U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

VINCENT A. POLLOCK,

COMPLAINANT,

v.

CONTINENTAL EXPRESS,

RESPONDENT.

ARB CASE NOS. 07-073
08-051

ALJ CASE NO. 2006-STA-001

DATE: April 7, 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Paul O. Taylor, Esq., *Truckers Justice Center*, Burnsville, Minnesota

For the Respondent:
Byron Freeland, Esq., and Jeffrey L. Spillyards, Esq., *Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.*, Little Rock, Arkansas

FINAL DECISION AND ORDER (ARB NO. 07-073)
and
FINAL DECISION AND ORDER ON ATTORNEY FEES (ARB NO. 08-051)

Vincent A. Pollock filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). He alleged that his former employer, Continental Express (Continental), violated the employee protection provisions of the Surface

Transportation Assistance Act (STAA) of 1982, as amended and re-codified,[1] when it terminated his employment for his refusal to operate a company vehicle when such operation would violate a Department of Transportation (DOT) regulation.[2] The STAA protects from discrimination employees who refuse to operate a vehicle when such operation would violate commercial motor vehicle safety rules. After a hearing, a Labor Department Administrative Law Judge (ALJ) found that Pollock established that Continental discriminated against him in violation of the Act when it terminated his employment and that Continental did not show that it would have terminated him in the absence of his protected activity. The ALJ recommended, in part, that Pollock be reinstated and be awarded back pay plus pre-judgment interest through the date of completion of the hearing. In a subsequent Supplemental Recommended Decision and Order (S. D. & O.), the ALJ awarded Pollock's counsel attorneys' fees and costs. We affirm the ALJ's findings on the merits of Pollock's complaint as supported by substantial evidence, but modify his back pay award. We also conclude that the ALJ reasonably exercised his discretion in determining the fee award and that his determination is supported by substantial evidence.[3]

BACKGROUND

Continental is an interstate trucking company located in Little Rock, Arkansas that operates commercial vehicles with a gross vehicle weight of 10,001 pounds or more on the highways in interstate commerce.[4] Continental hired Pollock as a driver in May 2002.[5]

On May 2, 2005, Continental dispatched Pollock to pick up a load at Truck-Lite in McAlhattan, Pennsylvania.[6] Pollock consulted computer map programs in his truck's cab, but

---

1 49 U.S.C.A. § 31105 (Thomson/West 2007). The STAA has been amended since Pollock filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). The STAA amendment was signed on August 3, 2007. Noting that neither the plain language of the STAA amendment nor its legislative history signals a congressional intent for retroactive application, the United States Court of Appeals for the Eighth Circuit has held that this amendment is not applicable retroactively to complaints filed prior to August 3, 2007. *Elbert v. True Value Co.*, 550 F.3d 690 (8th Cir. 2008) (where Congress has not expressly prescribed a statute's reach, there is a presumption against retroactive application of legislation). Thus, because Pollock's complaint arose, was filed, and was adjudicated prior to the date of the STAA amendment, the amendment does not apply in this case.

2 *See* 49 C.F.R. § 392.2 (2009).

3 In the interest of judicial and administrative economy, we have consolidated these appeals for decision. *See Harvey v. Home Depot U.S.A., Inc.*, ARB Nos. 04-114, 04-115, ALJ Nos. 2004-SOX-020, 2004-SOX-036, slip op. at 6 (ARB June 2, 2006).

4 June 28, 2005 Complaint at 1; Hearing Transcript (HT) at 109-110.

5 HT at 109.

they did not provide directions all the way to the Truck-Lite facility.[7] In addition, Continental's dispatcher informed Pollock that she did not have directions to the facility.[8] Instead, Pollock used a road atlas, which provided him directions to the highway exit for McAlhattan.[9] After driving to the McAlhattan exit, Pollock turned left off of the exit, following a sign indicating the direction to McAlhattan's business district and toward an industrial park he saw from his cab.[10] But the Truck-Lite facility is actually located to the right off the exit, so Pollock made a wrong turn when he turned left.[11]

Pollock stopped his truck and asked for directions, but the individuals he asked were unable to direct him to the Truck-Lite facility.[12] So Pollock returned to his truck cab to use a computer map program for directions.[13] The program directed him to drive initially from his location to Linwood Drive.[14] Upon arriving at Linwood Drive, Pollock saw signs indicating that trucks over 10 tons, such as his truck, were prohibited from driving on Linwood Drive.[15] At the hearing, Pollock testified that he believed it was unsafe to drive on the weight-restricted road because the road might be too narrow for his truck or have a low overpass or a bridge that would not support the weight of his truck.[16]

After again stopping his truck, Pollock called Truck-Lite for alternative directions, but his call was not answered.[17] He again contacted his dispatcher, who replied that the only directions available were from the computer program.[18] The dispatcher instructed Pollock to go to Truck-

---

6 HT at 224.

7 HT at 226-230; Joint Exhibit (JX) 29 at 266, 268.

8 HT at 230, 233; JX 29 at 272.

9 HT at 231-233.

10 HT at 56, 233-235, 613-614.

11 HT at 44-45.

12 HT at 234, 236, 616-617.

13 HT at 234, 236; JX 29 at 277-278, 616-617.

14 HT at 236-237; JX 29 at 278.

15 HT at 237-239, 616.

16 HT at 241-242.

17 HT at 238-239, 619-621.

18 HT at 240-241; JX 29 at 279-280, 282, 285.

Lite and that if he had "any problem," the dispatcher would "take care of it."[19] Pollock testified that he believed the dispatcher meant that Continental would pay for any fines he might receive if he drove onto Linwood Drive.[20] Ultimately, the dispatcher sent Pollock a message stating that if Pollock would not make the pick up, the dispatcher would take him off of the assignment and Pollock could wait for another assignment if he wished.[21] Pollock replied that he was not refusing to pick up the load, but was refusing to violate the law.[22] In response, Pollock's dispatcher informed him that he was "pulled" off of the assignment and was later given another assignment.[23]

When Pollock returned to Little Rock from his assignment, Continental terminated him on May 10, 2005.[24] Tim Hodnett was the director of human resources for Continental, responsible for approving terminations.[25] Hodnett testified that upon receiving a recommendation to terminate Pollock, after Pollock failed to make a reasonable effort to get to the Truck-Lite facility, he reviewed Pollock's employment history and approved the termination.[26] However, he further testified that Continental had no intention of terminating Pollock as of April 1, 2005, but agreed that the incident in McAlhattan was "what started the ball rolling" and was "the straw that broke the camel's back" leading to Pollock's termination.[27]

After Continental terminated Pollock, Pollock applied for employment with another trucking company, Schilli Specialized.[28] Natalie Brouwer, a recruiter for Schilli, conducted a background check on Pollock, which included contacting Continental about the reasons for Pollock's termination.[29] As part of her investigation, Brouwer spoke with "Pete" at Continental

---

19 HT at 242; JX 29 at 287-288.

20 HT at 242, 627-628.

21 HT at 243, 247; JX 29 at 293.

22 HT at 244; JX 29 at 294-295.

23 HT at 245; JX 29 at 296.

24 HT at 246-2472; JX 29 at 287-288.

25 HT at 706-707.

26 HT at 716-717, 727-730, 733.

27 HT at 740, 758.

28 HT at 69, 251.

29 HT at 62-66.

on the phone and took notes of their conversation immediately after it was completed.[30] Brouwer's notes stated:

> [Pollock] refused to drive on a road that was not scaled to hold the weight of truck even though it was the way he was dispatched that route. The company told him they will pay for any ticket he may get and [Pollock] still refused. [Pollock] was subsequently fired. Pete says his company was breaking the law and the termination was to cover themselves.[31]

Brouwer testified that she believed "Pete" was telling the truth because "to fire somebody for refusing to break the law is illegal."[32]

Pollock filed his STAA complaint with OSHA on June 28, 2005. OSHA investigated the complaint and, on September 29, 2005, dismissed the complaint. Pollock requested a hearing on his complaint before an ALJ. After a hearing, the ALJ issued his recommended decision on the merits of Pollock's complaint on May 3, 2007.

The ALJ determined that Continental violated the STAA when it terminated Pollock's employment on May 10, 2005. He ordered Continental to reinstate Pollock and awarded him back pay, pre-judgment interest, $105.00 in compensatory damages, and abatement measures. The ALJ later awarded Pollock's counsel attorneys' fees and costs.

The Administrative Review Board automatically reviews an ALJ's recommended STAA decision.[33] The Board "shall issue the final decision and order based on the record and the decision and order of the administrative law judge."[34] The Board issued a Notice of Review and Briefing Schedule permitting the parties to submit briefs in support of or in opposition to the ALJ's order and both parties timely filed briefs.

---

30 HT at 69, 74, 76-78; Complainant's Exhibit (CX) 1 at 2.

31 CX 1 at 2.

32 HT at 81.

33 29 C.F.R. § 1978.109(c)(1)-(2) (2009).

34 29 C.F.R. § 1978.109(c); *Monroe v. Cumberland Transp. Corp.*, ARB No. 01-101, ALJ No. 2000-STA-050 (ARB Sept. 26, 2001).

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.[35] The Board automatically reviews an ALJ's recommended STAA decision.[36] The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge."[37]

Under the STAA, we are bound by the ALJ's fact findings if substantial evidence on the record considered as a whole supports those findings.[38] Substantial evidence does not, however, require a degree of proof "that would foreclose the possibility of an alternate conclusion."[39] In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[40] Therefore, the Board reviews the ALJ's conclusions of law de novo.[41]

DISCUSSION

The Legal Standards

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 activity. The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;" who "refuses to operate a

---

35 Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010)); 29 C.F.R. § 1978.109(a).

36 29 C.F.R. § 1978.109(c)(1).

37 29 C.F.R. § 1978.109(c).

38 29 C.F.R. § 1978.109(c)(3); *BSP Transp., Inc. v. U.S. Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). 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)).

39 *BSP Trans, Inc.*, 160 F.3d at 45.

40 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b).

41 *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;" or who "refuses 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."[42]

To prevail on this STAA claim, Pollock must prove by a preponderance of the evidence that he engaged in protected activity, that Continental was aware of the protected activity and took an adverse employment action against him, and that there was a causal connection between the protected activity and the adverse action.[43] If Pollock does not prove one of the requisite elements, the entire claim fails.[44] Pollock bears the ultimate burden of persuading the ALJ that the employer discriminated against him.[45]

If Continental presents evidence of a nondiscriminatory reason for the adverse action, Pollock must then prove by a preponderance of the evidence that the reason Continental offered was not its true reason but was a pretext for discrimination.[46] Once Pollock has proved by a preponderance of the evidence that the employer did act against him at least in part because he engaged in protected activity, the only means by which Continental can escape liability is by proving by a preponderance of the evidence that it would have taken the adverse action even in the absence of protected activity.[47]

Analysis

Protected Activity and Adverse Action

The STAA protects an employee when "the employee refuses to operate a vehicle because the operation violates a regulation, standard or order of the United States related to

---

[42] 49 U.S.C.A. § 31105(a)(1).

[43] *Regan v. National Welders Supply*, ARB No. 03-117, ALJ No. 2003-STA-014, slip op. at 4 (ARB Sept. 30, 2004).

[44] *See West v. Kasbar, Inc /Mail Contractors of Am.*, ARB No. 04-155, ALJ No. 2004-STA-034, slip op. at 3-4 (ARB Nov. 30, 2005).

[45] *Calhoun v. United Parcel Serv.*, ARB No. 00-026, ALJ No. 1999-STA-007, slip op. at 5 (ARB No. 27, 2002)(citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993)).

[46] *Formella v. Schnidt Cartage, Inc.*, ARB No. 08-050, ALJ No. 2006-STA-035, slip op. at 5 (ARB Mar. 19, 2009) (citations omitted).

[47] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989); *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21-22 (1st Cir. 1998); *Mourfield v. Frederick Plaas*, ARB No. 00-055, ALJ No. 1999-CAA-013, slip op. at 5 (ARB Dec. 6, 2002).

commercial motor vehicle safety or health."[48] In addition, an employee who refuses to drive because of a reasonable apprehension of serious injury to himself or the public because of the vehicle's unsafe condition is also protected.[49]

Thus, the STAA's work refusal clause protects two categories of work refusals commonly referred to as the "actual violation" and "reasonable apprehension" categories.[50] Under the actual violation category, the refusal to drive is protected only if the record establishes that the employee's driving would have violated a motor vehicle regulation, standard, or order.[51] Under the reasonable apprehension category, the refusal to drive is protected only if it was based on an objectively reasonable belief that operation of the motor vehicle would pose a risk of serious injury to the employee or the public.[52]

With respect to refusing to drive based on an "actual violation," Pollock argues that had he driven on Linwood Drive, he would have violated DOT regulation 49 C.F.R. § 392.2, which provides, in part, that "[e]very commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated."[53] Because Pollock was driving within Pennsylvania, the motor vehicle laws of that jurisdiction are subsumed and incorporated under both 49 U.S.C.A. § 31105(a)(1)(B)(i) and 49 C.F.R. § 392. 2.[54]

As the ALJ found, it is undisputed that Pollock refused to drive on Linwood Drive.[55] Moreover, as Pollock and the ALJ properly note, driving his truck on a weight-restricted road such as Linwood Drive would be a violation of § 4902 of the Pennsylvania Statutory Code[56] and of the Pennsylvania Regulatory Code Chapter 189, which do not permit vehicles weighing more

---

48 49 U.S.C.A. § 31105(a)(1)(B)(i).

49 *See* 49 U.S.C.A. § 31105 (a).

50 *Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 2002-STA-005, slip op. at 4 (ARB July 31, 2003) (citing 49 U.S.C.A. § 31105(a)(1)(B)(i), (ii) and *Ass't Sec'y v. Consol. Freightways (Freeze)*, ARB No. 99-030, ALJ No. 1998-STA-026, slip op. at 5 (ARB Apr. 22, 1999)).

51 *Leach*, ARB No. 02-089, slip op. at 4 (citing 49 U.S.C.A. § 31105(a)(1)(B)(i) and *Freeze*, ARB No. 99-030, slip op. at 7 (citations omitted)).

52 *Id*.

53 49 C.F.R. § 392.2.

54 *Beveridge v. Waste Stream Envtl., Inc.*, ARB No. 97-137, ALJ No. 1997-STA-015, slip op. at 3 (ARB Dec. 23, 1997).

55 Recommended Decision and Order (R. D. & O.) at 37-39; *see* HT at 241; JX 29 at 286.

56 75 PA. CONS. STATE. ANN. § 4902(a-b), (e),(g) (West 2007).

than the posted limit to enter a roadway.[57] Consequently, the ALJ found that Pollock's refusal to drive on Linwood Drive and, therefore, his refusal to violate a motor safety regulation qualifies as protected activity under the STAA.[58] In addition, the ALJ found that as Pollock informed Continental's dispatcher of his refusal, Continental was aware of Pollock's protected activity.[59]

Continental argues that the ALJ erred in finding that Pollock's refusal to drive on Linwood Drive constituted protected activity. Specifically, Continental contends that it was not "reasonable" for Pollock to refuse to drive on Linwood Drive based on his opinion that it posed a safety hazard.[60] While Continental's argument may be relevant to a refusal to drive based on a "reasonable apprehension," the ALJ's alternative finding that Pollock's refusal was protected activity because it would constitute an "actual violation" of a motor vehicle regulation is supported by substantial evidence. Therefore, substantial evidence supports the ALJ's conclusion that Pollock engaged in protected activity of which Continental was aware. Furthermore, the ALJ's finding that Pollock suffered an adverse employment action when he was terminated is supported by substantial evidence and Continental admits that Pollock's termination constitutes an adverse employment action.[61] Thus, we affirm the ALJ's findings.

Causation

Next, the ALJ considered whether there was a causal relation between the adverse employment action and Pollock's protected activity. The ALJ initially found that Brouwer's testimony and notes regarding her conversation with "Pete" at Continental were credible, supported Pollock's testimony regarding his refusal to drive on Linwood Drive, and provided direct evidence that Continental terminated Pollock's employment because of his refusal to drive on a weight-restricted road.[62] Continental contends that the ALJ abused his discretion and disregarded "common sense" in finding Brouwer's testimony credible.[63] While Brouwer related what "Pete" at Continental told her regarding the reasons for Pollock's termination, Continental notes that the only people named "Pete" at Continental testified that they either did not know Pollock or never spoke with Brouwer.[64] Moreover, Continental asserts that it defies common

---

57 67 PA. CODE §§ 189.1-189.2, 189.4 (2007).

58 R. D. & O. at 38.

59 R. D. & O. at 39.

60 Respondent's Brief at 19.

61 R. D. & O. at 39.

62 R. D. & O. at 40, 44.

63 Respondent's Brief at 20-21.

64 *See* HT at 333, 579.

sense that one of the "Petes," a company vice-president, would make such an incriminating statement to a stranger like Brouwer.[65]

The ARB generally defers to an ALJ's credibility determinations, unless they are "inherently incredible or patently unreasonable."[66] The ALJ found Brouwer to be a credible witness because she had no evident bias or reason to be untruthful.[67] Because the ALJ's stated reasons for his credibility determination regarding Brouwer's testimony is reasonable, we reject Continental's contention that the ALJ abused his discretion.

The ALJ further noted the temporal proximity between Pollock's protected activity when he refused to drive on a weight-restricted road and his termination one week later.[68] As the ALJ noted, temporal proximity between protected activity and an adverse employment action may raise the inference that the protected activity was the likely reason for the adverse action.[69] The ALJ pointed out that there was no other intervening event between Pollock's protected activity and his termination, and Hodnett testified that Pollock's refusal to drive was "the straw that broke the camel's back" leading to his termination.[70] Thus, the ALJ found the close proximity in time between Pollock's refusal to drive and his termination supports a finding of a causal relation between his termination and his protected activity. Consequently, the ALJ concluded that Pollock's termination was based at least in part on his protected activity.[71] Substantial evidence supports the ALJ's finding.

However, Continental argued before the ALJ, and reiterates its argument on appeal, that it terminated Pollock's employment based on his entire employment history of company policy violations and insubordination.[72] Although Continental presented evidence of a

---

65 Respondent's Brief at 21.

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

67 R. D. & O. at 40, 44.

68 R. D. & O. at 40-41.

69 *Id*. (citing *Kovas v. Morin Transp., Inc.*, 1992-STA-041 (Sec'y Oct. 1, 1993)).

70 R. D. & O. at 40-41; *see* HT at 740, 758.

71 An employer's admission that a complainant's protected activity was the "straw that broke the camel's back" leading to the complainant's termination supports a finding that the complainant's termination was due at least in part to the complainant's protected activity. *Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-021, ALJ No. 2007-STA-022, slip op. at 10, n.48 (ARB Nov. 30, 2009); *Kovas*, 1992-STA-041, slip op. 3.

72 R. D. & O. at 41; Respondent's Brief at 5, 16-17, 19.

nondiscriminatory reason for Pollock's termination, the ALJ concluded that the reason Continental offered was, in essence, a pretext for terminating Pollock's employment and that Continental failed to prove by a preponderance of the evidence that it would have terminated Pollock in the absence of his protected activity when he refused to drive on a weight-restricted road.[73]

The ALJ agreed with Continental's assertion that Pollock was a "difficult" and "problem" employee.[74] Nevertheless, he properly noted that it is not sufficient for an employer to merely prove that it had a "good reason" to terminate its employee, but must prove by a preponderance of the evidence that it "would have" terminated the employee, even if the employee had not engaged in protected activity."[75] As the ALJ concluded, the record does not support a finding that, had Pollock not refused to drive on a weight-restricted road, Continental would still have considered terminating him.

The ALJ noted that Continental admitted that it was not until Pollock refused to drive on Linwood Drive that it began to consider terminating Pollock's employment.[76] Moreover, Pollock had only received one disciplinary warning, fourteen months before his termination, in his three years of employment with Continental.[77] For these reasons, the ALJ concluded that the reason Continental offered for Pollock's termination was, in essence, merely a pretext for terminating his employment based on his protected activity and that Continental failed to prove by a preponderance of the evidence that it would have terminated Pollock even if he had not engaged in protected activity. As substantial evidence supports the ALJ's findings, they are affirmed.

Remedies

Reinstatement

Because Pollock prevailed on his STAA complaint, and Continental offered no reason as to why reinstatement would be inappropriate, the ALJ, consistent with the STAA, ordered Continental to reinstate Pollock to his former position "with the same seniority, status, and benefits he would have had but for [Continental's] unlawful discrimination."[78] Reinstatement is

---

[73] R. D. & O. at 41-44.

[74] R. D. & O. at 42.

[75] R. D. & O. at 43; *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-005, slip op. at 12-13 (ARB Mar. 29, 2000).

[76] R. D. & O. at 43; *see* HT at 740.

[77] R. D. & O. at 43-44; *see* HT at 477.

[78] R. D. & O. at 45, 49.

an automatic remedy under the STAA, although when reinstatement is impossible or impractical, alternative remedies such as front pay are available.[79] We affirm the ALJ's order to reinstate Pollock.

Back Pay

Under the STAA, Pollock is also entitled to "compensatory damages, including back pay."[80] A wrongfully discharged STAA complainant is required, however, to mitigate his damages through the exercise of reasonable diligence in seeking alternative employment.[81] The burden is on an employer to establish any failure by a wrongfully discharged complainant to properly mitigate damages through the pursuit of alternative employment.[82]

The mitigation of damages doctrine requires that a wrongfully discharged employee not only diligently seek substantially equivalent employment during the interim period but also that the employee acts reasonably to maintain such employment.[83] A failure to mitigate damages through the retention of employment will reduce the employer's back pay liability in that the back pay award will be reduced by no less an amount than that which the complainant would have made had he remained in the interim employment throughout the remainder of the back pay period.[84] However, "only if the employee's misconduct is gross or egregious, or if it constitutes a willful violation of company rules, will termination resulting from such conduct serve to toll the discriminating employer's back pay liability."[85]

During the period between Continental's termination of Pollock's employment and the hearing on damages in this case, the ALJ noted that Pollock worked as a truck driver for various trucking companies.[86] Pollock testified that he was justifiably terminated from one of those companies, JDC Logistics, on May 31, 2006, for refusing to transport a load that he could have

---

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

80 49 U.S.C.A. § 31105 (b)(3)(A)(iii).

81 *Cook v. Guardian Lubricants, Inc.*, ARB No. 97-055, ALJ No. 95-STA-043, slip op. at 5 (ARB May 30, 1997).

82 *Id*.

83 *Johnson v. Roadway Express, Inc.*, ARB No. 01-013, ALJ No. 1999-STA-005, slip op. at 10 (ARB Dec. 30, 2002); *Cook*, ARB No. 97-055, slip op. at 5.

84 *Id*.

85 *Johnson*, ARB No. 01-013, slip op. at 10-11; *Cook*, ARB No. 97-055, slip op. at 6.

86 R. D. & O. at 45; *see* HT at 249, 253-254, 261-263; JX 28 at 1, 3-4.

legally carried.[87] Continental argued before the ALJ, and reiterates its argument on appeal, that Pollock should not receive back pay for the period following his termination from JDC Logistics, as his termination constituted a willful violation of company rules.[88]

The ALJ held that back pay awards are only reduced if an employee was terminated from subsequent employment for "gross" or "egregious" conduct and found that Pollock's testimony about why JDC Logistics terminated his employment fails to establish that it was due to gross or egregious conduct.[89] The ALJ did not specifically consider, however, whether Pollock's termination also constituted a willful violation of JDC Logistics' rules. Nevertheless, Pollock's mere concession that his termination from JDC Logistics was justified does not necessarily establish, in and of itself, that his termination was due either to gross or egregious misconduct or a willful violation of JDC Logistics' rules. As the burden was on Continental to establish that Pollock failed to mitigate damages due to his termination from JDC Logistics, Continental could have called Pollock at the hearing to more fully pursue or establish that the reasons for his termination constituted a willful violation of JDC Logistics' rules, but it did not do so. Thus, we reject Continental's contention and affirm the ALJ's finding in this regard.

Continental further contended before the ALJ, and reiterates its contention on appeal, that the ALJ abused his discretion in not allowing it to question Pollock regarding the reasons for Pollock's terminations from other trucking companies after his termination from Continental. Thus, Continental requests that the Board remand this case to the ALJ for the admission of evidence related to Pollock's terminations.[90]

Contrary to Continental's contention, however, the ALJ did allow Continental to ask Pollock about the reasons for his terminations from the three subsequent trucking companies that employed him after Continental terminated his employment.[91] What the ALJ did not allow Continental to inquire about was only whether Pollock had filed suits or OSHA complaints against the three trucking companies that subsequently employed him as a means to impeach Pollock's credibility.[92] As the ALJ noted, "[e]vidence of other crimes, wrongs or acts is not

---

87 HT at 263.

88 Respondent's Brief at 24-25; R. D. & O. at 46.

89 R. D. & O. at 46-47.

90 Respondent's Brief at 21-24.

91 *See* HT at 254, 266. In addition to Pollock's testimony concerning why JDC Logistics terminated his employment, Pollock also testified under cross-examination that he believed Schilli Specialized fired him because he refused to violate hours of service regulations and Baylor Trucking terminated his employment because he did not maintain the profitability of its vehicle at the expected levels. HT at 266. The ALJ also found these reasons did not prove conduct sufficient to toll the discriminating employer's back pay liability. R. D. & O. at 47, n.17.

92 HT at 255-260, 264.

admissible to prove the character of a person in order to show action and conformity therewith."[93] Thus, we reject Continental's contention in this regard.[94]

In determining how much back pay to award, the ALJ initially found that Pollock's average weekly wage was $748.88.[95] Because the record supports the ALJ's finding, it is affirmed. The ALJ ordered that Continental remit to Pollock back pay for the period from May 10, 2005, the date of his termination from Continental, until August 17, 2006, the date of the conclusion of the hearing before the ALJ. Thus, the ALJ awarded Pollock $24,726.90, after discounting the wages Pollock earned from his subsequent interim employment with other trucking companies, and awarded further back pay at the rate of $748.88 per week for the period of August 18, 2006, through the date Continental remits payment of the award, plus prejudgment interest.[96]

The ALJ erred, however, in determining the period of time for which Pollock is entitled to back pay. Back pay liability ends when the employer makes a bona fide, unconditional offer of reinstatement or, in very limited circumstances, when the employee rejects a bona fide offer, not through the date that the employer remits payment of the back pay award.[97] The record contains no evidence whether or when Continental made a bona fide offer to reinstate Pollock.

---

93 29 C.F.R. § 18.404(b); R. D. & O. at 47; HT at 256.

94 Continental also notes on appeal that it "has learned" that Pollock filed a complaint against Baylor Trucking and that the parties reached a financial settlement that presumably represents wages Pollock would have earned had he not been terminated. Thus, because Continental argues that it is entitled to a reduction of Pollock's back pay award for the amount of lost wages that Baylor paid to Pollock as part of the settlement, it asks that we remand the case for consideration of the financial settlement. Respondent's Brief at 25-26.

But evidence of such a financial settlement was not in the record before the ALJ. The Board's review of a case must be based on the record before the ALJ and on the ALJ's R. D. & O. 29 C.F.R. § 1978.109(c)(1). We note that the Board may order an ALJ to reopen the record to receive evidence and reconsider his or her findings based on that evidence where the proffered evidence is relevant and material and was not available prior to the closing of the record. *Halloum v. Intel Corp.*, ARB No. 04-068, ALJ No. 2003-SOX-007, slip op. at 6, n.1 (ARB Jan. 31, 2006); *Madonia v. Dominick's Finer Food, Inc.*, ARB No. 99-001, ALJ No. 1998-STA-002, slip op. at 4 (ARB Jan. 29, 1999). Continental has not established that either requirement is satisfied in regard to the alleged financial settlement. Thus, we decline to address Continental's contention or to order the ALJ to reopen the record.

95 R. D. & O. at 47.

96 R. D. & O. at 47-49.

97 *See Dale*, ARB No. 04-003, slip op. at 6; *Michaud v. BSP Transp., Inc.*, ARB No. 97-113, ALJ No. 1995-STA-029, slip op. at 5-6 n.3 (ARB Oct. 9, 1997).

Therefore, since the record does not show when Continental's back pay liability to Pollock ended, we must vacate and modify the ALJ's back pay award. Consequently, Pollock is entitled to back pay at the rate of $748.88 per week for the period of May 10, 2005, the date of his termination from Continental, until the date Continental made, or makes, Pollock a bona fide, unconditional offer of reinstatement to his former position with the same pay, terms, and privileges of employment that he had before he was terminated. But the back pay due to Pollock will be reduced by the wages Pollock earned from his subsequent interim employment with other trucking companies between May 10, 2005, and the date that Continental made or makes a bona fide offer of reinstatement. Furthermore, Continental shall pay to Pollock pre-judgment and post-judgment interest on the back pay owing according to the rate used for underpayment of federal taxes.[98]

Compensatory Damages

As noted above, a successful STAA litigant like Pollock is also entitled to "compensatory damages." The purpose of a compensatory damage award is to make the complainant whole for the harm caused by the employer's unlawful act.[99] In other words, compensatory damages are meant to restore the employee to the same position he would have been in if the employer had not discriminated against him.[100]

The ALJ noted that Pollock testified that he purchased a $105.00 bus ticket for his return home after Continental terminated his employment, which was deducted from his final paycheck from Continental.[101] Thus, because the ALJ found that Continental wrongly terminated Pollock, he found that he is entitled to reimbursement in the amount of $105.00 from Continental in compensatory damages. Because Continental has not appealed this aspect of the ALJ's order and substantial evidence supports the ALJ's finding, we affirm the $105.00 compensatory damages award.

Abatement

The ALJ also ordered Continental to expunge from Pollock's personnel records all derogatory or negative information contained therein relating to Pollock's protected activity or its role in Pollock's termination and to contact every consumer reporting agency to which it

---

98 *See* 26 U.S.C.A. § 6621(a)(2)(West 2002); *Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012; ALJ No. 1989-ERA-022, slip op. at 18-21 (ARB May 17, 2000) (outlining the procedures to be followed in computing the interest due on back pay awards).

99 *Smith v. Esicorp*, ARB No. 97-065, 97-112; ALJ No. 1993-ERA-016, slip op. at 5 n.4 (ARB Aug. 27, 1998).

100 *Johnson*, ARB No. 99-111, slip op. at 14.

101 R. D. & O. at 48; HT at 248.

furnished a report about Pollock to request that the reports also be so amended.[102] Additionally, the ALJ ordered that Continental shall post a written notice in a centrally located area frequented by most, if not all, of Continental's employees for a period of thirty (30) days, advising its employees that the disciplinary action taken against Pollock has been expunged from his personnel record and that Pollock's complaint has been decided in his favor.

The ALJ did not abuse his discretion in ordering these abatement measures. We have affirmed ALJ orders to expunge references to adverse actions taken against complainants for protected activity and have ordered such measures in the past.[103] Moreover, we note that it is a standard remedy in discrimination cases to notify a respondent's employees of the outcome of a case against their employer.[104] Thus, we affirm the abatement measures the ALJ ordered in this case.[105]

---

[102] R. D. & O. at 48-49; *see Michaud*, ARB No. 97-113.

[103] *See, e.g., Dickey v. West Side Transp., Inc.*, ARB Nos. 06-150, 06-151; ALJ Nos. 2006-STA-026, -027, slip op. 8-9 (ARB May 29, 2008); *Ass't Sec'y & Marziano v. Kids Bus Serv., Inc.*, ARB No. 06-068, ALJ No. 2005-STA-064, slip op. at 4-5 (ARB Dec. 29, 2006); *Jackson v. Butler & Co.*, ARB Nos. 03-116,-144, ALJ No. 2003-STA-026, slip op. at 13 (ARB Aug. 31, 2004).

[104] *Michaud,* ARB No. 97-113.

[105] We note that Pollock has also filed Complainant's Motion to Expedite Issuance of Final Order and For Remand to Determine Successorship Liability of Celadon Group Affiliates. In his motion, Pollock indicates that one of Celadon Group's subsidiaries has purchased Continental's truckload van assets and operations. Pollock asserts that until the Board issues a final order in this case, Continental may waste assets and pay preferred creditors, leaving no funds to pay Pollock. In addition, Pollock requests that the case be remanded to the ALJ to address all issues in regard to the liability of Celadon Group and its affiliates as successor to Continental.

In response, Continental admits that "some" of its assets have been purchased by a subsidiary of Celadon Group, but asserts that there are no funds with which to pay Pollock. Moreover, Continental denies that there is any issue related to successor liability in this case and denies that the case should be remanded to the ALJ for consideration of any issues related to successor liability.

In a similar case, the Board has declined to engage in any analysis of whether a respondent's successor meets the criteria for liability as a successor corporation. *See Doyle v. Hydro Nuclear Servs.*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 1989-ERA-022, slip op. at 21 (ARB May 17, 2000). However, we further note that when a party, such as Continental potentially in this case, fails to comply with a Board order, the STAA requires the Secretary of Labor to seek enforcement of the order. Under 49 U.S.C.A. § 31105(d), "If a person fails to comply with an order issued under subsection (b) of this section, the Secretary shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred." Pursuant to 29 C.F.R. § 1978.113, "Whenever any person has failed to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the Secretary may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to occur." *See Scott v. Roadway Express, Inc.*, ARB No. 01-065, ALJ No. 1998-

Attorneys' Fees and Costs

Pollock's attorney, Paul Taylor, filed a fee petition with the ALJ, and Continental filed an opposition. Taylor requested $94,348.48 in attorneys' fees, paralegal fees, fees for Taylor's non-attorney associate, and costs, plus $719.76 in costs that Pollock himself incurred. This amount represented 283.15 hours of work Taylor performed at an hourly rate of $275.00, 28 hours for travel time at a rate of $137.50 per hour, $1,255.98 in costs, $1,657.50 in paralegal fees, $8,156.25 in non-attorney associate fees, and 9 hours for non-attorney associate travel time at a rate of $62.50 per hour. In his S. R. D. & O., the ALJ discussed Continental's objections to Pollock's fee petition and awarded a total of $72,270.25 in attorneys' fees and costs for work performed before the ALJ and $719.76 in costs to Pollock.[106] He reduced Taylor's requested hourly rate to $250, reduced the hours of work for which Taylor should be reimbursed to 242.20, reduced the hours of work for which Taylor's non-attorney associate should be reimbursed to 40.25, and reduced the costs for which Taylor should be reimbursed to $969 to reflect the actual amount of costs listed on Taylor's fee petition.[107] We conclude that the ALJ reasonably exercised his discretion in determining the fee award and that his determination is supported by substantial evidence.

Continental filed a brief in opposition to the ALJ's order and Pollock filed a brief in support of the order, in part, and in opposition to the order, in part.

Continental argues before the Board that the ALJ erred in determining that the amount of fees awarded to Taylor was reasonable. Specifically, Continental contends that, as this case required little in terms of reviewing and organizing documents and Taylor arranged for only two witnesses to testify regarding very limited facts at the hearing, the fees Taylor requested were largely unnecessary. In addition, in light of Taylor's experience in STAA cases, Continental asserts that Taylor had no need for the assistance of a non-attorney associate.

Furthermore, Continental argues that the ALJ erred in merely reducing the fees Taylor requested for daily time entries, which the ALJ found to be vague and excessive, or which reflected large groupings of unrelated tasks, to ten hours per day instead of declining to award fees for such entries altogether. Finally, Continental contends that the ALJ's award to Taylor of 24 hours in fees for preparing his brief and 5.75 hours in fees for preparing his fee petition was

---

STA-008, slip op. at 2 (ARB May 29, 2003)(Order Denying Motion to Enforce); *see also Martin v. Yellow Freight, Inc.*, 983 F.2d 1201 (2d Cir. 1993). But the Secretary has not delegated to the Board her authority to enforce such orders. Accordingly, if Pollock has reason to believe that Continental will not comply with the Board's final order in this case, he may apply to the Assistant Secretary for Occupational Safety and Health for enforcement of the Board's order. *See* Sec'y Ord. 5-2002 (Oct. 10, 2002) 4.a.(1)(h); *Scott,* ARB No. 01-065.

106 S. R. D. & O. at 8.

107 S. R. D. & O. at 4-7.

excessive, especially considering the lack of detail within the time entries for such work. Thus, Continental requests that the ALJ's fee award be reduced to no more than the amount that Continental expended in this case or less.

Pollock's counsel initially contends that the ALJ erred in reducing his requested hourly rate from $275 to $250. Because the ALJ based his determination on cases in which Pollock's counsel's fees were earned in 2003 and 2004, Pollock's counsel asserts that he is entitled to a reasonable increase in his requested hourly rate to $275 as his fees in this case were earned in 2005 and 2006. In this regard, Pollock's counsel notes that the Board has found his requested hourly rate of $275 reasonable for fees he earned dating from April 2006.[108] Moreover, Pollock's counsel contends that the ALJ erred in further relying on the fact that his requested hourly rate exceeded the rate that Continental's counsel charged. Pollock's counsel asserts that Continental's counsel merely has a local practice and lacks experience in STAA cases, whereas he has a nationwide law practice and substantial experience in STAA cases, which is reflected in his requested hourly rate.

Additionally, Pollock's counsel argues that the ALJ erred in reducing the hours of work for which his non-attorney associate should be reimbursed. While the ALJ determined that the hours requested for the non-attorney associate to attend a mere three-day hearing were unnecessary, Pollock's counsel notes that how long the hearing would last was initially unknown. Furthermore, Pollock's counsel asserts that due to the many lengthy documents offered at the hearing, coupled with twelve witnesses testifying, his non-attorney associate's assistance at the hearing was justified. In all other aspects, Pollock's counsel requests that the ALJ's order be affirmed.

The Legal Standard

Where, as here, a STAA complainant has prevailed on the merits, he or she may be reimbursed for litigation costs, including attorneys' fees. The Act provides that the ALJ may include an award of the complainant's costs and expenses, including attorneys' fees that were reasonably incurred in bringing and litigating the case, if the complainant has prevailed.[109] Generally, the lodestar method of calculation is used, which requires multiplying the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate.[110]

In reviewing attorneys' fee awards, the ARB follows the fee-shifting precedents of the Supreme Court and other federal courts.[111] Once it is established that the plaintiff has prevailed,

---

[108] *See Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, 04-161, ALJ No. 2003-STA-055, slip op. at 3 (ARB Apr. 3, 2008)(Order On Attorney's Fees).

[109] 49 U.S.C.A. § 31105(b)(3)(B); 29 C.F.R. § 1978.109(a).

[110] *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

[111] *See*, e.g., *Shields v. James E. Owen Trucking, Inc.*, ARB No. 08-072, ALJ No. 2007-STA-022, slip op. at 4 (ARB Nov. 30, 2009); *Scott v. Roadway Express*, ARB No. 01-065, ALJ No. 1998-

Hensley v. Eckerhart[112] provides the framework for deciding the merits of fee petitions. In *Eckerhart*, the Court wrote, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."[113] This lodestar "calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services."[114] The district court may reduce the award for inadequately documented hours, or for hours that were not "reasonably expended" due to overstaffing or inexperience.

The petitioner bears the burden of proof that claimed hours of compensation are adequately demonstrated and reasonably expended.[115] The "reasonableness of the time expended must . . . be judged by standards of the private bar" so that "hours claimed are to be examined in detail with a view to the . . . value of the work product to the client in light of the standards of the private bar."[116] Faced with an unreasonable number of hours, the court can reduce the lodestar fee by a reasonable amount or percentage, without performing an item-by-item accounting.[117]

The other element of the lodestar calculation (besides time reasonably expended) is the reasonableness of plaintiff's attorney's hourly rates. The Supreme Court has held that fees are to be "calculated according to the prevailing market rates in the relevant community."[118] It is the petitioner's burden "to produce satisfactory evidence – in addition to the attorney's own affidavits – that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."[119] In deciding the "prevailing market rates in the relevant community," the court may consider, among other

---

STA-008, slip op. at 5 (ARB May 29, 2003); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-019, slip op. at 12 (ARB Nov. 13, 2002).

112 461 U.S. 424 (1983).

113 *Id.* at 433.

114 *Id.*

115 *Jackson*, ARB Nos. 03-116, 03-144, slip op. at 10 (citations omitted).

116 *Id.*, slip op. at 11 (quoting *DiFilippo v. Morizio*, 759 F.2d 231, 235-36 (2d Cir. 1985)).

117 *Id.* (citations omitted).

118 *Blum v. Stenson*, 465 U.S. 886, 895 (1984).

119 *Id.* at 895 n.11; *see also Eddleman v. Switchcraft, Inc*., 965 F.2d 422, 424 (7th Cir. 1992) (market rate is rate that lawyers of similar ability and experience in community normally charge their paying clients for type of work in question).

things, rates a plaintiff's attorney charges paying clients,[120] and rates other lawyers in the community charge for similar work.[121]

Finally, the party seeking a fee award must submit evidence documenting the hours worked and the rates claimed. As we have said, "a complainant's attorney fee petition must include adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent [with] practice in the local geographic area, as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs."[122]

Discussion

We begin with the reasonableness of Pollock's counsel's hourly rates because that affects how we view the number of hours expended. Taylor requested approval of an hourly rate of $275. He alleged before the ALJ that he had practiced law for 22 years and has a nationwide law practice, handling about 115 STAA cases including 39 administrative trials before the Office of Administrative Law Judges. The ALJ found Taylor's requested hourly rate excessive because it exceeds the amount Continental's counsel charged, the case presented no novel issues or complicated facts, the hearing lasted only three days and the Board had approved his previous rate of $250.[123] We defer to the ALJ's determination to reduce Pollock's counsel's hourly rate as a reasonable exercise of his discretion and as it is supported by substantial evidence. Based on a full review of the record, the ALJ approved the other requested hourly rates. Similarly, we conclude that the ALJ reasonably exercised his discretion in approving the other requested hourly rates and his determination is supported by substantial evidence. Therefore, we approve the rates.

We turn to the other element of the lodestar calculus, the number of hours reasonably expended. The ALJ found that Taylor's time entries on his fee petition were excessive given the

---

[120] *Connolly v. National Sch. Bus. Serv., Inc*., 177 F.3d 593, 596 (7th Cir. 1999) (Title VII); *Spegon v. Catholic Bishop of Chicago*, 175 F.3d 544, 555 (7th Cir. 1999) (FLSA); *Cooper v. Casey*, 97 F.3d 914, 920-21 (7th Cir. 1996) (§ 1983 inmate).

[121] *Spegon*, 175 F.3d at 555; *People Who Care v. Rockford Bd. of Educ.*, 90 F.3d 1307, 1312 (7th Cir. 1996) (school desegregation; billing rates of other attorneys in same firm not irrelevant).

[122] *Gutierrez*, ARB No. 99-116, slip op. at 13 (internal quotations and citations omitted).

[123] S. R. D. & O. at 4; *see Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, 04-161, ALJ No. 2003-STA-055 (ARB Jan. 31, 2006); *Waechter v. J. W. Roach & Sons Logging and Hauling*, ARB Nos. 04-167, 04-183, ALJ No. 2004-STA-043 (ARB Jan. 9, 2006).

lack of complexity of the case. Thus, the ALJ reduced the hours Taylor billed to a reasonable amount for the type of work he conducted.[124]

Specifically, given Taylor's expertise and experience, the quality of his brief, and the lack of any complex issues, the ALJ excluded any amount of time on brief writing over three working days as excessive. Thus, the ALJ reduced the number of hours for brief writing that Taylor requested from 36.25 to 24. The ALJ also reduced the number of hours for writing the reply brief that Taylor requested from 24.5 to 16. In addition, the ALJ found the number of hours Taylor requested for reviewing the hearing transcript to be excessive in light of the amount of testimony and the fact-driven nature of the case, so he reduced the number of hours for this review from 10.75 to 8.[125] Finally, due to vague time entries and listing unrelated tasks under the same hours, which cannot be broken down by the type of work conducted, the ALJ found the total hour entries for five specific days, which exceeded ten total hours, were excessive and reduced the number requested to ten hours billed per day. This resulted in a reduction of 17.25 in the number of hours Taylor billed for this case.[126]

In addition, the ALJ found that Taylor failed to show that this case required the presence of his non-attorney associate at the hearing. Thus, the ALJ reduced the number of hours of work Taylor requested for his non-attorney associate by 25, the number attributed to his attendance at the hearing. The ALJ approved the remaining 40.25 hours of work Taylor requested for his non-attorney associate, as he found that Taylor demonstrated that the non-attorney associate's pre-hearing assistance and assistance in daily hearing preparation was necessary and reasonable. Furthermore, the ALJ found the number of hours of work Taylor requested for his paralegal was not challenged and was reasonable. [127] We find that the ALJ fully analyzed Continental's objections and defer to the ALJ's determination to reduce the number hours of work Pollock's counsel requested as a reasonable exercise of his discretion and as his determination is supported by substantial evidence. Therefore, since the ALJ properly applied the lodestar method and substantial evidence supports his findings, we affirm the number of hours of work the ALJ awarded.

Finally, we consider costs. Based on a review of the actual amount of costs listed in Taylor's fee petition, we affirm the ALJ's reduction of the costs for which Taylor should be reimbursed to $969 as supported by substantial evidence.[128] In all other aspects, we affirm the

---

[124] S. R. D. & O. at 4; *see Jackson*, ARB Nos. 03-116, 03-144, slip op. at 10 (Faced with an unreasonable number of hours, the court can reduce the lodestar fee by a reasonable amount or percentage without performing an item by item accounting).

[125] S. R. D. & O. at 5.

[126] S. R. D. & O. at 5-6.

[127] S. R. D. & O. at 6.

[128] S. R. D. & O. at 6-7.

award of $969 for costs as a reasonable exercise of the ALJ's discretion. In addition, we affirm the ALJ's award of $719.76 to Pollock for his case-related expenses as a reasonable exercise of his discretion and as his determination is supported by substantial evidence.

Consequently, we find that the ALJ reasonably exercised his discretion in determining the fee award and that his determination is supported by substantial evidence. As the attorneys' fee figure is reasonable, we approve the recommended award of $72,270.25 in fees and costs to Taylor and $719.76 in costs to Pollock.

CONCLUSION

Substantial evidence in the record as a whole supports the ALJ's finding that Pollock engaged in STAA-protected activity when he refused to drive on a weight-restricted road. The record also supports the ALJ's finding that Continental terminated Pollock for his refusal to drive. Therefore, the ALJ's findings and conclusion that Continental violated the STAA are **AFFIRMED**. We make the following modification and orders:

> 1. Continental shall reinstate Pollock with the same seniority, status, and benefits that he would have had but for the unlawful discrimination.
>
> 2. Since the ALJ did not properly calculate the back pay owed to Pollock, we **MODIFY** the ALJ's back pay award. We vacate the ALJ's back pay award and **ORDER** Continental to pay Pollock back pay at the rate of $748.88 per week from May 10, 2005, until the date Continental made, or makes, Pollock a bona fide, unconditional offer of reinstatement to his former position with the same pay, terms, and privileges of employment that he had before he was discharged. The back pay due to Pollock will be reduced by any money Pollock earned between May 10, 2005, and the date that Continental made or makes a bona fide offer of reinstatement. Furthermore, we **ORDER** that Continental pay to Pollock pre-judgment and post-judgment interest on the back pay owing according to the rate used for underpayment of federal taxes.
>
> 3. Continental shall pay Pollock $105.00 compensatory damages as reimbursement for the bus ticket he purchased for his return home after Continental terminated his employment.
>
> 4. Continental shall expunge from Pollock's personnel records all derogatory or negative information regarding Pollock's protected activity and its role in his termination from his personnel file, contact every consumer reporting agency to which it may have furnished a report about Pollock and request that such reports be so amended, and post a written notice in a centrally located area

> frequented by most, if not all, of Continental's employees for a period of thirty (30) days, advising its employees that the disciplinary action taken against Pollock has been expunged from his personnel record and that Pollock's complaint has been decided in his favor.

Finally, we find that the ALJ reasonably exercised his discretion in determining the fee award and that his determination is supported by substantial evidence. As the attorneys' fee figure is reasonable we **APPROVE** the recommended award of $72,270.25 in fees and costs to Pollock's counsel and $719.76 in costs to Pollock. Continental shall pay to Pollock's counsel the amount of $72,270.25 in attorneys' fees and costs, as well as $719.76 in costs to Pollock, as reasonably incurred in bringing the complaint.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge