In the Matter of:

JEFFREY COLE,

COMPLAINANT,

v.

R. CONSTRUCTION COMPANY,

RESPONDENT.

ARB CASE NOS. 12-037
12-039

ALJ CASE NO. 2011-STA-022

DATE: July 31, 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Michael V. Galo, Jr., Esq., *Galo Law Firm, P.C.*, San Antonio, Texas

For the Respondent:
George D. Gordon, Esq., *Baggett, Gordon & Deison*, Conroe, Texas

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of the Surface Transportation Assistance Act of 1982, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2012) (STAA), as amended, and its implementing regulations, 29 C.F.R. Part 1978 (2012). On January 4, 2011, Jeffrey Cole filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employer, R. Construction (Respondent), constructively discharged him in violation of the STAA. OSHA dismissed the complaint. On January 20, 2012, after a hearing, an Administrative Law Judge (ALJ) entered an order finding Respondent liable for violating STAA, and ordering, inter alia, reinstatement and backpay. *Cole v. R. Constr. Co.*, ALJ No. 2011-STA-022 (D. & O.). Respondent petitioned for review challenging liability. Cole

petitioned for review challenging the relief. We summarily affirm the ALJ's order on liability, and remand for the limited purpose of recalculating backpay.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the STAA, and its implementing regulations at 29 C.F.R. Part 1978. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012). The Board reviews the ALJ's factual findings for substantial evidence on the record considered as a whole, 29 C.F.R. § 1978.110(b), and conclusions of law de novo, *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024, slip op. at 5 (ARB Apr. 25, 2013) (citation omitted).

DISCUSSION

A. The ALJ's STAA Liability Determination Is Supported By Substantial Evidence And Is In Accordance With Law

To prevail on a STAA whistleblower complaint, a complainant must prove "by a preponderance of evidence that (1) his safety complaints to his employer were protected activity; (2) the Respondent took an adverse action against him, and (3) his protected activity was a contributing factor to the adverse personnel action." *Blackie v. Smith Transp., Inc.*, ARB No. 11-054, ALJ No. 2009-STA-043, slip op. at 8 (ARB Nov. 29, 2012) (citations omitted); see also *Tablas* ARB No. 11-050, slip op. at 5-6. If a complainant proves by a preponderance of the evidence that protected activity was a contributing factor in the adverse personnel action, an employer may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event. *Tablas*, ARB No. 11-050, slip op. at 6; *Blackie*, ARB No. 11-054, slip op. at 8.

The ALJ's factual findings in a STAA case are reviewed for substantial evidence. 29 C.F.R. § 1978.110(b). "Substantial evidence is such relevant evidence a reasonable person would deem adequate to support the ultimate conclusion." *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1129 (10th Cir. 2013); see also *Henrich v. Ecolab, Inc.*, ARB No. 05-030, ALJ No. 2004-SOX-051, slip op. at 7 (ARB June 29, 2006). In this case, the record is replete with substantial evidence to support the ALJ's determination that Cole engaged in protected activity and that the protected activity contributed to the adverse action he suffered. D. & O. at 45-48, 52-55.

Cole alleged that Respondent engaged in adverse action when it constructively discharged him. To prevail on a constructive discharge claim, "the complainant must prove that working conditions were so difficult or unpleasant that a reasonable person in the employee's shoes would have found continued employment intolerable and would have been compelled to resign." *Brown v. Lockheed Martin Corp.*, ARB No. 10-050, ALJ No. 2008-SOX-049, slip op. at 10 (ARB Feb. 28, 2011) (citations omitted), *aff'd Lockheed Martin Corp.*, 717 F.3d at 1134

("even if the ALJ erroneously applied a more lenient standard when analyzing [complainant's] claim of constructive discharge, any such error was corrected by the Board."); see also *Gattegno v. Prospect Energy Corp.*, ARB No. 06-118, ALJ No. 2006-SOX-008, slip op. at 21 (ARB May 29, 2008). The ALJ determined that Cole was constructively discharged after refusing to drive a truck loaded with hazardous material when he lacked the qualifications. D. & O. at 48-52. The ALJ closely analyzed witness testimony, and weighed that testimony based on a "review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and demeanor of witnesses." D. & O. at 42. We "generally defer to ALJ findings of fact when based on the credibility of a witness as shown by their demeanor or conduct at the hearing." *Hall v. U.S. Dugway Proving Ground*, ARB Nos. 02-108, 03-013; ALJ No. 1997-SDW-005, slip op. at 27 (ARB Dec. 30, 2004), *aff'd sub nom. Hall v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 476 F.3d 847 (10th Cir. 2007). In this case, the ALJ weighed the evidence, assessed the credibility of witnesses, and determined that the overall combination of actions that Respondent took against Cole after his refusal to drive "were arguably so difficult or unpleasant that a reasonable person in [Cole's] position would have felt compelled to resign." D. & O. at 52. Substantial evidence in the record, which the ALJ cited in support of that conclusion, fully supports this finding.

Having reviewed the evidentiary record as a whole, and the parties' briefs on petition for review, we conclude that the ALJ's findings of fact fully support the determination that Cole engaged in protected activity that was a contributing factor in his constructive discharge. The findings that support this conclusion are fully supported by substantial evidence in the record. We further conclude that the ALJ's legal conclusions with respect to the liability determination are in accordance with applicable law.

B. ALJ Correctly Ordered Reinstatement, But Backpay Award Was Error

The ALJ ordered Respondent to reinstate Cole, expunge Cole's personnel records, and pay backpay to Cole in the amount of $16,229.85 (the amount due from December 20, 2010, to May 9, 2011, when he enrolled in college). D. & O. at 56-58. The ALJ denied punitive damages. *Id.* at 58.

Respondent argues against reinstatement because Cole sought to be laid off after the December 17 incident. Respondent's Br. at 11. Cole argues for reinstatement. Cole Br. Opp. at 25-26. Reinstatement is an automatic remedy in STAA cases, and is required once a respondent receives an ALJ's order mandating reinstatement, and pending a petition for review to the ARB. See 75 Fed. Reg. 53544-01, 2010 WL 3392072, at 53557 (Aug. 31, 2010) (2013 Thomson Reuters) (reinstatement "effective immediately upon receipt of the decision by the respondent."); see *id.* at 53551 ("If a timely petition for review is filed with the ARB, relief ordered by the ALJ is inoperative while the matter is pending before the ARB, except that orders of reinstatement will be effective pending review."). A stay of reinstatement is rare. "The Secretary believes that a stay of a reinstatement order is only appropriate when the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, and a balancing of possible harms to the parties and the public favoring a stay." *Id.* Respondent argues that Cole should not be reinstated because he requested the layoff. This reasoning however, is not sufficiently compelling to warrant a departure from the Department's

general policy of ordering reinstatement in STAA cases where, as here, a violation of the STAA whistleblower provision is found.[1]

Cole argues that the ALJ erred in ending the backpay award at March 9, 2011, the date that he started college.[2] Cole Br. at 4-5. Courts have held that enrollment in college after a diligent search for work does not foreclose a complainant's back pay award. See *Killian v. Yorozu Auto. Tenn., Inc.*, 454 F.3d 549, 557 (6th Cir. 2006) (court of appeals upholds backpay award where plaintiff "was unemployed for eight months before entering cosmetology school." The court stated that it "cannot be said that she removed herself from the job market prematurely, and we cannot fault her for embarking upon a new career when there were no comparable positions available in her old one.); see also *Miller v. AT&T Corp.*, 250 F.3d 820, 839 (4th Cir. 2001); *Dailey v. Societe Generale*, 108 F.3d 451, 457 (2d Cir. 1997) ("We believe that a fact-finder may, under certain circumstances, conclude that 'one who chooses to attend school only when diligent efforts to find work prove fruitless,' . . . satisfies his or her duty to mitigate."); *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1276 (4th Cir. 1985). It was error to limit Cole's backpay award to March 2011. When he was unable to find comparable employment after a diligent search, Cole enrolled in college to retrain in computer networking and systems administration. This satisfies Cole's duty to mitigate.[3] Cole states that soon after the ALJ's January 12, 2012, decision, he sought reinstatement with Respondent. See Cole Br. at 5 (Cole states that "[o]n February 12, 2012, . . . counsel [for Cole] sent counsel for Respondent an email inquiring whether Cole could return to work. Respondent's counsel did not respond."). Indeed, Respondent's refusal to reinstate Cole after the ALJ's reinstatement order further underscores the appropriateness of extending backpay in this case beyond March 9, 2011.

---

[1] When reinstatement is impossible or impractical, alternative remedies such as front pay are available. *Assistant Sec'y & Bryant v. Bearden Trucking Co.*, ARB No. 04-014, ALJ No. 2003-STA-036, slip op. at 7-8 (ARB June 30, 2005).

[2] Cole does not challenge the ALJ's order denying punitive damages.

[3] The ALJ relies on *Ass'y Sec'y & Cotes v. Double R Trucking, Inc.*, ARB. No. 99-061, ALJ No. 1998-STA-034 (ARB July 16, 1999) as support for terminating Cole's backpay on the date he voluntarily became a full-time student. *Cotes* is distinguishable, however, because it appears that the complainant in that case did not even request backpay beyond the date when he became a full-time student. In this case, Cole requested backpay beyond his college enrollment date following a fruitless search for comparable employment, and after entry of the reinstatement order by the ALJ.

CONCLUSION

The ALJ's order finding Respondent liable for violating the STAA is **AFFIRMED**, and the award of backpay is **REMANDED** for further proceedings consistent with this opinion.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge