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Issue Date: 23 August 2017

In the Matter of
CHUCK A. BAILEY
Complainant

v. Case No **2017 STA 00004**

PATRICK TRENTELMAN TRUCKING
Respondent

Paul Taylor, Esquire
For Complainant
C. Wade Pierce, Esquire
For Respondent

DECISION AND ORDER

AWARD OF DAMAGES

This case came to hearing under the Surface Transportation Assistance Act, hereinafter "STAA," or 49 U.S.C. §31105, May 16, 2017 in Memphis, Tennessee. At that time, I entered two joint exhibits, "JX" 1 and JX 2; six Complainant's exhibits, "CX" 1 to CX 6 and six Respondent's exhibits, "RX" A through RX G. Kristen Bailey and the Complainant testified as did Patrick Trentelman and Donald Pennell for Respondent.

Post hearing, both of the parties filed proposed findings of fact and briefs.

LAW AND REGULATIONS

To prevail under the STAA, Complainant must prove by a preponderance of the evidence that he (1) engaged in protected activity, (2) that the employer was aware of the activity, (3) that there was an adverse employment action taken against the complainant, and (4) that there was a causal connection between the protected activity and the adverse employment action. ***Clarke v. Navajo Express, Inc***., ARB No. 09-114, ALJ No. 2009-STA-18, slip op. at 4 (ARB June 29, 2011).

If the Complainant meets his prima facie burden, the Respondent may avoid liability if it can demonstrate by clear and convincing evidence that it would have taken the same adverse action in any event. 49 U.S.C. § 42121(b)(2)(B)(iv); ***Clarke***, ARB No. 09-114, *slip op*. at 4.

An employee engages in protected activity when he refuses to drive because the operation of a vehicle would violate "a regulation, standard, or order of the United States related to commercial motor vehicle safety, health or security." 49 U.S.C. § 31105(a)(1)(B)(i); 29 C.F.R. § 1978.102(c)(1)(i). A refusal to drive constitutes a protected activity when "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition." 49 U.S.C. § 31105(a)(1)(B)(ii); 29 C.F.R. § 1978.102(c)(1)(ii). Complaints made internally, to a company hotline or a supervisor, constitute protected activity under the STAA. ***Williams v. Domino's Pizza***, ARB No. 09-092, ALJ No. 2008-STA-052, slip op at 7 (ARB Jan. 31, 2011).

FINDINGS OF FACT

A review of the competing proposed findings shows that there are only a few items in dispute. I re-state the proposed finding submitted by Complainant:

1. Complainant Chuck Anthony Bailey lives at 21 Deer Run Drive, Poplar Bluff, MO 63901 (TR 113-114). Complainant attended truck-driving school and holds a Missouri commercial driver's license. He has worked intermittently as a commercial driver for 8 years operating tractor-trailer sets and dump trucks hauling rock, gravel, and sand. Complainant has not had a DOT chargeable accident while operating a commercial vehicle (TR 115-116, 162).

2. Patrick Trentelman is a truck driver and holds a commercial driver's license (TR 12-13). Mr. Trentelman was issued authority to operate as a motor carrier by the Federal Motor Carrier Safety Administration, and transacts business as "Trentelman Trucking." (TR 12-13). His business hauls sand, gravel and other product to construction sites (TR 14, 47).

3. Complainant was employed as a truck driver for Mr. Trentelman from April 26, 2015 to June 1, 2015, and from September 21, 2015 to January 4, 2016 (TR 16, 55, 117-118).

4. Mr. Trentelman's drivers do not work every day. The busiest time for his work is from June through December. He usually keeps all of his drivers working during this time frame. After January, his work slows down (TR 47-48). During the slower times, Mr. Trentelman keeps working as a driver and another driver, Donald Pinnell typically works as well (TR 48). Sometimes other drivers work as well during the winter (TR 185-186).

5. Respondent operated seven trucks while Complainant worked there (TR 47). The trucks were a blue Freightliner, a blue and white Peterbilt, a white Mack, a gold Peterbilt, a red Peterbilt, a truck operated by Mr. Trentelman, and a truck assigned to Donald Pinnell (TR 16-17, 118).

6. On August 17, 2015, law enforcement placed the blue and white Peterbilt truck out of service due to defects including an air pressure loss (TR 34, 132; CX-5; CX-6). Air

pressure loss is caused by leaks in the brake system. When a driver depresses the brake pedal, air is sent through hoses to push rods which push brake shoes against a drum. A loss of air pressure will cause emergency brakes to engage (TR 36-37). If this happens at highway speeds, a roll over can result if the brakes are not properly adjusted (TR 37).

7. Brakes need to be adjusted periodically. Mr. Trentelman [allegedly] understands that a person servicing or inspecting brake parts must have legal qualifications to do so (TR 38-39).

8. If a brake is adjusted too tightly it will stick. If a brake is sticking on one side of a truck, the vehicle will not track properly resulting in unsafe operation. If a brake sticks due to improper adjustment, it creates friction resulting in heat. When brakes overheat there is danger of brake fade (failure) because the heat increases the circumference of the brake drum making it more difficult for the brake shoe to touch the drum (TR 38-39, 42).

9. On June 1, 2015 Complainant negligently caused damage when he allowed a dump bed to impact a paver while performing work at Pace Construction. (TR 57-58, 118-119). [Respondent relates a different version. See below.]

10. Complainant quit his job with Mr. Trentelman on June 1, 2015 to work for Cornell Trucking. Complainant left Cornell Trucking because the truck he operated broke down frequently which made it difficult for him to earn wages (TR 107, 117-118).

11. In mid-September 2015, Complainant asked Mr. Trentelman to allow him to come back to work for him (TR 59-60; RX-D, p. 14). At that time Complainant told Mr. Trentelman that "there was too many issues with the truck that he was driving" for another employer, Blake Blue, "and he couldn't deal with it no more. So, he walked away from the job that morning." (TR 60-61; RX-D, pp. 15-17).

12. Complainant was rehired by Mr. Trentelman on September 21, 2015 (TR 118).

13. On September 24, 2015, Complainant sent a text message to Mr. Trentelman informing him that he was ill and would probably seek medical advice (TR 120; RX-D, p. 26). Complainant felt ill and did not believe that it was safe for him to operate a commercial vehicle. He missed work for several days due to illness (TR 120-121). Complainant was never disciplined for absenteeism by Trentelman Trucking (TR 44, 121-122).

14. On October 6, 2015, Complainant sent a text message to Mr. Trentelman indicating that he would be late to work due to a court appearance (TR 121; RX-D, p. 28). Mr. Trentelman did not discipline Complainant for being late to work (TR 44-45, 119-120).

15. On October 20, 2015, Complainant discovered that his assigned truck was low on oil. He added oil but forgot to put the oil cap on. Later during the day, he observed that oil pressure was low. He pulled the truck over and observed oil on the engine and the engine compartment. He reported this to Mr. Trentelman to inform him of the mistake. Complainant had a shop add oil and wash the truck. Complainant paid for the truck wash (TR 122-123).

16. Complainant cleaned the engine and engine compartment of the blue and white Peterbilt with a pressure washer on October 23, 2015 (TR 169-170, 172). After the truck was put back into service, Complainant observed that the truck had low oil pressure and observed an oil leak at the front of the engine. Mr. Trentelman told him to take the truck to a shop in Neelyville, MO to have it inspected (TR 123-124, 170-171). Complainant was informed later by a mechanic that Mr. Trentelman did not authorize repair of the oil leak (TR 171).

17. On November 12, 2015, Complainant sent a text message to Mr. Trentelman to ask if he would be required to work the next day and if he could have the following Monday off work (TR 124; RX-D, p. 43). Complainant wanted time off to go deer hunting (TR 125). Mr. Trentelman responded that he needed "load tickets" for loads Complainant had hauled that week.

18. Complainant had not left the load tickets in his assigned truck (TR 125-126; RX-D, p. 44-45). Complainant brought the load tickets to Mr. Trentelman before he left to go deer hunting. Mr. Trentelman did not discipline Complainant for this incident (TR 126-127).

19. For a two-week period in December 2015, Mr. Trentelman's trucks were hauling to BioKyowa, as a contractor for R.L. Persons Construction (TR 70-71, 79). On several occasions Complainant had a passenger with him at BioKyowa, in violation of its rules (TR 77). The passenger was a friend of Mr. and Mrs. Bailey. She accompanied Complainant with the knowledge of Mrs. Bailey and Mr. Trentelman (TR 71-72, 77, 104-105, 127-128).

20. BioKyowa did not allow the use of tobacco products on the work site. It was reported to Mr. Trentelman that Complainant had used tobacco at the delivery point (TR 71-72). Complainant denies using tobacco at BioKyowa (TR 129). Mr. Trentelman issued no written discipline to Complainant for using tobacco at BioKyowa (TR 45-46).

21. On December 17, 2015 while Complainant was at BioKyowa, Mr. Trentelman told Complainant that there was material stuck to the asphalt lip on the red Peterbilt that needed to be cleared off (TR 76, 129). The asphalt lip is a piece of metal along the bottom of the truck bed that prevents all the asphalt from going in front of the paver (TR 72, 131).

22. The asphalt build-up resulted because an air ram that lifts the tailgate broke. This resulted in an air leak (TR 74-75). Mr. Trentelman observed the defect and disarmed the valve that powered the lift gate and cleaned off the asphalt lip. This allowed the air brakes to function properly by eliminating the air leak (TR 75-76). Mr. Trentelman did not discipline Complainant for failing to keep the asphalt lip clear on his assigned truck (TR 131).

23. In December 2015, Complainant was operating the Peterbilt truck when he heard a loud noise indicating an air leak. He tried to maintain air pressure in order to keep the brakes operating. He pulled the truck over and located the air leak, which he reported to Mr. Trentelman. Complainant and Mr. Trentelman tried to correct the air leak (TR 132-133). Mr. Trentelman told Complainant to replace a valve on the air gate but that did not fix the defect. The truck still had an air leak after Complainant replaced the valve (TR 68-69, 134).

24. Complainant's last day of work for Mr. Trentelman was December 18, 2015. On that day Complainant hauled dirt at BioKyowa (TR 78). Mr. Trentelman's drivers never work between Christmas and New Year's Day (TR 79).

25. On or about December 30, 2015, Mr. Trentelman called Complainant and told him that he had work for him to perform hauling product for flood control levees in Caruthersville, MO and Perryville, MO (TR 49-50, 160). Mr. Trentelman told Complainant that he would have to operate the blue and white Peterbilt. Mr. Trentelman told Complainant that the brakes were "sticking" on the blue and white Peterbilt truck and to make sure the brakes were not stuck (TR 135-136, 151-152).

26. In response to Mr. Trentelman's instruction to operate the blue and white Peterbilt truck on December 30, 2016, Complainant told Mr. Trentelman that he did not feel safe operating the truck if the brakes were sticking on it (TR 135-136). Complainant asked to operate the red Peterbilt truck, offering to repair the broken tailgate ram first (TR 90). Mr. Trentelman told Complainant that there was no truck he could drive except the blue and white Peterbilt, and that he would "understand if you don't want to drive it." (TR 136).

27. [Allegedly] when trucks sit for a month, the brakes can stick due to moisture (TR 186). When Donald Pinnell, another driver for Trentelman Trucking encounters such a condition he normally adjusts the brakes himself with a 9/16" wrench (TR 186, 194)

28. Mr. Pinnell has not successfully completed a government sponsored or approved programs that qualifies him to perform brake service or inspections. Nor does he have a certificate from a state or Canadian province qualifying him to perform brake service and inspection tasks. He has not had brake-related training consisting of participation in a training program sponsored by a brake or vehicle manufacturer, or similar training program designed to train students in brake maintenance or inspections (TR 194-195).

29. Mr. Pinnell is not aware of any Department of Transportation regulation that requires him to have special qualifications and training to adjust brakes. He was trained to perform brake adjustments by another driver (TR 195).

30. Complainant [allegedly] did not feel safe operating the blue and white Peterbilt because it had brakes that were sticking which could cause brake fade. He was also concerned that his brakes could lock up due to a loss of air pressure, resulting in loss of a tire, or upset due to skidding, or heat due to friction, which might result in a wheel fire. Complainant was also concerned that the brakes on the truck needed to be adjusted (TR 136-139).

31. Complainant is not certified or qualified to adjust brakes (TR 204-205). The trucks operated by Trentelman Trucking take abuse hauling into construction sites, which can cause brakes to become out of adjustment (TR 182, 192-193).

32. At 4:52 p.m. on January 3, 2016, Complainant sent a text message to Mr. Trentelman stating that he did not feel safe operating the blue and white Peterbilt. Complainant asked to operate the red Peterbilt (JX-1, p. 1; TR 23, 140-142) Mr. Trentelman responded with a text message at 4:54 p.m. stating, "There is nothi g [sic] wrong with brakes you can drive it or dont [sic] drive at all" (JX-1, p. 1; TR 24, 140-141).

33. On January 3, 2016, the red Peterbilt needed to have a cylinder for the dump gate repaired or replaced. Complainant believed he could make the repair (TR 141). In asking to operate the red Peterbilt Complainant was seeking to operate a truck that complied with commercial vehicle safety regulations (TR 142).

34. At 4:59 p.m. on January 3, 2016, Mr. Trentelman sent Complainant a message stating, "Im not going to pass on a day of hauling because you think the only truck you can drive is the red one we already missed o [sic]?" (JX-1, p. 2; TR 24, 142-143). The red Peterbilt is better equipped than the blue and white Peterbilt (TR 53, 160-161). Complainant preferred driving the red Peterbilt because he felt safe driving it (TR 149, 160-161).

35. On January 3, 2016, the blue and white Peterbilt had been sitting for more than one month (TR 51). When trucks sit, brake shoes will stick to the drums due to rust (TR 52). Mr. Trentelman loosens brake shoes from the drum by rocking the truck (TR 52).

36. No truck other than the blue and white Peterbilt was available for Complainant to operate on January 4, 2016, except one that he was not qualified to operate (TR 24, 54-55).

37. At 5:09 a.m. on January 4, 2016, Mr. Trentelman received a message from Complainant stating, "Pat I'm sorry, thought about it all night I don't feel safe driving that truck or the blue Freightliner I don't feel safe in them. I hope you can respect my

decision and not let me go." (JX-1, p.3; TR 24-25, 143). Mr. Trentelman understood that Complainant was refusing to drive the blue and white Peterbilt because he believed it was not safe to do so (TR 19).

38. At 5:12 a.m. on January 4, 2016, Mr. Trentelman sent a message to Complainant stating, "Dont worry about it I will find someone to drive bring my credit card back to me today after work." (JX-1, p. 4; TR 25, 144). Complainant believed that he was fired (TR 144).

39. On the evening of January 4, 2016, Complainant sent Mr. Trentelman a text message stating that he would return the credit card when he came to the terminal to recover his personal effects. The text message also stated, "Can't believe you fired me because I felt a truck was unsafe Pat." (JX-1, p. 5; TR 28, 144). Mr. Trentelman replied stating, "They were safe when you drove th [sic] this summer nothing changed." (TR 29; JX-1, p. 5-6)

40. Complainant returned the credit card to Respondent on January 8, 2016 (TR 85). The credit card was used to pay for fuel and maintenance (TR 81-82, 188). When Complainant returned the credit card Respondent understood that Complainant no longer worked for him (TR 89). Mr. Trentelman did not ask drivers who worked in January 2016 to turn in credit cards (TR 89). When Mr. Pinnell was off work he did not turn in his credit card (TR 188).

41. Mr. Trentelman had no other drivers to perform the work he had assigned to Complainant (TR 80). As a result, his business did not perform all the work he had wanted to perform (TR 84). Mr. Trentelman had other work for his drivers in January 2016 (TR 28).

42. If Complainant had not been separated from his job with Mr. Trentelman, there would have been work for him after January 6, 2016 (TR 28).

43. Complainant earned 25 per cent of the revenue Mr. Trentelman received for Complainant's work (TR 42, 117). Mr. Trentelman paid Complainant $8,696.17 in 2015 (JX-2). Mr. Trentelman's highest paid driver earns between $500 and $1,000 weekly (TR 43).

44. Complainant was out of work for about one month (TR 105, 144-146). After he was fired, Mrs. Bailey observed that he was "very upset," that he "felt very like much like a failure, [and] disappointed in losing a job (TR 105). Complainant was stressed and depressed while he was out of work, and worried about paying his bills (TR 105, 144).

45. Complainant has had anxiety for his entire life. He receives treatment for the anxiety and takes medication for it (TR 164-165).

46. Complainant looked for work soon after Mr. Trentelman fired him. He was hired by Agri-Trans, also known as First Missouri Terminals, Inc. (TR 145-147). Complainant's first paycheck from Agri-Trans was for the two-week period ending February 10, 2016. He earned wages of $376.05 for 9 hours of work during this period (TR 146; CX-3). In 2016, He earned gross wages of $19,301.87 at Agri-Trans (TR 147; CX-4).

47. On January 19, 2016, Complainant filed a complaint with the Secretary of Labor alleging that Respondent had discharged him in violation of 49 U.S.C. § 31105 (CX-1).

48. On October 6, 2016, the Assistant Regional Administrator for Region VII issued a decision finding that Complainant did not meet his burden to show retaliation in violation of the STAA (CX-2, p. 5). On October 14, 2016, Complainant filed objections to OSHA's decision and requested a hearing de novo before an administrative law judge (CX-2).

Please note that the Respondent also suggested the following:

5. On or about June 1, 2015, Complainant negligently caused damages to one of Respondent's dump trucks while on a job site for Pace Construction. A representative of Pace Construction asked that Complainant not be permitted to drive on their site again. Though Respondent had other work available, Complainant quit working for Respondent that day and [allegedly] gave no notice. (TR-58; 118; 119). Complainant had submitted an equivalent. See Number 9 above.

6. On or about September 10, 2015, Complainant contacted Respondent seeking to be given work of any type stating that he had "walked out" from his other job because he "couldn't handle anymore problems with the truck" at that job. (TR-60; Respondent's Exhibit-D 19).[1]

[1] Q (Mr. Pierce) Did he [Complainant] tell you anything about his current or previous employment between the June 1 date and September 21st?
A Yes, he did.
Q What did he tell you?
A He told me that there was too many issues with the truck that he was driving and he couldn't deal with it no more. So, he walked away from the job that morning. And he had no other appointments.
Q Who was he working for?
A Blake Blue, I believe.
Q Was this in a text message?
A Yes.
Q Is this the one where he says, thought I could believe him so we known each other from school. I actually walked away this morning. Couldn't handle any more problems with the truck. I knew I had nothing lined up, but I just couldn't handle it any longer. If you don't have anything now, I will be available for power washing this winter. Hope there is no hard feelings. Hope you understand. Thanks.
JUDGE SOLOMON: What's the date of that?
MR. PIERCE: We have that on top? I'm not sure it came through on these. Sometime around September 10th.

21. Complainant had driven the blue and white Peterbilt regularly during his time with Trentelman Trucking, and at no time in his months of driving it did he ever experience any problems with any aspect of the brakes or braking system. (TR-152; 153)

22. By his own admission, Complainant simply heard the term "brakes" and then deduced that the vehicle was completely and totally unsafe to drive that day. (TR-153)

23. Complainant did not inspect the truck he believed to be defective or dangerous on that day or any subsequent day. Therefore, Complainant has and had no personal knowledge of the condition of the blue and white Peterbilt during the month of January, 2016. (TR-153)

24. Complainant refused to work on the days in question in that he failed to show up for his shift at all. (TR-153)

25. Complainant has a long history of suffering from anxiety, for which he voluntarily stopped taking his medication prior to working with Respondent. Complainant left his subsequent job with Agri-trans due to "anxiety." (TR-164; 165; 167)

26. Respondent does not generally work, nor does he generally have work, for any independent contractors or employees in the month of January. Complainant never had any expectation of year -round work through Respondent. Complainant began working for Agri-trans on January 28, 2016. Therefore, Complainant did not miss any work or pay prior to the acceptance of a new job. (TR-47; 161; 185)

27. No testimony or evidence was offered, submitted or produced at the hearing sufficient to calculate the amount of pay Complainant either did or could have missed.

28. Complainant did not seek any counseling, medical care, nor take any medication for any of the emotional distress he claims to have experienced. Complainant's history with anxiety and intentional lack of treatment are significant contributing factors to any emotional distress he may have experienced. (TR-163)

29. Complainant, Respondent, and witness Donald Pinnell are all holders of Commercial Driver's Licenses and none are Brake Inspectors. Respondent is an authorized motor carrier and has been for approximately 10 years. Furthermore, and significantly, no testimony nor evidence of any kind was offered, submitted or produced to show that the brakes on any of the trucks Respondent directed Complainant to drive were improperly adjusted, by either a qualified or non-

qualified person, or that the braking systems were actually defective. (TR-13; 114; 179)

PROTECTED ACTIVITY AND KNOWLEDGE

The STAA provides that "[a] person may not discharge an employee" for conduct protected by the STAA. 49 U.S.C. § 31105(a)(1). 29 C.F.R.§ 1978.101(k) defines a person as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any other organized group of individuals."

Because this case has been fully tried, theoretically there is an inference that a prima facie case has been made. ***Kester v. Carolina Power & Light Co***, ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 5-8 (ARB Sept. 30, 2003) ("[W]e continue to discourage the unnecessary discussion of whether or not a whistleblower has established a prima facie case when a case has been fully tried."). ***Kester*** has been cited as authority in many cases, i.e. ***Barrett v. e-Smart Technologies, Inc.,*** ARB Nos. 11-088, 12-013, ALJ No. 2010-SOX-31 (ARB Apr. 25, 2013).[2]

Despite allegations to the contrary in its brief, Respondent stipulated that Complainant is an employee subject to protection under the STAA (Transcript, "TR" 15).[3] In the brief, Respondent argues that Complainant's apprehension could not have been reasonable in this case, as he failed to show up for work and failed to inspect the vehicle in question. Therefore, according to the allegation, he had no knowledge of the vehicle's

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[2] See also ***Hoffman v. Nextera Energy***, ARB No. 12-062, ALJ No. 2010-ERA-011, slip op. at 12 (ARB Dec. 17, 2013) (prima facie showing irrelevant once case goes to hearing before ALJ); ***Barry v. Specialty Materials***, ARB No. 06-005, ALJ No. 2005-WPC-003, slip op. at 7 n.32 (ARB USDOL/OALJ Nov. 30, 2007) (same); ***Journeay v. Barry Smith Transp***., ARB No. 01-046, ALJ No. 2001-STA-003, slip op. at 3 n.5 (ARB June 25, 2001) (same); ***Jordan v IESI PA Blue Ridge Landfill***, ARB No. 10-076, ALJ No. 2009-STA-062, slip op. at 2 (ARB Jan. 17, 2012) (same); ***Spelson v. United Express Sys.***, ARB No. 09-063, ALJ No. 2008-STA-039, slip. op at 3 n.3 (ARB Feb. 23, 2011) (identifying investigatory stage before OSHA as the "prima facie level of proving a case").

[3] See TR 15:

> Q [by Mr. Taylor] All right. And when Mr. Bailey hauled loads, did Mr. Bailey prepare an invoice that he sent to the customers?
> A He turned in haul tickets.
> Q Did Mr. Bailey prepare invoices that --
> A No.
> Q -- he sent to the customers? Okay. Did the customer pay Mr. Bailey directly for the hauling he did while operating your truck?
> A No.
> MR. PIERCE: Judge, if I may, I'm sorry to interrupt. I think I see where he's going with this. We do not intend to defend this in any way, claiming that Mr. Bailey does not fit the statutory definition of an employee. We'll stipulate to that for purposes of this if we want to move beyond those issues.
> MR. TAYLOR: Okay.
> MR. PIERCE: It's not our intention to defend it in any way.
> MR. TAYLOR: That had been an issue. Okay.
> JUDGE SOLOMON: There any other issues like that?
> MR. PIERCE: I don't think so.

condition.

Testimony shows that the truck was the blue and white Peterbilt, as no other truck was available for Complainant to operate on January 4, 2016, except one that he allegedly was not qualified to operate (TR 24, 54-55). Complainant allegedly did not feel safe operating the blue and white Peterbilt because it had brakes that were sticking which could cause brake fade. He was also concerned that his brakes could lock up due to a loss of air pressure, resulting in loss of a tire, or upset due to skidding, or heat due to friction, which might result in a wheel fire. Complainant was also concerned that the brakes on the truck needed to be adjusted (TR 136-139).

Moreover, I accept that Complainant was not certified or qualified to adjust brakes (TR 204-205). The trucks operated by Trentelman Trucking take abuse hauling into construction sites, which can cause brakes to become out of adjustment (TR 182, 192-193). I accept that at 4:52 p.m. on January 3, 2016, Complainant sent a text message to Mr. Trentelman stating that he did not feel safe operating the blue and white Peterbilt. Complainant asked to operate the red Peterbilt (JX-1, p. 1; TR 23, 140-142) Mr. Trentelman responded with a text message at 4:54 p.m. stating, "There is nothi g [sic] wrong with brakes you can drive it or dont [sic] drive at all" (JX-1, p. 1; TR 24, 140-141).

Respondent emphasizes that Complainant had driven the blue and white Peterbilt regularly during his time with Trentelman Trucking, and at no time in his months of driving it did he ever experience any problems with any aspect of the brakes or braking system. (TR-152; 153) Respondent alleges that " [b]y his own admission, Complainant simply heard the term 'brakes' and then deduced that the vehicle was completely and totally unsafe to drive that day." (TR-153). I discount this allegation. On August 17, 2015, law enforcement placed the blue and white Peterbilt truck out of service due to defects including an air pressure loss (TR 34, 132; CX-5; CX-6). Air pressure loss is caused by leaks in the brake system. When a driver depresses the brake pedal, air is sent through hoses to push rods which push brake shoes against a drum. A loss of air pressure will cause emergency brakes to engage (TR 36-37). If this happens at highway speeds, a roll over can result if the brakes are not properly adjusted (TR 37). Respondent called Mr. Pinnell to testify. He admitted that he was unaware of the Department of Transportation regulations that require a certification in order to touch, even to adjust brakes, with a wrench. TR 195.[4]

[4] During the hearing, I asked the witness at TR 198-199:

> So, you're familiar with the Peterbilt blue and white truck that Mr. Trentelman owned?
> THE WITNESS: This one here?
> JUDGE SOLOMON: Yes.
> THE WITNESS: Yes, I drove that truck when I first started for him.
> JUDGE SOLOMON: Did you drive it at any time after January 3rd, 2016?
> THE WITNESS: No.
> JUDGE SOLOMON: Do you know whether or not it's in service, whether it's being operated?
> THE WITNESS: Yes, it's working.
> JUDGE SOLOMON: Do you know when it began to be operated after January 3rd, 2016?
> THE WITNESS: I can, I, you know, I don't know.
> JUDGE SOLOMON: Do you know whether it had to be serviced before it became operable in, after

The regulation states that the brake evidence must be maintained for the period during which the brake inspector is employed in that capacity and for one year thereafter. 49 C.F.R. § 396.25 (e). Thus the parties were on at least inquiry notice that there had been something wrong with the brakes. Moreover, although they were requested, no repair records for the Peterbilt were produced by Respondent.

Whereas it may be true that Complainant did not physically inspect the truck on the date he refused to drive it, because he could reasonably infer from his colloquy with Respondent that it had been placed out of service, and because the truck's brakes had a documented repair history, I do not accept that Complainant had no personal knowledge of the condition of the blue and white Peterbilt. (TR-153). It admittedly was not driven for several months. Respondent's witnesses testified that when trucks sit for a month, the brakes can stick due to moisture and need adjustment (TR 52, 186).

Complainant complained to Mr. Trentelman that the brakes on the blue and white Peterbilt truck were unsafe on or about December 30, 2016. Mr. Trentelman had told Complainant that the brakes were "sticking" on the truck and to make sure the brakes were not stuck (TR 135-136, 151-152). Complainant told Mr. Trentelman that he did not feel safe operating the truck if the brakes were sticking on it (TR 135-136).

Complainant argues that his refusal to drive on January 4, 2016 was protected under 49 U.S.C. § 31105(a)(1)(B)(ii). Under the "reasonable apprehension" category, a complainant's refusal to drive must be based on an objectively reasonable belief that operation of the motor vehicle would pose a risk of serious injury to the complainant or the public. ***Stauffer v. Wal-Mart Stores, Inc***., ARB No.99-107, ALJ No. 1999-STA-21, at 7 (ARB Nov. 30, 1999). An objectively reasonable driver in Complainant's situation on January 3-4, 2016 would have concluded that driving established a real danger of injury due to brakes sticking.[5]

> January 3rd, 2016?
> THE WITNESS: Not other than a service from a driver. I mean, as far as I know, it hasn't been in the shop or nothing for repairs or nothing like that.
> JUDGE SOLOMON: Does anybody have any questions based on what I asked? Mr. Pierce?
>
> 49 C.F.R. § 396.25 (e) states as follows:
>
> No motor carrier or intermodal equipment provider may employ any person as a brake inspector unless the evidence of the inspector's qualifications, required under this section, is maintained by the motor carrier or intermodal equipment provider at its principal place of business, or at the location at which the brake inspector is employed. The evidence must be maintained for the period during which the brake inspector is employed in that capacity and for one year thereafter. However, motor carriers and intermodal equipment providers do not have to maintain evidence of qualifications to inspect air brake systems for such inspections performed by persons who have passed the air brake knowledge and skills test for a Commercial Driver's License.

[5] 49 U.S.C. § 31105(a)(2):

> Under paragraph 1(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the

Complainant reminds me that he testified that he was not qualified to adjust brakes (TR 205). I had the opportunity to see and hearing the witnesses. I have reviewed the transcript. I have no reason to discount this assertion.[6]

Mr. Pinnell testified that sticking brakes must be adjusted (TR 186. 194). 49 C.F.R. § 393.47 requires that brakes be properly adjusted. Complainant argues that even if the blue and white Peterbilt had been safe to drive (which Complainant does not concede), an actual violation of 49 C.F.R.§ 393.47 would have occurred but for Complainant's refusal to operate the vehicle as Complainant was not qualified to adjust brakes. I accept this allegation.

After, a review of the evidence, I find that Complainant reasonably perceived a violation of a commercial vehicle safety regulation. 49 U.S.C. § 31105(a)(1)(B)(ii); ***Calhoun v. United Parcel Service***, ARB No. 04-108, ALJ No. 2002-STA-31 at 11 (ARB Sept. 14, 2007), *aff'd* 576 F.3d 201 (4th Cir. 2009). A refusal to drive is protected where the driver's refusal is based on a subjectively and objectively reasonable belief that the operation of a truck-tractor would violate commercial vehicle safety law or regulation. ***Ass't Sec'y and Bailey v. Koch Foods,*** LLC, ARB No. 10-001, ALJ No. 2008-STA-61 (ARB Sept. 30, 2011).

I find both protected activity and knowledge are substantiated by the colloquy that took place January 4, 2016, when Complainant sent Mr. Trentelman a text message stating in part, "Can't believe you fired me because I felt a truck was unsafe Pat." (JX-1, p. 5; TR 28, 144). Mr. Trentelman replied stating, "They were safe when you drove th [sic] this summer nothing

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> unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain correction of the unsafe condition.

[6] Complainant argues as follows:

> The credibility of Mr. Trentelman's testimony that the brakes on the blue and white Peterbilt were in safe condition is undermined by the August 17, 2015 out of service order August 17, 2015 (CX-5). Complainant testified that the brakes on the truck were safe and he sent a text message telling Complainant that the brakes were safe when he drove the truck the previous summer and that nothing had changed (TR 29; JX-1, p. 5-6). If nothing had changed since the previous summer then the truck still had had defective brakes when Complainant refused to operate it. Mr. Trentelman was obviously not telling the truth when he told Complainant that the brakes were safe when he drove the truck the previous summer.
>
> It is noteworthy Mr. Trentelman initially denied that the truck had been placed out of service by law enforcement on August 17, 2015 due to an air pressure loss in the brake system (TR 29). When impeached with the out of service order, he testified that he had no recollection of the out of service order (TR 30). He then testified that when vehicle is placed out of service, it is tagged by law enforcement and cannot be moved until it is repaired or towed. His drivers tell him when a vehicle is placed out of service and he would know if the vehicle had to be towed (TR 32-33). He acknowledged that repair records, which he failed to produce in discovery, would indicate if any out of service defects had been corrected (TR 34). Mr. Trentelman's deception as to knowledge of the August 17, 2015 out of service order is a valid basis to discredit his testimony where it conflicts with Complainant's testimony.

Although this argument is partly based on facts not in evidence, I find that Mr. Trentelman was impeached, which buttresses Complainant's version.

changed." (TR 29; JX-1, p. 5-6). This allegation that the truck was safe is inconsistent with the hearing testimony and with the December 30 colloquy. I find that it is a tacit admission of protected activity and of knowledge.

ADVERSE ACTION

Again Complainant asserts that he was fired. On the evening of January 4, 2016, he sent Mr. Trentelman a text message stating in part, "Can't believe you fired me because I felt a truck was unsafe Pat." (JX-1, p. 5; TR 28, 144). Mr. Trentelman replied stating, "They were safe when you drove th [sic] this summer nothing changed." (TR 29; JX-1, p. 5-6). He also told Complainant "Dont worry about it I will find someone to drive bring my credit card back to me today after work." (JX-1, p. 1).

I am directed to ***Minne v. Star Air, Inc***., ARB No. 05-005, ALJ No. 2004-STA-26 (ARB Oct. 31, 2007), when the Board noted that under its precedent, "except where an employee actually has resigned, an employer who decides to interpret an employee's actions as a quit [sic] or resignation has in fact decided to discharge that employee." ***Minne*** at 14 (citations omitted). Any alleged resignation by Complainant was not voluntary.

In ***Minne***, the complainant engaged in a protected activity when he, and his co-driver complained that their assigned truck-tractor did not comply with certain commercial vehicle safety regulations. Id. at 3. The co-driver told his supervisor that he would not drive the truck-tractor if it was not in compliance. Id. a 4. The Board held the treatment of ***Minne's*** separation as a resignation constituted a decision to terminate their employment. Therefore, the Board found adverse action. Id. at 15-16. Complainant alleges that here, as in ***Minne***, it is the supervisor's behavior (Mr. Trentelman's), rather than the employee's, which ultimately ended the employment relationship.

Respondent alleges that that there was no adverse employment action. It asserts that it was shown that Respondent had no other safe vehicle for Complainant to drive aside from the blue and white Peterbilt and that after the emergency flood job ended, there was no other work until April and Respondent took a new job January 28, 2016.

After a review of the evidence, I find that the Complainant was effectively fired by Respondent, which constitutes an adverse personnel action.

CONTRIBUTION

A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." ***Williams v. Domino's Pizza***, ARB No. 09-092, ALJ No. 2008-STA-052 (ARB Jan. 31, 2011) at 5. Complainant can succeed by "providing either direct or indirect proof of contribution." Id. "Direct evidence is 'smoking gun' evidence that conclusively links the protected activity and the adverse action and does not rely upon inference." Id. If Complainant "does not produce direct evidence, he must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that retaliation was the true reason for terminating his employment." Id."

On January 4, 2016, Complainant sent Mr. Trentelman a text message stating in part, "Can't believe you fired me because I felt a truck was unsafe Pat." (JX-1, p. 5; TR 28, 144). Mr. Trentelman replied stating, "They were safe when you drove th [sic] this summer nothing changed." (TR 29; JX-1, p. 5-6). He also told Complainant "Dont worry about it I will find someone to drive bring my credit card back to me today after work." (JX-1, p. 1).

I find that Respondent's response is direct evidence of contribution.[7]

Moreover, knowledge of the protected activity coupled with close temporal proximity of the protected activity and the adverse employment action raises an inference of discrimination. ***Cefalu v. Roadway Express, Inc***., ARB Nos. 04-103 & 04-161, ALJ No. 2003-STA-55, at 7 (ARB Jan. 31. 2006), *aff'd sub nom*. ***Roadway Express v. United States Department of Labor***, 495 F.3d 477 (7th Cir. 2007). I accept that the temporal proximity between Complainant's protected activities and his discharge is circumstantial evidence that the protected activity contributed to the discharge.

Complainant directs me to animus toward protected safety complaints as evidenced by Mr. Trentelman's text message in response to Complainant's refusal to operate the blue and white Peterbilt, wherein Mr. Trentelman stated "Dont [sic] worry about it I will find someone to drive bring my credit card back to me today after work." (JX-1, p. 4; TR 25, 144). Complainant also argues that animus toward compliance with commercial vehicle safety regulations is evidenced by CX-5.

Complainant argues that Mr. Trentelman had a motive to fire Complainant because he lost work due to Complainant's refusal to operate the truck. Respondent has proffered no reason for firing him, and instead claims he was not fired. I am reminded that Mr. Trentelman testified that none of Complainant's alleged performance issues resulted in any discipline. I accept this argument, also.

After a review of the evidence, I find that Complainant has established contribution of the termination by a preponderance of the evidence.

SHIFTING BURDEN OF PROOF

To avoid liability Respondent must show "by clear and convincing evidence" that it would have taken the unfavorable personnel action in the absence of protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv); ***Fleeman v. Nebraska Pork Partners***, ARB Nos. 09-059 & 09-096, ALJ No. 2008-STA-15, at 2, n. 1 (ARB May 28, 2010). "Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain." ***Clarke***, ARB No. 09-114, slip op. at 4 (internal quotation marks deleted)(citations omitted). See also ***DeFrancesco v. Union Railroad Company***, ARB No. 10-114, ALJ No. 2009-FRS-009 (ARB

[7] It is also an example of the negative pregnant because it is an admission that Complainant was fired during a dispute about the safety of the truck..

February 29, 2012). The burden of proof under the clear-and-convincing standard is more rigorous than the preponderance-of-the-evidence standard.

The Administrative Review Board has been using the following test: the plain language of the statute requires a case-by-case balancing of three factors:

(1) How 'clear' and 'convincing' the independent significance is of the non-protected activity;

(2) The evidence that proves or disproves whether the employer 'would have' taken the same adverse actions; and

(3) The facts that would change in the 'absence of' the protected activity.

Speegle v. Stone & Webster Constr., Inc., ARB No. 13-074, ALJ No. 2005-ERA-006, *slip op*. at 12 (ARB Apr. 25, 2014) (internal citations omitted). Although ***Speegle*** was a nuclear whistleblower, the standard would be the same. ***Timmons v. CRST Dedicated Services, Inc.,*** ARB No. 14-051, ALJ No. 2014-STA-9 (ARB Sept. 29, 2014)

I have reviewed Respondent's brief and the transcript. Respondent does not argue that it would have terminated Complainant's employment, because it takes the position that he was not terminated: rather he voluntarily quit.

Complainant argues that Mr. Trentelman has not clearly and convincingly shown that, independent of Complainant's protected activities, he would have fired him. There is no independent significance of Complainant's non-protected job performance deficiencies, as they played no role in his firing. There is no evidence that proves that Mr. Trentelman would have fired Complainant absent his protected activity. Indeed, Mr. Trentelman told Complainant "There is nothi g [sic] wrong with brakes you can drive it or dont [sic] drive at all" (JX-1, p. 2; TR 24, 140-141). Respondent has alleged no facts that would have changed absent protected activity.

I agree. For the above reasons, I find that Respondent has failed to meet its burden of proof. 49 U.S.C.A. § 42121(b)(2)(B)(iv).

REMEDIES

Under the STAA, a successful complainant is entitled to reinstatement, compensatory damages, back pay, interest and attorney fees and costs. 49 U.S.C. § 31105(b)(2)(A). In appropriate cases, a complainant may also recover punitive damages. Complainant requests all relief available to him.

A. Reinstatement. Under the STAA, a successful complainant is entitled to automatic reinstatement to his former position with the same pay and terms and privileges of employment. 49 U. S. C. § 31105(b)(3)(A)(ii). Reinstatement is a mandatory remedy. ***Ferguson v. New Prime, Inc***., ARB No 10-075, 2009-STA-47, at 6 (ARB Aug. 31, 2011). Unless it is impossible or impractical, reinstatement is an automatic remedy under the Act

and respondent employers must make a bona fide reinstatement offer. Respondent did not address this issue in its brief.

B Back Wages. An award of back pay in an appropriate amount is mandated once it is determined that an employer violated the Act. ***Moravec v. HC & M Transportation, Inc.,*** 1990-STA-44 (Sec'y Jan. 6, 1992), citing ***Hufstetler v. Roadway Express, Inc***., 1985-STA-8 (Sec'y Aug. 21, 1986), *slip op* at 50, *aff'd sub nom*., ***Roadway Express, Inc. v. Brock***, 830 F.2d 179 (11th Cir. 1987). Back pay awards are to be calculated in accordance with the make-whole remedial scheme embodied in § 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. (1988). See, ***Loeffler v. Frank***, 489 U.S. 549 (1988).

Mr. Trentelman testified that his highest paid driver earns between $500 and $1,000 weekly (TR 43). Complainant was out of work for approximately one month after Mr. Trentelman fired him. Any uncertainty about wage loss calculations should be resolved in favor of Complainant as the non-discriminating party. See ***Johnson v. Roadway Express, Inc***., ARB No. 01-013, ALJ No. 1999-STA-5, at 13 (ARB Dec. 30, 2002). Thus, Complainant seeks back pay of $4,300 ($1,000 x 4.3 weeks).

Complainant argues that he earned $8,696.17 working for Mr. Trentelman in 2015 (JX-2). He was employed by Mr. Trentelman from April 26, 2015 to June 1, 2015, and from September 21, 2015 to January 4, 2016, approximately 20 weeks. His average weekly wage was $434.81 (TR 16, 55, 117-118). Claimant concedes that if I use Complainant's past earnings as a basis for determining back pay, Complainant should be awarded at least $1,869.68 in back wages ($434.81 x 4.3 weeks). Complainant argues that while Mr. Trentelman's business was entering its slow season in January 2016, he had work available in January 2016 (TR 28). Mr. Pinnell testified that more than two drivers sometimes work at Trentelman Trucking during the winter (TR 186-187).

I agree that I should use the Complainant's earnings history and find $1,869.68 in back wages.

C. Compensatory Damages. The STAA permits awards of compensatory damages for emotional distress and mental pain. ***Michaud v. BSP Transport, Inc***., ARB No. 97-113, ALJ No. 1995-STA-29, at 7-8 (ARB Oct. 9, 1997). The amount awarded is often based upon awards in similar cases. ***Ferguson v. New Prime, Inc***., ARB No. 10-075, ALJ No. 2009-STA-47, at 8 (ARB Aug. 31, 2011).

Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation. Such awards may be supported by the circumstances of the case and testimony about physical or mental consequences of retaliatory action. Compensatory damages are designed to compensate not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering. ***Martin v. Dep't of the Army***, ARB No. 96-131, ALJ No. 93-SDW-1, slip op. at 17 (ARB July 30, 1999), *citing* ***Memphis Community Sch. Dist. v. Stachura***, 477 U.S. 299, 305-307 (1986); ***Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (Dep. Sec'y Feb. 14, 1996)*** (compensatory damages based solely upon the testimony of the complainant

concerning his embarrassment about seeking a new job, his emotional turmoil, and his panicked response to being unable to pay his debts); ***Crow v. Noble Roman's, Inc.***, No. 95-CAA-08, slip op. at 4 (Sec'y Feb. 26, 1996) (complainant's testimony sufficient to establish entitlement to compensatory damages); ***Jones v. EG&G Defense Materials, Inc***., ARB No. 97-129, ALJ No. 1995-CAA-3 (ARB Sept. 29, 1998) (injury to complainant's credit rating, the loss of his job, loss of medical coverage, and the embarrassment of having his car and Truck repossessed deemed sufficient bases for awarding the compensatory damages).

Complainant argues that he looked "very like much like a failure, [and] disappointed in losing a job." He was stressed and depressed while he was out of work, and worried about paying his bills including his mortgage, car payment, utilities and credit card (TR 105, 144). Given that Complainant was only out of work briefly, Complainant suggests a compensatory damages award of $2,000.

I have reviewed many other compensatory damage awards. There were no special damages presented. The Complainant is credible. I accept that he did suffer some distress. Reviewing comparable awards, I find that where there is established distress, one thousand dollars in a fair award.

D. Punitive Damages. The STAA allows punitive damage awards. 49 U.S.C. § 31105 (b)(3)(C). I am reminded that in ***Ferguson v. New Prime, Inc***., ARB No. 10-075, ALJ No. 2009-STA-47 (ARB Aug. 31, 2011) the Board provided guidance to be considered in awarding punitive damage awards under the STAA. In that case the complainant received $75,000 in punitive damages. The Board vacated this award and remanded the case for consideration of whether the behavior of the dispatcher who caused the discharge reflected a corporate policy of STAA violations, and whether punitive damages were necessary to deter future violations. Id. at 8. An "ALJ should also include consideration of the size of the award that would adequately deter [the employer] from future violations and the punitive impact of the damages on the company." Id. at 8-9.

Complainant argues that the discharge of Complainant exhibited callous disregard for his rights under the STAA. Complainant argues that while Trentelman Trucking is not a large business, I should award punitive damages because the amount of any back-pay award will not deter Mr. Trentelman from future retaliation against other drivers. Complainant requests an award of $5,000 in punitive damages.

I have awarded punitive damages in many other cases. However, in this case, as the Respondent is a small business there is some question regarding the financial ability to withstand an award. I award the Complainant one thousand dollars ($1000.00) in punitive damages.

E. Interest. Complainant is entitled to interest on his back pay, compounded daily, at the IRS rate for the underpayment of taxes. See 29 C.F.R. § 1978.105(a)(1).

F. Attorney Fees and Costs. Under the STAA, a successful complainant is entitled to an award of attorney fees and costs. 29 C.F.R. § 1978.109(d)(1). Complainant requests leave to file a petition for attorney fees and costs in the event the ALJ rules in his favor.

G. Abatement of the Violation. The Court should order Respondents to expunge all references to Complainant's protected activities and his separation from employment from its personnel records. Such relief is appropriate. See ***Griffith v. Atlantic Inland Carriers***, 2002-STA-34 (ALJ Oct. 21, 2003) adopted ARB No. 04-010 (ARB Feb. 20, 2004). Mr. Trentelman should also be ordered to post a copy of any decision in favor of Complainant for 60 consecutive days in conspicuous places, including all places where employee notices are customarily posted. See ***Scott v. Roadway Express, Inc.***, 1998-STA-8 (ARB July 28, 1999).

ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that:

1. Respondent shall reinstate Complainant to his former position with the same pay, terms, conditions and privileges of employment that he would have received if he had continued working from December 30, 2016, through the date of the offer of reinstatement.

2. Respondent shall pay Complainant the amount of one thousand eight hundred sixty nine dollars and sixty eight cents ($1,869.68) in back pay with interest.

3. Respondent shall pay to Complainant the sum of one thousand dollars ($1,000.00) in compensatory damages and one thousand dollars ($1,000.00) in punitive damages for a total of two thousand dollars ($2,000.00).

4. The rate of interest is that required by 29 C.F.R. § 20.58(a) which is the IRS rate for the underpayment of taxes set out in 26 U.S.C. § 6621. Interest is to be compounded daily. 29 C.F.R. § 1978.105(a)(1).

5. Counsel for Complainant shall have 30 days from the date of this Decision to file a fee petition. The parties are directed to discuss this issue before the Petition is filed. Respondent shall have ten (10) days to object. All documents must be submitted in hardcopy and in Word.

6. Respondent shall post a copy of the decision and order in this case for 90 consecutive days in all places where employee notices are customarily posted.

7. Respondent shall expunge all references to Complainant's protected activity and unfavorable information, including references to a discharge or termination, from its personnel records and from any report it has made about him to any consumer-reporting agency

DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it.

See 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. See 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Associate Solicitor, Division of Fair Labor Standards. See 29 C.F.R. § 1982.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party‘s supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party‘s legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. §§ 1982.110(a) and (b).

The preliminary order of reinstatement is **EFFECTIVE IMMEDIATELY** upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board. 29 C.F.R. § 1982.109(e). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board unless the Board grants a motion by the respondent to stay that

order based on exceptional circumstances. 29 C.F.R. § 1982.110(b).