**In the Matter of:**

**THOMAS E. CLEMMONS,**

**COMPLAINANT,**

**v.**

**AMERISTAR AIRWAYS, INC.,**

**and**

**AMERISTAR JET CHARTER, INC.,**

**RESPONDENTS.**

**ARB CASE NO. 08-067**

**ALJ CASE NO. 2004-AIR-011**

**DATE: May 26, 2010**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***
**Steven K. Hoffman, Esq., Emilie S. Kraft, Esq., *James & Hoffman, P.C.*, Washington, District of Columbia**

***For the Respondent:***
**Chris E. Howe, Esq., *Kelly, Hart & Hallman, LLP*, Fort Worth, Texas**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*, E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*, and Wayne C. Beyer, *Administrative Appeals Judge***

## FINAL DECISION AND ORDER

Thomas E. Clemmons alleged that Ameristar Airways, Inc. and Ameristar Jet Charter, Inc. violated the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21 or the Act)[1] when Ameristar terminated his employment after he complained about air safety issues. After a hearing, a United States Department of Labor (DOL) Administrative Law Judge (ALJ) concluded that Ameristar violated AIR 21. Ameristar appealed to the Administrative Review Board (ARB). The ARB vacated the ALJ's recommended decision because of legal errors and remanded the case for further consideration.[2] On remand, the ALJ addressed each of the four legal errors that the ARB had identified and again concluded that Ameristar had violated AIR 21. The ALJ reaffirmed his previous order on Clemmons's back-pay award. Ameristar appealed.

## BACKGROUND

In its previous decision, the ARB detailed the relevant facts. We will reiterate briefly. Ameristar hired Clemmons in September 2002 as Director of Operations. He was responsible for hiring and scheduling pilots, directing training and updating manuals, coordinating personnel, maintaining pilot records, and informing pilots of required navigational information.

Shortly after Clemmons hired pilots and they began to fly, the pilots complained about their pay and voiced their concerns about duty-time violations.[3] In a December 17, 2002 e-mail, Clemmons notified Ameristar President Thomas Wachendorfer and Vice President of Operations Lindon Frazer that pilots were being pushed to work beyond the 16-hour restriction in violation of the Part 125 regulations governing a pilot's hours.

Clemmons also complained that pilots were being directed to seek permission from maintenance officials before they registered mechanical problems in their logbooks, which, Clemmons believed, violated federal regulations.

Another issue that arose during Clemmons's employment involved his scheduling of the pilots' work. Management wanted a 14-days-on, 7-days-off schedule, but Clemmons believed that such scheduling violated the duty-time regulations. On January

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[1] 49 U.S.C.A. § 42121 (Thomson/West 2007). Regulations implementing AIR 21 appear at 29 C.F.R. Part 1979 (2009).

[2] In vacating the ALJ's January 14, 2005 Decision and Order, the ARB addressed only his legal errors and did not rule on his factual findings. We will do so here. *See* generally Ameristar's Reply Brief.

[3] By federal regulation, each flight crewmember and attendant must be relieved from all duty for at least 8 consecutive hours during any 24-hour period. 14 C.F.R. § 125.37 (2009).

7, 2003, Clemmons met with Ron Brown from the Federal Aviation Administration (FAA) to discuss the pilot duty-time regulations and other issues relating to Ameristar's violations of the regulations governing common carriage and use of the call sign.[4]

Meanwhile, the scheduling difficulties continued. On January 9, Wachendorfer sent a memorandum to Clemmons and Frazer stating that one of Clemmons's schedules was unacceptable. Wachendorfer reiterated his desire for a two-weeks-on and one-week-off schedule. Clemmons turned in a second schedule, which Wachendorfer also rejected. Clemmons sent an insubordinate e-mail to the pilots that insulted Wachendorfer and apologized for the schedule that was drafted in line with Wachendorfer's demands.

On January 16, Clemmons and another pilot had trouble loading pallets of freight on a plane. Clemmons called dispatch, and they concluded that the client had given incorrect pallet dimensions. Wachendorfer became involved. He called the other pilot and told him how to load the pallets. With Wachendorfer's instructions, they were able to load 20 of the 24 pallets.

Two or three days later, Frazer recommended to Wachendorfer that Clemmons be terminated. Wachendorfer concurred. On January 20, with Lolly Rives, the Human Resources Director, present, Frazer met with Clemmons and terminated his employment.

Clemmons filed a complaint with DOL's Occupational Safety and Health Administration (OSHA). After investigating, OSHA found in Clemmons's favor. Upon Ameristar's request, an ALJ conducted a hearing. On January 14, 2005, the ALJ issued a [Recommended] Decision and Order (R. D. & O.) in which he concluded that Ameristar violated AIR 21. Ameristar appealed, and the ARB remanded the case.[5] On February 20, 2008, the ALJ issued a Decision and Order on Remand (D. & O. on R.), and Ameristar again appealed to the ARB.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to decide this matter to the ARB.[6] In cases arising under AIR 21, the ARB reviews the ALJ's findings of fact under the substantial evidence standard.[7] Substantial evidence means "such relevant evidence

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[4] The call sign is composed of the initial three letters that a pilot uses to communicate with others. "AJI" was Jet Charter's sign and Airways was using this acronym as its call sign.

[5] *Clemmons v. Ameristar Airways, Inc.* ARB Nos. 05-048, -096, ALJ No. 2004-AIR-011 (ARB June 29, 2007).

[6] *See* Secretary's Order 1-2010, 75 Fed. Reg. 3924 (Jan. 15, 2010); 29 C.F.R. § 1979.110.

as a reasonable mind might accept as adequate to support a conclusion."[8] Thus, if substantial evidence supports the ALJ's findings of fact, they shall be conclusive.[9] The ARB reviews the ALJ's legal conclusions de novo.[10] The ARB generally defers to an ALJ's credibility determinations, unless they are "inherently incredible or patently unreasonable."[11]

## DISCUSSION

AIR 21 prohibits air carriers, contractors, and their subcontractors from discharging or otherwise discriminating against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee:

> provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle [subtitle VII of title 49 of the United States Code] or any other law of the United States . . . .[12]

To prevail under AIR 21, Clemmons must prove by a preponderance of the evidence that: (1) he engaged in protected activity; (2) his employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4)

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7 29 C.F.R. § 1979.110(b).

8 *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

9 *Mehan v. Delta Air Lines*, ARB No. 03-070, ALJ No. 2003-AIR-004, slip op. at 2 (ARB Feb. 24, 2005).

10 *Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 4 (ARB June 29, 2006).

11 *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 13 (ARB Feb. 29, 2008).

12 49 U.S.C.A. § 42121(a). An employer also violates AIR 21 if it intimidates, threatens, restrains, coerces, or blacklists an employee because of protected activity. 29 C.F.R. § 1979.102(b).

the protected activity was a contributing factor in the adverse personnel action.[13] If Clemmons proves that Ameristar violated AIR 21, he is entitled to relief unless Ameristar demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity.[14]

We remanded this case upon review of the ALJ's initial decision because the ALJ, committed four legal errors in analyzing whether Ameristar violated AIR 21 when it discharged Clemmons. We address each error in turn and Ameristar's arguments on appeal.

*Ameristar produced legitimate, non-discriminatory reasons for firing Clemmons*

Initially, the ALJ erred in merging Ameristar's burden to produce legitimate reasons for firing Clemmons with its burden to prove by clear and convincing evidence that it would have fired him absent his protected activity. On remand, the ALJ listed the six reasons that Ameristar proffered in support of its decision to fire Clemmons. The ALJ found that, "without determining the credibility of [the] asserted reasons," Ameristar had articulated facially non-discriminatory reasons for Clemmons's discharge and therefore had rebutted his prima facie case. The ALJ then concluded that Clemmons had to prove by a preponderance of the evidence that his protected activity contributed to his firing.[15]

On appeal, Ameristar argues that the ALJ erred in finding that Clemmons engaged in protected activity when he complained about Ameristar's maintenance policy.[16] The ALJ found, however, that Ameristar did not contest the issue of protected activity on remand.[17] Accordingly, Ameristar has waived this issue on appeal.[18]

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[13] *See* 49 U.S.C.A. §§ 42121(a), (b)(2)(B)(i); *Clark v. Pace Airlines, Inc.,* ARB No. 04-150, ALJ No. 2003-AIR-028, slip op. at 11 (ARB Nov. 30, 2006).

[14] *See* 49 U.S.C.A. §§ 42121(b)(2)(B)(ii), (3)(B).

[15] D. & O. on R. at 5.

[16] Ameristar's Brief at 8-10.

[17] D. & O. on R. at 6.

[18] The ARB affirmed, as supported by substantial evidence, the ALJ's conclusion that Clemmons engaged in protected activity during his discussions with Ameristar's managers about duty-time restrictions. *Clemmons,* slip op. at 7.

*Clemmons proved that his protected activity contributed to his firing*

Initially, the ALJ failed to apply the proper "contributed to" standard in finding that Clemmons's protected activity was a factor in his discharge. The ARB instructed the ALJ to determine whether Clemmons proved by a preponderance of the evidence that his protected activity contributed to his firing and to clarify what evidence supported such a conclusion. In addition, the ARB held that the ALJ erred in finding that pretext alone could establish that Ameristar discriminated.[19]

The ALJ found that Ameristar had no legitimate reason to fire Clemmons and, to cover up the true reason for his discharge, "manufactured facially legitimate ones." Based on the record evidence of temporal proximity, Ameristar's shifting defenses to explain Clemmons's discharge, and the fact that Ameristar's reasons for firing Clemmons constituted pretext, the ALJ concluded that Clemmons established by a preponderance of the credible evidence that his protected activity was a contributing factor in Ameristar's decision to fire him.[20]

**Temporal proximity**

Ameristar argues first that because the ALJ failed to analyze the issue of temporal proximity, his conclusion that Clemmons's protected activity contributed to his firing cannot stand. Ameristar also contends that temporal proximity alone cannot establish causation and that legitimate reasons for firing Clemmons intervened between his protected activity and discharge.[21]

While a temporal connection between protected activity and an adverse action may support an inference of retaliation, the inference is not necessarily dispositive.[22] The ARB has held, however, that temporal proximity is "evidence for the trier of fact to weigh in deciding the ultimate question of whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action."[23]

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[19] *Clemmons,* slip op at 8-10.

[20] R. D. & O. on R. at 6-9.

[21] Ameristar Brief at 10-11. Ameristar did not indicate what intervening events "severed" any inference of causation resulting from temporal proximity.

[22] *Robinson v. Northwest Airlines, Inc*., ARB No. 04-041, ALJ No. 2003-AIR-022, slip op. at 9 (ARB Nov. 30, 2005).

[23] *Dixon v. U.S. Dep't. of Interior,* ARB Nos. 06-147, -160; ALJ No. 2005-SDW-008, slop op. at 13 (ARB Aug. 28, 2008).

In his initial decision, the ALJ found that Clemmons exchanged e-mails with Wachendorfer in December 2002 and met with an FAA representative on January 7, 2003. Among Clemmons's concerns was his complaint that Ameristar was violating the FAA's Part 125 duty-time restrictions by "pushing pilots to violate the 16-hour rule and allowing dispatchers or schedulers to interrupt their rest periods with pages." The ALJ found that Clemmons's protected activity in December was about one-and-one-half months prior to his firing and that the protected activity in January occurred within two weeks of the January 20, 2003 discharge.[24]

Substantial evidence supports the ALJ's findings. Clemmons's December 17, 2002 e-mail informed Wachendorfer that Ameristar could not use the "beyond-our-control" exception to the 16-hour duty limit in Part 121 to justify exceeding the same rule under Part 125 because FAR § 125.37 was more restrictive.[25] Further, Clemmons testified that on January 7, 2003, he asked the FAA's representative to clarify the duty-time rule after Wachendorfer questioned his research.[26] The ALJ thus properly concluded that Clemmons showed temporal proximity between his protected activities and his firing.[27]

**Pretext**

Ameristar argues that substantial evidence does not support the ALJ's factual findings that its proffered reasons for firing Clemmons constituted pretext because initially the ALJ found four of those six reasons to be legitimate.[28]

If Clemmons proves pretext, the fact-finder may infer that his protected activity contributed to his discharge, but is not compelled to do so.[29] Nonetheless, proof that an employer's "explanation is unworthy of credence" is persuasive evidence of discrimination because "once the employer's justification has been eliminated,

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[24] R. D. & O. at 62-65.

[25] Complainant's Exhibit (CX) 15, 19-21; Respondent's Exhibit (RX) 13; hearing transcript (TR) at 580-89, 722-23.

[26] TR at 618-22, 644-51, 719-21, 781-82.

[27] D. & O. on R. at 6. *Sievers v. Alaska Airlines*, ARB No. 05-109, ALJ No. 2004-AIR-028, slip op. at 9 (ARB Jan. 30, 2008) (record supports the ALJ's finding of temporal proximity between the engine vibration incident sometime in early 2003 and complainant's discharge in July 2003).

[28] Ameristar Brief at 13-20.

[29] *Sievers*, ARB No. 05-109, slip op. at 5 (citations omitted).

discrimination may well be the most likely alternative explanation" for an adverse action.[30]

The ALJ's finding on remand that Ameristar produced "facially non-discriminatory" reasons for firing Clemmons does not mean that the ALJ found these reasons to be credible.[31] To the contrary, the ALJ found that neither Wachendorfer nor Frazier testified credibly.

Substantial evidence amply supports the ALJ's credibility findings regarding the testimony of Wachendorfer and Frazier. The record demonstrates that neither manager even saw Clemmons's inappropriate January 13 e-mail to various pilots until March 28, 2003, more than two months after his firing.[32] Contrary to Ameristar's argument that the ALJ believed Frazier, the ALJ found that Frazer's testimony about seeing the memo "within days" of Clemmons's discharge was "particularly dubious" and "wholly incredible."[33] Because Frazier was found to be untruthful, the January 13 e-mail could not have been a true reason to fire Clemmons.

Similarly, the ALJ found Wachendorfer's statements concerning the reasons Ameristar fired Clemmons to be "incredible." Wachendorfer testified that Clemmons was fired because he had to instruct him how to load the aircraft on January 16, 2003. Substantial evidence supports the ALJ's finding that this reason was pretext because: (1) Wachendorfer did not talk to Clemmons on that day but to his co-pilot; (2) Clemmons was able to load 20 of the 24 pallets on the plane, not 30 percent as Wachendorfer claimed; (3) the problem was not Clemmons's supposed inability but the customer's misrepresentation of the size of the pallets; and (4) Wachendorfer admitted that no other pilot was fired for such a reason.[34]

Wachendorfer testified that Clemmons's schedules were unacceptable because they did not provide pilot coverage for Ameristar's three planes, yet Ameristar introduced no documentary evidence of inadequate pilot coverage. Also, Wachendorfer rejected as unacceptable the 14-days-on, 7-days-off schedule that he told Clemmons to produce in

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30 *Florek v. Eastern Air Cent., Inc.* ARB No. 07-113, ALJ No. 2006-AIR-009, slip op. at 7-8 (ARB May 21, 2009), citing *Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 147-48 (2000).

31 D. & O. on R. at 9.

32 RX 20.

33 R. D. & O. at 56. *See* TR at 1345-50, 1509-19. Frazier testified that his affidavit, which was given under oath and based on personal knowledge, was in fact not based on personal knowledge of certain events.

34 D. & O. on R. at 8. *See* CX 32-33.

mid-January.[35] Based on our review of the record, substantial evidence supports the ALJ's finding that the scheduling reason was pretext.

Finally, substantial evidence supports the ALJ's finding that Clemmons's alleged failure to update pilot training records and operational manuals was pretext. Daniel Hulsey, Ameristar's primary record keeper, testified that the incomplete pilot records he found in November 2002 were not a big concern because Clemmons agreed to fix the problem.[36] Frazier testified that he did not discuss any discrepancies in the pilot records with Clemmons in January.[37] Human resources director Rives testified that that the FAA approved the manuals and that Ameristar was not fined or sanctioned for any deficiencies in its manuals or pilot records.[38] Therefore, we reject Ameristar's argument that these reasons were not pretext.

**Shifting defenses**

On remand, the ALJ concluded that Ameristar's "presentation of shifting defenses" confirmed the discriminatory nature of Ameristar's discharge of Clemmons because Ameristar proffered new reasons for firing Clemmons after the fact and offered some but not all of those reasons at different times.[39]

Ameristar argues that the ALJ should not have relied on its communications with the Texas Workforce Commission (TWC), which oversees unemployment benefits, and with OSHA about its reasons for firing Clemmons.[40]

The ARB has held that shifting explanations for an employer's adverse action often indicate that its asserted legitimate reasons are pretext.[41] Also, the credibility of an

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35 RX 17. *See* RX 20.

36 TR at 1201-1210.

37 TR at 1552-55.

38 TR at 1025, 1084-89, 1113-14, 1138-42.

39 D. & O. on R. at 8.

40 Ameristar Brief at 20-22.

41 *Berkman v. U.S. Coast Guard Acad.*, ARB No. 98-056, ALJ No. 1997-CAA-002, slip op. at 19 (ARB Feb. 29, 2000), citing *Hoffman v. Bossert*, No. 1994-CAA-004, (Sec'y Sept. 1995) (finding a shift in respondent's theory of the case a strong indication of pretext); *Priest v. Baldwin Assoc.*, No. 1984-ERA-030, slip op. at 12 (Sec'y June 11, 1986) (holding that the reasons not relied upon at the time of the adverse action, but later presented, were pretext). *See also Speegle v. Stone & Webster Const., Inc*., ARB No. 06-041, ALJ No. 2005-ERA-006, slip op. at 10 (ARB Sept. 24, 2009).

employer's after-the-fact reasons for firing an employee is diminished if these reasons were not given at the time of the initial discharge decision.[42] Finally, contradictions in the circumstances surrounding an employer's termination of employment can also indicate that the employer's real motive was unlawful retaliation.[43]

Substantial evidence supports the ALJ's findings that Ameristar offered new and differing reasons for firing Clemmons after the fact. Frazier testified that he told Clemmons the company had lost confidence in his ability to manage the pilots.[44] Rives remembered that the company had lost confidence in Clemmons's ability to manage Part 125 operations.[45] Wachendorfer first testified that Clemmons was fired because of his inability to load the airplane on January 16, and later added scheduling problems as a reason. Further, additional reasons surfaced in Ameristar's responses to the OSHA investigation, including lowering morale by his January 13 e-mail to the pilots and failing to update operations manuals, maintain accurate pilot training records, create efficient pilot schedules, manage the pilots, and disseminate navigational charts.[46] Finally, Ameristar stated on February 5 and March 31, 2003, in its appeal to the TWC that Clemmons was fired for "poor performance" in that he "exercised poor judgment in executing training plans and work schedules" and "did not choose the most economical way to maintain" his flight currency.[47] On April 4, 2003, Ameristar again cited work schedules and added the January 16 pallet loading as the "final incident."[48]

Standing alone, temporal proximity, pretext, or shifting defenses may be insufficient to establish by a preponderance of the evidence that a complainant's protected activity contributed to his employer's adverse action. Based on this record, however, substantial evidence supports the ALJ's findings that Clemmons established

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[42] *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 8 (ARB Dec. 30, 2004), *aff'd Vieques Air Link, Inc. v. U.S. Dept. of Labor*, 437 F.3d 102, 109 (1st Cir. 2006).

[43] *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, -169, ALJ No. 1990-ERA-030, slip op. at 9 (ARB Feb. 9, 2001), citing *Bechtel Const. Co. v. Sec'y of Labor*, 50 F.3d 926, 935 (11th Cir. 1995).

[44] TR at 1428.

[45] TR at 983.

[46] CX 46.

[47] CX 42.

[48] CX 44. Rives stated in this communication that there were only 18 pallets and that Frazier showed Clemmons how they could all be loaded.

temporal proximity between his protected activity and his firing, that the reasons Ameristar proffered for firing Clemmons were pretext, and that Ameristar's shifting defenses indicated unlawful retaliation. Therefore, we affirm the ALJ's conclusion that Clemmons established by a preponderance of the evidence that his protected activity contributed to his discharge.[49]

*Ameristar did not prove that it would have fired Clemmons absent his protected activity*

Because the ALJ failed to consider whether Ameristar proved by clear and convincing evidence that it would have discharged Clemmons absent his protected activity, the ARB directed him on remand to "analyze, discuss, make findings, and conclude" whether Ameristar met its burden of proof. The ALJ concluded that Ameristar failed to establish by clear and convincing evidence that it would have fired Clemmons absent his protected activity and re-affirmed his previous decision.[50]

Clear and convincing evidence or proof denotes a conclusive demonstration; such evidence indicates that the thing to be proved is highly probable or reasonably certain.[51] Thus, in an AIR 21 case, clear and convincing evidence that an employer would have fired the employee in the absence of the protected activity overcomes the fact that an employee's protected activity played a role in the employer's adverse action and relieves the employer of liability.[52]

Ameristar argues again that substantial evidence does not support the ALJ's findings regarding its reasons for firing Clemmons.[53] However, substantial evidence supports the ALJ's conclusions regarding the credibility of Wachendorfer and Frazier and his factual findings regarding temporal proximity, pretext, and shifting defenses and thus preclude any determination that Ameristar could establish by clear and convincing evidence that it would have fired Clemmons absent his protected activity.[54] As the ALJ stated, Ameristar wanted to "relieve itself of a supervisor who refused to condone pilot abuse by working them past allowable duty time, or having them fly unsafe aircraft due

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49 *See generally Speegle,* ARB No. 06-041.

50 D. & O. on R. at 9.

51 BLACK'S LAW DICTIONARY 577 (7th ed. 1999).

52 *Evans v. Miami Valley Hosp.,* ARB Nos. 07-118, -121, ALJ No. 2006-AIR-022, slip op. at 19 (ARB June 30, 2009).

53 Ameristar Brief at 25-26.

54 *See Lebo v. Piedmont-Hawthorne,* ARB No. 04-020, ALJ No. 2003-AIR-025, slip op. at 5 (ARB Aug. 30, 2005) (holding that the reasons proffered for firing the complainant were not true and could not constitute clear and convincing evidence).

to lack of proper maintenance . . . [and] who would not condone common carriage" against regulations.[55]

*Clemmons is entitled to back pay*

AIR 21 provides that if a violation of AIR 21 has occurred, the ALJ shall order the employer to (1) take affirmative action to abate the violation; (2) reinstate the complainant to his former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his employment; and (3) provide compensatory damages.[56]

In his initial decision, the ALJ did not order Ameristar to reinstate Clemmons to his former position because Clemmons requested that he not be reinstated as he had found other employment.[57] The ALJ erred in this regard because AIR 21 provides for reinstatement as an automatic remedy except where impossible or impractical.[58] However, the issue was not raised on appeal and thus, we need not address it.[59]

The ALJ stated that Clemmons had limited his requested damages to $56,746.23, representing back pay from the date of firing, January 20, 2003, through July 2004, when the first hearing began. The ALJ found this amount to be reasonable and awarded it.[60]

The purpose of a back-pay award is to return the wronged employee to the position he would have been in had his employer not retaliated against him; calculations of the amount due must be reasonable and supported by the evidence.[61] Back-pay liability ends when the employer makes a bona fide, unconditional offer of reinstatement

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[55] D. & O. on R. at 9.

[56] 49 U.S.C.A. § 42121(b)(3)(B); 29 C.F.R. § 1979.109(b). *See Florek*, ARB No. 07-113, slip op. at 11.

[57] R. D. & O. at 70. *See* CX 79.

[58] *Rooks*, ARB No. 04-092, slip op. at 9; *Assistant Sec'y & Bryant v. Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-036, slip op. at 8 (ARB June 30, 2005).

[59] *See Walker v. American Airlines, Inc.*, ARB No. 05-028, ALJ No. 2003-AIR-017, slip op. at 9 (ARB Mar. 30, 2007) (argument not raised on appeal is waived).

[60] R. D. & O. at 70-71.

[61] *Evans*, ARB Nos. 07-118, -121, slip op. at 20.

or, in very limited circumstances, when the employee rejects a bona fide offer, not when the case goes to a hearing before the ALJ.[62]

Although the ALJ erred in awarding back pay only until the date of the hearing, Clemmons offered no evidence on remand showing any lost wages thereafter and Ameristar has not made any offer of reinstatement. While legal error of this type generally requires remand for the ALJ to correct, we will not remand this case for a proper determination of the back pay owing because Clemmons does not seek reinstatement and has not argued the issue on appeal.[63]

Ameristar contends that the ALJ's award cannot stand because Clemmons received workers' compensation, unemployment benefits, and interim wages. Ameristar argues that if an employee is receiving income benefits to replace lost wages, he cannot also be awarded back pay to replace those same lost wages.[64]

The ALJ declined to deduct from Clemmons's back pay award the amounts he received in Texas workers' compensation payments – $17,951.14 in "temporary income benefits" from January 17 through September 7, 2003, and $9,049.86 in "impairment income benefits" from September 5, 2003, to April 1, 2004.[65] The ALJ found that the word "income" was not dispositive and dismissed Ameristar's "windfall" argument because Ameristar had offered no proof that Clemmons's workers' compensation benefits were to replace lost wages, and thus no set-off from his back pay award was necessary.[66] We disagree.

Generally, workers' compensation benefits that replace lost wages during a period in which back pay is owed may be deducted from a back-pay award; however, workers' compensation in reparation for permanent physical injury is not compensation for loss of wages and is thus not deductible.[67]

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62 *See Dale v. Step 1 Stairworks, Inc*., ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 4-5 (ARB Mar. 31, 2005).

63 *See Seetharaman v. Stone & Webster, Inc.,* ARB No. 06-024, ALJ No. 2003-CAA-004, slip op. at 7-8 (ARB Aug. 31, 2007) (complainant failed to argue the legal significance of factual error on appeal and therefore waived the issue).

64 Ameristar Brief at 26-27.

65 RX 34.

66 R. D. & O. at 71-72.

67 *Berkman*, slip op. at 29. *See also Williams v. TIW Fabrication & Mach., Inc.,* ALJ No. 1988-SWD-003, slip op. at 13 (Sec'y June 24, 1992).

The Texas Workers' Compensation Act defines an income benefit as "a payment made to any employee for a compensable injury."[68] Section 408.061(a) states that the temporary income benefit cannot exceed 100 percent of the state average weekly wage, which is determined annually under section 408.047. After an employee reaches maximum medical improvement, he or she is entitled to an impairment income benefit the amount of which is based on the percentage of permanent impairment and may not exceed 70 percent of the state average weekly wage.[69]

Before he was fired, Clemmons was earning about $6,000.00 a month. His first award of $17,951.14 was a temporary income benefit for his compensable injury, two injured discs in his lower back from a fall on the ice. The second award of $9,049.86 was an impairment income benefit, which was paid while he was working for the FAA.

While the computation of these benefits was not based on Clemmons's wages, the first award did replace some of the wages Clemmons would have received had he not been fired. *See* TR at 774. Since part of the $56,746.23 back pay covers all of the wages Clemmons would have earned from January until September 2003, we will deduct the temporary income benefit of $17,951.14 from the award to avoid a windfall. The second award of $9,049.86 was for permanent impairment and will not be deducted.

Ameristar also contends that the ALJ erred in discounting the "undisputed" fraud Clemmons committed in seeking unemployment benefits while receiving workers' compensation.[70] Substantial evidence supports the ALJ's finding that Ameristar failed to prove that Clemmons engaged in fraud. Clemmons testified that he filed for unemployment in January and won but Ameristar appealed and finally had the decision reversed in June. He added that after the TWC informed him that he could not receive both benefits, he agreed to pay back Ameristar for the jobless benefits – about $6,000.00 – that he had received in error and did so on a payment plan.[71] The record contains no evidence of fraud by Clemmons.

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[68] Vernon's Texas Code Annotated (V.T.C.A.) § 401.011(25) (West 2010). *See Payne v. Galen Hosp. Corp*., 29 S.W.3d 15, 17 (Tex. 2000) (stating that the primary purpose of the state compensation program is to provide injured employees prompt remuneration for their job-related injuries).

[69] §§ 408.061(b), 408.121. Section 408.121 provides that an employee's entitlement to impairment income benefits begins on the day after the date the employee reaches maximum medical improvement and ends on the earlier of the date of expiration of a period computed at the rate of three weeks for each percentage point of impairment or the date of the employee's death.

[70] Ameristar Brief at 27-28.

[71] RX 33; TR at 630-33.

Accordingly, we modify the ALJ's award of back pay to reflect the $800.00 Clemmons earned while unemployed in 2003 and the $17,951.14 he received in temporary income benefits while unemployed.[72] Thus, Ameristar shall pay Clemmons $37,995.09 plus interest pursuant to 26 U.S.C.A. § 6621.

Clemmons's attorney has 30 days in which to submit a petition for attorneys' fees and other litigation expenses for work done before the ARB. He is to serve any such petition on Ameristar, which will have 30 days in which to file objections to the petition.[73]

**SO ORDERED.**

**PAUL M. IGASAKI**
**Chief Administrative Appeals Judge**

**E. COOPER BROWN**
**Deputy Chief Administrative Appeals Judge**

**WAYNE C. BEYER**
**Administrative Appeals Judge**

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[72] Clemmons earned $800.00 from Avia Crew Leasing, RX 37, before joining the FAA in September 2003.

[73] In his brief, Clemmons's attorney asks that we remand this case to the ALJ for consideration of his fees and expenses. We decline to do so. Clemmons must file a petition for such fees and expenses with the ALJ.