



**In the Matter of:**

**JOSEPH DADY,**

**COMPLAINANT,**

**v.**

**HARLEY MARINE SERVICES, INC.,**

**RESPONDENT.**

**ARB CASE NOS. 13-076  
13-077**

**ALJ CASE NO. 2012-SPA-002**

**DATE: July 31, 2015**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Stephen M. Chouest, Esq. and J. Rand Smith, Jr., Esq.; *The Chouest Law Firm;*  
Metairie, Louisiana**

***For the Respondent:***

**William T. Grimm, Esq. and Brian P Lundgren, Esq.; *Davis Grimm Payne & Marra;*  
Seattle, Washington**

***For the Assistant Secretary of Labor for the Occupational Safety and Health Administration  
as Amicus Curiae:***

**M. Patricia Smith, Esq.; Joseph Woodward, Esq.; Charles James, Esq.; and Ann  
Capps Webb, Esq.; United States Department of Labor, Washington, District of  
Columbia**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge;* Joanne Royce, *Administrative  
Appeals Judge,* and Luis A. Corchado, *Administrative Appeals Judge.***

**FINAL DECISION AND ORDER**

This case arises under the employee protection provisions of the Seaman's Protection Act, 46 U.S.C.A. § 2114 (Thomson/West 2007) (SPA or the Act), as amended by Section 611 of the Coast Guard Authorization Act of 2010, P.L. 111-281 (2015 Thomson Reuters), and implementing regulations at 29 C.F.R. Part 1986 (2014). In November 2010, the Complainant, Joseph Dady, filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his former employer, Harley Marine Services, Inc. (Harley Marine), violated the SPA by discharging him for engaging in activity that the SPA protects. OSHA found no violation. Dady requested a hearing. Subsequent to a hearing, a Department of Labor (DOL) Administrative Law Judge (ALJ) found that Harley Marine terminated Dady's employment in violation of the SPA. The ALJ ordered reinstatement and other relief, including punitive damages. Decision and Order Damage Award (June 25, 2013)(D. & O.). Harley Marine appealed to the Administrative Review Board (ARB).<sup>1</sup> Dady filed a cross-appeal. We affirm the D. & O., deny both appeals, and summarily explain.

## DISCUSSION<sup>2</sup>

By letter dated October 25, 2010, John Walls, Harley Marine's General Manager in New York, notified Dady that his employment the company was terminating his employment as a "result of failure to report the incident involving the Chrestensen Sea on October 12, 2010 which resulted in extensive damage to the vessel and the company's loss of faith in your abilities to perform the job functions of your position." Complainant's Exhibit AA. The ALJ thoroughly discussed the evidence and the parties' contentions regarding Dady's complaint. The ALJ concluded that Dady met his burden to establish that his protected safety complaints contributed to Harley Marine's decision to discharge him. The ALJ also determined that Harley Marine failed to prove by clear and convincing evidence, that it would have discharged Dady in the absence of the protected activity. The ALJ thus ruled that Harley Marine violated the SPA whistleblower statute and awarded damages in Dady's favor. We affirm and highlight only a few reasons for the decision.

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<sup>1</sup> Dady moves to strike Harley Marine's September 23, 2013 reply brief as untimely filed. The Department of Labor stamped the pleading as filed on October 22, 2013. We deny the motion. The reply is untimely on its face. Dady, however, could not have been prejudiced by this fact as the pleading was processed a month after its writing, only after a Federal Government shutdown ended.

<sup>2</sup> The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final decisions under the Seaman's Protection Act. 29 C.F.R. § 1986.110(a); Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012). We review the ALJ's factual determinations to determine whether they are supported by substantial evidence. 29 C.F.R. § 1986.110(b). The Board reviews the ALJ's legal conclusions de novo. *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

### *Protected Activity*

Harley Marine admits that it “stipulated only that element 1 (engaged in protected activity) was satisfied, but not to any ‘assertions made therein’ and not to other elements such as employer knowledge or contributing factor.” Respondent’s Supporting Brief at 8. Harley Marine contends that the ALJ failed to hold Dady to his burden of proof by presuming the protected activities to have actually taken place for the purpose of analyzing Harley Marine’s knowledge of the activities. Respondent’s Supporting Brief at 8-14. Harley Marine specifically contests this ALJ finding:

In its post-trial briefs, Respondent repeatedly raises the question of whether the protected activities actually took place (e.g., “Captain Dady appeared to testify that he reported [the incident related to sewage] to the Coast Guard at **some unknown time**, but the record contains no other proof in this regard,” Post-trial Brief at 10-12 (emphasis in original)). However, since Respondent stipulated to the protected activities, they will be presumed to have taken place for the purpose of analyzing employer knowledge.

D. & O. at 30 n.4. Harley Marine argues that the ALJ thereby “erred by claiming this stipulation relieved [Dady] of his obligation to fully establish the element of employer knowledge.” Respondent’s Supporting Brief at 8 n.8. We disagree.

Harley Marine’s admission that protected activity occurred necessarily means that some underlying conduct occurred. We infer from the ALJ’s footnote 4 as well as from the totality of his findings and conclusions, that he believed that the stipulation was to the protected activities as alleged by Dady. *See Zink v. U.S.*, 929 F.2d 1015, 1020-21 (5th Cir. 1991) (reasonable inferences may be drawn by an appellate body reviewing a trial or hearing court’s findings of fact); *see also Jackson v. Comm’r*, 864 F.2d 1521, 1524 (10th Cir. 1989) (citations omitted). Harley Marine’s submission, Respondent’s Exhibit 24 (corrected), details the protected activity alleged by Dady, and the ALJ, in determining what actually happened here, rationally “accept[ed] the four activities stipulated to as the protected activities in this case.” D. & O. at 30; *see also id.* at 28-30; ALJ’s Order Denial of Respondent’s Motions for Summary Decision and to Strike, at 6-7 and at 7 n.7 (Feb. 13, 2013); Respondent’s Exhibit 24 (corrected); Hearing Transcript (Tr.) at 14.<sup>3</sup> The ALJ found that the subject of this conduct “overlap[s]” the subject in the public reports Dady made for the duck boat article in October 2010. D. & O. 30. This

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<sup>3</sup> Respondent’s Exhibit 24 (original and corrected version) entitled “Allegations of Protected Activity” includes the following quotation: “Many of these issues were addressed by Captain Dady with the [Towing Safety Advisory Committee], an organ of the office of the Commandant of the [United States Coast Guard].” *See* Respondent’s Exhibit 24 (original and corrected version); D. & O. at 3.

conduct easily fits within one or more of the categories of protected activity listed in the SPA whistleblower statute, which includes engaging in one or more of the following (directly or indirectly): (1) reporting (or about to report) maritime law violations to the Coast Guard, (2) testifying in a proceeding related to enforcement of maritime laws, or (3) furnishing information to the Secretary, the National Transportation Safety Board, or any other public official about any marine casualty resulting in injury or death to an individual or damage to property occurring in connection with vessel transportation. 46 U.S.C.A § 2114(a)(1)(A), (C), (F). The combined effect of these provisions is that the SPA protects individuals who publicly disclose maritime law violations and safety issues connected with vessel transportation.

### *Contributing Factor*

Harley Marine argues that the ALJ erred in finding that the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century<sup>4</sup> (AIR 21) causation standard and legal burdens of proof apply here because the SPA requires that a seaman show discharge or other discrimination “because” of protected activity. *See* 46 U.S.C.A. § 2114(a)(1). Respondent’s Brief at 28. The Administrator argues that the AIR 21 standards apply, as Congress provided. We agree. The SPA provides that a complaint may be filed in the same manner as a Surface Transportation Assistance Act (STAA) complaint under 49 U.S.C.A. § 31105(b) (2007 Thomson/West) and that such complaint will be “subject to the procedures, requirements, and rights described in that section,” 46 U.S.C.A. § 2114(b). The STAA in turn references AIR 21. While Harley Marine argues that nowhere in the STAA are the AIR 21 burdens of proof “described,” that verb can be easily understood to include the AIR 21 causation standard expressly referenced in the STAA. Harley Marine urges a hypertechnical interpretation of statutory language that runs contrary to the remedial purposes of the Acts involved here.

Viewing the record as a whole, we find that substantial evidence supports the ALJ’s finding of a causal link between Dady’s protected activity and Harley Marine’s termination of his employment. The ALJ found important the close temporal proximity between Dady’s protected activity and the termination, particularly a conversation that Walls had with Dady in late September/early October just before Harley Marine ended Dady’s employment. D. & O. at 35. The ALJ found that this conversation constitutes indirect evidence that Dady’s protected complaints contributed to Harley Marine’s decision to discharge him. The ALJ accepted Dady’s account of this conversation, which Dady interpreted as Walls threatening him with adverse employment action. More specifically, the ALJ believed Dady’s testimony that Walls told Dady: (1) that Harley Franco (the company’s founder, chairman, chief executive officer, and president) was not happy with Dady giving a public opinion as an expert on a duck boat incident that did not involve Harley Marine; (2) that Dady needed to stop talking to the press; (3) *that had Dady named his employer to the press, Dady would have been immediately discharged, and (4) that if*

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<sup>4</sup> 49 U.S.C.A. § 42121(b) (Thomson Reuters 2015).

*the company had any reason to discharge Dady he would be discharged right then.* D. & O. at 14, 34-36.

The ALJ also found to be pretextual Harley Marine's stated reason for Dady's discharge, namely the October 2010 collision with the pier (also referred to as an "allision" in the record). The ALJ determined that Harley Marine's investigation following the allision was faulty and not comprehensive and that Harley Marine provided shifting reasons for Dady's discharge that its own investigation did not support. D. & O. at 38-41. The ALJ further noted Walls's testimony that the allision was "not the only reason why Captain Dady was terminated," Tr. at 232; D. & O. at 36, and determined, "Yet the allision is the only grounds for termination mentioned in the termination letter [Walls] wrote." D. & O. at 36. It is this ambiguity of facts that allowed the ALJ to infer that Harley Marine knew about some or all of the protected activity and that this knowledge informed its decision to fire Dady. *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003 (ARB Aug. 24, 2014).

#### *Harley Marine's Affirmative Defense*

The ALJ found that Harley Marine did not meet its burden to prove by clear and convincing evidence that it would have terminated Dady's employment in the absence of the protected activity because of his failure to report the allision. Substantial evidence supports the ALJ's determination that statements in Harley Marine's operations manual regarding the responsibilities of a captain and of the person in charge at the time of an allision appear "inconsistent at times" and "[a]lthough some provisions suggest that the captain bears ultimate authority, other provisions indicate that the captain's duties are assumed by the person(s) in charge when he is off watch. Because the [Marine Operations Manual] is ambiguous on this point, I am not persuaded that it shows that Respondent would have terminated Complainant even if he had not engaged in the protected activity." D. & O. at 43.

The ALJ also rejected Harley Marine's argument that the discharge of another captain, Captain McCauley, was evidence that (1) another similarly situated employee had suffered the same discipline, and (2) thus constituted clear and convincing proof that Harley Marine would have discharged Dady for failure to report the allision even in the absence of his protected activity. Substantial evidence supports the ALJ's finding that McCauley was not similarly situated to Dady. Moreover, the ALJ noted Walls's testimony that to his knowledge, except for Dady, Harley Marine had never terminated anybody who was asleep and off watch when an allision or accident occurred that they did not cause. D. & O. at 44; *see* Tr. at 166.

Substantial evidence further supports the ALJ's finding that Dady's work record, including 2008 appraisals in which Harley Marine rated his performance as outstanding, "cast doubt" on Harley Marine's assertion that Walls's 2008 concerns about Dady's then communication problems related to the 2010 decision to discharge him. D. & O. at 44.

We recognize the seriousness of the events that occurred here. First, there was a serious allision that punctured the hull of the barge, followed by the crew's failure to report the allision or, supposedly, even to mention it to Dady, which all lead up to the near sinking of the barge in New York harbor when the barge was full of oil. But equally significant is the lack of clear and convincing evidence that Harley Marine would have *terminated* Dady's employment absent the contribution of the protected activity. We do not consider whether some discipline was inevitable because that issue was not raised.

### *Reinstatement*

Both parties contest the ALJ's order of reinstatement; Harley Marine, in its appeal, and Dady, in his cross-appeal. But we are not persuaded by any argument of either party to modify it. The regulations provide that where the ALJ finds a SPA violation, as the ALJ in this case did, the ALJ "will" issue an order which will require reinstatement where "appropriate." 29 C.F.R. § 1986.109(d)(1). The ALJ's reinstatement order, which was issued in his decision dated June 25, 2013, was "effective immediately" upon Harley Marine's receipt of the decision, and remains a standing order that Harley Marine must follow. 29 C.F.R. § 1986.109(e). Accordingly, Harley Marine is required to make a bona fide offer of reinstatement to Dady to his "former position, with the same compensation, terms, conditions and privileges" of his employment. 29 C.F.R. § 1986.109(d)(1). As the ALJ properly determined, Dady is entitled to back pay until he is reinstated or he receives a bona fide offer of reinstatement. D. & O. at 45.

### *Punitive Damages*

Harley Marine challenges the ALJ's award of \$20,000 in punitive damages as unsupported by the facts of this case. On cross-appeal, Dady argues that the ALJ erred in failing to impose the maximum punitive damages allowed under the SPA. Cross Petition for Review at 2. The regulations implementing the SPA provide for up to \$250,000 in punitive damages. 29 C.F.R. § 1986.109(d)(1). The ALJ adequately addressed the relevant facts of this case, including Harley Marine's conduct, and determined that \$20,000 "is a sufficient amount in punitive damages to accomplish the aims of punishment and deterrence in this case." D. & O. at 50. Upon review of the ALJ's punitive damages award, we find that it is supported by the record and consistent with applicable law. *Youngermann v. United Parcel Serv., Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047 (ARB Feb. 27, 2013). Finding no reversible error, we do not disturb the ALJ's punitive damages award.

**CONCLUSION**

Accordingly, the ALJ's Decision and Order is **AFFIRMED**.

**SO ORDERED.**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

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

**JOANNE ROYCE**  
**Administrative Appeals Judge**