that pertained to tax enhancement. Approving this action would establish a procedure that, if abused, could shield erroneous ALJ rulings from review. *See Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983) (reversing district court's grant of motion to strike a motion). Accordingly, we reverse the ALJ's grant of the motion to strike and accept into the record the complete motion for summary judgment.

19.[9/] The ALJ denied portions of both parties' motions for summary judgment because genuine issues of material fact remained concerning actual interim earnings (to be deducted from back pay) and the dollar amount of employment benefits to which Doyle was entitled. *Id.* at 20-24.

In light of the remaining issues identified by the ALJ, the parties entered into a second stipulation (1999 Stip.). Pursuant to the ALJ's order to submit a recalculation of the prejudgment interest, Doyle and Hydro agreed on the amount of prejudgment interest that would be paid if a final order issued in the first quarter of the year 1999 (1999 Stip. ¶3) and provided a formula for calculating the prejudgment interest for a final judgment issued in any subsequent quarter (*id.* at ¶4). The parties also agreed on the amount of Doyle's lost employment benefits, including out of pocket medical expenses. *Id*. at ¶5. Again, the parties reserved their rights to judicial review of the forthcoming final administrative decision.

G. The Final Recommended Decisions Now Before the Board for Review

Soon after the parties reached the second stipulation, the ALJ issued the Final Recommended Decision and Order on Damages (FRD&O). In that decision, the ALJ ordered Hydro to pay the amounts of damages he earlier had determined in the 1998 Partial Order and the parties' stipulated recalculation of the prejudgment interest. The ALJ also accepted the parties' stipulation to the amount of employee benefits to which Doyle is entitled. In a separate Order Denying Motion for Stay issued the same day, the ALJ found that he did not have authority to consider Hydro's motion for a stay pending judicial review of the future administratively final order.

In a subsequent Recommended Decision and Order Awarding Attorney Fees (1999 Fee Order), the ALJ recommended that Hydro pay the following amounts to Doyle and his counsel for work performed in this case since December 11, 1995: $145,657.00 in attorney fees and $14,273.42 in expenses.

Both parties petitioned for administrative review of the FRD&O before the ARB, and Doyle also sought review of the 1999 Fee Order.

II. PENDING MOTIONS

Both parties have filed motions that are pending before us. We will now rule on these motions.

A. Hydro's Motion for Stay Pending Appeal

At the same time it filed a petition for review of the FRD&O, Hydro asked us to issue a stay pending judicial review of the future administratively final decision. Doyle opposed the motion on the grounds that it was premature. Doyle also argued that the stay should be denied on its merits.

[9/] Concerning the interest calculation, the ALJ ordered: "The parties shall recalculate interest awards in conformity with these instructions and submit them to the court." 1998 Part. Ord. at 19.

Because this decision is the administratively final order, we will rule on the merits of the stay request.

The factors for determining whether the Board's final decision should be stayed pending judicial review are:

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting a stay.

Dutkiewicz v. Clean Harbors Environmental Svcs, Inc., ARB Case No. 97-090, ALJ Case No. 95-STA-34, Order Denying Stay, Sept. 23, 1997; *Goldstein v. Ebasco Constructors, Inc.,* Case No. 86-ERA-35, Sec. Order Denying Stay, Aug. 31, 1992. We will examine each of the criteria in turn.

(1) Hydro argues that it is likely to prevail on the merits. Hydro characterizes its decision not to hire Doyle as legitimate because he would not sign a standard release form. Motion for Stay at 8. Citing the ALJ's 1989 RD&O**,** Hydro claims that Doyle's refusal to sign the release was not an activity protected under the whistleblower provision. *Id.* at 7. Hydro contends that the Secretary "compounded the error" by finding that it violated the whistleblower provision without the benefit of an evidentiary hearing.

Contrary to Hydro's contention, there was no need for an evidentiary hearing prior to the Secretary finding Hydro liable under the ERA. There was no dispute about the wording of the waiver, which was in the record, or the fact that Hydro refused to hire Doyle solely because he would not sign the waiver as written. The Secretary found that the waiver, if signed, would have immunized Hydro from liability if, in the future, the company violated the whistleblower provision, for example by refusing to hire Doyle because he had been a whistleblower in the past. As the Secretary reasoned:

> [I]f Respondent refused to hire an applicant because he filed a complaint with the NRC against another employer, such a clear violation of the ERA and the regulations would be immunized if this release were allowed to stand. . . . I find that Respondent violated the ERA when it refused to hire Complainant because he refused to sign the authorization form unless the release of liability paragraph was deleted.

1994 Sec'y D&O at 5.

We find support for the Secretary's ruling in this case in an earlier decision under the ERA in which the Secretary determined that an employer's mere proffer of a settlement that would have restricted the employee's access to administrative and judicial agencies, itself, was an ERA violation. *Delcore v. W. J. Barney Corp*., No. 89-ERA-38, Sec'y D&O, Apr. 19, 1995, *aff'd, Connecticut Light*

& Power Co. v. Sec'y of Labor, 85 F.3d 89 (2d Cir. 1996). Both the wording of the waiver and the Secretary's earlier ruling demonstrate that Hydro is not likely to succeed on the merits of a petition for judicial review.

(2) Hydro has not established the second factor: that it will suffer irreparable harm unless the stay is granted. Hydro contends that it will be compelled to pay Doyle approximately six hundred thousand dollars, which it may not be able to recover if Hydro prevails in its future petition for judicial review. Motion for Stay at 8. As we stated before, Hydro is not likely to prevail on the merits of such an appeal.

Even if it were likely to prevail, however, the courts have recognized that "economic loss does not, in and of itself, constitute irreparable harm. . . . Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the (movant)'s business." *Packard Elevator, Farmers Cooperative Soc., Inc. v. ICC,* 758 F.2d 669, 674 (D.C. Cir. 1985). *See also Arcierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994) (on review of district court issuance of preliminary injunction, noting that "[e]conomic loss does not constitute irreparable harm"). Respondent Hydro has not argued, let alone demonstrated, that payment of the damages in this case would threaten the company's existence.

(3) On the other hand, Doyle will be harmed if a stay is granted, because he will have to wait even longer to be paid the damages owed to him. Although in some cases the posting of a supersedeas bond possibly could serve fully to protect the complainant's rights, in this case the guarantee of future payment of the damages is not sufficient to prevent harm to Doyle. Doyle has stated under oath that because of lack of funds he is unable to purchase needed medications and obtain medical treatment. *See* Affidavit of Shannon Doyle dated July 31, 1998 at ¶¶ 2, 3, 6, attached as Exhibit 4 to Complainant's Answer to Respondent's Motion to Strike and Stay. Even when there are not such pressing reasons for immediate payment of damages, we have denied a stay despite the movant's offer of a bond to protect future payment. *E.g., Dutkiewicz*, slip op. at 1. With the compelling reasons Doyle has presented in this case, we find readily that he will be harmed if a stay is granted.

(4) The public interest weighs against the granting of a stay. The courts recognize that because employees often are in the best position to ensure nuclear safety, the protection of their rights under the ERA's whistleblower provision is paramount. *Kahn v. United States Sec'y of Labor*, 64 F.3d 271, 277 (7th Cir. 1995), *citing Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) and *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985). It has been more than eleven years since Doyle filed this complaint concerning Hydro's violation of the employee protection provision. It is time that Doyle be "made whole" for that violation.

In light of Hydro's failure to make the required showing for issuing a stay pending judicial review, we deny the motion for stay.[10/]

[10/] Doyle submitted a Motion to Strike Respondent's Motion for Stay, which we deny. Hydro submitted a Motion for Leave to File Reply Brief In Support of Motion for Stay (without an (continued...)

B. Doyle's Motion to Supplement 1996 Attorney Fee Award

In this motion, Doyle asks for the same relief he seeks in briefs filed with this Board: an enhancement to the 1996 award of attorney fees and costs award because of the passage of time. In the discussion below, we explain that we grant an adjustment to the 1996 attorney fee award. Accordingly, we grant Doyle's Motion to Supplement 1996 Attorney Fee Award.

C. Doyle's Motion to Expedite Final Order on Merits

Doyle's Motion is denied as moot because we now issue the administratively final decision in this case.

III. REQUESTED ENLARGEMENTS TO DAMAGES

A. Tax Enhancement to Back Pay

In an earlier decision in this case, we observed that "the goal of back pay is to make the victim[s] of discrimination whole and restore [them] to the position that [they] would have occupied in the absence of the unlawful discrimination." Sept. 1996 D&O at 2, *quoting Blackburn v. Martin*, 982 F.2d 125, 129 (4th Cir. 1992). Therefore, we agree in principle with Doyle's contention that a complainant is entitled to an enlargement of the back pay award to reflect the adverse tax consequences of receiving a lump sum payment that represents many years of back pay. Complainant's Initial Brief (Comp. Init. Br.) at 10-11. As Doyle states, had he received the pay over the many years involved, he would have been in a lower tax bracket and could have taken advantage of various exemptions available to him. When Doyle receives the lump sum payment, however, it will place him in the highest tax bracket and he will lose his ability to claim many exemptions.

Hydro objects to the requested enhancement, asserting that Doyle should have raised the issue earlier in the proceedings before the ALJ in 1994-95. Respondent's Brief in Opposition to the Complainant's Petition for Review to the ARB (Resp. Br. in Opp.) at 8. The company also argues that the issue was outside the scope of our 1997 Remand Order. *Id*. at 8-9. These arguments were made to the ALJ, who agreed with both objections and struck the portions of Doyle's motion for summary judgment that addressed enlargement of the award because of adverse tax effects. Sept. 1998 Order at 4.

To the extent the ALJ viewed our 1997 Remand Order as precluding consideration of the adverse tax consequences of receiving a lump sum, this interpretation was incorrect. The ALJ had authority to consider and decide this issue. Neither our September 1996 D&O nor the 1997 Remand Order decided the issue of a tax enhancement, either expressly or impliedly, as Hydro acknowledges. *See* Resp. Br. in Opp. At 8 ("there was no discussion by this Board about possible compensation for

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[10/](...continued)
accompanying reply), which we deny as moot in light of our decision on the merits of the stay request.

the tax effects of a lump sum payment"). In concluding that the ALJ had authority to rule on the requested tax enhancement, we look by analogy to the powers of a district court upon remand of a case by an appellate court. The Supreme Court has reasoned that "[t]he doctrine of law of the case comes into play only with respect to issues previously determined,"and on remand, a lower court "'may consider any matters left open by the mandate'" of the superior court. *Quern v. Jordan*, 440 U.S. 332, 337 n.18 (1979), *quoting In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895). *See also Liberty Mutual Ins. Co. v. EEOC*, 691 F.2d 438, 441 (9th Cir. 1982) and 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §4478, at 793 (1981).

Therefore, because the Board had not decided the issue of a tax enhancement, we conclude that the ALJ was free to decide it. However, the ALJ's failure to address this question does not foreclose the Board from considering it at this stage of the proceeding, because the Board acts with "all the powers [the Secretary or the ALJ] would have in making the initial decision. . . ." 5 U.S.C. §557(b), *quoted in Goldstein v. Ebasco Constructors, Inc.,* No. 86-ERA-36, Sec'y D&O (Apr. 7, 1992), *rev'd on other grounds sub nom. Ebasco Constructors, Inc. v. Martin,* No. 92-4576 (5th Cir. Feb. 18, 1993).

Hydro objected to Doyle's claim for a tax enhancement because Doyle allegedly did not provide an *"*admissible calculation of the enhancement" to the ALJ. Resp. Br. in Opp. At 10 (emphasis in original). Doyle's calculation of the tax enhancement was presented in the form of a signed affidavit containing the statement, under penalty of perjury, that it was "true and correct" to the best of Doyle's knowledge and belief. *See* Attachment 6 to Comp. Motion for Summary Judgment. Doyle stated that for all of the relevant years, he had personally computed his taxes and submitted a joint Federal income tax return on behalf of himself and his wife. *Id*. at p. 1. Doyle went on to explain how he calculated the difference between the tax he would have paid had he received the back pay award as a salary paid out in each of the years at issue, and the tax he will pay upon receiving the award as a lump sum.

Contrary to Hydro, we find that Doyle's affidavit was admissible. *See* Attachment 5 to Comp. Motion for Summary Judgment (affidavit of Doyle's expert witness, Stephen Jackson, signed in the same fashion). Of course, admissibility is only a first, preliminary issue; the more significant question is whether the evidence is persuasive.

Recognizing the complexity of income tax calculations, the courts have placed on the plaintiff the burden of providing credible evidence of the calculation of the difference in tax payments between receiving back pay as a lump sum and receiving the pay in the various years at issue. For example, in *Hukkanen v. Int'l Union of Operating Eng'rs*, 3 F.3d 281, 287 (8th Cir. 1993), the Court of Appeals affirmed the District Court's denial of tax enhancement where the plaintiff "failed to present evidence of the enhancement's amount or a convenient way for the court to calculate the amount." Likewise, in *Barbour v. Medlantic Mgt. Corp.*, 952 F.Supp. 857, 865 (D. D.C.), *aff'd*, 132 F.3d 1480 (D.C. Cir. 1987), the District Court rejected the plaintiff's claim for an income tax adjustment, even though the plaintiff's expert had offered testimony as to total tax liability arising from a lump sum award, because the plaintiff did not offer evidence on the difference between that tax burden and "what the plaintiff would bear if he were paid the front pay over time."

Thus, a failure to provide evidence on the tax enhancement calculation generally is held against the plaintiff who seeks the enhancement.

We must consider, therefore, whether Doyle's affidavit presented sufficiently *credible* evidence of the claimed tax enhancement. Hydro points out that Doyle did not include copies of his original tax returns for the periods in question. Resp. Br. in Opp. at 11. Further, Hydro objects that Doyle based his calculations upon information he received from unnamed sources. *Id.*

Doyle later provided copies of income tax transcripts, obtained from the IRS, for the years 1988-97. Comp. Notice of Filing dated Aug. 13, 1998.[11/] These records "set forth adjusted gross income and the taxable income of the Doyle family for each year." *Id.* The records are not official photocopies of Doyle's tax returns, however, and do not provide as much information as a return.

Perhaps recognizing the difficulty of calculating the tax enhancement, in his pleadings to this Board Doyle has stepped back from the calculation he provided earlier to the ALJ. Doyle now advocates a two step approach to determining the back pay award, proposing to rely upon the IRS to determine "the exact amount of any adverse tax consequence." Under this approach, Hydro is to pay Doyle the lump sums of back pay and front pay plus interest; Doyle is to pay income taxes based on the lump sum payment; and Doyle is then to seek a refund from the IRS to adjust for the adverse tax consequences. If the IRS does not allow the tax relief Doyle requests, the Board is to permit Doyle leave to file a motion to reopen the case and "obtain an order requiring that Respondent compensate Mr. Doyle for the increased tax burden." Comp. Init. Br. at 16.

We will not use this two step approach because allowing leave to reopen this decision would only prolong this case. Finality is long overdue. Because of the questions that we have outlined concerning Doyle's calculation of the tax enhancement, we find that Doyle did not meet his evidentiary burden on this issue and therefore deny the requested enhancement of back pay to allow for tax consequences.

B. Increase in Amount of Compensatory Damages

Doyle also seeks an increase of 150 percent in the compensatory damages award (from the $40,000 recommended by the ALJ to a total of $100,000), arguing that an increase is merited in light of (1) a change in the taxation of compensatory damages for nonphysical injuries, and (2) the delay in payment of these damages (which we ordered in 1996) and the additional harm to Doyle and his family from the delay in payment. Comp. Init. Br. at 18. Doyle allocates the requested additional $60,000 in compensatory damages as follows: $26,225 to cover the taxation change, and an additional $33,775 to cover the factors of delay and additional harm. We consider both prongs of Doyle's argument.

1. Requested Increase for Change in Tax Treatment of Award of Compensatory Damages for Non-Physical Injuries

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[11/] After the tax records Doyle provided were examined, they were placed in a sealed portion of the record.

In 1996, the Congress amended the Internal Revenue Code to provide that compensatory damages received for non-physical injuries, such as emotional distress, may not be excluded from gross income. Pub. L. No. 104-188, §1605(b), 110 Stat. 1838-39. This change applies to amounts received after August 20, 1996, in taxable years ending after such date. *Id.,* §1605(d). In its earlier decisions, the Board did not consider the 1996 tax code change because the record had closed in 1995, well before the enactment of the change. In light of the fact that the earlier Board decisions did not discuss or resolve the issue of a tax enhancement of the compensatory damages, we are free to consider the issue.[12/]

It is the complainant's burden to establish the amount of any such tax enhancement. Doyle did not provide evidence directly bearing on the amount of tax he will pay on the compensatory damages award. Rather, he referred to the manner in which he had calculated the tax enhancement for back pay. Comp. Motion for Summary Judgment at 18. In light of the absence of evidence bearing directly on the tax enhancement for compensatory damages and the insufficiency of Doyle's calculation of the tax enhancement for back pay, we find that Doyle has not sufficiently established the amount of any tax burden resulting from the change in the tax code. Consequently, we will not enlarge the compensatory damages award on that account.

2. Increased Compensatory Damages to Reflect Additional Harm to Doyle

Doyle seeks additional compensatory damages, above the $40,000 we awarded in 1996, to compensate him for additional harm he has suffered because of Hydro's failure to pay the earlier ordered damages or otherwise comply with the ordered remedies. Comp. Init. Br. at 18, 20. Doyle's 1998 affidavit states that he was experiencing extreme emotional distress because Hydro still had not complied with the 1996 order to notify Equifax to correct the notation that Doyle had been denied access to a nuclear plant. July 31, 1998 Affidavit at ¶3, attached to Comp. Answer to Resp. Motion to Strike. Earlier, we explained that the notation in the Equifax record prevented Doyle from obtaining any employment in the nuclear field.

In the affidavit, Doyle outlined significant effects from the added stress. Doyle stated that he had undergone crisis intervention because of nightmares and suicidal thoughts and could not afford to purchase medication that his family physician prescribed for this condition. July 31, 1998 Affidavit at ¶3. Doyle also suffered from a physical ailment, Hepatitis C, but could not afford the $10,000 recommended treatment for it. *Id.* at ¶6. As for his financial condition, Doyle testified that he was not able to provide even minimum financial support to his children, had amassed a significant amount of debt, and was on the verge of bankruptcy. Id. at ¶¶4, 5.

We are mindful that "[a]ny attempt to set a monetary value on intangible damages such as mental pain and anguish involves a subjective judgment." *Leveille v. New York Air National Guard*,

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[12/] The parties have not agreed to any enhancement of the compensatory damages award. Their stipulation merely recites our earlier compensatory damages award: "Based upon the ARB's September 6, 1996 Final Decision and Order, compensatory damages amount to $40,000." 1999 Stip. ¶6.

ARB No. 98-079, ALJ Nos. 1994-TSC-3 and -4, D&O On Damages, Oct. 25, 1999, at 5. A key first step in determining the monetary value "is a comparison with awards made in similar cases." *Id.*[13/]

We find the *Leveille* decision helpful in measuring the monetary value of Doyle's emotional distress and depression. In that case, the complainant's compensable injuries stemmed from two instances in which the respondent provided discriminatory references, once to a reference checking service and once to the United States Office of Personnel Management. *Leveille,* at 4. Notwithstanding those references, the *Leveille* complainant obtained another comparable position. Leveille testified that she experienced severe anxiety attacks, inability to concentrate, dysphoria, and marital conflict after she learned about the discriminatory references. A psychologist testified to the substantial effect of the discriminatory references on the complainant. *Id.* In that case, we valued the emotional distress at $45,000 and the damage to professional reputation at $25,000; we also awarded $10,000 to cover future medical bills for treatment of the emotional distress.

In this case, Hydro's unlawful action prevented Doyle from obtaining a position in the nuclear industry and affected him so substantially that he was unable to perform any other comparable work. Doyle suffered very serious financial harm from the loss of his income. In view of the evidence of additional harm to Doyle's mental condition during the pendency of this case, we find that Doyle is entitled to an additional $40,000, for a total award of $80,000 in compensatory damages.[14/]

C. Amounts of Back and Front Pay

In the Sept. 1996 D&O, we ordered Hydro to pay Doyle five years' front pay. Doyle now seeks an additional year of front pay, for a total of six years, because Hydro supposedly did not comply with a verbal agreement to reach promptly a full stipulation as to the damages. Comp. Init. Br. at 19 n.4. Nevertheless, in 1999 the parties did reach a final stipulation of the damages, including the front pay. Absent a provision of a stipulation that is contrary to public policy, we hold the parties to their bargain where, as here, they have fairly entered into a stipulation of facts. *See, e.g., Goldstein,* at 9.

Consequently, in this case we accept the parties' agreement that the five-year front pay period begins in 1997 and ends in 2002, and that the present value of the front pay principal totaled $154,695 in early 1999. 1999 Stip. at ¶2. We note that the agreed amount should be sufficient to allow Doyle to receive therapy and either education or training so that he may be able to work in a new field. *See* Sept. 1996 D&O at 8; 1997 Rem. Ord. at 3-4.

[13/] In *Leveille*, we also noted that Administrative Law Judges may appropriately consider the level of compensatory damages awarded in employment discrimination cases brought outside the Labor Department's administrative law system.

[14/] We reject Doyle's claim of entitlement to additional damages because of Hydro's failure to comply with the earlier-ordered remedies. A party need not comply with decisions that are not administratively final, and this is the administratively final decision in Doyle's case.

As for the back pay principal, we accept the parties' stipulation that it totaled $218,378. 1999 Stip. at ¶1. *See also* FRD&O, sum of ¶¶2, 3.

D. Additions to 1996 Award of Attorney Fees and Costs

1. Additur for Delay in Payment of Attorney Fees

Doyle requests an addition to the 1996 award of attorney fees and costs to reflect the passage of time between the Sept. 1996 D&O and the payment of the fees.[15/] Comp. Init. Br. at 20. As we explain below, we grant the request, which Doyle raised within briefs and also in a separate motion filed with us.

Hydro objects that this issue is beyond the scope of the remand. Further, the company argues inconsistently: that the 1996 fee award already compensates for the passage of time, but also that no tribunal has interpreted the ERA's employee protection provision to permit an adjustment in a fee award for the passage of time or a delay in payment. Resp. Br. in Opp. at 12-13.

The Board has allowed an enlargement to an attorney fee to compensate for delay in payment. In the *Leveille* case, which arose under the analogous whistleblower provisions of six environmental acts, the complainant sought pre- and post-judgment interest on the attorney fee because of delay. The ALJ in *Leveille* agreed, finding that "Complainant's counsel is entitled to interest on the award of the attorney's fee, and that the amount of the award will be the lesser amount of either the adjusted lodestar at current rates or the interest additur requested by Complainants." *Leveille*, Nos. 94-TSC-00003 and -00004, ALJ RD&O Upon Remand, Feb. 9, 1998, at 20. We affirmed the resulting attorney fee award recommended by the ALJ. *Leveille*, ARB D&O On Damages, Oct. 25, 1999, at 6.

Earlier, the Secretary took a similar approach in an ERA case, *Larry v. Detroit Edison Co.*, No. 86-ERA-32, Sec'y D&O on Costs and Expenses, May 19, 1992, at 2 (rejecting a requested additur at 12 percent interest as too high and allowing instead an additional $3,000 to compensate for delay in payment of attorney fees).

We conclude that an addition to the September 1996 attorney fee award is warranted by the passage of nearly four years. As in *Leveille*, we will award the lesser of the additions calculated as follows: (1) the number of hours multiplied by the current rates of the attorneys and law clerks, or (2) the 1996 award multiplied by the percentage increase in Consumer Price Index - All Urban Consumers, U.S. city average (CPI-U), between September 1996 and March 2000 (most recent figure available).

For the first calculation, we take the number of hours approved by the ALJ in the 1996 Fee Order for each attorney and law clerk and multiply by the difference in the hourly rates approved in

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[15/] That award covered work in this case through December 11, 1995. *See* 1999 Fee Order at n.1.

that order and the hourly rates approved by the ALJ in the 1999 Fee Order. The resulting additional fees are set out below.

Attorney	Hours Awarded in 1996 Fee Order	Hourly Rate Approved In 1996 Fee Order	Hourly Rate Approved In 1999 Fee Order	Difference in Hourly Rate	Resulting Additional Fee
Stephen Kohn	235.25	$245	$300	$55	$13,103.75
Annette Kronstadt	215.60	$180	$195	$15	$ 3,234.00
Victoria Villanueva	67.65	$100	$155	$55	$ 3,720.75
Law Clerk	24.75	$ 50	$ 85	$35	$ 866.25

The total of the resulting additional fees is $20,924.75.

For the second calculation, we find that the percentage change in the CPI-U between September, 1996 (157.8) and March 2000 (171.1) is 8.4% (171.1/157.8 = 1.084). Then we multiply the 1996 attorney fee award ($105,181.75) times 8.4%, for a result of $8,835.27.

We find that the lower of the two additions is that reached by the second calculation, or $8,835.27. We will add this amount to the 1996 attorney fee award, with the result that we award a total of $114,017.02 in attorney fees for the work performed in this case through December 11, 1995 (1996 Fee Award of $105,181.75 plus $8,835.27).

2. Award of the Costs Associated with Henderson Testimony

Doyle asks us to revisit the exclusion of $630 in costs associated with the testimony of Yvonne Henderson at the 1994 hearing in this case.[16/] Comp. Init. Br. at 21. In our September 1996 D&O we denied this cost item for the reasons that the ALJ provided in the 1996 Fee Order. 1996 D&O at 10. Hydro objects to Doyle's raising the issue for the first time at this late date. Resp. Br. in Opp. at 17.

[16/] The ALJ and Hydro referred to the $630 as both "attorneys' fees and costs" associated with Henderson's testimony, but did not specify which portion of that amount represents attorney fees. 1996 Fee Order at 8. Consequently, we treat the full amount as a cost, which is not subject to increase because of the delay in payment.

At the outset, we note that we neglected to authorize the parties to present briefs on the 1996 Fee Order.[17/] According to the ALJ's findings, Hydro objected to paying $630 in costs associated with Henderson's testimony because the testimony "was used to establish evidence which was ultimately rejected by the administrative law judge." 1996 Fee Order at 8. The ALJ noted that Doyle had not responded to Hydro's assertion in that regard, and consequently excluded the claimed $630 from the costs awarded. *Id.*

There was a good reason for the lack of any response from Doyle. The ALJ did not afford Doyle the opportunity to reply to Hydro's objections to the petition for attorney fees and costs. *See* 1995 RD&O at 22 (ordering Doyle to file a petition for fees and costs and allowing Hydro a response, but not allowing Doyle any further pleading if Hydro submitted a response). Had Doyle filed a reply without prior permission, we have no doubt that the ALJ would not have considered it. *See, e.g.*, 1999 Fee Order at 2 (ALJ struck Doyle's unauthorized reply to Hydro's response to a subsequent petition for attorney fees and costs).

We guaranteed Doyle's silence on this issue by failing to order briefing on the 1996 Fee Order. Consequently it is proper for Doyle to raise the issue now.

Turning to the merits of including this item of cost, Hydro contends that $630 is excessive payment for less than one hour of testimony by Henderson, especially in light of the fact that the ALJ did not credit some of her testimony. Doyle counters that both the ALJ and this Board credited the part of Henderson's testimony concerning the amount of time per year that an itinerant decontamination technician such as Doyle would be expected to have work. *See* 1995 RD&O at 11; 1996 Fee Order at 5-6. In light of our reliance upon Henderson's testimony in ordering back pay, we find that Doyle reasonably incurred the costs associated with obtaining the testimony. Accordingly, we allow the $630 cost item.

Consequently, the total of costs awarded through December 11, 1995, is $16,080.03 ($15,450.03 awarded in 1996 Fee Order plus $630).

IV. INTEREST CALCULATIONS

A. Compound Prejudgment Interest on Back Pay

Doyle argues that the prejudgment interest on back pay should be compounded to make him whole for the effects of the discrimination. Comp. Init. Br. at 8. Compound interest is "interest on interest." *Amax Land Co. v. Quarterman*, 181 F.3d 1356, 1367 (D.C. Cir. 1999).

We acknowledge that we have not ruled whether the interest on back pay ordered pursuant to the ERA's whistleblower provision (or those of analogous environmental statutes) should be compounded. Rather, we have been silent on the issue.

[17/] Although we had issued a briefing order concerning the 1995 RD&O (damages award), we did not separately order briefing on the 1996 Fee Order. Rather, we issued the 1996 D&O without the benefit of briefs addressing the ALJ's findings on attorney fees and costs.

Without any guidance from this Board, the ALJ applied his discretion, denied the use of compound interest, and ordered that simple interest accrues on the back pay award. 1998 Part. Ord. at 17-18. In denying compound interest, the ALJ relied primarily on a regulation concerning the collection of federal claims, 29 C.F.R. §20.58(c), which forbids the award of "interest on interest." Of course, there is no debt owed to the government in this case. For that reason, we need not follow the cited regulation.

Hydro's back pay award is owed to an individual who, if he had received the pay over the years, could have invested in instruments on which he would have earned compound interest. Therefore, we agree with the view of several of the United States Courts of Appeals that in discrimination cases, "back pay . . . should ordinarily include compound interest. . . . Back pay is awarded to make the claimant whole, and such relief 'can only be achieved if [prejudgment] interest is compounded.'" *EEOC v. Kentucky State Police Dept.*, 80 F.3d 1086, 1098 (6th Cir. 1996), *quoting Sands v. Runyon*, 28 F.3d 1323, 1328 (2d Cir. 1994) and *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994).

We recognize that a court of appeals ordinarily defers to the district court's exercise of its discretion in awarding or denying compound interest on back pay. *EEOC v. Kentucky*, 80 F.3d at 1098. In this case, however, we need not defer to the ALJ's exercise of discretion because we have all the powers the ALJ had in making a recommended decision. 5 U.S.C. §557(b).

In light of the remedial nature of the ERA's employee protection provision and the "make whole" goal of back pay, we hold that the prejudgment interest on back pay ordinarily shall be compound interest. Our reasoning applies equally to back pay awards under analogous employee protection provisions of the other federal statutes under which we issue administratively final decisions.[18/] Absent any unusual circumstance, we will award compound interest on back pay in cases arising under all of these employee protection provisions.

There remains the issue of the frequency of the compounding of interest. In two recent decisions under the whistleblower provision of the Surface Transportation Assistance Act of 1982, 49 U.S.C.A. §31105 (1999), we ordered that the interest on back pay should be compounded quarterly. *Johnson v. Roadway Express, Inc.*, ARB Case No. 99-111, ALJ Case No. 1999-STA-5, Dec. and Ord. of Rem., Mar. 29, 2000, at 18; *Ass't Sec'y and Cotes v. Double R Trucking, Inc.,* ARB Case No. 99-061, ALJ Case No. 98-STA-34, Supp. Dec. and Ord., Jan. 12, 2000, at 3. We order the same quarterly compounding in this case.

We provide guidance on the calculation of the total amount of prejudgment interest owed on the back pay. As provided by the ALJ and the parties' stipulation, the interest rate is that charged

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[18/] These analogous employee protection provisions include: the Clean Air Act, 42 U.S.C. §7622; the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9610; the Federal Water Pollution Control Act, 33 U.S.C. §1367; the Safe Drinking Water Act, 42 U.S.C. §300j-9(i); the Solid Waste Disposal Act, 42 U.S.C. §6971; the Surface Transportation Assistance Act of 1982, 49 U.S.C. §31105; and the Toxic Substances Control Act, 15 U.S.C. §2622 (all 1994).

on the underpayment of Federal income taxes, which consists of the Federal short-term rate determined under 26 U.S.C. §6621(b)(3) plus three percentage points. *See* 26 U.S.C. §6621(a)(2); FRD&O at 2; 1999 Stip. at ¶4.[19/]

The Federal short-term interest rate to be used is the so-called "applicable federal rate" (AFR) for a quarterly period of compounding. *See, e.g.*, Rev. Rul. 2000-23, Table 1.

To determine the interest for the first quarter of back pay owed, the parties shall multiply the back pay principal owed for that quarter[20/] by the sum of the quarterly average AFR plus three percentage points. To determine the quarterly average interest rate, the parties shall calculate the arithmetic average of the AFR for each of the three months of the calendar quarter, rounded to the nearest whole percentage point. *See* Table, *infra*. We round to the whole number because the parties did so in their evidentiary submissions to the ALJ. *See* Exhibit E to Hydro's Cross-Motion for Partial Summary Judgment and Exhibit 2 to Complainant's Motion for Summary Judgment.

To determine the interest for the second quarter of back pay owed, the parties shall add the first quarter principal, the first quarter interest, and the second quarter principal. The resulting sum is multiplied by the second quarter's interest rate as calculated according to the preceding paragraph. This multiplication yields the second quarter interest.

This process shall continue for computing the interest owed on the back pay through the date of the issuance of this decision. The Federal short-term interest rate, rounded to the nearest whole percentage point, plus three percent, for the period October 1988 through September 1998 is listed in Exhibit E to Hydro's Cross-Motion for Partial Summary Judgment. For the convenience of the parties, we list below the AFR for the quarters beginning with the fourth quarter of 1998.

Quarter	Monthly AFRs (Quarterly Compounding) Reported in the Quarter	Arithmetic Average AFR	Arithmetic Average AFR, Rounded	Rounded Average AFR Plus 3%
4th 1998	4.97, 4.40, 4.26	4.54	5	8
1st 1999	4.49, 4.54, 4.59	4.54	5	8
2nd 1999	4.90, 4.81, 4.89	4.86	5	8

[19/] We do not rely upon the parties' stipulation concerning the amount of prejudgment interest because the ALJ ordered them to use simple interest. Thus, in ordering the payment of compound interest, we are overturning the ALJ's recommendation, rather than a stipulation reached freely by the parties.

[20/] The parties already have determined the back pay principal owed for each of the quarters at issue, according to the ALJ's 1998 Partial Order.

3rd 1999	5.22, 5.32, 5.31	5.28	5	8
4th 1999	5.43, 5.45, 5.62	5.50	6	9
lst 2000	6.31, 6.27			

Hydro also owes prejudgment interest on the front pay award. The parties stipulated to the present value of five years of front pay, if the lump sum payment were received during the first quarter of 1999. 1999 Stip. at ¶3. Because the payment was not made during the stipulated time period, prejudgment interest on this amount will accrue beginning April 1, 1999. The prejudgment interest on the stipulated front pay award will be calculated at the same rate and in the same manner as the prejudgment interest on the back pay award, *i.e.,* compounded quarterly, beginning with the second quarter of 1999.

B. The Postjudgment Interest Rate on Back Pay and Front Pay

Both parties object to the ALJ's phrasing of the post-judgment interest rate on the back pay and front pay awards. Hydro contends that the rate is too high because applying the stated rate – the Federal short-term rate described in 26 U.S.C. §2261(b)(3) – after the judgment would make Doyle "more than whole."[21/] Resp. Br. in Opp. at 3. The company argues that, to reimburse Doyle for the time-value of his award from the date of final judgment to the date of payment, the rate routinely utilized in federal courts, 28 U.S.C. §1961 (based on Treasury bill rates), should be used. *Id*. at 4.

On the other hand, Doyle contends that the FRD&O contained a "ministerial error" in its reference to the interest rate set forth in 26 U.S.C. §2261(b)(3). Comp. Response to Resp. Br. in Opp. at 6. Doyle contends that the ALJ "merely failed to fully cite to appropriate language within the Second Joint Stipulation and the statute." *Id.*

Contrary to Doyle's argument, the 1999 (or second) Stipulation did not contain any agreement on postjudgment interest. It provided only for the rate to be used to calculate prejudgment interest. 1999 Stip. at ¶4.

The usual interest rate employed on back pay awards under analogous whistleblower provisions is the interest rate for underpayment of federal taxes, set forth at 26 U.S.C. §6621(a)(2) (short-term Federal rate plus three percentage points). *See, e.g.*, *Johnson v. Old Dominion Security,* ALJ Case Nos. 86-CAA-3, -4, and -5, Sec'y Final D&O, May 29, 1991, slip op. at 32 ¶6; *Cotes*,

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[21/] The ALJ stated the postjudgment interest rate as follows:

> (5) Interest on front pay and back pay shall continue to accrue at the rate set forth in 26 U.S.C. §6621(b)(3) until the back pay and fro[nt] pay is paid by the Respondent[.]

ARB Fin. Dec. and Ord., July 16, 1999, slip op. at 5, and cases there cited. This is the specific rate to which we should have referred in the September 1996 D&O.

In whistleblower cases, we award the same rate of interest on back pay awards, both pre- and post-judgment. *E.g., Johnson*, slip op. at 32 ¶6 (ordering interest on back pay to accrue "until compliance with this Order") and *Blackburn v. Metric Constructors, Inc.*, ALJ Case No. 86-ERA-4, Sec'y D&O, Oct. 30, 1991, slip op. at 26 (same), *rev'd on other grounds*, 982 F.2d 125 (4th Cir. 1992).

Consequently, we order payment of post-judgment interest at the same rate as the pre-judgment interest rate. Further, we order that the post-judgment interest shall be compounded and posted quarterly, in the same fashion as the prejudgment interest.

V. APPLICATION OF THE ORDERED REMEDIES TO WESTINGHOUSE

In the September 1996 D&O, we ordered Hydro to take certain affirmative action with regard to a different entity, Westinghouse. Specifically, we stated that "Respondent (Hydro) shall post this decision at the nuclear operations of Westinghouse, the successor to Hydro." Sept. 1996 D&O at 10, 11.

Hydro, which formerly was a division of Westinghouse, objects that the ordered relief is inappropriate because since the time Hydro was sold, "Westinghouse never reentered the decontamination business by purchasing another company or creating a new division." Resp. Br. in Opp. at 5. Thus, Hydro contends that a posting requirement is unnecessary and would be ineffective. *Id.* at 5-6.

Doyle counters that Hydro has mischaracterized the facts concerning the sale of Hydro and that Westinghouse "regularly employ[]s, th[r]ough other organizations, decontamination technician contractors." Comp. Response to Resp. Br. at 5. Doyle presses us to require Westinghouse, as Hydro's successor, to comply with all of the ordered relief. Comp. Init. Br. at 24.

Notwithstanding our reference to Westinghouse as Hydro's successor, 1996 D&O at 10-11, we did not engage in any analysis of whether Westinghouse meets the criteria for liability as a successor corporation. Nor are we inclined to prolong this lengthy litigation to perform such an analysis. We believe that Hydro's offer to post a supersedeas bond indicates that the payment of those damages is secure.

As for requiring Hydro to accomplish the posting of decisions at Westinghouse's nuclear operations, we no longer think this is a practical remedy in this case. We decided a similar issue in *Smith v. Esicorp, Inc.*, ARB Case No. 97-065, ALJ Case No. 93-ERA-16, Fin. D&O, Aug. 27, 1998 (*Esicorp)*. In that decision, the ARB found Esicorp liable under the ERA's whistleblower provision, ordered Esicorp to post the decision at the work site for 90 days, and remanded the case to the ALJ for further proceedings. *Id.* at 6. After the proceedings before the ALJ on remand, Esicorp represented that it no longer was in business, had no presence at the nuclear plant where the events of the case arose, and had no way of assuring that the posting would be carried out at the plant. *Id.*

The complainant countered that another corporation, Raytheon, should be added as a party for the purpose of accomplishing the posting. We declined to reopen the record to take evidence on whether Raytheon met the tests for successorship liability. *Id.* Instead, we found that if Esicorp was unable to secure posting of the decisions at the nuclear plant, "notification may be accomplished by publishing the two documents in a local general circulation newspaper." *Id.*

The publication option we ordered in *Esicorp* would not work well in this case because of the nature of Doyle's work as an itinerant decontamination technician who was expected to move on to work at many other nuclear plants. Even though we may view the "locus" of this case as arising at one plant in Michigan, the real scope of the discriminatory effect was nationwide, because Doyle has not been able to work in any nuclear plant. We are reluctant in this case to adapt the *Esicorp* option by requiring Hydro to publish these decisions in a national general circulation newspaper. Nor can we guarantee that Hydro will be able to achieve posting in Westinghouse's nuclear operations nationwide. For these reasons, we now decline to reorder the posting of the decisions at Westinghouse facilities. We will, however, affirm the requirement that Hydro post the decisions in this case at its own facilities. *See* FRD&O at 2 ¶8. Further, like the ALJ, we order that if Hydro has not done so, it shall comply with the affirmative relief previously awarded in the decisions of the Secretary, the ALJ, and this Board. *Id.*

VI. THE 1999 FEE ORDER

In the 1999 Fee Order, the ALJ granted most of the requested fees and costs. The ALJ recommended awarding the following sums for work performed after December 11, 1995: $145,657 in attorney fees and $14,273.42 in costs. Doyle has filed a petition for review of a limited portion of the claimed fees and costs that were denied by the ALJ.

A. Legal Work in the Court of Appeals

Doyle sought to recover attorney fees for some 8.53 hours of work before the Court of Appeals in 1996. Some portion of the claimed fees and costs concerned Doyle's petition for review in the Third Circuit, and the remainder concerned Hydro's petition for review in the Sixth Circuit.[22/] The ALJ explained, 1999 Fee Order at 6, that this Board does not award costs for work before the Sixth Circuit because of that Court's decision in *DeFord v. Secretary of Labor*, 715 F.2d 231, 232 (6th Cir. 1983) (in ERA case, rejecting Secretary's authority to award attorney fees for work in the court of appeals). Acknowledging that the Board will award costs for appellate work in other circuits, the ALJ nevertheless denied attorney fees for all of the hours devoted to appellate work because Doyle's fee petition did not distinguish between the work performed in the Third Circuit and that performed in the Sixth Circuit. *Id.*

As the ALJ pointed out, 1999 Fee Order at 6, we have acquiesced to the Sixth Circuit's decision in *DeFord* and do not award fees for appellate work performed in that circuit. *Pillow v. Bechtel*, ARB Case No. 97-040, ALJ Case No. 87-ERA-35, Supp. Ord. Denying Request for Interest, Sept. 11, 1997, slip op. at 3. *See also Sprague v. American Nuclear Resources, Inc.*, Case No. 92-ERA-37, Sec'y Final D&O, July 15, 1996, at 2, *rev'd on other grounds,* 134 F.3d 1292 (6th Cir. 1998). We will not reverse that position here. Consequently, we affirm the ALJ's denial of attorney fees for work before the Sixth Circuit.

Although in the usual case we would award attorney fees for work performed in the Third Circuit, we will not do so in this case because Doyle appeared *pro se* in that court. *See* Ex. A to Hydro Br. in Opp. to Att. Fees (documents Doyle submitted *pro se* to Third Circuit). A *pro se* litigant under the ERA is not entitled to an attorney fee award. *E.g., Johnson v. Bechtel Construction Co.,* Case No. 95-ERA-0011, Sec'y Final D&O, Sept. 28, 1995, at 3.

Accordingly, we accept the ALJ's exclusion of 8.53 hours of attorney time for work performed in the Court of Appeals.

B. Doyle's Costs of Attending the Maybray Deposition

The ALJ earlier ordered Hydro to pay "all reasonable costs related to the deposition of Ms. Maybray." Dec. 1998 Part. Ord. at 20. Consequently, upon receiving Doyle's petition for costs, the ALJ granted payment of most of the claimed costs associated with taking the deposition of Hydro witness Sally Maybray. However, the ALJ denied Doyle's claim for his own costs (a total of $759.29 for travel, lodging, and food) associated with attending that deposition because there was "no reasonable need for Complainant's attendance" at that deposition. 1999 Fee Order at 13.

[22/] The two petitions for review of the Sept.1996 D&O were consolidated in the Third Circuit, which remanded the case to the Secretary of Labor because the decision was not administratively final.

Doyle insists that, as the complainant, he "had the right to attend this deposition, hear the testimony of the witness and assist counsel during the deposition." Comp. Appeal of Attorney Fee and Costs Ruling at 7. Doyle further argues that he acted as the lead investigator in this case and attended the deposition to "provide advice and guidance concerning proper lines of questioning." *Id*. at 7-8.

Hydro concedes that Doyle had the right to attend the Maybray deposition, but argues that his presence was not absolutely necessary or even helpful. Hydro Br. in Opp. to Appeal of Att. Fees at 18. Even if Doyle were acting like a lead investigator in this case, Hydro contends, lead investigators do not attend depositions. *Id.*

The ALJ understood the significance of the Maybray testimony and was in the best position to assess whether Doyle reasonably incurred the cost of attending the deposition. We defer to the ALJ's assessment that Doyle's presence at the Maybray deposition was not a cost "reasonably incurred" in bringing his complaint.[23/]

C. Undocumented Costs to Attend the 1998 Mediation

Doyle traveled from his Alabama home to Washington, D.C. in June 1998 to attend a mediation ordered by the ALJ. Doyle did not produce documentation concerning his costs for the trip (mileage, lodging, and meals), claiming that he had lost the documents when a hurricane damaged his trailer home. 1999 Fee Order at n.10.

The ALJ awarded $544 to cover Doyle's mileage expense because it was possible to calculate the distance between Doyle's home and Washington. 1999 Fee Order at 13. As the ALJ pointed out, in other cases the Secretary has allowed undocumented costs where there were alternate means to verify them. *Johnson v. Bechtel*, Sec'y Supp. Ord. Concerning Costs, Feb. 26, 1996, at 3. The ALJ denied the claimed $110 expense for meals and lodging because there was neither any documentation nor any alternate way for the ALJ to ascertain the exact expense that Doyle had incurred.

Doyle objects to the disallowance of the $110 because, given the remedial nature of the ERA, he is entitled to payment of costs that he necessarily incurred, despite the loss of the receipts. Comp. Fee Rebuttal at 9. Doyle points out that his affidavit attesting to these costs was unrebutted.[24/] *Id.*

[23/] We note that even if we were to overrule the ALJ and to hold that Doyle's costs reasonably were incurred, we would award only those costs that he documented, such as his meals, or that reasonably could be ascertained, such as the travel costs between his home and Washington. We would not award the cost of Doyle's lodging because he did not produce any receipt or other evidence documenting the expense. *See Gaballa v. The Atlantic Group*, Case No. 94-ERA-9, Sec'y Interim Order, Dec. 7, 1995, at 4 (disallowing unsubstantiated costs).

[24/] We would not expect Hydro to be privy to any information with which to rebut the claimed costs for several meals ($50) and lodging ($60). Nor could Hydro produce evidence to rebut the loss

(continued...)

We accept the ALJ's findings on this issue and award $544 to cover the cost of mileage for travel by car between Dothan, Alabama and Washington, D.C.

D. Mileage, Copy, and Fax Costs

The ALJ denied a portion of the costs Doyle claimed for local travel, faxes, and photocopies. Doyle again asserts that he could not produce receipts for these costs because of hurricane damage to his home. Comp. Appeal of Attorney Fee and Costs at 11. Doyle claims that he is entitled to payment of these costs because there is a good cause for the absence of documentation. Comp. Appeal of Attorney Fee and Costs at 11.

Doyle gave the following description of his local travel: "throughout Dothan and Montgomery, Alabama to libraries, offices, copy/fax centers and post offices." *Id.* The ALJ denied the claimed costs of $179.20 for local travel because "there is no proof of the actual amount of miles claimed, nor even a list of Complainant's destinations when he allegedly incurred this mileage." 1999 Fee Order at 14.

Doyle claimed an expense of $1,152 (or $2 per page) for faxes from his home computer. He produced computer records purportedly documenting 288 fax pages (or $576), and stated that he could not produce receipts for the remaining $576 because of hurricane damage. *Id.*

The ALJ denied the $576 in undocumented fax costs. *Id.* Concerning the faxes for which Doyle produced computer records, the ALJ found that 69 pages were transmitted successfully from Doyle's computer and 128 pages were received successfully, for a total of 197 pages received or transmitted. *Id.* The ALJ accepted the claimed $2.00 per page and consequently awarded $394 for fax costs.

Finally, the ALJ denied Doyle's claimed expense of $128 for photocopies because of lack of documentation or even any list of his photocopies. *Id.*

Again, we accept the ALJ's judgment not to award costs for which there was no documentation. The ALJ was free to accept or reject the reason given for Doyle's inability to produce all receipts, and we will not disturb the ALJ's judgment.

In summary, we have accepted all of the ALJ's rulings concerning attorney fees and costs. Therefore, we accept the ALJ's award of $145,657 in attorney fees and $14,273.42 in costs for the proceedings in this case that occurred between December 11, 1995, and the date of issuance of the 1999 Fee Order.

This decision is administratively final.

[24/](...continued)
of receipts, although the company did question Doyle's veracity concerning the loss. Hydro Br. in Opp. to Appeal of Attorney's Fees at n. 3.

DISPOSITION

Hydro violated the employee protection provision of the ERA when it declined to hire Doyle and placed a notice with Equifax that it had denied Doyle access to a nuclear plant.

It is **ORDERED** that Respondent's motions for (1) stay pending judicial review, and (2) leave to file a reply brief in support of motion for stay, are **DENIED**.

It is **ORDERED** that Complainant's motions (1) to strike Respondent's motion for stay, and (2) to expedite final order on merits, are **DENIED**.

It is **ORDERED** that Complainant's motion to supplement the 1996 attorney fee award is **GRANTED**.

It is further **ORDERED** that:

(1) Respondent shall pay Complainant a back pay principal of $218,378.

(2) Respondent shall pay Complainant a front pay principal of $154,695.

(3) Respondent shall pay Complainant prejudgment interest on both front pay and back pay, compounded and posted quarterly, at the rate for underpayment of Federal income taxes, which consists of the Federal short-term rate determined under 26 U.S.C. §6621(b)(3) plus three percentage points, as explained in this decision.

(4) Respondent shall pay Complainant postjudgment interest on both front pay and back pay, compounded and posted quarterly, at the rate for underpayment of Federal income taxes, which consists of the Federal short-term rate determined under 26 U.S.C. §6621(b)(3) plus three percentage points, as explained in this decision.

(5) Respondent shall pay Complainant $45,000 for lost benefits.

(6) Respondent shall pay Complainant $80,000 in compensatory damages;

(7) Respondent shall send a notice to Equifax Corporation correcting Respondent's earlier notice that it had denied Complainant unescorted access to a nuclear plant. Respondent shall expunge from Complainant's personnel records all derogatory and negative information related to the failure to hire him. Respondent shall also provide neutral employment references and shall not divulge any information pertaining to not hiring Complainant or to denying him unescorted access to a nuclear facility, or the reasons for it, when inquiry is made about Complainant by another employer, organization, or individual. Respondent shall post this decision at all its facilities in the United States, in a location accessible to its employees, for a period of 45 days.

(8) Respondent shall pay to Complainant's attorney $259,674.02 in attorney fees and $30,353.45 in costs. We rely upon Complainant's counsel to remit to Complainant the portion of the awarded costs that Complainant incurred directly.

(9) Complainant's counsel shall have 30 days from the date of issuance of this order to submit to this Board a petition for attorney fees and costs incurred in this proceeding since November 15, 1999 (date of 1999 Fee Order). Respondent shall have 30 days from the date of receipt of Complainant's petition to submit a response, if any. No reply to Respondent's Response will be entertained.[25/]

SO ORDERED.

PAUL GREENBERG
Chair

CYNTHIA L. ATTWOOD
Member

[25/] Board Member E. Cooper Brown did not participate in the consideration of this case.