In the Matter of:

DENETTE D. YOUNG, **ARB CASE NO. 11-048**

COMPLAINANT, **ALJ CASE NO. 2010-STA-065**

v. **DATE: August 29, 2012**

PARK CITY TRANSPORTATION,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Denette Young, *pro se,* West Jordan, Utah

For the Respondent:
Donnie Novelle, *pro se,* Park City, Utah

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge.*

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2011) (STAA), and its implementing regulations at 29 C.F.R. Part 1978 (July 27, 2012). Complainant Denette D. Young (Young) filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondent Park City Transportation (Park City) terminated her

employment in violation of the STAA. Following rejection of her claim, Young requested a formal hearing before a Department of Labor Administrative Law Judge, which was held on November 2, 2010. Pursuant to the hearing, and based upon the evidence submitted, the ALJ issued a Decision and Order (D. & O.) on April 5, 2011, granting Young's claim and awarding her $8,288.72 in back pay and interest. Notwithstanding the award, Young has appealed the ALJ's Decision and Order to the Administrative Review Board (ARB or Board). For the following reasons, the Board affirms the ALJ's Decision and Order.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA and its implementing regulations at 29 C.F.R. Part 1978.[1] The ARB "shall issue a final decision and order based on the record and the decision and order of the administrative law judge."[2] We are bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole.[3] The ARB reviews the ALJ's conclusions of law de novo.[4]

DISCUSSION

The ALJ found that Park City, a commercial motor vehicle carrier within the meaning of 49 U.S.C.A. § 31101, terminated Young's employment on January 20, 2009, because she refused on January 17, 2009, to drive her vehicle out of concern that doing so would result in serious injury to herself, her passengers, or the public due to fatigue that she was at the time experiencing. The ALJ held that Young's refusal to drive was protected under 49 U.S.C.A. § 31105(a)(1)(B)(ii) and that Park City terminated her employment in retaliation for Young having refused to drive due to her fatigue, in violation of STAA's whistleblower protection provisions. As previously mentioned, the ALJ awarded Young $8,288.72 in back pay, plus the statutorily prescribed interest. The ALJ's back pay calculation was based on the fact that Young was a seasonal driver. Because Park City terminated her employment early in the 2008-2009 season of driving for which she had been hired,[5] the ALJ awarded Young back pay for the remainder of

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[1] 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).

[2] *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted).

[3] 29 C.F.R. § 1978.110(b).

[4] *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

[5] Young's seasonal driving involved the skiing season. For the 2008-2009 season, Young had commenced driving for Park City on December 25, 2008.

the season of lost driving that she sustained based on what she had earned the prior driving season. Young testified that she did not want to return to work for Park City. Consequently, the ALJ did not order that Park City reinstate Young to her former employment. The ALJ also did not award compensatory or other damages on the grounds that Young "has not made a convincing case for additional damages." D. & O. at 12.

On appeal, Young does not challenge the ALJ's findings and determination that Park City terminated her employment because she engaged in STAA-protected activity.[6] Young's challenge focuses exclusively on the adequacy of the remedies the ALJ ordered. Her challenge is somewhat difficult to decipher. But, giving Young the benefit of the doubt as a pro se litigant, we construe her appeal as challenging the ALJ's damage/remedy award in all three areas, i.e., with respect to the adequacy of the award of back pay and the failure of the ALJ to order reinstatement, and award compensatory and punitive damages.

Concerning the adequacy of the back pay award, Young argues in her brief on appeal that she should be paid more than the $8,288.72 plus interest that was awarded, which amount was based on the ski season for which she had been hired and was working when Park City terminated her employment. She appears to be arguing for an award that includes gratuities from passengers that she asserts on appeal she would have received in the normal course of her job, plus payment for lost income for the next season of driving that would have begun the following winter (the 2009-2010 ski season).[7]

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[6] We note that in reaching his decision on the merits, the ALJ applied the burdens of proof standards that existed prior to the 2007 STAA amendments. Congress amended STAA's burdens of proof standards effective August of 2007, as part of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266. The Act amended paragraph (b)(1) of 49 U.S.C.A. § 31105 to provide that STAA whistleblower complaints are to be governed by the legal burdens set out in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.A. § 42121(b) (Thomson/West 2007), which contains whistleblower protections for employees in the aviation industry. Under this standard, a complainant must show by a "preponderance of evidence" that the complainant engaged in protected activity that was a "contributing factor" to the adverse action taken against him. To prevail where the complainant has met his burden of proof, the employer must demonstrate "by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected conduct." *Beatty v. Inman Trucking Mgmt.*, ARB No. 11-021, ALJ No. 2008-STA-020, slip op. at 5, n.3 (ARB June 28, 2012); *Canter v. Maverick Transp.*, ARB No. 11-012, ALJ No. 2009-STA-054, slip op. at 4, n.4 (ARB June 27, 2012). However, since the burdens of proof that the ALJ should have applied lessened Young's burden and increased that for Park City, this error on the ALJ's part is harmless. Regardless, this issue has not been raised on appeal.

[7] While not directly arguing the point, Young attached to her brief on appeal copies of her W-2 IRS Wage and Tax Statement for 2008 showing total wage and tip earnings from Park City of $7,664.41. Presumably this document was attached to suggest that the ALJ's calculation of back wages owed based upon Young's 2008 earnings should have used her W-2 Statement, thereby resulting in a higher back pay award. Young did not introduce the W-2 Statement into evidence before the ALJ, however and thus the ARB cannot consider it on appeal.

"The purpose of a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against." *Ferguson v. New Prime*, ARB No. 10-075, ALJ No. 2009-STA-047 (ARB Aug. 31, 2011). To this end, tips and gratuities may be taken into consideration in computing the amount of back wages that are owed. *See Polger v. Florida Stage Lines*, No. 1994-STA-046 (Sec'y Apr. 18, 1995). The problem with Young's argument that her back pay award should have included the gratuities that she would have received had she not been discharged is that in determining the amount of weekly wages owed, the ALJ did include gratuities.[8]

Concerning Young's assertion that she is entitled to a back pay award that includes the amount she would have received in wages during the following 2009-2010 ski season, it is true that the Secretary has recognized the right of a seasonal worker to receive a back pay award that extends beyond the period of the complainant's seasonal employment. *See, e.g. Moravec v. H.C. & M. Transp.*, No. 1990-STA-044 (Sec'y Jan. 6, 1992). However, where such awards have been made, as in *Moravec*, credible evidence must exist indicating that the complainant would either have continued his employment beyond the seasonal work or that he would otherwise have been rehired for the next season. In this case, Young presented no such evidence. No evidence was offered that would indicate that Young sought reemployment for the 2009-2010 season. Instead, the evidence of record indicates, as the ALJ found, that Young was not interested in returning to work for Park City. D. & O. at 11.

Young also appears to argue that she should have been awarded reinstatement, stating in her appellate brief that "[n]o reinstatement was offered." While STAA affords a prevailing complainant the right to reinstatement to his former employment, see 49 U.S.C.A. § 31105(b)(3)(A)(ii), Young voluntarily waived that right. As just noted, Young testified that she did not want to return to work for Park City, stating in response to the ALJ's question of whether she sought reinstatement, "I don't believe that I could possibly work for a company that treats their employees as they treated me. . . ." Hearing Transcript at 17.

In support of her argument on appeal that she is entitled to additional compensatory and punitive damages, Young quotes from several ARB decisions that awarded such damages and asserts that she has experienced depression and hardship as a result of her discharge. While the case law cited is authoritative, any award of compensatory or punitive damages must be supported by evidence. Young presented no such evidence. As a result, the ALJ reasonably concluded that Young "has not made a convincing case for additional damages." D. & O. at 12. Young argues nothing on appeal that would cause the Board to reject the ALJ's conclusion.

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[8] For the four-week period of the previous ski season that the ALJ relied upon to determine the weekly wages to which Young was entitled as back pay, the ALJ relied upon the documents Young provided, which established that for the period of January 6 to January 19, 2008, she received $760.30 in salary and $848.40 in gratuities, and that for the period January 20 to February 2, 2008, she received $781.05 in salary and $624.33 in gratuities. The ALJ divided the total salary and gratuities by four (for the four-week period) in arriving at a weekly wage rate of $753.52 which, when multiplied by the eleven-week 2008-2009 seasonal period during which Young was unemployed as a result of her discharge, resulted in the ALJ's determination of $8,288.72 as the amount of back wages owed.

CONCLUSION

For the foregoing reasons, the ALJ's Decision and Order is **AFFIRMED**. Complainant Young is awarded $8,288.72 in back pay, plus interest on the entire back pay award calculated in accordance with 26 U.S.C.A. § 6621.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge