



In the Matter of:

JOHN J. SIMON,

ARB CASE NOS. 06-039, -088

COMPLAINANT,

ALJ CASE NO. 2005-STA-040

DATE: November 30, 2007

v.

SANCKEN TRUCKING COMPANY,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul O. Taylor, Esq., *Truckers Justice Center*, Burnsville, Minnesota

For the Respondent:

Richard J. Puchalski, Esq., *Law Offices of Richard J. Puchalski*, Chicago, Illinois.

FINAL DECISION AND ORDER

John J. Simon filed a complaint under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended and codified, 49 U.S.C.A. § 31105 (West 1997)¹, and its implementing regulations, 29 C.F.R. Part 1978

¹ The STAA has been amended since Simon filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). We need not decide here whether the amended provisions are applicable to this

(2007), alleging that Sancken Trucking Company violated the STAA by terminating his employment. A United States Department of Labor (DOL) Administrative Law Judge (ALJ) found in Simon's favor, ordered reinstatement, and awarded back pay and damages. Sancken appealed to the Administrative Review Board (ARB). We affirm the ALJ's decision on the merits but reverse his award of compensatory damages.

BACKGROUND

The record fully supports the ALJ's acceptance of the parties' stipulations and recitation of the facts. Recommended Decision and Order (R. D. & O.) at 1-5. We summarize briefly.

Sancken hired Simon in November 2004 to deliver diesel and jet fuel to airports in Michigan, Illinois, and Wisconsin. Hearing Transcript (TR) at 25-31. Upon Simon's request, Sancken arranged for him to work only during the week because he had custody of his daughter on weekends. TR at 26, 152-54.

In early December, Simon told Sancken's dispatchers that he and other drivers needed to keep a log of their hours because the airports were more than 100 miles from the depot. TR at 36. Subsequently, Simon called the Federal Motor Carrier Safety Administration (FMCSA) to complain about Sancken's failure to log drivers' hours of service, TR at 38-40, and sent a written complaint. Complainant's Exhibit (CX) 16.

Shortly thereafter, the FMCSA contacted James Sancken, Sancken's Vice-President. TR at 39-41. He then took Simon off the jet fuel runs and assigned him to hauling diesel fuel for the Chicago Transit Authority (CTA). TR at 35, 45. Simon worked fewer hours but again only during the week. TR at 35, 49. On December 22, 2004, Simon filed a complaint with DOL's Occupational Safety and Health Administration (OSHA), CX 3, and later discussed his complaint with Susan Sancken, who is co-owner of Sancken Trucking. TR at 147-50, 156, 162-64.

Simon was off work during February because of an on-the-job leg injury. TR at 50-51. After obtaining a physical clearing him to return to work, CX 4, Simon talked with Glen Stevens, Sancken's dispatcher, at the office early on March 10, 2005. TR at 59-60, 201. Stevens informed Simon that the only shift available was Thursday to Monday at \$100.00 a day and that he "could take it or leave it." TR at 63, 202. Simon asked Stevens to provide him with a job description and stated that he would have to make arrangements for his daughter if he had to work weekends. TR at 63-64.

That same day, the FMCSA followed up on Simon's written complaint and conducted a two-day compliance review of Sancken. CX 9. The FMCSA informed

complaint because even if the amendments applied, they are not at issue in this case and thus would not affect our decision.

Sancken that it would receive an “unsatisfactory” rating, and that fines and a suspension of its license to operate would result if the violations of drivers’ hours-of-service logs were not corrected. TR at 120-38, 142-47; CX 6.

Early on March 11, 2005, Stevens learned that Simon had not shown up for work and questioned Simon when he called the office about 10:00 p.m. TR at 204-05. Stevens testified that Simon again asked for a job description and did not answer when asked why he had not reported to work. TR at 205. Simon testified that he asked Stevens, what he was talking about, he had not been assigned a specific shift, and that he needed a job description. TR at 71-75, 205. Later, James Sancken called the company’s attorney and, based on his advice, fired Simon for “failure to appear for work [on] assigned shift.” TR at 265-66, Respondent’s Exhibit (RX) 5.

Following his discharge, Simon filed a second complaint with OSHA on April 8, 2005, which OSHA found to be without merit. CX 14-15. Simon requested a hearing, which a DOL Administrative Law Judge held on September 27-28, 2005 in Chicago.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under the STAA. Secretary’s Order No. 1-2002, (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

Under the STAA, the ARB is bound by the ALJ’s factual 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.2001-STA-038, slip op. at 2 (ARB Feb. 19, 2004). Substantial evidence 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. 2003-STA-012, slip op. at 3 (ARB Feb. 27, 2004).

Substantial evidence does not, however, require a degree of proof “that would foreclose the possibility of an alternate conclusion.” *BSP Trans, Inc. v. U.S. Dep’t of Labor*, 160 F.3d 38, 45 (1st Cir. 1998). Also, whether substantial evidence supports an ALJ’s decision “is not simply a quantitative exercise, for evidence is not substantial if it is overwhelmed by other evidence or if it really constitutes mere conclusion.” *Dalton v. U.S Dep’t of Labor*, 58 Fed. App. 442, 445, 2003 WL 356780 (10th Cir. Feb. 19, 2003), citing *Ray v. Bowen*, 865 F.2d 222, 224 (10th Cir. 1989).

In reviewing the ALJ’s conclusions of law, the ARB, as the Secretary of Labor’s designee, acts with “all the powers [the Secretary] would have in making the initial decision” 5 U.S.C.A. § 557(b) (West 2004). 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. 2001-STA-022, -029, slip op. at 2 (ARB Oct. 31, 2003).

DISCUSSION

We consider whether Simon established by a preponderance of the evidence that Sancken fired him because he complained to the FMSCA about violations of the hours-of-service rules.

The legal standard

The STAA provides that an employer may not “discharge,” “discipline,” or “discriminate” against an employee-operator of a commercial motor vehicle “regarding pay, terms, or privileges of employment” because the employee has engaged in certain protected activities. These include: making a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order,” 49 U.S.C.A. § 31105(a)(1)(A); “refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health,” 49 U.S.C.A. § 31105(a)(1)(B)(i); or “refus[ing] to operate a vehicle because . . . 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)(ii).

To prevail on a claim under the STAA, 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 the protected activity was the reason for the adverse action. *BSP Trans, Inc.*, 160 F.3d at 45; *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Densieski v. La Corte Farm Equip.*, ARB No. 03-145, ALJ No. 2003-STA-030, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. Nat’l Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004); *Schwartz v. Young’s Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 2001-STA-033, slip op. at 8-9 (Oct. 31, 2003).

The ALJ’s findings

Simon engaged in protected activity, according to the ALJ, when he complained to James and Sue Sancken about their drivers’ failure to complete time-on-duty logs and when he filed a complaint with the FMCSA about violations of the 100-air-mile rule.² R.

² A driver is exempt from the hours-of-service provisions of 49 C.F.R. § 395.8 (Driver’s Record of Duty Status) if he operates within a 100-air-mile radius of the work location to which he normally reports. 49 C.F.R. § 395.1(e)(1)(i). Simon testified that he

D. & O. at 6. The ALJ determined that Sancken was “unquestionably” aware of Simon’s complaints and that Sancken’s transfer of Simon to a weekend shift on March 10, 2005, was an adverse action because such a different schedule would “negatively impact” his family obligations and the pay was less than he had been earning. *Id.* The ALJ also found that Sancken’s firing on March 11, 2004, was an adverse action. R. D. & O. at 7.

The ALJ found Sancken’s reasons for assigning weekend work and firing Sancken to be pretext. First, Sancken’s reason for the transfer to the weekend shifts was that no others were available. Yet, Sancken still had both the jet fuel and the transit authority accounts on which Simon had been working weekdays prior to his injury. TR at 167. Therefore, the ALJ found Sancken’s reason to be not credible. R. D. & O. at 6.

Second, Sancken’s reason for firing Simon was that he did not show up for work on March 11, 2005. The ALJ discredited the testimony of Stevens, office clerk Deborah Bellefeuille, and James Sancken that Simon said he would be there and found that Simon had not agreed to work weekends when he left the Sancken office on March 10, 2005. R. D. & O. at 7. The ALJ also found that both witnesses - Sancken and Bellefeuille - were too far away to hear Simon’s words as he was leaving the office. The ALJ reasoned that Simon had to make child care arrangements if he was going to work weekends, and that he had twice asked for a job description, both of which indicated that he had not decided whether he would even take the weekend work. *Id.*

The ALJ concluded that Sancken fired Simon because of his protected activity in complaining to the FMCSA about violations of the STAA’s safety regulations. The ALJ reasoned that Sancken received the FMCSA’s negative report, which noted the imposition of fines and the possible suspension of operations, on March 10, the same day it assigned Simon to weekend work and the day before it fired him. The ALJ concluded that Sancken’s actions in transferring and then firing Simon were retaliation for his protected activity. R. D. & O. at 6-7.

Turning to the remedies available under the STAA, the ALJ awarded Simon back pay of \$18,855.82 and ordered Sancken to pay him \$721.54 a week until he was reinstated.³ R. D. & O. at 7. The ALJ also awarded Simon \$5,000.00 in compensatory damages. R. D. & O. at 8.

was required to drive outside the 100-mile radius of Sancken’s terminal and sometimes worked more than 12 hours a day. CX 1; TR at 36-37.

³ Simon does not challenge the ALJ’s findings that he worked a total of seven weeks, averaged \$721.54 a week, and earned \$12,459.02 from the time he was fired until the date of the R. D. & O. Subtracting the amount Simon earned from \$31,314.83 (43.4 weeks times \$721.54), the ALJ properly awarded \$18,855.82. R. D. & O. at 7.

Analysis

We have reviewed the record and find that, with one exception, *see* discussion *infra*, substantial evidence on the record as a whole supports the ALJ's factual findings. Those findings are therefore conclusive. 29 C.F.R. § 1978.109(c)(3). Moreover, Sancken does not quarrel with the ALJ's conclusion that Simon engaged in protected activity, that Sancken was aware of such activity, and that Sancken took adverse action. Therefore, we affirm it.

The issue we next consider is whether Sancken terminated Simon's employment because he engaged in protected activity. The ALJ concluded that it did. We affirm.

The ALJ noted that on March 10, the very day that Simon was told he would have to work weekends, "take it or leave it," TR at 63, the FMCSA had just completed a compliance review with Sancken and informed him of fines and possible suspension of the company's license to operate. Simon precipitated the adverse review by reporting Sancken's drivers' log violations to the agency. TR at 80-82. The ALJ concluded that Sancken's reassignment of Simon to a weekend shift on the same day it received the adverse report and its "take it or leave it" attitude "clearly show[ed]" retaliation. R. D. & O. at 6.

Similarly, the events of March 11 support the ALJ's conclusion that Simon's discharge that day was retaliatory. Sancken admitted that he did not call Simon to ask why he had not shown up for work at 5:00 a.m. TR at 265, 269. Rather, he called his attorney to see if he could fire Simon. TR at 284. Further, Sancken testified that it was necessary for Simon to work on Friday because he had to obtain "carding" at a fuel depot,⁴ but then admitted that such credentialing was not done on Fridays, thus contradicting the purported necessity for Simon's Friday shift. TR at 266-68, 270, 292-95. Finally, Simon testified credibly that he never told Stevens he would work on Friday, that he was trying to make child care arrangements, and that the termination letter he received on March 12 upset him because he expected a job description. TR at 70-72, 74, 84-85, 87, 90-96.

While not ineluctable, the circumstances of a given case may support a fact-finder's conclusion that the temporal proximity between protected activity and adverse action establishes that the adverse action was motivated by the protected activity. *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ Nos. 1996-ERA-034, 036, slip op. at 6 (ARB Mar. 30, 2001). As the United States Supreme Court stated in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000), "once the employer's justification has been eliminated, discrimination may well be the most likely

⁴ Simon explained that, before a driver could load and unload the fuel at a terminal or depot, he had to undergo training in security and safety measures as well as accident procedures and equipment handling. Prior to his discharge, Simon was "carded" at three terminals while driving for Sancken. TR at 29, 266.

alternative explanation” for an adverse action. The ultimate burden of persuasion that an employer intentionally discriminated because of a complainant’s protected activity remains at all times with the complainant, *Martin v. United Parcel Ser.*, ARB No. 05-040, ALJ No. 2003-STA-009, slip op. at 9 (ARB May 31, 2007), but proof that an employer’s “explanation is unworthy of credence” . . . “can be quite persuasive.” *Reeves*, slip op. at 147.

Given the close temporal proximity between the negative results of the FMSCA audit precipitated by Simon and his reassignment and firing, coupled with the ALJ’s findings of pretext, which are supported by substantial evidence, we conclude that Sancken retaliated against Simon for his protected activity in complaining to the FMSCA about Sancken’s violations of the drivers’ hours-of-service regulations. Therefore, we affirm the ALJ’s conclusion that Sancken violated the STAA. *See Timmons v. Franklin Elec. Coop.*, ARB No. 97-141, ALJ No. 1997-SWD-002, slip op. at 6 (ARB Dec. 1, 1998) (temporal proximity between protected activity and termination plus employer’s failure to provide plausible explanation for firing sufficient to establish retaliatory discharge).

Back pay award

Simon asserts that the ALJ erred in calculating the amount of back pay because he failed to “resolve the uncertainties” in Simon’s favor if he had stayed with Sancken. Complainant’s Brief at 23. Simon states that he was promised an annual salary of \$52,000.00 - thus, his back pay award should be based on \$1,000.00 a week - and requests that the ARB apply the representative employee method in determining the correct amount of back pay. *Id.*

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. *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 1999-STA-005, slip op. at 13 (Dec. 30, 2002), citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418-421 (1975). The ARB does not indulge in speculation about what a complainant would have earned in his position if he had not been discharged by the employer. *Oliver v. Hydro-Vac Servs., Inc.*, ARB No. 97-063, ALJ No. 1991-SWD-001, slip op. at 3 (ARB Jan. 6, 1998), citing *Welch v. Univ. of Tex. & Its Marine Sci. Inst.*, 659 F.2d 532, 535 (5th Cir. 1981) (back pay awarded from date of constructive discharge to date grant expired because “it is simply a matter of speculation” whether grantee would have received another grant).

We agree with the ALJ that the record does not support Simon’s assertion that he was promised earnings of \$52,000.00 a year, TR at 26, but does demonstrate that he earned substantially less. CX 2. We therefore decline to speculate that Simon would have received higher wages than he actually earned.

Compensatory damages

Sancken argues on appeal that the ALJ “gratuitously” awarded \$5,000.00 in compensatory damages because there is “absolutely” no evidence to support such an award. Respondent’s Brief at 25. The ALJ explained only that Simon “suffered emotional distress as a result of his termination and inability to find permanent employment” and therefore was entitled to \$5,000.00 compensatory damages. R. D. & O. at 8.

An employer who violates the STAA may be held liable to the employee for compensatory damages for mental or emotional distress. 49 U.S.C.A § 31105(b)(3)(A)(iii); *Jackson v. Butler & Co.* ARB Nos. 03-116, 144, ALJ No. 2003-STA-026, slip op. at 009 (ARB Aug. 31, 2004). Compensatory damages are designed to compensate whistleblowers not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress. *Hobby v. Ga. Power Co.*, ARB Nos. 98-166, 169, ALJ No. 1990-ERA-030, slip op. at 33 (ARB Feb. 9, 2001) (citations omitted).

Emotional distress is not presumed; it must be proven. *Moder v. Village of Jackson, Wis.*, ARB Nos. 01-095, 02-039, ALJ No. 00-WPC-005, slip op. at 10 (ARB June 30, 2003). “Awards generally require that a plaintiff demonstrate both (1) objective manifestation of distress, *e.g.*, sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the violation and the distress.” *Martin v. Dep’t of the Army*, ARB No. 96-131, ALJ No. 1993-SWD-001, slip op. at 17 (ARB July 30, 1999) To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm. *Gutierrez v. Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 9 (ARB Nov. 13, 2002).

Simon was a veteran truck driver with a clean record. TR at 22-23. While the record contains unrefuted evidence of Simon’s inability to find a permanent job, TR at 76-82; CX 13, 21, Simon did not testify about any emotional distress or humiliation he suffered. Nor did he seek any compensatory damages. *See* TR at 82-83. There is no documentary evidence in the record supporting any loss of reputation or mental anguish. Therefore, we must reverse the ALJ’s award of compensatory damages as unsupported by substantial evidence.

Sancken’s other arguments on appeal

Sancken also argues that: (1) Illinois state law does not require Sancken to return Simon to weekday work; (2) the ALJ’s finding of pretext regarding Simon’s discharge was legally erroneous; (3) the record does not support the ALJ’s credibility determinations regarding Sancken’s witnesses; (4) substantial evidence does not support some of the ALJ’s factual findings; and (5) Simon is not entitled to reinstatement because he resigned. Respondent’s Brief at 15-16.

Sancken's first argument is without merit. The requirements of Illinois law are irrelevant to the ALJ's finding that reassigning Simon to weekend work was an adverse action because he would receive less money and would have to find day care.

Sancken next argues that Simon failed to prove pretext regarding his discharge because he proffered no evidence that Sancken's reason for firing him was not truthful. In other words, Sancken's reason for firing Simon - he did not show up for work - was not a "dishonest explanation, a lie," and therefore, the ALJ cannot legally find pretext.⁵ Brief at 18-21.

Pretext is defined as an "ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive." BLACK'S LAW DICTIONARY at 1351 (Rev'd 4th Ed. 1968). Here, the ostensible and only stated reason for firing Simon was his no-show. Simon must prove by a preponderance of the evidence that the explanation given for his firing was a "phony reason." *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 1997-ERA-038, slip op. at 9 (ARB July 31, 2002), citing *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 278 (7th Cir. 1995).

In justifying the firing, Sancken said Simon needed to work with another driver on Friday, March 11 to be "carded," that is, complete a training procedure at a fuel depot so that he could load and unload the fuel individually. TR at 267. Upon cross-examination, Sancken admitted that the fuel depots did not conduct such training on Fridays. TR at 270-71. And Simon testified that he had already been carded at three fuel depots. TR at 29. Further, the ALJ believed both Simon's explanation that he could not take the job until he had made arrangements for his daughter and his statement that he did not say he would work on Friday. TR at 90-96. Because substantial evidence supports the ALJ's finding that Sancken's proffered reason for firing Simon was not believable, we reject this argument.

Sancken also quarrels with the ALJ's credibility determinations. Brief at 21-22. Sancken argues that Stevens memorialized his conversation with Simon and both Bellefeuille and James Sancken corroborated Stevens's testimony. It argues that because their statements were consistent, the ALJ erred in discrediting them. *Id.*

The ARB generally defers to an ALJ's credibility determinations, unless they are "inherently incredible or patently unreasonable." *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 5 (ARB Dec. 30, 2004). In situations

⁵ In support of its theory that Simon had to prove that Sancken was lying before the ALJ could legally find pretext, Sancken cites a number of cases decided by the United States Court of Appeals for the Seventh Circuit, in jurisdiction of which this case arises. Brief at 19-20. After reviewing these decisions, we conclude that they are not applicable to the circumstances of this case. The ALJ found Sancken to be not credible; therefore, he could not have honestly believed that Simon was supposed to show up for work on Friday.

where both parties provide substantial evidence for their positions, the ARB will uphold the findings of the ALJ. *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 14 (ARB June 29, 2006).

In weighing the testimony of witnesses, the ALJ as fact finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of their testimony, and the extent to which their testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006) (citations omitted).

Contrary to Sancken's argument, the ALJ provided sufficient "specific and cogent reasons" for finding that the testimony of the three witnesses - Stevens, Sancken, and Bellefeuille - that Simon said that he would show up for work on Friday was unworthy of credence, i.e., not believable.

The ALJ believed Simon's testimony that he did not respond to Stevens's question about why he had not shown up because he did not know he was supposed to have worked that Friday. The ALJ also believed Simon's testimony that he never said he would be there on Friday because he had to make child care arrangements before he could commit to weekend work. R. D. & O. at 7.

Further, Stevens's testimony that Simon said he would be there on Friday, TR at 203, was inconsistent with his earlier deposition testimony, TR at 224-25. Sancken testified that he overheard Simon tell Stevens he would be there on Friday, but Sancken's desk was 10 to 12 feet away, and Simon was, according to Stevens, six feet away on the other side of the sliding glass window and going down the stairs. TR at 223, 226, 264. Bellefeuille testified that Simon answered "yeah" to Stevens' question about being "here tomorrow morning," TR at 240, but admitted on cross-examination that Simon was going down the steps about 15 feet on the other side of the glass window when she overheard his answer, TR at 241-42. The record supports the ALJ's finding that Sancken and Bellefeuille were too far away to hear what Simon said and that Stevens was not credible. Therefore, we reject this argument.

We also reject Sancken's argument concerning substantial evidence. Sancken contends that Simon's testimony lacked credibility based on the letter he wrote in response to Sancken's termination letter.⁶ Brief at 23-24.

⁶ The letter stated: "I received the letter of termination sent March 11, 2005. You expecting me to do what you say when you say to do it regardless of UNITED STATES DEPARTMENT OF TRANSPORTATION, LAWS and REGULATIONS, is why I did not show up for work. I was told on March 10, 2005, by your office this was expected of me. As you know, you and I have had conversations on this matter before. I have not and will not break laws for this job. Effective immediately, I am leaving. Further, instead of changing

The ALJ dealt with this contention, finding that Simon was “greatly distressed about his firing” when he wrote it. R. D. & O. at 7 n.5. The substance of the letter and the manner of its expression support the ALJ’s finding. The fact that Simon referred to the complaints he had made and the conversations he had about weekday work did not detract from his testimony that he did not commit to reporting for work on Friday because he needed more time to arrange child care. As he testified, the letter was a “smart aleck answer” to the termination letter, because he was expecting a letter describing the weekend job. TR at 99. Therefore, we reject this argument.

Finally, the issue of Simon’s reinstatement is moot. On September 26, 2006, the United States District Court for Northern Illinois issued a Consent Judgment and Order finding that Sancken reinstated Simon on September 11, 2006, pursuant to the court’s previous order and that Simon resigned later that day. *U.S. Sec’y of Labor v. Sancken Trucking, Inc.*, No. 06-CV-02890 (N.D. Ill., E.Div. Sept. 26, 2006).

Attorney’s fees and costs

Sancken’s attorney requested \$49,841.21 in attorney’s fees and costs. This amount represented 166.65 hours at a rate of \$250.00 an hour, 31.75 hours of travel time at \$137.50, 36.75 hours of paralegal work at \$75.00 an hour, and costs of \$72.38 for lodging, and \$984.46 for Simon’s expenses.

The ALJ discussed each of Sancken’s objections to Simon’s fee petition and awarded a total of \$48,331.90, after deleting six hours of time entries covering brief writing and travel and reducing the travel time rate to \$125.00 an hour.

On appeal, Sancken has reiterated its arguments before the ALJ, namely, that the number of hours be reduced by 65.5, that the hourly fee be only \$250.00, that the travel time of 31.75 hours is excessive and should be considered part of overhead, and that paralegal payments are not recoverable as a cost of litigation. Sancken does not quarrel with the amounts awarded for lodging and Simon’s costs.

As the ALJ pointed out, Simon’s attorney is seeking only \$250.00 an hour, with which Sancken concurs. Further, Sancken offered no rationale for its assertion that the 65.5 hours it wants cut are unreasonable. The ALJ considered all the item entries Sancken cited, dismissed Sancken’s contention that the travel time was excessive, and considered Simon’s affidavits in support of his fees. Because the ALJ’s decision is supported by substantial evidence and legally correct, we adopt and attach the ALJ’s decision regarding attorney’s fees. *Simon v. Sancken Trucking Co.*, ALJ No. 2005-STA-040 (ALJ Apr. 10, 2006).

your policy, I was threatened with my job, harassed and discriminated against for not breaking laws, by you and your Company.” RX 6.

CONCLUSION

We **AFFIRM** the ALJ's conclusion that Sancken violated the STAA's employee protection provision because substantial evidence in the record as a whole supports his findings. We also **AFFIRM** the ALJ's award of back pay. We **REVERSE** as unsupported by substantial evidence his award of compensatory damages. Finally, we adopt and attach the ALJ's recommended decision awarding attorney's fees and costs.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

DAVID G. DYE
Administrative Appeals Judge