In the Matter of:

CHRIS HOOD,

COMPLAINANT,

v.

R&M PRO TRANSPORT, LLC AND BAYLOR INTERMODAL, INC.,

RESPONDENTS.

ARB CASE NO. 15-010

ALJ CASE NO. 2012-STA-036

DATE: December 4, 2015

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Theodore W. Walton, Esq.; *Clay Daniel Walton & Adams PLC*; Louisville, Kentucky

Formerly for the Respondent, R&M Pro Transport, LLC:
John L. Grannan, Esq.; Jeffersonville, Indiana

For the Respondent, Baylor Intermodal, Inc.:
Jerry L. McCullum, Esq.; *McCullum Law Office LLC* New Albany, Indiana

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982 (STAA or the Act), as amended, 49 U.S.C.A. § 31105 (Thomson/West 2007 & Supp. 2015), and its implementing regulations, 29 C.F.R. Part 1978 (2015). Chris Hood filed a complaint alleging that R&M Pro Transport, LLC (R&M) and Baylor Intermodal, Inc. (Baylor) retaliated against

him in violation of the STAA's whistleblower protection provisions. Baylor and R&M appeal from a Decision and Order (D. & O.) issued by a Department of Labor Administrative Law Judge (ALJ) on October 24, 2014, finding in Hood's favor, after a hearing on the merits.

BACKGROUND

From June 2010 until May 2011, Hood worked as a contract driver for R&M, a company that hauled freight exclusively for Baylor Intermodal.[1] R&M supplies trucks and drivers to Baylor. Baylor assigned R&M drivers to drive loads using a satellite tracking and messaging system called Qualcomm. Drivers accepted a load by sending a Qualcomm message back to Baylor's dispatch office with the load number and their acceptance of the load. **Both** R&M and Baylor were Hood's "employers" and covered under the STAA.[2] From his fact findings however, we infer that the ALJ also made the finding that **each** Respondent was also Hood's employer.[3] As to R&M, the ALJ found that Hood was R&M's employee because Hood was an independent contractor for R&M, drove R&M's commercial motor vehicles, and R&M "had authority to 'assign[] [Hood] to operate the vehicle in commerce.'"[4] As to Baylor, the ALJ found that Baylor made intermodal loads and also had the authority to assign Hood to drive.[5]

On May 12, 2011, Baylor assigned Hood an overweight load.[6] The scale ticket established a gross weight of 80,080 pounds, but 80,000 was the maximum gross vehicle weight permitted by regulation. Further, the scale ticket established a drive axle weight of 38,100 pounds, but 34,000 was the maximum weight permitted on the drive axle. Hauling overweight loads to nearby facilities violates federal regulations.

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1 The facts in this paragraph are from D. & O. at 2, 6.

2 Under the STAA, an "employer" is "a person engaged in a business affecting commerce that owns or leases a commercial motor vehicle in connection with that business, or assigns an employee to operate the vehicle in commerce," "but does not include the Government, a State, or a political subdivision of a State." 49 U.S.C.A. § 31101(3)(A and B).

3 *See, e.g., Zink v. U.S.*, 929 F.2d 1015, 1020-21 (5th Cir. 1991) (the Fifth Circuit Court of Appeals expressly relied on the reasonable inferences it drew from the district court judge's fact findings) (citations omitted).

4 D. & O. at 6.

5 *Id.*

6 The facts in this paragraph are from D. & O. at 3, 7.

After Hood saw the scale ticket, he called Robert Farley, R&M's owner, and told him that he was refusing to haul the overweight load and asked him to dispatch a different assignment.[7] Farley called Tanner Kitchen, Baylor's safety director, to communicate what was happening and try to facilitate a resolution. After talking to Kitchen, Farley told Hood that if he were Hood, he would take the load to a nearby facility to get it "reworked" so that it was no longer overweight. He also told Hood that Baylor would not assign him another load. Hood spent the next one or two hours on the telephone with Farley and Kitchen. Kitchen reiterated to Hood that it was important that the overweight load get reworked so that it was no longer overweight. While Hood was on the telephone with Kitchen, he heard Mark Fessel, Baylor's owner, say "He's going to take that load, he's going to take that load. That's all there is to it, that's all there is to it."

Meanwhile, the facility available to rework the overweight load closed at 5:00 p.m.[8] Also around five o'clock, Hood called the Illinois State Police and the Indiana Department of Transportation, who each told him that he could not legally drive the overweight load. At 5:02 p.m., Baylor sent Hood a Qualcomm message telling him to call Fessel immediately. Five minutes later, Baylor sent Hood another Qualcomm message telling him not to move the load until he talked to Fessel.

In another call with Farley, Hood asked Farley about the consequences if he were to drive the truck back to the Baylor yard with the trailer (the load) not attached.[9] Farley told Hood that it was up to Hood what he would do, but that Baylor would fire him. Hood told Farley that he did not have to call Fessel and had nothing to say to him or Baylor's dispatch because they would not assign him a different load. He indicated that he was done and was leaving. At 7:31 p.m., Baylor sent a Qualcomm message to Hood indicating that he had been "REMOVED FROM THE LOAD AND [WAS] NO LONGER UNDER DISPATCH AT BAYLOR." Hood decided to drive the truck back to the Baylor yard without the trailer. Then, at around 7:46 p.m., Hood called Farley and left him a message indicating that Baylor had left him stuck and that he had no choice but to refuse to drive because he refused to do something illegal. He stated that he did not know what else to do but that he "was done," that he would clean out his truck, and that he expected to be paid. Farley at R&M and Baylor interpreted Hood's voicemail as a resignation.

Shortly after leaving this voicemail, Hood talked to Farley again and told him that he would not clean out his truck and that he wanted to come back to work.[10] It is undisputed that at

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[7] The facts in this paragraph are from D. & O. at 2-4, 7; Hearing Transcript (Tr.) at 140 (Farley's testimony shows that he owns R&M).

[8] The facts in this paragraph are from D. & O. at 4, 7.

[9] The facts in this paragraph are from D. & O. at 4, 5, 8-9.

[10] The facts in this paragraph are from D. & O. at 9.

some point on Hood's drive home, he talked to Kitchen again.[11] In that conversation, Hood indicated to Kitchen that he wanted to come back to work.[12] After Hood drove the truck back to the Baylor yard, he drove home in his personal vehicle, but did not clean his things out of the truck. Aware that Hood wanted to come back to work, Kitchen and Fessel talked the next day about what to do and decided that "it would be in everyone's best interest" if Hood no longer worked for Baylor.[13]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated her authority to this Board to issue final agency decisions in STAA cases.[14] The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations if they are supported by substantial evidence.[15] We uphold an ALJ's credibility findings unless they are "inherently incredible or patently unreasonable."[16]

DISCUSSION

The STAA provides that a person may not "discharge," "discipline," or "discriminate" against an employee "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activities.[17] Complaints filed under the STAA are governed by

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[11] Tr. at 64; 199 (the testimony of both Hood and Kitchen establish this).

[12] *Id.*

[13] *Id.* at 199.

[14] Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012); 29 C.F.R. § 1978.110(a).

[15] 29 C.F.R. § 1978.110(b); *Lachica v. Trans-Bridge Lines,* ARB No. 10-088, ALJ No. 2010-STA-027, slip op. at 2, n.3 (ARB Feb. 1, 2012) (citations omitted).

[16] *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 3 (ARB June 15, 2012) (quoting *Jeter v. Avior Tech. Ops., Inc.*, ARB No. 06-035, ALJ No. 2004-AIR-030, slip op. at 13 (ARB Feb. 29, 2008)).

[17] 49 U.S.C.A. § 31105(a)(1).

the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).[18]

To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action.[19] Once the complainant has established that the protected activity was a contributing factor in the employer's decision to take adverse action, the employer may escape liability only by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.[20]

The ALJ found that Hood's protected activity (refusing to drive an overweight load) contributed to the Respondents' decisions to terminate Hood's employment. We affirm and add limited discussion.

Respondents argue that Hood did not engage in protected activity because it would not have been a safety issue if Hood had driven the overweight truck. But Respondents ignore that protected activity includes an employee's refusal to operate a motor vehicle if it would violate a regulation related to commercial motor vehicle safety, health, or security,[21] so this argument fails. Substantial evidence supports that Hood refused to drive an overweight truck and that it would have violated a federal regulation for him to drive it. As the ALJ explained, the regulation proscribing driving overweight trucks is a regulation related to safety.[22] Hood engaged in protected activity, as found by the ALJ.

We reject the Respondents' argument that they took no adverse action against Hood. Substantial evidence supports the ALJ's finding of adverse action, and we agree with his legal analysis and conclusions. The ALJ explained that Farley of R&M and Baylor[23] each interpreted Hood's statement (that Respondents were asking him to do something illegal, that he was not going to do it, was "done," and would clean out his truck) as a resignation. We agree with the

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18 49 U.S.C.A. § 31105(b)(1); *see* 49 U.S.C.A. § 42121 (Thomson/West 2007).

19 49 U.S.C.A. § 42121(b)(2)(B)(iii).

20 49 U.S.C.A. § 42121(b)(2)(B)(iv).

21 29 C.F.R. § 1978.102(c)(1)(i).

22 See D. & O. at 7, and n.21.

23 The ALJ did clearly find who at Baylor interpreted Hood's voicemail as a resignation, but we infer that the ALJ believed that either Kitchen, Fessel, or both of them did so. *See, e.g., Zink*, 929 F.2d at 1020-21.

ALJ's reliance on *Minne v. Star Air, Inc.*, ALJ No. 2004-STA-026 (ARB Oct. 31, 2007) and *Klosterman v. E.J. Davies*, ARB No. 08-035, ALJ No. 2007-STA-019 (ARB Sept. 30, 2010), to find that when Respondents treated Hood's statement as a voluntary resignation and then accepted that resignation the next day,[24] Respondents effectively discharged Hood. The ALJ found that Hood did not unequivocally quit.[25] The ALJ instead found that Hood's statement was equivocal and most certainly was not an unequivocal resignation. We infer from the ALJ's findings that Respondents chose to treat Hood's equivocal statement as a resignation and, based on its interpretation, officially ended the employment relationship. Respondents have not provided us with any legal authority or argument to persuade us to reach a different result than the ALJ on this issue.

Respondents challenge the ALJ's factual finding of causation by arguing that Hood was removed from the load because of his mental state and refusal to communicate. They also object that the ALJ relied solely on temporal proximity to find that there was contributing factor causation. We disagree that the ALJ relied solely on temporal proximity. The ALJ found that Fessel, Baylor's owner, "was primarily concerned with why the Complainant refused this overweight load," in making the decision to terminate Hood's employment.[26] The ALJ also found that Farley, R&M's owner, told Hood that if he did not drive the overweight truck to have it "reworked," Baylor would fire him.[27] Farley took action against Hood *because* he refused to drive, when he interpreted Hood's statements to him that he was "done" as a resignation. From these findings, in addition to the ALJ findings that both Respondents employed Hood and that both Respondents were liable for damages and the other abatement measures, we infer that the ALJ attributed causation to both Respondents. Thus, contributing factor causation was established as to both Respondents based on the ALJ findings, which are supported by substantial evidence in the record.

Respondents unpersuasively challenge the ALJ's factual finding that they did not prove that they would have taken the same action absent protected activity. The ALJ found that Respondents terminated Hood's employment primarily because he refused to drive the overweight load.[28] Substantial evidence supports the ALJ's finding that Respondents failed to show that it was "highly probably or reasonably certain" that they would have terminated his

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[24] This is especially true in this case, as Hood clearly expressed to Respondents his willingness to continue to work.

[25] D. & O. at 9.

[26] *Id.* at 11.

[27] *Id.* at 4.

[28] *Id.* at 11.

employment absent his refusal.[29] The ALJ cited inconsistent testimony by Fessel, as well as inconsistent testimony between the testimonies of Fessel and Kitchen, for his conclusion that Respondents did not establish their affirmative defense by clear and convincing evidence.

On appeal, Respondents argue that the ALJ made no clear finding as to apportionment of liability. But they failed to show us in the record where they asked the ALJ to apportion liability when the case was before him, nor did we find such argument in the record. We consider this argument waived on appeal.[30] As the ALJ found both Respondents liable,[31] and ordered them each to pay damages,[32] they are together fully liable for the award. The ALJ's findings and supporting record establish that Respondents worked jointly to assign deliveries to Hood, pay him, and fire him. They can now work together to ensure that the ALJ's orders are carried out and jointly share liability.[33]

Respondents object to the ALJ's order of reinstatement as not appropriate because the ALJ did not make clear whether the original employment relationship is to be reinstated. Baylor argues that this is important because R&M has not responded as to its status in recent proceedings. If an ALJ concludes that a respondent has violated the STAA, the ALJ must issue an order requiring, where appropriate, "reinstatement of the complainant to his or her former

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29 *Id.*

30 See *OFCCP v. Fla. Hosp. of Orlando*, ARB No. 11-011, ALJ No. 2009-OFC-002, slip op. at 13, n.38 (ARB July 22, 2013) ("The failure to argue a particular point may be deemed an abandonment or waiver of the argument.").

31 The ALJ found that Hood proved by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action and that the evidence was insufficient to show that it was "'highly probable or reasonably certain' that the Respondents would have terminated the Complainant's employment absent his protected activity." D. & O. at 10, 11.

32 D. & O. at 16.

33 *Cf. Cook v. Guardian Lubricants, Inc.*, No. 1995-STA-043 (Sec'y May 1, 1996). *See Cook*, No. 1995-STA-043, slip op. at 6-7 ("In cases involving . . . the leasing of drivers and trucks to a separate business entity that shared employment responsibilities with the respondent employer, the two entities have been deemed to be joint employers, for the purpose of determining liability under the STAA") (citing *Settle v. BWD Trucking Co., Inc., and Red Arrow Corp.*, No. 1992-STA-016, slip op. at 4 n.2 (Sec'y May 18, 1994); *White v. "Q" Trucking Co.*, No. 1993-STA-028, slip op. at 3 n.1 (Sec'y Mar. 7, 1994); and *Palmer v. Western Truck Manpower, Inc.*, No. 1985-STA-016, slip op. at 2-3 (Sec'y Mar. 13, 1992)); see also *Myers v. AMS/Breckenridge/Equity Group Leasing 1*, ARB No. 10-044, ALJ Nos. 2010-STA-007, 2010-STA-008; slip op. at 11 (ARB Aug. 3, 2012) ("two corporations jointly controlling the terms and conditions of employment as described in *Cook* . . . also fit within the broad definition of "person," exposing a corporation to potential liability under STAA as a corporate person as well as a 'joint employer' person.").

position with the same compensation, terms, conditions, and privileges of the complainant's employment."[34] In this case, that means that both Respondents must offer to reinstate Hood in the manner in which he was formerly employed.

Respondents object to the amount of the backpay award because Hood allegedly sustained an ankle injury at some point in his employment history and because he failed to show that he searched for other employment. We find that the ALJ adequately considered the nature of the violation and harm caused in this case and sufficiently provided reasons for the back pay he awarded. Respondents' argument about Hood's ankle injury is too vague for us to consider and does not indicate why his injury should have any effect on the back pay award. Respondents' argument that Hood failed to show that he searched for other employment also fails because the ALJ found that Hood "exercised reasonable diligence in securing and maintaining employment."[35] This finding is supported by substantial evidence in the record which shows that Hood worked for several other companies to mitigate his damages as confirmed by his testimony and W-2 forms. As the ALJ noted, the burden is on the employer to establish a failure to properly mitigate damages, and Respondents in this case did not meet this burden.[36]

Respondents object to emotional damages because they argue that Hood did not start treatment for anxiety until after he had already found other employment and did not provide medical records. Substantial evidence supports the ALJ's award of emotional damages. Hood's testimony "that he suffered from anxiety, depression, and trouble sleeping," due to Respondents' actions is sufficient to support the ALJ's award.

Finally, Respondents object to expunging negative information from reporting agencies because it argues that it is required to disclose certain information and has never reported adversely for Hood upon inquiries. If the Respondents have not sent negative information about Hood regarding this matter to any reporting agencies, then they have nothing to do with regard to this part of the ALJ's order. But if either of them has in any way placed information about these events that conflicts with the ALJ's findings that the Respondents unlawfully terminated Hood's employment because he engaged in protected activity, then that information must be expunged. The Respondents must request from the reporting agencies that any such information be altered to correlate with the ALJ's order.

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[34] 29 C.F.R. § 1978.109(d)(1).

[35] D. & O. at 13.

[36] *See Coates v. Grand Trunk W. R.R., Co.*, ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 5 (ARB July 17, 2015) (citing *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 employer bears the burden of proving that the employee failed to mitigate")).

As to the Respondents other objections, we find them unpersuasive. There was no indication in the hearing transcript that the ALJ was anything other than an alert and active trier of fact and neither Respondent objected to the contrary at the hearing. Further, Respondents have not provided a sufficient explanation of any prejudice that resulted because of anything the ALJ may have done at the hearing. With respect to Respondents' argument that the time it took for the ALJ to issue his decision prejudiced them, 29 C.F.R. 18.92 states that "[a]t the conclusion of the proceeding, the judge must issue a written decision and order." Further, 29 C.F.R. 18.12(b)(8) gives the ALJ "all powers necessary to conduct fair and impartial proceedings, including . . . to . . . [i]ssue decisions and orders." Neither the OALJ regulations, nor the STAA regulations, provide for a time limitation for an ALJ's decision. We hold that the ALJ did not abuse his discretion in issuing his decision approximately seventeen months after the hearing in this matter.

CONCLUSION

Accordingly, we **AFFIRM** the ALJ's award ordering reinstatement, back pay, emotional damages, interest, expungement of adverse information in Hood's personnel files maintained by Respondents and correction of any reports to consumer-reporting agencies concerning his work record, posting of the ALJ's D. & O. on their premises for ninety days where employee notices are customarily posted, and attorney's fees.

To recover reasonable attorney's fees and litigation costs incurred in responding to this appeal before the Board, Hood must file a sufficiently supported petition for such costs and fees within 30 days after receiving this Final Decision and Order, with simultaneous service on opposng counsel. Thereafter, Respondents shall have 30 days from their receipt of the fee petition to file a response.[37]

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

[37] 49 U.S.C.A. § 31105(b)(3)(A)(iii); 29 C.F.R. § 1978.110(d).