



In the Matter of:

HARRY PETTIT,

ARB CASE NO. 00-053

COMPLAINANT,

ALJ CASE NO. 99-STA-047

v.

DATE: August 27, 2002

**AMERICAN CONCRETE PRODUCTS,
INCORPORATED,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Neil A. Barrick, Esq., *Des Moines, Iowa*

For the Respondent:

Denis Y. Reed, Esq., *Des Moines, Iowa*

FINAL DECISION AND ORDER

This case arises under Section 405, the employee protection provision, of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C. § 31105 (1994), and the implementing regulations found at 29 C.F.R. Part 1978 (1999). On April 14, 1999, the Complainant Harry Pettit (Pettit)¹ filed a complaint under the STAA with the Occupational Safety and Health Administration (OSHA) alleging that the Respondent American Concrete Products, Inc., (American) terminated his employment in retaliation for his refusal to drive a particular truck because of safety concerns. Following an investigation and a ruling against Pettit by OSHA, Pettit requested a hearing before an Administrative Law Judge (ALJ). *See* 29 C.F.R. §§ 1978.102 - 1978.105. The ALJ issued a Recommended Decision and Order (RD&O) on April 27, 2000, in which he found that American had discriminated against Pettit in violation

¹ We have corrected the spelling of the Complainant's last name from "Petit," which appeared in the Recommended Decision and Order of the Administrative Law Judge and the Board's May 3, 2000 briefing order in this case, based on review of the Administrative Law Judge's August 11, 2000 Supplemental Decision and Order awarding attorney's fees and correspondence from the Complainant and his counsel.

of the STAA. The ALJ specifically found that Pettit's refusal to drive the truck assigned to him by American on March 23, 1999, was activity protected under the STAA and that American fired Pettit for that protected activity, on March 24, 1999. RD&O at 3-10. The ALJ ordered American to immediately reinstate Pettit to his former position, and recommended that American be ordered to pay back wages. RD&O at 10-12; *see* 29 C.F.R. § 1978.109(a), (b).

BOARD'S AUTHORITY AND STANDARD OF REVIEW

A. The Board's Authority

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under, *inter alia*, the STAA and the implementing regulations at 29 C.F.R. Part 1978. Secretary's Order 2-96 (Apr. 17, 1996), 61 Fed. Reg. 19978 (May 3, 1996). This case is before the Board pursuant to the automatic review provisions found at 29 C.F.R.

§ 1978.109(a).

B. Standard of Review

Pursuant to Section 1978.109(c)(3) of the implementing regulations, we are bound by the factual findings of the ALJ if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. §1978.109(c)(3); *BSP Transp., Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1063 (5th Cir. 1991).

In reviewing an ALJ's conclusions of law, the Administrative Review Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision . . ." 5 U.S.C. §557(b) (2000); *see* 29 C.F.R. §1978.109(b). The Board accordingly reviews questions of law *de novo*. *See Yellow Freight Systems, Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Roadway Express*, 929 F.2d at 1063.

DISCUSSION

A. The Issues Before the Board

The parties have filed briefs in support of their respective positions. *See* 29 C.F.R. § 1978.109(c)(2). In opposition to the RD&O, American assigns error to the ALJ's factual findings as well as his legal conclusions. American challenges the ALJ's crediting of Pettit's testimony over that of American's dispatcher, Tucker, and the personnel and safety director, Jungbluth, regarding the circumstances leading to Pettit's termination. American also objects to the ALJ's finding that the brakes on the truck assigned to Pettit were faulty, in violation of Department of Transportation (DOT) regulations. In the alternative, American requests that, if the Board adopts the ALJ's liability determination, the case be remanded for a hearing on the issue of damages. In addition to urging that the ALJ's liability decision be adopted by the Board, Pettit urges the Board to expand the remedy recommended by the ALJ. Specifically, Pettit

argues that the remedy should include losses incurred for medical expenses that he asserts would otherwise have been covered by employee benefits had American not terminated his employment on March 24, 1999.

The STAA protects trucking industry employees from actions taken by employers in retaliation for the pursuit of safety issues related to vehicle safety. *See Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987). The STAA covers both the raising of complaints relevant to safety and the refusal to drive vehicles in circumstances that pose a threat to the safety of the employee and/or the public. *Id.* This case involves a protected work refusal. Section 405 of the STAA specifically provides, in relevant part, as follows:

(a) Prohibitions. (1) a person may not discharge any employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because –

* * * *

(B) the employee refuses to operate a vehicle because–

- (i) the operation violates a regulation, standard or order of the United States related to commercial motor vehicle safety or health; or
- (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.

49 U.S.C. §31105(a). In order to prevail under the STAA, Pettit must prove, by a preponderance of the evidence, that American discharged him because he refused to operate the truck on the basis that to do so would violate DOT regulations (or alternatively, because he had a reasonable apprehension of serious injury because of the vehicle’s unsafe condition). Since the Complainant’s version of the circumstances leading to his discharge differs from the Respondent’s version of those events, the Complainant’s ability to prevail turns on the ALJ’s credibility determination.

The Complainant testified that he reported safety defects in the truck he was assigned to drive, and that American’s dispatcher told him to drive the truck despite those defects or “look for another job.” Hearing Transcript (HT) at 75. The Respondent presented testimony indicating that the Complainant refused to drive the truck unless “a laundry list of demands, with just as many comfort issues as legitimate safety concerns,” was met, and quit when his request was denied. Respondent’s Brief at 4-5. The ALJ credited the version of events attested to by the Complainant and found that the Complainant had been terminated from employment for refusing to drive an unsafe vehicle in violation of the STAA. RD&O at 6-10. Before us, the

central issue is whether the ALJ properly chose to credit the evidence in support of the Complainant's position that he was ready and willing to drive a safe truck rather than the evidence in support of the Respondent's position that the Complainant refused to drive the truck assigned because of issues other than vehicle safety.

We have carefully considered the parties' contentions, the ALJ's RD&O, and the evidence of record. Except as specifically modified below, we adopt the ALJ's findings as supported by the record and in accordance with pertinent legal authority.

B. The Merits of the Complaint

The ALJ's findings of fact are supported by substantial evidence on the record considered as a whole and are therefore conclusive. 29 C.F.R. §1978.109(c)(3). Contrary to the Respondent's contentions, the ALJ's credibility determinations are adequately explained, well-supported by the evidence of record, and consistent with relevant legal principles. RD&O at 6-10; HT at 17-19, 30-32, 64 (Pettit), 101-04 (Jungbluth), 119-20, 122-23 (Tucker), 144-46 (Thomas); Complainant's Exh. 3 at 4; 29 C.F.R. §18.613(b); *see* Strong, *McCormick on Evid.* §33 (1999). Similarly, the record evidence provides ample support for the ALJ's determination that the brakes on Truck 215 were defective. HT at 17-19, 31-33, 61, 64 (Pettit), 101-04, 110, 113-14 (Jungbluth), 120-21, 126 (Tucker), 139-40, 145-46, 147-48 (Thomas). The ALJ's further finding that the Complainant refused to drive the truck due to its unsafe condition is also supported by the record. HT at 45-47, 69-78 (Pettit).__

The ALJ's conclusion that this work refusal was protected by the "actual violation" clause of Section 31105(a)(1)(B)(i) is based on proper consideration of DOT regulations and is consistent with the body of case law developed under the STAA. RD&O at 9; *see* 49 C.F.R. §§393.40, 393.52 (1999); *Ass't Sec'y and Freeze v. Consolidated Freightways*, ARB No. 99-030, ALJ No. 98-STA-26, slip op. at 5-6 (ARB Apr. 22, 1999); *Hadley v. Southeast Coop. Serv. Co.*, No. 86-STA-24, slip op. at 2-3 (Sec'y June 28, 1991). As the ALJ stated, the other STAA provision that covers a refusal to drive, Section 31105(a)(1)(B)(ii), is based on the driver's reasonable apprehension of serious personal injury or injury to the public, and protection under that provision is subject to the Section 31105(a)(2) requirement that the driver sought and was unable to obtain correction of the unsafe condition. 49 U.S.C. §31105(a)(1)(B)(ii), (a)(2); RD&O at 6, 9-10.

However, the ALJ's conclusion that the Complainant's request for a safe truck to drive did not meet the obligation to seek correction of the unsafe condition under Section 31105(a)(2) is not consistent with the body of relevant case law. *See Jackson v. Protein Express*, ARB No. 96-194, ALJ No. 95-STA-38, slip op. at 2-4 (ARB Jan. 9, 1997) (complainant's request for repair of truck or another truck to drive met his obligation to seek correction of unsafe condition); *Cleary v. Flint Ink Corp.*, No. 94-STA-52, slip op. at 2-4 (Sec'y Mar. 5, 1996) (discussing different options available to correct unsafe condition arguably posed by hazardous snow storm and liquid cargo); *Williams v. Carretta Trucking*, No. 94-STA-07, slip op. at 6-7 (Sec'y Feb. 15, 1995) (complainant's failure to inspect vehicles and bring any defects to employer's attention precluded protection under reasonable apprehension clause); *see generally*

Yellow Freight Systems, Inc. v. Reich, 38 F.3d 76, 81-85 (2d Cir. 1994) (discussing purpose of Section 31105(a)(2) requirement that complainant seek correction of an unsafe condition). This error is harmless, however, in view of the the ALJ's proper finding that the Complainant qualified for protection under the "actual violation" clause.

The ALJ properly concluded that the Complainant had prevailed on this complaint under the work refusal protections provided by the STAA. RD&O at 4-10; *see Freeze*, slip op. at 7-9.

C. Remedies

We reject the parties' arguments concerning damages, both of which are improperly raised for the first time before the Board. The Complainant raises the issue of medical costs incurred because of the interruption of health insurance coverage that he suggests was provided while he was in the Respondent's employ. Claims for medical costs that had been incurred between the time of the Complainant's termination on March 24, 1999, and the hearing before the ALJ should have been raised and litigated by the Complainant before the ALJ. *See Michaud and Ass't Sec'y v. BSP Transp., Inc.*, ARB No. 97-113, ALJ No. 95-STA-29, slip op. at 7-8 (ARB Oct. 9, 1997). This was not done, *see* RD&O at 12, and the Complainant cannot raise this issue for the first time before the Board. We also note, however, that the ALJ's April 27, 2000 reinstatement order, with which we concur, became effective immediately upon receipt by the Complainant, pursuant to Section 1978.109(b). 29 C.F.R. §1978.109(b); *see Martin v. Yellow Freight Sys., Inc.*, 983 F.2d 1201 (2d Cir. 1993) (rejecting argument that ALJ's reinstatement order was not immediately enforceable pursuant to STAA implementing regulations). The STAA provides that reinstatement entitles the Complainant "to the former position with the same pay and terms and privileges of employment." 49 U.S.C. §31105(b)(3)(A)(ii); *see* 29 C.F.R. § 1978.104(a).

We likewise reject the Respondent's request that the case be remanded for a hearing on the issue of mitigation of the Complainant's damages. Although the Complainant has a duty to mitigate his loss of earnings through the exercise of reasonable diligence to obtain substantially equivalent employment, the burden falls on the Respondent to raise any failure to mitigate such losses as an affirmative defense. *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, -169, ALJ No. 90-ERA-30, slip op. at 21-22 and authorities there cited (ARB Feb. 9, 2001) (under analogous whistleblower provision of the Energy Reorganization Act, 42 U.S.C. §5851). The Respondent failed to pursue this issue before the ALJ and cannot raise it at this stage of adjudication.

CONCLUSION AND ORDER

Accordingly, the ALJ's decision, which is appended, is modified as specified above and is incorporated herein. The Respondent, American Concrete Products, Inc., is **ORDERED** to:

1. Immediately reinstate the Complainant, Harry Pettit, to his former employment with the pay, terms and privileges of employment had his employment with the Respondent not ended on March 24, 1999;

2. Expunge from the Respondent's records any reference to the Complainant's termination on March 24, 1999, and any adverse reference to the Complainant's protected activity;

3. Pay the Complainant back pay for the period beginning March 24, 1999, and continuing until such time as the Respondent extends an unconditional offer of reinstatement to the Complainant; for the period beginning March 24, 1999, through April 28, 2000, that amount totals \$23,088.24; the amount of back pay is to be calculated based on the "work year" period during which the Complainant would have been employed by the Respondent, as designated by the Administrative Law Judge, Recommended Decision and Order at 11, n.2, and is to be reduced by interim earnings from employment earned during the "work year;"

4. Pay interest on all amounts due, at the rate provided at 26 U.S.C. §6621 (2000), to accrue from the dates that each salary payment, minus the applicable interim earnings, would have been paid had the Complainant not been terminated on March 24, 1999;

5. Pay attorney's fees for services rendered through April 27, 2000, in the proceedings before the Administrative Law Judge, in the amount of \$1,937.50, pursuant to the Administrative Law Judge's Supplemental Decision and Order of August 11, 2000.

It is further **ORDERED** that the Complainant shall have 20 days from the date of this Decision and Order to submit to this Board an itemized petition for additional attorney's fees and other litigation expenses incurred on or after April 28, 2000. The Complainant shall serve the petition on the Respondent, who shall have 30 days after issuance of this Decision and Order to file objections to the petition with this Board.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge