In the Matter of:

STEPHEN W. DALE, **ARB CASE NO. 04-003**

COMPLAINANT, **ALJ CASE NO. 02-STA-30**

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

STEP 1 STAIRWORKS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Diana Brodman Summers, ***Lisle, Illinois***

For the Respondent:
Gary Lambes, Jr., ***pro se, Hinckley, Illinois***

FINAL DECISION AND ORDER OF REMAND

Stephen W. Dale 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).[1] He alleged that his employer, Step 1 Stairworks,

[1] 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

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Inc., terminated his employment because he refused to drive an unsafe truck. A U.S. Department of Labor Administrative Law Judge (ALJ) concluded that Step 1 violated the STAA when it fired Dale. The ALJ ordered Step 1 to pay Dale $4,080.00 in back pay and awarded attorney's fees to Dale's lawyer. The ALJ's April 11, 2003 Decision and Order (D. & O.) and attorney's fees Order are 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) (2003).[2]

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)(2004).

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)).

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 Step 1 fired Dale because he engaged in protected activities?

Did the ALJ err in failing to order reinstatement?

Did the ALJ err in determining the amount of back pay due to Dale?

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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).

[2] 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."

DISCUSSION

Step 1 is liable to Dale

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).

The D. & O. thoroughly and fairly recites the relevant facts underlying this dispute. D. & O. at 2-5. To summarize, Dale drove trucks for Step 1 which manufactures and sells hardwood stair components. Step 1 assigned its 18-20 foot long "box truck" to Dale. Dale repeatedly complained about the safety defects of the truck and eventually refused to drive it. Refusing to drive an unsafe truck constitutes protected activity under the STAA. 49 U.S.C.A. § 31105 (a)(1)(B).

Substantial evidence supports the ALJ's finding that Dale established by a preponderance of the evidence that Step 1 terminated his employment because he engaged in protected activity. Substantial evidence also supports the ALJ's finding that Step 1's professed motivations for firing Dale – negative attitude, bad language, and an unexcused absence – "were inextricably intertwined with his protected activity" and that but for the protected activity, Step 1 would not have fired Dale. D. & O. at 13. Therefore, these findings are conclusive, and we agree with the ALJ that Step 1 violated the STAA.

The ALJ erred in failing to order Step 1 to reinstate Dale

While we are affirming the ALJ's conclusion that Step 1 is liable, we remand this case for further proceedings because the ALJ erred in determining the relief to which Dale is entitled. As a successful litigant, Dale is entitled to an order requiring Step 1 to take affirmative action to abate the violation, to reinstate him to his former position with the same pay, terms and privileges of employment, and to pay him compensatory

damages, including back wages. 49 U.S.C.A § 31105(b)(3)(A)(ii).[3] The ALJ erred as a matter of law because he did not order Step 1 to reinstate Dale to his previous or a similar position.

Under the STAA, reinstatement is an automatic remedy designed to re-establish the employment relationship. *Jackson v. Butler & Co.*, ARB Nos. 03-116, 03-144, ALJ No. 03-STA-26, slip op. at 7 (ARB Aug. 21, 2004). *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). Reinstatement not only vindicates the rights of the complainant who engaged in protected activity, but also provides concrete evidence to other employees, through the return of the discharged employee to the jobsite, that the legal protections of the whistleblower statutes are real and effective. *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, 98-169, ALJ No. 1990-ERA-30, slip op. at 8 (ARB Feb. 9, 2001) (citing *Allen v. Autauga County Bd. of Educ*., 685 F.2d 1302, 1306 (11th Cir. 1982)), *aff'd sub nom. Georgia Power Co. v. United States Dep't of Labor*, 52 Fed. Appx. 490, 2002 WL 31556530 (table) (11th Cir. Sept. 30, 2002). Moreover, as the Supreme Court recognized in *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258-59 (1987), the STAA's whistleblower protection provision "would lack practical effectiveness if the employee could not be reinstated pending complete review."

Thus, as a victorious complainant, Dale is entitled to be restored to the same or a similar position that he would have occupied but for the discrimination. *Cf. Hobby*, slip op. at 13 (construing the remedies provision of the Energy Reorganization Act, 42 U.S.C.A. § 5851 (b)(2)(B)).

But the ALJ here did not adequately address this statutory remedy. He apparently accepted at face value a statement from Dale's attorney at the hearing that Dale was not seeking reinstatement. Transcript (TR) at 13. Dale's personal preference, however, is not sufficient grounds for the ALJ to ignore the STAA's requirement that the victims of retaliation be reinstated.

In *Dutile v. Tighe Trucking, Inc.*, 93-STA-31 (Sec'y Oct. 31, 1994), the Secretary of Labor scrutinized the previous Department of Labor policy of honoring a discharged employee's statement that he does not seek reinstatement. The Secretary found that "a complainant who is not ordered to be reinstated may gain a windfall as back pay continues to accrue during the pendency of remanded issues such as the calculation of back pay and related benefits." Therefore, he determined that the better policy was for

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[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) (2004).

the ALJ to order reinstatement which, in turn, would obligate the respondent employer to "make a bona fide reinstatement offer." Slip op. at 4-5.

Three years later, relying on *Dutile*, the ARB found that an ALJ erred when, on remand, he had ordered the complainant to advise him whether he would be seeking reinstatement. The employee advised the ALJ by letter that he preferred to remain at his new employment "unless certain circumstances change." The Board held that the ALJ "wrongfully relieved [the employer] of its obligation to make a *bona fide* offer of reinstatement." Furthermore, the employee's letter to the ALJ did not constitute a valid waiver of reinstatement because the employer had not unconditionally offered him reinstatement. *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-055, ALJ No. 95-STA-43, slip op. at 3 (ARB May 30, 1997). *See also Heinrich Motors, Inc. v. NLRB*, 403 F.2d 145, 150 (2d Cir. 1968) (remarks indicating a disinterest in reinstatement are "of little value" when made before a company has offered reinstatement).

Although reinstatement is the presumptive remedy under the STAA, circumstances may exist in which alternative remedies are preferred. For example, front pay in lieu of reinstatement may be appropriate where the parties have demonstrated "the impossibility of a productive and amicable working relationship," or where reinstatement otherwise is not possible or is impractical because, for instance, the company no longer employs workers in the job classification the complainant occupied or has no positions for which the complainant is qualified. But reinstatement should not be denied merely because friction may continue to exist between the complainant and the company or its employees. Nor should it be denied because the employer may find it inconvenient to reinstate the former employee. *See Hobby*, slip op. at 8-13 and cases cited therein for a thorough discussion of exceptions to reinstatement.

On remand, the ALJ should order Step 1 to reinstate Dale unless the parties demonstrate that circumstances exist under which reinstatement would not be appropriate.

The ALJ erred in determining the amount of back pay owed to Dale

The ALJ wrote:

> As a prerequisite to the entry of an award for economic damages in these types of cases, however, a complainant usually must demonstrate some effort to mitigate his losses. The record shows that Dale eventually secured other employment, but it fails to show when he initiated his job search or the leads, if any, he pursued before he landed his present job. Under such circumstances, an award of back pay for the full period Dale was out of work is not justified. . . . Considering all of the foregoing circumstances, including the time Dale was out of work, his hourly wage at Step 1, and his current earnings, I conclude that an award in

> the amount of $4080, representing the loss of eight weeks of wages due to the improper discharge, reasonably compensates Dale for the damages he sustained in the absence of evidence that he attempted to mitigate his losses thereafter.

D. & O. at 13-14.

This statement reveals two flaws in the ALJ's back pay calculation. First, he calculated the back pay liability without determining when that liability ended. And, second, he calculated the back wage liability without correctly determining whether Dale had mitigated his damages.

As to the first reason, the ALJ's calculation seems to have been based on some vague "fairness" standard that has no statutory or case law basis. An employee whose employment is wrongfully terminated is entitled to back pay. 49 U.S.C.A. § 31105(b)(3). "An award of back pay under the STAA is not a matter of discretion but is mandated once it is determined that an employer has violated the STAA." *Assistant Sec'y & Moravec v. HC & M Transp., Inc*., ALJ No. 90-STA-44, slip op. at 18 (Sec'y Jan. 6, 1992) (citation omitted). Back pay awards to successful whistleblower complainants are calculated in accordance with the make-whole remedial scheme embodied in section 706 (g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e et seq. (West 1988). *See, e.g., Polgar v. Florida Stage Lines*, ARB No. 97-056, ALJ No. 94-STA-46, slip op. at 3 (ARB Mar. 31, 1997). 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*, slip op. at 5.

Here, the ALJ decided that the back wage liability was $4,080.00, which represented eight weeks of Dale's Step 1 salary. D. & O. at 14. But since the ALJ did not order reinstatement and thus compel Step 1 to make an offer of reinstatement, the date when the back pay liability ends has not been determined. Therefore, the ALJ erred when, without determining when the back pay liability ended, he arbitrarily found that Dale was entitled to eight weeks of back pay.

The burden of proof on mitigation of damages

The second error that the ALJ made in calculating the back pay award was to shift the burden of proving that Dale mitigated damages from Step 1 to Dale. ("[A] complainant must usually demonstrate some effort to mitigate his losses" and $4080 reasonably compensates Dale "in the absence of evidence that he attempted to mitigate his losses thereafter." D. & O. at 13-14).

Though the complainant has a duty to exercise reasonable diligence to attempt to mitigate damages awarded as back pay, the employer bears the burden of proving that the employee failed to mitigate. The employer can satisfy its burden by establishing that "substantially equivalent positions were available [to the complainant] and he failed to use reasonable diligence in attempting to secure such a position." *Hobby*, slip op. at 19-20. A "substantially equivalent position" provides the same promotional opportunities, compensation, job duties, working conditions, and status. *Id.* at 20.

Thus, since the ALJ required Dale to prove mitigation and found that he had not done so, the ALJ erred because he did not properly determine whether Dale had mitigated damages. Therefore, he did not accurately calculate the back pay liability.

The ALJ's duty to inform Lambes about mitigation

Since the burden of proving failure to mitigate is the employer's, the ALJ should have advised Lambes, a pro se litigant, about this burden.

ALJs have some responsibility for helping unrepresented litigants. *See, e.g., Griffith v. Wackenhut Corp.,* ARB No. 98-067, ALJ No. 97-ERA-52 (ARB Feb. 29, 2000), slip op. at 10 n.5 *("[p]ro se* complainants are by nature inexpert in legal matters, and we construe their complaints liberally and not over technically"); *Saporito v. Florida Power & Light Co.*, 94-ERA-35, slip op. at 7 (ARB July 19, 1996) (a pro se complainant is entitled to a certain degree of adjudicative latitude). *Cf. Hughes v. Rowe,* 449 U.S. 5, 10 (1980) (papers submitted by pro se litigants must be construed liberally in deference to their lack of training in the law).

But an ALJ is not obligated to develop arguments on behalf of the complainant. *Hasan v. Sargent and Lundy*, ARB No. 01-001, ALJ No. 00-ERA-7, slip op. at 4 n.4 (ARB Apr. 30, 2001). *See Saporito,* slip op. at 6-7 (although pro se complainants should be given some adjudicative latitude, they must still allege and prove a set of facts sufficient to establish the violation alleged); *Griffith*, slip op. at 10 n.7, (quoting *Dozier v. Ford Motor Co.,* 702 F.2d 1189, 1194 (D.C. Cir. 1983)) ("At least where a litigant is seeking a monetary award, we do not believe pro se status necessarily justifies special consideration . . . . While such a pro se litigant must of course be given fair and equal treatment, he cannot generally be permitted to shift the burden of litigating his case to the courts, nor to avoid the risks of failure that attend his decision to forgo expert assistance.").

Although the ALJ has some duty to assist pro se litigants, he also has a duty of impartiality. A judge must refrain from becoming an advocate for the pro se litigant. *See, e.g., United States v. Trapnell*, 512 F.2d 10, 12 (9th Cir. 1975) (per curiam) ("The trial judge is charged with the responsibility of conducting the trial as impartially and fairly as possible.") "Helping" the pro se litigant to get material evidence into the record risks undermining the impartial role of the judge in the adversary system. Jessica Case, Note: *Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law an Excuse?*, 90 KY. L. J. 701 (2002); MODEL CODE OF JUDICIAL CONDUCT, CANON

3 (1990) (A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently). Even so, an ALJ satisfies his duty to assist the pro se litigant while remaining impartial when he advises an unrepresented party about essential elements of its case. *Young v. Schlumberger Oil Field Services*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 10-11 (ARB Feb. 28, 2003).

Here, while otherwise fulfilling his duty of assisting the pro se Lambes, the ALJ did not tell Lambes that, in the event that Step 1 was liable for back wages, Lambes would have the burden of proof to show that Dale had breached his duty to mitigate damages. Had Lambes been so advised, he at least would have had the opportunity to present evidence concerning Dale's efforts to mitigate. On remand, the ALJ should permit Lambes, and then Dale, the opportunity to address the mitigation issue.

Back wages – Conclusion

On remand, to properly calculate Step 1's back wage liability, the ALJ should order Step 1 to reinstate Dale to his previous or a similar position unless Step 1 can demonstrate that reinstatement is impractical or impossible or otherwise not warranted. The ALJ could then permit the parties to address the issue of whether Dale mitigated his losses and whether back pay should be reduced accordingly. It would be proper for the ALJ to also determine whether the back pay award should be reduced by any money Dale earned between the termination and when Step 1 proffers a bona fide offer of reinstatement (or the date Dale declines such an offer).

Furthermore, the ALJ should determine the pre-judgment and post-judgment interest on the back pay award. *See Murray v. Air Ride, Inc.*, ARB No. 00-045, ALJ No. 99-STA-34, slip op. at 9 (ARB Dec. 29, 2000). In calculating the interest on back pay awards under the STAA, the rate used is that charged for underpayment of federal taxes. *See* 26 U.S.C.A. § 6621(a)(2) (West 2002); *Drew v. Alpine, Inc.*, ARB Nos. 02-044, 02-079, ALJ No. 2001-STA-47, slip op. at 4 (ARB June 30, 2003). Moreover, the interest accrues, compounded quarterly, until Step 1 pays the damages award. *Assistant Sec'y & Cotes v. Double R. Trucking, Inc.*, ARB No. 99-061, ALJ No. 1998-STA-34, slip op. at 3 (ARB Jan. 12, 2000); *see Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 89-ERA-22, slip op. at 18-21 (ARB May 17, 2000) (outlining the procedures to be followed in computing the interest due on back pay awards).

Attorney's fees

A STAA complainant who has prevailed on the merits may be reimbursed for litigation costs, including attorney's fees. 49 U.S.C.A. § 31105(b)(3)(B). This section provides in part that "the Secretary [of Labor] may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant in bringing the complaint."

On June 11, 2003, the ALJ issued an Order granting an award of attorney's fees in the amount of $3,600.00, and Step 1 did not object to the Order. Because substantial

evidence supports the ALJ's findings that the hourly rate Dale's attorney charged and the number of hours she expended on this case were reasonable, we affirm the ALJ's award of attorney's fees. *See Jackson*, slip op. at 10-12.

CONCLUSION

We **AFFIRM** the ALJ's conclusion that Step 1 violated the STAA's employee protection provision because substantial evidence in the record as a whole supports the findings underlying his conclusion. We also **AFFIRM** the ALJ's award of attorney's fees. We conclude that the ALJ erred in not ordering Step 1 to reinstate Dale. The ALJ also erred in calculating Dale's back pay damages. Therefore, we **REMAND** so that the ALJ may order, if appropriate, that Step 1 reinstate Dale to the position he held, or to a similar position, at the time Step 1 terminated his employment. On remand, the ALJ should also properly calculate Dale's back pay.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge