



IN THE MATTER OF:

SHERVIS SMITH,

ARB CASE NO. 2022-0041

COMPLAINANT,

ALJ CASE NO. 2021-STA-00028

v.

DATE: April 21, 2023

**AKAL EXPRESS, INC. and
DALSHER SINGH,**

RESPONDENTS.

Appearances:

For the Complainant:

Shervis Smith; *pro se*; Kansas City, Missouri

For the Respondents:

Samantha J. Monsees, Esq.; *Fisher & Phillips, LLP*; Kansas City, Missouri; and Patrick W. Dennison, Esq.; *Fisher & Phillips, LLP*; Pittsburgh, Pennsylvania

**Before PUST, BURRELL, and MILTENBERG Administrative Appeals
Judges**

**DECISION AND ORDER AFFIRMING IN PART, AND VACATING AND
REMANDING IN PART**

PUST, Administrative Appeals Judge:

This case arises under the Surface Transportation Assistance Act of 1982 (STAA) and its implementing regulations.¹ Shervis Smith (Smith) filed a complaint against Akal Express, Inc., (Akal Express) and Dalsher Singh (Singh) (collectively,

¹ 49 U.S.C. § 31105(a); 29 C.F.R. Part 1978 (2022).

Respondents) alleging that they violated the employee protection provisions of the STAA when they constructively terminated his employment.² On November 16, 2021, the Administrative Law Judge (ALJ) issued a Default Decision and Order Against Akal Express, Inc. and Dalsher Singh (Default D. & O.).³ On May 5, 2022, the same ALJ issued an Order Awarding Damages, Fees, and Costs (Order Awarding Damages).⁴ Respondents appealed to the Administrative Review Board (ARB or Board). The Board affirms the ALJ's Default D. & O. and affirms in part, and vacates in part, the ALJ's Order Awarding Damages.

BACKGROUND

Smith worked as a driver for Akal Express between May 2019 and September 2020.⁵ On November 12, 2020, Smith filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondents violated the STAA.⁶ On February 22, 2021, OSHA dismissed the complaint because Smith requested that OSHA terminate its investigation to allow him to request a hearing with the Office of Administrative Law Judges (OALJ).⁷ On April 5, 2021, an ALJ issued and served on the parties a Notice of Assignment and Preliminary Order (Preliminary Order) setting relevant proceeding dates and advising the parties of the consequences of non-appearance.⁸ After Respondents failed to respond to an Order to Show Cause, the ALJ issued the Default D. & O. on November 16, 2021.⁹

The Default D. & O. stated:

Here, Respondents have not complied with the Preliminary Order by failing to provide initial disclosures pursuant to 29 C.F.R. § 18.50, failing to respond to Claimant's interrogatories and requests for production served pursuant 29 C.F.R. §§ 18.60 and 18.61, and failing to confer with Complainant or otherwise participate in the filing of

² *Smith v. Akal Express, Inc.*, ALJ No. 2021-STA-00028, slip op. at 1 (ALJ Nov. 16, 2021) (Default D. & O.).

³ *Id.*

⁴ *Smith v. Akal Express, Inc.*, ALJ No. 2021-STA-00028 (ALJ May 5, 2022) (Order Awarding Damages).

⁵ Proof of Damages and Application for Award of Attorney's Fees and Costs, Exhibit (Ex.) 1.

⁶ Default D. & O. at 1.

⁷ *Id.*

⁸ *Id.* at 2-3.

⁹ *Id.* at 4.

a joint prehearing statement pursuant to 29 C.F.R. § 18.80. Although given an opportunity to do so, Respondents have not provided any explanation for their failure to comply. Respondents' noncompliance has resulted in the denial of Complainant's right to discovery and adjudication of his claims. Accordingly, pursuant to 29 C.F.R. § 18.57(b)(vi), a default decision and order against Respondents is an appropriate sanction.^[10]

The Default D. & O. instructed Smith to file a proof of damages within thirty days and required Respondents to respond to Smith's filing within thirty days.¹¹ Smith filed a Proof of Damages and Application for Award of Attorney's Fees and Costs (Proof of Damages) on December 14, 2021.¹² Respondents did not respond to Smith's Proof of Damages.¹³ Smith filed a Supplement to Complainant's Proof of Damages and Application for Award of Attorney's Fees and Costs (Supplement to Proof of Damages) on April 19, 2022.¹⁴

On May 5, 2022, the ALJ issued the Order Awarding Damages. Respondents appealed to the Board on May 19, 2022.¹⁵ The parties filed several pleadings before the Board, and the Board issued an Order Regarding Pending Motions on January 12, 2023.¹⁶

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to review ALJ decisions under the STAA.¹⁷ The ARB reviews questions of law presented on

¹⁰ *Id.* at 5.

¹¹ *Id.* at 6.

¹² Order Awarding Damages at 3.

¹³ *Id.*

¹⁴ *Id.* n.1.

¹⁵ Respondents' Petition for Review; *Smith v. Akal Express, Inc.*, ARB No. 2022-0041, ALJ No. 2021-STA-00028, slip op. at 1 (ARB May 25, 2022) (Notice of Appeal and Order Establishing Briefing Schedule).

¹⁶ *Smith v. Akal Express, Inc.*, ARB No. 2022-0041, ALJ No. 2021-STA-00028 (ARB Jan. 12, 2023) (Order Regarding Pending Motions) (denying Respondents' Motion to Supplement, granting Complainant's Motion to Strike, and granting Complainant's Counsel's Motion to Withdraw).

¹⁷ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

appeal *de novo* but is bound by the ALJ's factual determinations as long as they are supported by substantial evidence.¹⁸ "The Board reviews the imposition of discovery sanctions under an abuse of discretion standard."¹⁹

DISCUSSION

1. Rules of Practice and Procedure Before OALJ

The Department of Labor's Rules of Practice and Procedure for hearings before the Office of Administrative Law Judges (OALJ's Rules of Practice and Procedure) are found at 29 C.F.R. Part 18.²⁰ The OALJ's Rules of Practice and Procedure, which apply to STAA proceedings, provide that "they should be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding."²¹ The OALJ's Rules of Practice and Procedure permit an ALJ to issue sanctions against parties for failing to comply with a judge's discovery order.²² In such a case, an ALJ may "[r]ender[] a default decision and order against the disobedient party."²³

2. The ALJ Did Not Abuse His Discretion When He Defaulted Respondents

Respondents argue that the ALJ's issuance of a default judgment was improper because Respondents' failure to respond to the ALJ's orders was not willful, in bad faith, or Respondents' fault, "but properly attributable to misunderstanding and mistake, compounded by circumstances beyond the control of [Respondents] caused by [COVID-19]."²⁴ In essence, Respondents argue not that they did not know about the ALJ's orders but instead that they should be allowed to avoid the issued default because they did not understand that they were required to participate in the proceedings and Akal's owner's travel out of the country,

¹⁸ 29 C.F.R. § 1978.110(b); *Stokes v. Albertson's, LLC*, ARB No. 2022-0007, ALJ Nos. 2020-STA-00080, -00082, slip op. at 5 (ARB May 20, 2022) (citation omitted).

¹⁹ *Deepali Company, LLC*, ARB No. 2021-0028, ALJ No. 2017-DBA-00022, slip op. at 3 n.5 (ARB Sept. 20, 2021) (citing *Saporito v. Fla. Power & Light Co.*, ARB Nos. 2009-0009, -0010, ALJ No. 2008-ERA-00014, slip op. at 2 (ARB Feb. 28, 2011); see *Powers v. Pinnacle Airlines, Inc.*, ARB No. 2005-0022, ALJ No. 2004-AIR-00032, slip op. at 10 (ARB Jan. 31, 2006); *Mao v. Nasser*, ARB No. 2006-0121, ALJ No. 2005-LCA-00036, slip op. at 12 (ARB Nov. 26, 2008)).

²⁰ 29 C.F.R. Part 18.

²¹ 29 C.F.R. § 18.10(a).

²² *Id.* § 18.57(b)(1).

²³ *Id.* § 18.57(b)(1)(vi).

²⁴ Revised Brief of Respondents/Petitioners (Resp. Br.) at 12.

compounded by COVID-19 restrictions, prevented Respondents from participating.²⁵

On April 5, 2021, the ALJ issued and served, at the email and postal address provided by Respondents, a Preliminary Order in which Respondents were ordered to file a response within fourteen days of receipt of the “Pleading Complaint.”²⁶ Respondents received the Preliminary Order, as evidenced by the fact that, on May 20, 2021, they untimely filed their response in the form of a letter directed to OALJ denying all wrongdoing.²⁷ Following their untimely response, Respondents did not comply with the discovery provisions in the Preliminary Order. The Preliminary Order directed the parties to participate in discovery immediately, complete discovery within 140 days, and file a Joint Prehearing Statement twenty-one days after the conclusion of discovery.²⁸

Smith served Respondents with interrogatories and requests for production on June 1, 2021.²⁹ Respondents did not comply with Smith’s discovery requests, which resulted in Smith filing a Motion for Entry of Default Judgment on June 1, 2021, a Supplemental Motion on July 29, 2021, and a Second Supplemental Motion on September 14, 2021.³⁰ Smith also filed a Prehearing Statement on September 14, 2021, stating that he was unable to submit a joint prehearing statement in compliance with the Preliminary Order because Respondents had made no effort to participate in the proceedings since May 20, 2021.³¹

Within the terms of the Preliminary Order, the ALJ warned the parties about the potential consequences of noncompliance. Specifically, the ALJ advised the parties that failure to comply with the Preliminary Order could result in the imposition of sanctions including, but not limited to, entry of a default judgment.³²

The record reflects that the Preliminary Order was served on Singh, Akal Express’ general manager and a named respondent in this case, five days before

²⁵ *Id.*; see also Order Regarding Pending Motions at 5-6

²⁶ Default D. & O. at 2.

²⁷ *Id.* at 3. Respondents’ filing was sent to OALJ electronically from “akalexpress@gmail.com.”

²⁸ *Id.* at 2.

²⁹ *Id.* at 3.

³⁰ *Id.* at 3-4.

³¹ *Id.* at 4.

³² *Id.* at 2.

Rajwinder Kaur (Kaur), Akal Express' owner, traveled to India.³³ Respondents previously acknowledged that, during her travels, Kaur was intermittently in contact with Singh regarding the OALJ proceeding.³⁴ Thus, Respondents should have been aware of the OALJ proceedings before Kaur left the country.

Respondents chose not to obtain legal counsel and, instead, relied upon Singh's mistaken belief that OSHA's earlier dismissal had concluded the matter such that the ALJ's orders could be safely ignored.³⁵ As previously addressed in the Order Regarding Pending Motions, "ignorance of the law is neither a sufficient basis for granting equitable tolling nor by itself an independent ground for establishing entitlement."³⁶ Accordingly, the Board finds that Respondents were on notice as to the potential sanctions for failure to comply with the Preliminary Order, including the entry of a default judgment.

On October 7, 2021, the ALJ ordered Respondents to show cause within ten days as to why a default order should not be issued against them.³⁷ Again, Respondents did not respond.³⁸ Consequently, the ALJ issued the Default D. & O. Respondents argue now before the Board that the ALJ erred by issuing the default judgment nearly two months before the conclusion of the twenty-week period in which a hearing would be scheduled in this matter.³⁹

³³ The Preliminary Order was served on Respondents via regular mail and e-mail on April 5, 2021. Order Regarding Pending Motions at 6. Kaur departed the United States on April 10, 2021. *Id.*

³⁴ See *id.*

³⁵ Respondents claim that they believed that "the matter had ended and required no future response from Akal." Resp. Br. 14. Yet on May 20, 2021, Singh filed an untimely response to Smith's complaint with the OALJ. Default D. & O. at 3. Filing a response with the OALJ contradicts Respondents' argument that they believed the matter to be over following the OSHA dismissal. If Respondents thought the matter was truly over, there would have been no reason for Singh to have prepared and filed such a response.

³⁶ Order Regarding Pending Motions at 5 (quoting *Lugg v. Lear Corp.*, ARB No. 2022-0008, ALJ No. 2021-SOX-00022, slip op. at 7 (ARB May 19, 2022); *Tardy v. Delta Air Lines*, ARB No. 2016-0077, ALJ No. 2015-AIR-00026, slip op. at 5 (ARB Oct. 5, 2017)).

³⁷ Default D. & O. at 4. The Preliminary Order was served on Respondents via regular mail and e-mail. The Preliminary Order served via regular mail was addressed to Akal Express, Inc. and sent to 12337 S. Summertree Circle, Olathe, KS 66062. The Preliminary Order served via e-mail was addressed to Singh and sent to dalsher@akalexpress.com. *Id.* at 3.

³⁸ *Id.* at 4.

³⁹ Resp. Br. at 15-16; within the joint prehearing statement, the parties were required to include a listing of any period during the subsequent twenty-weeks in which they were "unavailable for hearing due to previously scheduled judicial proceedings or other good cause shown." Default D. & O. at 2.

The Board generally does not consider arguments raised for the first time on appeal.⁴⁰ Even if considered, Respondents' argument fails to recognize that discovery was required to be completed by August 23, 2021, and a Joint Prehearing Statement was to be filed by September 13, 2021. Therefore, even if the hearing was intended to be scheduled sometime in December 2021, Respondents did not comply with the ALJ's discovery instructions, file a pre-hearing statement, or respond to the ALJ's Show Cause Order—all of which were independently sufficient grounds for the issuance of sanctions.

The Board has consistently supported an ALJ's authority to enforce prehearing orders and issue sanctions to deter parties from disregarding these orders.⁴¹ Discovery sanctions must be available to an ALJ when parties flagrantly fail to comply. "To hold otherwise would render the discovery process meaningless and vitiate an ALJ's duty to conclude cases fairly and expeditiously."⁴²

As set forth above, the ALJ gave Respondents adequate opportunity to comply with his orders. Respondents chose to ignore the ALJ's orders, and they did so at their peril and at the risk of having a default decision entered against them. When the ALJ issued the Default D. & O., the ALJ acted in a manner consistent with the regulations. Accordingly, the ALJ did not abuse his discretion when he defaulted Respondents.

3. The ALJ Did Not Err by Issuing the Order Awarding Damages but Erred in Considering Smith's Supplement to Proof of Damages

The STAA provides that, when a violation of the employee protection provisions occurs, the ALJ shall issue an order that will require, where appropriate:

[A]ffirmative action to abate the violation; reinstatement of the complainant to his or her former position with the

⁴⁰ *Budri v. Firstfleet, Inc.*, ARB No. 2018-0055, ALJ No. 2018-STA-00033, slip op. at 3 n.6 (Mar. 25, 2019) (citing *Seehusen v. Mayo Clinic*, ARB No. 2012-0047, ALJ No. 2011-STA-00018, slip op. at 4 (ARB Sept. 11, 2013) (citation omitted)).

⁴¹ *See Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Moonwalks for Fun, Inc.*, ARB No. 2013-0027, ALJ No. 2012-CLA-00008, slip op. at 5 (ARB May 19, 2014); *Sisfontes v. Kuchana*, ARB Nos. 2007-0107, -0114, ALJ No. 2007-LCA-0014, slip op. at 7-9 (ARB Aug. 31, 2009); *but see Matthews v. LaBarge, Inc.*, ARB No. 2008-0038, ALJ No. 2007-SOX-00056, slip op. at 3 (ARB Nov. 26, 2008) (stating that "dismissing a complaint for failure to comply with an ALJ's order is a 'very severe penalty to be assessed in only the most extreme cases.'").

⁴² *Sisfontes*, ARB Nos. 2007-0107, -0114, slip op. at 8 (citing *Supervan, Inc.*, ARB No. 2000-0008, ALJ No. 1994-SCA-00047, slip op. at 6).

same compensation, terms, conditions, and privileges of the complainant's employment; payment of compensatory damages (backpay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees which the complainant may have incurred); and payment of punitive damages up to \$250,000.^[43]

In the Default D. & O., the ALJ instructed Smith to file a proof of damages within thirty days and required Respondents to respond within thirty days of Smith's filing.⁴⁴ Smith timely filed the Proof of Damages; Respondents did not respond.⁴⁵ Smith subsequently filed a Supplement to Proof of Damages on April 19, 2022.⁴⁶ The ALJ issued an Order Awarding Damages on May 5, 2022, ordering Respondents to pay Smith: (1) back pay in the amount of \$49,750.00, pre-judgment interest in the amount of \$2,063.00, and post-judgment interest on the foregoing sums; (2) compensatory damages in the amount of \$50,000.00; (3) punitive damages in the amount of \$25,000.00; and (4) attorney's fees in the amount of \$26,720.00 and costs in the amount of \$252.32.⁴⁷

Respondents aver that the ALJ erred by issuing the Order Awarding Damages.⁴⁸ Respondents also contend that Smith's counsel's billing rate is

⁴³ 29 C.F.R. § 1978.109(d)(1).

⁴⁴ Default D. & O. at 6.

⁴⁵ Order Awarding Damages at 3. In support of his Proof of Damages, Smith submitted the following exhibits: Ex. 1 "Declaration of Shervis Ramar Smith;" Ex. 1A "New Employment pay history from April 5, 2021 to November 19, 2021;" Ex. 2 "Declaration of Garrett M. Hodes;" Ex. 2A "Professional Biography;" Ex. 2B "Attorney Time Detail;" Ex. 2C "Costs, Expenses and Advance Detail;" Ex. 2D "2021 Billing Rates for Kansas City, Missouri;" Ex. 2E "Freedom of Information Act ('FOIA') Request Control Number: FMCS-2022-00420;" Ex. 3 "Federal Motor Carrier Safety Administration ('FMCSA') records in response to FOIA request;" Ex. 4 "FMCSA enforcement actions against Respondents (2016-2022);" Ex. 5 "Respondent's Safety Measurement System Report from FMCSA."

⁴⁶ *Id.* n.1. In support of his Supplement to Proof of Damages, Smith submitted the following exhibits: Ex. 6 "Respondent's 2021 for Profit Corporation Annual Report filed with the Kansas Secretary of State on April 6, 2022;" Ex. 7 "Petition for Damages, *Oumar v. Akal Express, Inc.*, et al., No. 21CV03178 (Kan. 10th Jud. Dist. Ct. July 14, 2021);" Ex. 8 "Journal Entry, *Oumar v. Akal Express, Inc.*, et al., No. 21CV03178 (Kan. 10th Jud. Dist. Ct. Dec. 16, 2021);" and Ex. 9 "Civil Case History, *Oumar v. Akal Express, Inc.*, et al., No. 21CV03178 (Kan. 10th Jud. Dist. Ct.)."

⁴⁷ *Id.* at 10-11.

⁴⁸ Resp. Br. at 16-26.

excessive⁴⁹ and “block-billed and contains numerous hours that are excessive, redundant, or otherwise unnecessary,”⁵⁰ and that Smith is not entitled to back pay,⁵¹ compensatory damages,⁵² or punitive damages.⁵³

As previously noted, the Board generally does not consider arguments raised for the first time on appeal.⁵⁴ Even though the Board will not consider Respondents’ new arguments on appeal, the ALJ’s factual determinations must still be supported by substantial evidence.⁵⁵ Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. [T]he threshold for such evidentiary sufficiency is not high.”⁵⁶ “The substantial evidence standard ‘limits the reviewing court from deciding the facts anew, making credibility determinations, or re-weighing the evidence.’”⁵⁷ The ALJ’s decision must be upheld if substantial evidence supports the ALJ’s conclusion “even if it is ‘possible that a reasonable mind could have come to a different finding.’”⁵⁸

A. Attorney’s Fees and Costs

A prevailing STAA complainant is entitled to be reimbursed for litigation costs, including attorney’s fees.⁵⁹ The starting point is the “lodestar” method of multiplying a reasonable number of hours by a reasonable hourly rate.⁶⁰ The party seeking attorney’s fees “must submit ‘adequate evidence concerning a reasonable

⁴⁹ *Id.* at 17-19.

⁵⁰ *Id.* at 19-22.

⁵¹ *Id.* at 22-24.

⁵² *Id.* at 24-25.

⁵³ *Id.* at 25-26.

⁵⁴ *Budri*, ARB No. 2018-0055, slip op. at 3 n.6 (citing *Seehusen*, ARB No. 2012-0047, ALJ No. 2011-STA-00018, slip op. at 4 (citation omitted)).

⁵⁵ 29 C.F.R. § 1978.110(b).

⁵⁶ *Neely v. The Boeing Co.*, ARB No. 2020-0071, ALJ No. 2018-AIR-00019, slip op. at 9 (ARB May 19, 2022) (quoting *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (quotations and citations omitted)).

⁵⁷ *Id.* (quoting *Stone & Webster Const., Inc. v. U.S. Dep’t of Labor*, 684 F.3d 1127, 1133 (11th Cir. 2012) (internal quotation omitted) (citation omitted)).

⁵⁸ *Id.* (quoting *Clem v. Comput. Scis. Corp.*, ARB No. 2020-0025, ALJ Nos. 2015-ERA-00003, -00004, slip op. at 17 (ARB Mar. 10, 2021)).

⁵⁹ 49 U.S.C. § 31105(b)(3)(B).

⁶⁰ *Simpson v. Equity Transp. Co.*, ARB No. 2019-0010, ALJ No. 2017-STA-00076, slip op. at 16 (ARB May 13, 2020) (citing *Jackson v. Butler & Co.*, ARB Nos. 2003-0116, -0144, ALJ No. 2003-STA-00026, slip op. at 10-11 (ARB Aug. 31, 2004)).

hourly fee for the type of work the attorney performed and consistent [with] practice in the local geographic area,' as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs.”⁶¹

The ALJ awarded Smith’s attorney \$26,720.00 in fees and \$252.32 in costs in connection with litigation of the case before the OALJ.⁶² The ALJ relied upon Smith’s Proof of Damages, which contained a declaration from Smith’s attorney, a detailed narrative of his professional qualifications, median and mean rates for attorneys in Kansas City, an itemized billing statement listing time spent performing various tasks, and an itemized billing statement listing costs for online research, postage, and court databases.⁶³ Accordingly, substantial evidence supports the ALJ’s award for attorney’s fees and costs and the Board affirms that award.

B. Back Pay

A prevailing complainant is entitled to an award of back pay, which includes pre-judgment and post-judgment interest on the award.⁶⁴ Back pay is awarded from the date of the retaliatory discharge. Back pay liability ends when the employer makes a bona fide, unconditional offer of reinstatement, or the employee gains comparable employment.⁶⁵ A STAA complainant has a duty to exercise reasonable diligence to mitigate back pay damages.⁶⁶

The ALJ calculated that Smith was entitled to back pay in the amount of \$49,750.00, pre-judgment interest in the amount of \$2,063.00, and post-judgment interest.⁶⁷ The ALJ relied upon Smith’s Proof of Damages, which contained a declaration from Smith and a post-Akal employment pay history, which established that Smith had an average weekly wage of \$1,750 and began new employment on

⁶¹ *Id.* (quoting *Gutierrez v. Regents, Univ. of Cal.*, ARB No. 1999-0116, ALJ No. 1998-ERA-00019, slip op. at 11 (ARB Nov. 13, 2002) (internal quotations and citations omitted)).

⁶² Order Awarding Damages at 10.

⁶³ *Id.*; Proof of Damages, Exs. 2, 2A, 2B, 2D.

⁶⁴ 49 U.S.C. § 31105(b)(3)(A)(iii); 29 C.F.R. § 1978.109(d)(1).

⁶⁵ *See Simpson*, ARB No. 2019-0010, ALJ No. 2017-STA-00076, slip op. at 15 (holding employer’s back pay obligation ended when the former employee found comparable employment).

⁶⁶ *Rudolph v. Nat’l R.R. Passenger Corp.*, ARB Nos. 2014-0053, -0056, ALJ No. 2009-FRS-00015, slip op. at 13 (ARB Apr. 5, 2016) (citing *Abdur-Rahman v. DeKalb Cnty.*, ARB Nos. 2012-0064, -0067, ALJ No. 2006-WPC-00002, slip op. at 4 (ARB Oct. 9, 2014); *Johnson v. Roadway Express, Inc.*, ARB No. 1999-0111, ALJ No. 1999-STA-00005, slip op. at 14 (ARB Mar. 29, 2000)).

⁶⁷ Order Awarding Damages at 5.

April 5, 2021.⁶⁸ Thus, substantial evidence supports the ALJ's award for back pay and the Board affirms that award.

C. Additional Compensatory Damages

A successful complainant is also entitled to compensatory damages.⁶⁹ Compensatory damages are designed to compensate complainants not only for direct pecuniary loss but also for harms such as loss of reputation, personal humiliation, mental anguish, and emotional distress.⁷⁰ The ALJ awarded Smith \$50,000.00 in compensatory damages, finding that Smith suffered from emotional distress, anxiety, humiliation, anger, and reputational loss due to Respondents' actions.⁷¹ The ALJ relied upon Smith's Proof of Damages, which contained a declaration from Smith.⁷² While Smith did not support his claim with supporting medical or professional evidence, no other evidence was offered to the ALJ. The Board has affirmed reasonable compensatory awards based solely on the employee's testimony in the past.⁷³ Therefore, substantial evidence supports the ALJ's award for compensatory damages and the Board affirms that award.

D. Punitive Damages

Relief may also include punitive damages in an amount not to exceed \$250,000.00.⁷⁴ "Punitive damages are warranted where there has been 'reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law.'"⁷⁵

⁶⁸ *Id.*; Proof of Damages, Exs. 1, 1A.

⁶⁹ 49 U.S.C. § 31105(b)(3)(A)(iii).

⁷⁰ *Smith v. Lake City Enterprises, Inc.*, ARB Nos. 2008-0091, 2009-0033, ALJ No. 2006-STA-00032, slip op. at 11 (ARB Sept. 24, 2010) (reissued Sept. 28, 2010).

⁷¹ Order Awarding Damages at 5-8. "To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm." *Simpson*, ARB No. 2019-0010, slip op. at 15 (quoting *Evans v. Miami Valley Hosp.*, ARB Nos. 2007-0118, -0121, ALJ No. 2006-AIR-00022, slip op. at 20 (ARB June 30, 2009)).

⁷² Order Awarding Damages at 6-8; Proof of Damages, Ex. 1.

⁷³ See *Simpson*, ARB No. 2019-0010, slip op. at 15; *Barnum v. J.D.C. Logistics, Inc.*, ARB No. 2008-0030, ALJ No. 2008-STA-00006 slip op. at 7 (ARB Feb. 27, 2009) (citing *Hobson v. Combined Transp., Inc.*, ARB Nos. 2006-0016, -0053, ALJ No. 2005-STA-00035, slip op. at 8, 9 n.36. (ARB Jan. 31, 2008)).

⁷⁴ 49 U.S.C. § 31105(b)(3)(C).

⁷⁵ *Simpson v. Equity Transp. Co.*, ARB No. 2019-0010, ALJ No. 2017-STA-00076, slip op. at 15-16 (ARB May 13, 2020) (quoting *Smith v. Wade*, 461 U.S. 30, 51 (1983)).

The ALJ found that punitive damages were warranted in order to deter similar future actions and to serve as punishment for actions taken by Respondents.⁷⁶ The ALJ determined that \$25,000.00 in punitive damages was appropriate based on Smith's Proof of Damages and Supplement to Proof of Damages, as supported by a FOIA request to the FMCSA,⁷⁷ FMCSA records and safety reports,⁷⁸ FMCSA enforcement actions against Respondents,⁷⁹ a petition for damages involving Respondents in a Kansas District Court Case titled *Oumar v. Akal Express Inc.*,⁸⁰ a journal entry from *Oumar v. Akal Express Inc.*,⁸¹ and a civil case history of *Oumar v. Akal Express Inc.*, plus other awards in similar cases.⁸²

Although Smith may be entitled to punitive damages, the Board finds that the ALJ erred in considering Smith's Supplement to Proof of Damages in making this determination. Smith was directed to file a proof of damages within thirty days of the Default D. & O.⁸³ Smith timely filed his Proof of Damages on December 14, 2021.⁸⁴ However, Smith untimely filed a Supplement to Proof of Damages more than three months after the Default D. & O.'s filing deadlines.⁸⁵ The OALJ's Rules of Practice and Procedure require a party to file a motion to reopen the record promptly after additional evidence is discovered.⁸⁶ Additionally, if the record is reopened the other party must be provided an opportunity to offer responsive evidence.⁸⁷ Smith did not file a motion to reopen the record or argue that the new

⁷⁶ Order Awarding Damages at 9.

⁷⁷ *Id.*; Proof of Damages, Ex. 2E.

⁷⁸ Order Awarding Damages at 9; Proof of Damages, Exs. 3, 5.

⁷⁹ Order Awarding Damages at 9, Proof of Damages, Ex. 4.

⁸⁰ Order Awarding Damages at 9; Supplement to Proof of Damages, Ex. 7.

⁸¹ Order Awarding Damages at 9; Supplement to Proof of Damages, Ex. 8.

⁸² Order Awarding Damages at 9; Supplement to Proof of Damages, Ex. 9.

⁸³ Default D. & O. at 6.

⁸⁴ Order Awarding Damages at 3.

⁸⁵ Respondents were given thirty days to respond to Smith's Proof of Damages. Following these thirty days, the record should have closed absent good cause. Default D. & O. at 6.

⁸⁶ 29 C.F.R. § 18.90(b)(1).

⁸⁷ *Id.* § 18.90(b)(2). The record reflects that Respondents were also deprived of an opportunity to respond to Smith's Supplement to Proof of Damages. The Board has held that "[i]t is unfair to consider an argument to which [a party] has been given no opportunity to respond." *Palisades Urban Renewal Enterprises, LLP*, ARB No. 2007-0124, ALJ No. 2006-DBA-00001, slip op. at 8 n.44 (ARB July 30, 2009) (quoting *United States v. Ford Motor Co.*, 463 F.3d 1267, 1277 (Fed. Cir. 2006)). See *Erickson v. U.S. EPA*, ARB No. 1999-0095, ALJ No. 1999-CAA-00002, slip op. at 6 (ARB July 31, 2001) (holding that "the other

exhibits he sought to introduce for consideration were not discoverable with reasonable diligence before the Default D. & O.'s filing deadlines. Thus, the ALJ should not have accepted the Supplement to Proof of Damages after the Default D. & O.'s filing deadlines and should not have considered it when assessing punitive damages.

Therefore, the Board vacates the ALJ's punitive damages award. The Board remands this case to the ALJ to reassess the punitive damages award by considering only arguments and evidence from Smith's initial Proof of Damages.⁸⁸

CONCLUSION

For the foregoing reasons, the Board **AFFIRMS** the ALJ's Default D. & O., and **AFFRIMS** in part, and **VACATES** and **REMANDS** in part, the ALJ's Order Awarding Damages for further proceedings consistent with this decision.

SO ORDERED.



TAMMY L. PUST
Administrative Appeals Judge



THOMAS H. BURRELL
Administrative Appeals Judge



NED I. MILTENBERG
Administrative Appeals Judge

party must be given adequate opportunity to respond in some manner" to arguments raised for the first time in reply briefs). *See also Amazon.com, Inc. v. ZitoVault, LLC*, 754 F. App'x 965, 972 (Fed. Cir. 2018); *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1278 (10th Cir. 1994). Although the Board recognizes that it is unlikely that Respondents would have responded to the Supplement to Proof of Damages if they were provided the opportunity given that they did not participate in the OALJ proceedings since May 20, 2021, a hypothesized outcome cannot substitute for Respondents' actual opportunity to defend themselves.

⁸⁸ The Board acknowledges the possibility that the ALJ may, on remand, arrive at the same conclusion and award Smith punitive damages in the amount of \$25,000.00.