In the Matter of:

ROBERT PALMER, **ARB CASE NO. 03-109**

COMPLAINANT, **ALJ CASE NO. 2003-STA-28**

v. **DATE: August 31, 2005**

TRIPLE R TRUCKING,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Complainant:
Robert Palmer, *pro se*, Avalon, California

FINAL DECISION AND ORDER OF REMAND

Robert Palmer filed a complaint under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 1997), and its implementing regulations at 29 C.F.R. Part 1978 (2004). He alleged that Triple R Trucking terminated his employment relationship in violation of the STAA. A U.S. Department of Labor Administrative Law Judge (ALJ) concluded that Triple R violated the STAA. The ALJ ordered Triple R to pay Palmer $70,875.00 and $4,037.00 a month until the damages award was paid. The ALJ's June 19, 2003 Recommended Decision and Order (R. D. & O.) is now before the Administrative Review Board (ARB) pursuant to the automatic review provisions of 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(a).[1]

[1] This regulation provides: "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee."

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her jurisdiction to decide this matter to the ARB. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c).

Under the STAA, the ARB is bound by the ALJ's fact findings if substantial evidence on the record considered as a whole supports those findings. 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 02-STA-12, slip op. at 3 (ARB Feb. 27, 2004).

In reviewing the ALJ's conclusions of law, the ARB, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 1996). Therefore, we review the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

ISSUES PRESENTED

Does substantial evidence support the ALJ's finding that Triple R terminated Palmer's employment relationship because he engaged in protected activities?

Did the ALJ err in failing to order reinstatement?

DISCUSSION

The employee protection provisions of the STAA prohibit employment discrimination against any employee for engaging in protected activity, including filing a complaint or beginning a proceeding "related to" a violation of a commercial motor vehicle safety regulation, standard, or order or testifying or intending to testify in such a proceeding. 49 U.S.C.A. § 31105(a)(1)(A). Protected activity also includes a refusal to operate a commercial motor vehicle because "(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or (ii) the employee has a reasonable apprehension of serious injury to the

employee or the public because of the vehicle's unsafe condition." 49 U.S.C.A. § 31105(a)(1)(B).

To prevail on a STAA claim, the complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity, that the employer discharged, disciplined, or discriminated against him, and that there is a causal connection between the protected activity and the adverse action. *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 47 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (ARB Oct. 31, 2003).

We note at the outset that Triple R was not represented by counsel at the May 23, 2003 hearing and no company representative testified. Therefore, Palmer's testimony about his work history and earnings, Triple R's liability, and his monetary damages resulting from its retaliatory termination were uncontested. R. D. & O. at 2-3.

Briefly, Palmer, an owner-operator truck driver located in California, made three deliveries for Triple R between February 7 and 17, 2003. Complainant's Exhibit (CX) 2. During this time, Palmer repeatedly asked Triple R to arrange for his required road driving test, drug screen, and physical examination.[2] Hearing transcript (TR) at 16-20. Following his last delivery, Palmer threatened to report Triple R's president, Charles Richard, to the U.S. Department of Transportation (DOT) if Triple R would not arrange for the tests and examination. Palmer testified that after he complained again during a telephone conversation about the lack of testing, Richard terminated the employment relationship. TR at 18, 21, 39-40.

Substantial evidence supports the ALJ's finding that Palmer engaged in protected activity by repeatedly asking Triple R to provide the DOT-required tests and threatening to report the company's failure to comply. 49 U.S.C.A. § 31105(a)(1)(B)(ii). Substantial evidence also supports the ALJ's findings that Richard was aware of Palmer's complaints about the lack of testing and that Triple R ended its employment relationship with Palmer in retaliation for his protected activity. R. D. & O. at 5. Therefore, these findings are conclusive, and we affirm the ALJ's conclusion that Triple R violated the STAA.

[2] The regulations of the Federal Motor Carrier Safety Administration, U.S. Department of Transportation, require that new employees be administered a drug test, 49 C.F.R. § 382.301 (2004), and have a valid certification of road test, 49 C.F.R. § 391.31, and a valid certificate of physical examination, 49 C.F.R. § 391.43.

The ALJ erred in failing to order Triple R to reinstate Palmer

As a successful litigant, Palmer is entitled to an order requiring Triple R to reinstate him "to [his] former position with the same pay and terms and privileges of employment." 49 U.S.C.A § 31105(b)(3)(A)(ii).[3] *See Dale v. Step 1 Stairworks, Inc.*, ARB No. 04-003, ALJ No. 02-STA-30, slip op. at 4 (Mar. 31, 2005) (reinstatement under the STAA is an automatic remedy designed to re-establish the employment relationship). *See Palmer v. Western Truck Manpower,* ALJ No. 85-STA-6, slip op. at 19 (Sec'y Jan. 16, 1987) (an order of reinstatement is not discretionary).

While reinstatement is the statutory remedy, we have held that circumstances may exist in which reinstatement is impossible or impractical. *Assistant Sec'y & Bryant v. Bearden Trucking Co.*, ARB No. 04-014, ALJ No. 03-STA-36, slip op. at 7-8 (ARB June 30, 2005). *See Creekmore v. ABB Power Sys. Energy Servs., Inc.*, 93-ERA-24, slip op. at 9 (Sec'y Feb. 14, 1996) (front pay in lieu of reinstatement may be appropriate where the parties have demonstrated "the impossibility of a productive and amicable working relationship"); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ No. 1997-CAA-2, 9, slip op. at 27 (ARB Feb. 29, 2000) (same). *See also Doyle v. Hydro Nuclear Servs., Inc.*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 89-ERA-22, slip op. at 7-8 (ARB Sept. 6, 1996), *rev'd on other grounds sub nom. Doyle v. United States Sec'y of Labor,* 285 F.2d 243, 251 (3d Cir. 2002) (under Energy Reorganization Act, 42 U.S.C.A. § 5851, reinstatement was impractical because the company no longer engaged workers in the job classification complainant occupied, and had no positions for which he qualified).

In this case, the ALJ made no findings on the issue of reinstatement. Therefore, on remand, the ALJ must address Palmer's reinstatement "to his former position" and, based on the record evidence, determine whether to order Triple R to reinstate Palmer. *See Dale,* slip op. at 5.

[3] That subsection provides that the company shall "reinstate the complainant to the former position with the same pay and terms and privileges of employment" as he or she held before the retaliatory action. The implementing regulation provides that the ALJ's "decision and order concerning whether the reinstatement of a discharged employee is appropriate shall be effective immediately upon receipt of the decision" by the company. 29 C.F.R. § 1978.109(b).

The ALJ's award of damages to Palmer must be vacated[4]

The STAA also provides that a complainant is entitled to compensatory damages, including back pay. 49 U.S.C.A § 31105(b)(3)(A)(iii). The purpose of monetary damages is to make the complainant whole, that is, to restore the employee to the same position he would have been in if not discriminated against. *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-5, slip op. at 14 (ARB Mar. 29, 2000).

Back pay liability begins when the employee is wrongfully discharged or suspended. Then, when reinstatement is ordered, the employer must make a bona fide reinstatement offer. Back pay liability ends when the employer makes the bona fide unconditional offer of reinstatement or when the complainant declines such an offer. *Dutile v. Tighe Trucking, Inc.*, 93-STA-31, slip op. at 5 (Sec'y Oct. 31, 1994) (the ALJ's reinstatement order obligates the respondent employer to "make a bona fide reinstatement offer").

Thus, Palmer is entitled to back pay, less any interim earnings he may have had during that period, plus interest, until a bona fide offer of reinstatement is made and he refuses or accepts such an offer or the ALJ finds reinstatement impossible; in either case front pay needs to be considered. *See Michaud v. BSP Transp., Inc.*, ARB No. 97-113, ALJ No. 95-STA-29, slip op. at 5-6 (ARB Oct. 9, 1997) (reasonable refusal of offer of reinstatement ends employer's back pay liability but may subject it to front pay liability).

On remand, the ALJ may find it necessary to recalculate the amount of damages to which Palmer is entitled, given the scant evidence on Palmer's earnings with Triple R,[5] his ten-day employment, the lack of any agreement for future work, and the passage of considerable time since the complaint. *See Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 6-8 (ARB Oct. 20, 2004) (discussing reinstatement and remedies of back pay and front pay); *Dale*, slip op. at 8 (discussing procedures for calculating damages awards).

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[4] The ALJ awarded $70,875.00 in damages to Palmer, based on his unemployment from February 17, 2002, until April 1, 2003, and the $5,250.00 a month "which he averaged driving his truck the previous five years." R. D. & O. at 6. The ALJ also ordered Triple R to pay Palmer $4,037.00 a month as "wage loss differential" until the damages award was paid. *Id.*

[5] Palmer's testimony that he had grossed $122,000.00 to $128,000.00 over the past five years, netted about $63,000.00 annually, and was paid 90 cents a mile was uncontested. TR at 23-24, 36. Palmer drove a total of 3,964 miles for Triple R, which at 90 cents a mile would gross him $3,567.60, CX 2, and submitted a tax form from Triple R showing income of $7,418.10 for 2002, CX 1.

CONCLUSION

We **AFFIRM** the ALJ's conclusion that Triple R violated the STAA's employee protection provision as supported by substantial evidence in the record as a whole. We conclude that the ALJ erred in failing to order Triple R to reinstate Palmer and **VACATE** his damages award. We **REMAND** for further proceedings consistent with our opinion.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge