In the Matter of:

RICKIE ANDERSON,

COMPLAINANT,

v.

TIMEX LOGISTICS, MILDA KRAPUKAITYTE, and JANIS JUSHKEVICH,

RESPONDENTS.

ARB CASE NO. 13-016

ALJ CASE NO. 2012-STA-011

DATE: April 30, 2014

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

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

For the Respondent:
Donald J. Vogel, Esq.; Sara L. Pettinger, Esq.; Scopelitis, Garvin, Light, Hanson & Feary, P.C.; Chicago, Illinois

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 Surface Transportation Assistance Act of 1982 (STAA or the Act), as amended, 42 U.S.C.A. § 31105 (Thomson/West Supp. 2013) and implementing regulations, 29 C.F.R. Part 1978 (2013). Rickie Anderson, a truck driver, filed a complaint alleging that his employer, Respondents Timex Logistics (Timex or Company), Milda Krapukaityte, and Janis Jushkevich, violated the STAA by terminating his employment. On

November 8, 2012, an Administrative Law Judge (ALJ) entered a Decision and Order (D. & O.) holding that the Company's termination decision violated the Act and holding owner Milda Krapukaityte and operations manager and dispatcher Janis Jushkevich individually liable for damages. The ALJ awarded Anderson backpay, compensatory damages for emotional distress, and punitive damages. Respondents petitioned the Administrative Review Board (ARB) for review. We affirm the liability determination and damages award with regard to the Company and Krapukaityte, and reverse the ALJ's ruling that holds Jushkevich individually liable for damages.

BACKGROUND

A. Events leading to Anderson's termination

Timex Logistics is a commercial trucking company engaged in interstate commerce within the meaning of 49 U.S.C.A. § 31105. D. & O. at 15. Milda Krapukaityte owns the Company, and Janis Jushkevich worked at the Company as operations manager and dispatcher. Timex hired Rickie Anderson as a truck driver in October 2010. On December 9, 2010, the Company required Anderson to sign a "General Agreement" requiring that he:

> [B]e on time for all loads your dispatcher gives to you.
>
> When anyone including your dispatcher calls you, you must pick up the phone unless you have reason not to and then you must call in to check status.
>
> If you are going to be late for your delivery you must notify dispatch prior to arrival time.

Complainant's Exhibit (CX) 3 (General Agreement). The General Agreement further reads: "Violation of the terms of this agreement are grounds for immediate termination from Timex Logistics Company." *Id.*; D. & O. at 4 ¶ 10, citing Hearing Transcript (Tr.) at 46.

On or about December 14, 2010, Timex contracted with broker ACT International Corp. (ACT) to transport a load from Seattle, Washington to San Francisco, California, a distance of over 800 miles. CX 14 at 1-2 (Leg miles reflecting "808.0" total miles); see also D. & O. at 2 ¶ 2. The travel time would require more than 11 hours of driving. D. & O. at 3 ¶ 4, citing Tr. at 24. ACT indicated that the load was a "hot shipment" and expected Timex's drivers to "drive straight through and deliver" the load by 7:00 p.m. on December 15, 2010. D. & O. at 16 ¶ 76; CX 14[1]. See also D. & O. at 6 ¶, citing Tr. at 118-120 (Jushkevich testifying that "hot load" means it is a "critical shipment, and he knew that it was air freight, which means it was going to be put on an airplane."). Company operations manager and dispatcher Jushkevich testified that

[1] CX 14 contains a typographical error indicating that the load was to be delivered on December 14 instead of December 15.

he "knew that a single driver could not drive from Seattle to San Francisco without taking a 10-hour rest break." D. & O. at 16 ¶ 76. Jushkevich directed Anderson to take the assignment by himself. *Id.* The load was not ready for transport until 5:15 a.m. on December 15, 2010. D. & O. at 10 ¶ 44, citing Tr. at 222.

Anderson drove 9.75 hours, and at about 3:30 p.m. he stopped in Weed, California to take a rest break. D. & O. at 10 ¶¶ 44-45, citing Tr. at 222-228. ACT contacted Timex to check on the status of the delivery. In response to ACT's inquiry, Timex located Anderson's vehicle in Weed, California, during Anderson's break. D. & O. at 7 ¶ 30, citing Tr. at 143-145. When the police arrived at Anderson's truck in Weed, he was still on his 10-hour break. *Id.* at 16 ¶ 78. Another driver was sent to complete the run to San Francisco. *Id.* at 16 ¶¶ 77-79.

Shortly after this incident, and on Jushkevich's recommendation, Krapukaityte terminated Anderson's employment with the Company effective December 22, 2010. D. & O. at 5 ¶ 19; *see also id.* at 7 ¶ 26, citing Tr. at 131-132 & CX-16 (Termination Letter). The termination letter directed at Anderson states that his employment "has been terminated for reasons of missed delivery appointments and late delivery times." CX-16. The letter states as grounds for termination the following:

> On 11/23/2010 you were late for your Miami, Florida appointment.
> On 11/30/2010 you were late for your pick up in Alexandria, Indiana and you also missed your delivery with that load in Atlanta, Georgia.
> On 12/14/2010 you missed your delivery appointment in San Francisco and the broker charged us back $1500.00 for sending another company to pick up the load off your truck.

CX-16 at 1. Krapukaityte testified that while there were complaints about Anderson's work, "the San Francisco trip was the last straw that broke the camel's back." D. & O. at 4 ¶ 14, citing Tr. at 61-62; *id.* at 5 ¶ 20, citing Tr. at 97; *id.* at 17 ¶ 82. The Company did not pay Anderson for work completed prior to his termination. D. & O. at 4 ¶ 11, 21.

B. Proceedings below

Anderson filed a complaint with the Occupational Safety and Health Administration (OSHA) on April 14, 2011, alleging that the Company's termination decision violated STAA. Following an investigation, OSHA issued a determination letter dismissing Anderson's complaint. Anderson filed objections and requested a hearing before an ALJ.

After an evidentiary hearing, the ALJ issued a Decision and Order Granting Relief on November 8, 2012. The ALJ determined that Anderson proved by a preponderance of the evidence that his refusal to drive constituted protected activity under the STAA that contributed to his termination, and that Respondents failed to show by clear and convincing evidence that they would have fired Anderson absent his protected acts. The ALJ next determined that Respondents failed to show that Anderson did not make reasonable attempts to mitigate damages. The ALJ held that Respondents "offered no evidence establishing that substantially

equivalent jobs were available to [Anderson]." D. & O. at 18 ¶ 86. Moreover, the ALJ observed that even assuming that substantially equivalent employment was available, that Anderson "sought work as a truck driver by submitting more than 75 on-line employment applications." *Id.*

The ALJ held Company owner Krapukaityte and operations manager and dispatcher Jushkevich individually liable for damages. The ALJ held that Krapukaityte was individually liable as owner of the company, and Jushkevich was liable because he "influenced Ms. Krapukaityte's decision to fire [Anderson]." D. & O. at 19 ¶ 91.

The ALJ awarded Anderson backpay in the amount of $89,179.50, plus interest. The ALJ awarded Anderson $50,000 in compensatory damages for emotional distress and $12,500 in punitive damages, jointly payable by the Company, Krapukaityte, and Jushkevich. The ALJ awarded attorney's fees and costs to Anderson. D. & O. at 21.

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. 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); 29 C.F.R. § 1978.110(a). The ARB reviews the ALJ's factual findings for substantial evidence, 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).

DISCUSSION

A. Statutory And Regulatory Framework

Under STAA's employee protection provision, an employee may not be discharged or discriminated against when

> (B) the employee refuses to operate a vehicle because—
> (i) The operation violates a *regulation*, standard, or order of the United States related to commercial motor vehicle safety, health, or security * * *

49 U.S.C.A. § 31105(a)(1)(B)(i) (emphasis added). Federal Motor Carrier Safety (FMCS) regulation 49 C.F.R. § 395.3(a) (2010), then-applicable in December 2010, stated as follows:

> § 395.3 Maximum driving time for property-carrying vehicles.
>
> (a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall

> any such driver drive a property carrying commercial motor vehicle:
> (1) More than 11 cumulative hours following 10 consecutive hours off duty; or
> (2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty. . . .

Drivers of commercial vehicles who refuse to drive under STAA can prevail on a whistleblower complaint by proving "by a preponderance of evidence that (1) he engaged in 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, a respondent 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.

B. The ALJ's Liability Determination Is Supported By Substantial Evidence

The ALJ determined that Anderson engaged in STAA-protected activity on December 15, 2010, when he took a break from driving during his trip from Seattle to San Francisco as required by the FMCS regulations. D. & O. at 16. See also 49 C.F.R. § 395.3(a)(1)(2010). Substantial evidence supports that determination.

Under the FMCS regulations effective in December 2010, a motor carrier is prohibited from requiring a driver to operate a commercial vehicle more than 11 cumulative hours following 10 consecutive hours off-duty. 49 C.F.R. § 395.3 (a)(1) (2010). A driver is protected under the STAA for refusing an order when "a violation of DOT driving time regulations . . . is necessarily contemplated in the order, albeit at a somewhat later time." *Boone v. TFE, Inc.*, No. 1990-STA-007, slip op. at 3 (Sec'y July 17, 1991), *aff'd Trans Fleet Enters., Inc. v. Boone*, 987 F.2d 1000 (4th Cir. 1992). The ALJ correctly determined that Anderson is protected under STAA because he refused to obey an order to drive in violation of the hours of service rules set out in the FMCS regulations. As a commercial trucking company, Timex was aware of the hours of service rules. Tr. at 24, 67. Krapukaityte testified at the hearing that she agreed that "the amount of allowable driving time under the hours of service regulations is 11 hours before a driver has to take a 10-hour break" and "if one driver was going to take [the Seattle to San Francisco] run, at some point he would have to take a 10-hour break." Tr. at 24. See also D. & O. at 5¶ 18, citing Tr. at 81-82. The Load Confirmation sheet for the ACT load to San Francisco states: "DRIVERS TO DRIVE STRAIGHT THROUGH AND DELIVER." CX-14 at 1. See also D. & O. at 3 ¶ 3, citing Tr. at 21-22, 120-123. The Company assigned one driver, Anderson, to complete the driving order even though "a single driver could not drive straight through from Seattle to San Francisco without taking a 10 hour rest break." D. & O. at 16 ¶ 76; Tr. at 21-24, 120-121.

The ALJ determined, and the record reflects, that the driving distance from Seattle to San Francisco is approximately 808 miles and that it is not possible for an individual to drive this distance in 11 hours or less. D. & O. at 3 ¶ 4; *id.* at 16 ¶ 76. See also Tr. at 19, 24-25, 105-106, 192; CX-14 at 1-2. The maximum speed limit for commercial vehicles in California and Oregon was 55 miles per hour, and the maximum speed limit for commercial vehicles in the State of Washington was 60 miles per hour. See Tr. at 24-25, 132. Approximately two-thirds of the trip was in California and Oregon. Tr. at 25; see also D. & O. at 3 ¶ 4. The actual driving time from Seattle to San Francisco is approximately 16 hours. Tr. at 106. Anderson drove 9.75 hours, or about 519 miles, before taking his break. Tr. at 226, 228-229. Anderson testified that he stopped in Weed because there was "a McDonald's Truck Stop . . . [a]nd from that point on for the next 250 miles there's nothing." Tr. at 229. The record reflects that had Anderson driven 11 hours (which is permitted under the FMCS regulations), he would not have arrived in San Francisco in time to meet the 7:00 p.m. deadline on December 15, 2010. Tr. at 230-231. One driver could not have legally performed Anderson's assigned run without running afoul of either ACT's delivery requirements or the FMCS hours of service regulations, 49 C.F.R. § 395.3 (a)(1) (2010). Given these undisputed facts, the ALJ reasonably determined that "at the time Mr. Jushkevich gave permission to [ACT] to send another driver to pick up the trailer, he had to know Anderson was on his 10 hour break." D. & O. at 16 ¶ 79. Substantial evidence thus fully supports the ALJ's determination that Anderson's decision to stop and rest in Weed, California, after driving for nearly 10 hours, was activity protected by STAA.

The ALJ determined that Anderson's decision to rest on December 15, 2010, during the Seattle to San Francisco run contributed to the Company's decision to terminate his employment. D. & O. at 16 ¶¶ 72, 80. A contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Tablas*, ARB No. 11-050, slip op. at 8.[2] Anderson's discharge letter states that one of the reasons he was fired was because he "missed [his] delivery appointment in San Francisco and the broker charged [Timex] $1500.00 for sending another company to come pick up the load off your truck." CX 16. Krapukaityte agreed in her testimony that "part of the reason Mr. Anderson was terminated was that he missed a delivery appointment in San Francisco." Tr. at 18. Substantial evidence thus fully supports the ALJ's determination that Anderson's protected activity contributed to the Company's decision to terminate him.

Respondents can avoid liability by demonstrating by clear and convincing evidence that they would have taken the same adverse action against Anderson in the absence of his protected

[2] Respondents argue that the ALJ did not apply the correct burden of proof. Brief of Respondents in Support of Their Petition for Review (Respondent's Brief) at 9. The ALJ cited the proper "contributing factor" burden, D. & O. at 15 ¶ 75, but in stating his holding in the case, the ALJ stated that Anderson's STAA-protected activity was "a motivating factor" in his discharge, " D. & O. at 16 ¶ 80. The "motivating factor" standard is a higher burden for a complainant to meet, and the record reflects that Anderson met that burden as well. Thus the ALJ's error in applying the incorrect standard for proving causation, was harmless. *See, e.g., Canter v. Maverick Transp.*, ARB No. 11-012, ALJ No. 2009-STA-054, slip op. at 5 (ARB June 27, 2012).

activity. *Tablas*, ARB No. 11-050, slip op. at 6. While Timex argues (Br. at 15) that Anderson was terminated because he was late on multiple occasions during his employment, the ALJ found that Krapukaityte "also admitted that the San Francisco load was the last straw in making her decision to terminate Mr. Anderson." D. & O. at 17 ¶ 82. See also Tr. at 61-62, 97. Further, Timex contends (Br. at 17-18) that Anderson was terminated because he failed to communicate to dispatch prior to taking his break. However, the record shows that, as a general matter, drivers were not required to contact the Company prior to commencing their rest periods, Tr. at 185, 197, and, as the ALJ found, the termination letter does not state that Anderson was fired for failing to communicate to dispatch prior to taking his break. D. & O. at 17-18 ¶ 84 & n.13 (ALJ stating that the "termination alone states he was fired in part for missing his delivery in San Francisco, not for lack of communication. (CX 16)."). Moreover, in addressing this issue, the ALJ determined as follows:

> I agree that Mr. Anderson should have communicated more frequently with the dispatcher; however, I find that Respondents have not shown clear and convincing evidence that Respondents would have fired Anderson in the absence of his protected activity. In other words, had Mr. Anderson not stopped in Weed, California for a 10 hour break, and he had delivered the load on time without stopping, he would still be working for Timex.

Substantial evidence supports this determination.

C. The Relief Awarded By The ALJ Is Supported By The Record

As the prevailing party, Anderson is entitled to reinstatement, damages, attorney's fees and costs. 49 U.S.C.A. § 31105(b)(3).

Respondents argue that Anderson failed to mitigate his damages during his period of unemployment. While STAA imposes a duty on a wrongfully discharged complainant to mitigate damages, the burden of proving a failure to mitigate lies with Respondent. *See, e.g., Dale v. Step 1 Stairworks, Inc*., ARB No. 04-003, ALJ No. 2002-STA-030, slip op. at 6-7 (ARB Mar. 31, 2005). The respondent must establish that substantially equivalent positions were available to complainant and that complainant failed to use reasonable diligence in attempting to secure such position(s). *Id*. at 6-7. Respondents argue (Br. at 20) that Anderson failed to "produce a single application" proving that he sought other employment. However, Respondents proffered no evidence to the ALJ establishing that substantially equivalent jobs were available to Anderson. D. & O. at 18 ¶ 86. Based on Respondents' lack of evidence, the ALJ correctly concluded that they failed to prove that Anderson failed to mitigate. Accordingly, we find no reason for disturbing the ALJ's back pay award of $89,179.50, plus interest.

The ALJ awarded Anderson $50,000 for emotional distress. D. & O. at 21. Timex argues (Br. at 21) that the ALJ erred because Anderson failed to proffer medical evidence to support the award. However, the ARB has affirmed compensatory damage awards for emotional distress, even absent medical evidence, where the lay witness statements are credible and unrefuted. *See, e.g., Ferguson v. New Prime, Inc*., ARB No. 10-075, ALJ No. 2009-STA-047,

slip op. at 7-8 (ARB Aug. 31, 2011) ("Although Ferguson's testimony was unsupported by medical evidence, it was unrefuted and, according to the ALJ, credible."); *Hobson v. Combined Transp., Inc.*, ARB Nos. 06-016, -053; ALJ No. 2005-STA-035, slip op. at 8 (ARB Jan. 31, 2008) (ARB affirms award for emotional distress based on complainant's testimony alone where it is "unrefuted and, according to the ALJ, credible."). The ALJ held that Anderson provided unrefuted testimony regarding how his discharge has affected his credit, savings, and living circumstances. D. & O. at 21; see also *id*. at 11 ¶ 49, citing Tr. at 261-265. The record fully supports the ALJ's award for emotional distress.

The record also supports the ALJ's award of punitive damages in the amount of $12,500. 49 U.S.C.A. § 31105(b)(3)(C). An award of punitive damages is warranted "where there has been 'reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law.'" *Youngerman v. United Parcel Serv., Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 5 & n.16 (ARB Feb. 27, 2013) (quoting *Ferguson*, ARB No. 10-075, slip op. at 98). The size of the punitive award is fundamentally a fact-based determination driven by the circumstances of the case, and we are bound by the ALJ's findings if they are supported by substantial evidence on the record considered as a whole. *Youngerman*, ARB No. 11-056, slip op. at 10 (citing *Cooper Indus. v. Leatherman Tool Grp.*, 532 U.S. 424, 435 (2001)). The ALJ awarded the punitive relief on finding that Timex "set Mr. Anderson up for failure," and that after firing him "the Respondents did not help him get home, showing callous disregard for [Anderson's] welfare, and they even withheld $1,879.50 from him for no apparent good reason." D. & O. at 21. Indeed, Anderson testified extensively about the distress he suffered just before and after his termination. Tr. at 261-265. The ALJ's findings are supported by substantial evidence. *Id.* (citing D. & O. at 4 ¶ 11, at 7 ¶ 31, at 11 ¶ 49).

D. The ALJ Correctly Held Company Owner Krapukaityte Individually Liable, But Erred In Holding Jushkevich Individually Liable For Damages Anderson Suffered

The ALJ held Krapukaityte and Jushkevich individually liable for payment of monetary damages to Anderson. D. & O. at 18-19. The express language of the STAA permits individual liability. The statute provides that "[a] *person* may not discharge an employee" for conduct protected by the STAA." 49 U.S.C.A. § 31105(a)(1) (emphasis added). The regulations implementing STAA define a person as "one or more *individuals* . . . ." 29 C.F.R. § 1978.101(k) (emphasis added); *see also Assistant Sec'y of Labor v. Bolin Assocs.*, No. 1991-STA-004, slip op. at 5-6 (Sec'y Dec. 30, 1991) ("Bolin, as the person who discharged Complainant, is liable under the express language of [the STAA]"). An integral factor for determining individual liability under the Act is whether an individual exercises control over the employee. *Smith v. Lake City Enters., Inc.*, ARB Nos. 08-091, 09-033; ALJ No. 2006-STA-032, slip op. at 9 (ARB Sept. 24, 2010). The requisite control over an employee for purposes of individual liability includes "the ability to hire, transfer, promote, reprimand, or discharge the complainant . . . ." *Id*. (citing *Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-010, slip op. at 9 (ARB Jan. 31, 2001)). Krapukaityte is liable as the Company's sole owner, and she made the final decision to discharge Anderson. Tr. at 16. *See, e.g., Smith*, ARB Nos. 08-091, 09-033; slip op. at 9 (ALJ stating that "while Donald Morgan advised his wife about her business, stored and maintained his truck at the LCE facility, and helped with equipment issues, he exercised no control over Smith's employment.").

The ALJ erred, however, in holding operations manager and dispatcher Jushkevich individually liable for payment of damages to Anderson. Unlike Krapukaityte, Jushkevich is not an owner of Timex, and he testified that it was "not really [his] position to" fire people at the company. Tr. at 131. Moreover, while Jushkevich recommended that Krapukaityte terminate Anderson following the December 2010 incident, there is no evidence that Jushkevich had authority to "hire, transfer, promote, reprimand, or discharge" Anderson. *Smith*, ARB Nos. 08-091, 09-033, slip op. at 8.[3] Since Jushkevich did not have the requisite control over Anderson's employment, the ALJ erred as a matter of law in holding him individually liable for damages, as substantial evidence does not support that determination.

CONCLUSION

The ALJ's decision holding Timex Logistics and Milda Krapukaityte liable for violating STAA is **AFFIRMED**. Timex and Milda Krapukaityte are **ORDERED** to pay Anderson $89,179.50 in back pay plus interest, $50,000 in compensatory damages for emotional distress, $12,500 in punitive damages, and attorney's fees and costs. The ALJ's ruling that Jushkevich is individually liable for damages is **REVERSED**.

As the prevailing party, Anderson is also entitled to costs, including reasonable attorney's fees, incurred before ARB. Anderson's attorney shall have 30 days from receipt of this Final Decision and Order in which to file a fully supported attorney's fee petition with the Board, with

[3] While Anderson does not advance this argument in its brief, the ARB in *Smith*, ARB Nos. 08-091, 09-033, slip op. at 8, stated that control may also be shown where there is the ability to "influence another employer to take such actions against a complainant." This aspect of control for purposes of assessing individual liability is not applicable here. The ARB analyzed this aspect of control in "joint employer" situations. See *Williams v. Lockheed Martin Energy Sys. Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-010, slip op. at 9-12 (ARB Jan. 31, 2001) ("Allegations that a company is a joint employer most often arise in situations where the [complainant] works for an independent contractor commissioned to perform certain work for the alleged joint employer, and the [complainant] claims that the alleged joint employer caused the discrimination."). The parties here do not allege that this case presents an issue involving a joint-employer arrangement.

simultaneous service on opposing counsel. Thereafter, counsel for Timex and Krapukaityte shall have 30 days from its receipt of the fee petition to file a response.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative
Appeals Judge