

In the Matter of:

PAUL IRWIN,

ARB CASE NO. 16-033

COMPLAINANT,

ALJ CASE NO. 2014-STA-061

v.

DATE: September 27, 2017

**NASHVILLE PLYWOOD, INC.,
JAMES AGEE, JOHN DOE AND MARY ROE,**

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul O. Taylor Esq.; *Truckers Justice Center*; Burnsville, Minnesota

For the Respondents:

Randle S. Davis, Esq.; *Davis Law Group, PLLC*; Hendersonville, Tennessee

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Tanya L. Goldman, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982 (STAA), as amended, and its implementing regulations.¹ Paul Irwin filed a complaint alleging that Nashville Plywood, Incorporated; James Agee; and Ronald Meredith (collectively NPI or Respondents) fired him in violation of the STAA's whistleblower protection provisions after he complained about and refused to drive overloaded trucks. Following a hearing, a Department of Labor Administrative Law Judge (ALJ) concluded that NPI had violated the STAA, reinstated Irwin to his job, and awarded him back pay and compensatory damages. NPI appealed to the Administrative Review Board (ARB or Board). We affirm.

¹ 49 U.S.C.A. § 31105 (Thomson/West 2015); 29 C.F.R. Part 1978 (2016).

BACKGROUND

Irwin is an experienced truck driver and has had a commercial driver's license (CDL) since 2004.² He estimates he has driven half a million miles in commercial vehicles.³ He worked for NPI from July 2010 until December 9, 2013, operating commercial motor vehicles, including delivering loads of plywood and other building materials used in the cabinet industry and transferring shipments between NPI's facilities in Hopkinsville, Kentucky and Nashville, Tennessee. Irwin worked Monday through Friday, 7:00 am to 4:30 pm. He reported to Ronald Meredith.

Irwin's main responsibility was driving, but his job also entailed some warehouse duties. NPI's President, James Agee, testified that Complainant was responsible for pulling orders, loading and unloading his trucks, helping other drivers load their trucks, delivering loads, and driving a forklift, in addition to sometimes sweeping and cleaning up in the warehouse.⁴ Irwin agrees that he supervised the loading of his assigned truck, secured the product, occasionally loaded the truck, and would sweep up in the warehouse on his own initiative.⁵ Other times when he was not driving he would remain in the breakroom. Irwin testified that on occasion he left his shift early when he was finished driving, though there was conflicting testimony about whether he just informed or sought approval from his supervisor, Meredith, before doing so.

At NPI, Irwin drove two trucks, an International and a Kenworth. Irwin testified that truck manufacturers provide information inside their vehicles listing the gross vehicle weight rating (GVWR), which is the maker's recommendation for the weight a truck can haul. Both trucks had a GVWR of 33,000 pounds. The manufacturer also provided the weight of the empty trucks, which was 13,500 pounds. That meant, according to Irwin, that if the truck was carrying a load weighing 20,000 pounds, it would exceed the manufacturer's recommended GVWR.⁶

On August 30, 2012, Irwin reported to Stephen Angel, NPI's Vice President, that the International truck's load was more than 20,000 pounds and that "the material on the truck was loaded high above the headboard" behind the driver's cab, which is dangerous.⁷ Irwin showed Angel that the manufacturer recommended a 33,000 pound GVWR for the vehicle and a front axle weight limit of 12,000 pounds.⁸ Irwin and Angel then consulted with NPI's President,

² ALJ's Decision and Order (D. & O.) at 6 (citing Hearing Transcript (TR) at 70).

³ D. & O. at 7; TR at 75.

⁴ D. & O. at 4.

⁵ *Id.* at 7.

⁶ TR at 82-83.

⁷ D. & O. at 7. The headboard is directly behind the truck's cab and prevents the product from sliding forward off the truck, which could injure the driver and the public. TR at 80, 84.

⁸ TR at 97.

James Agee, who informed them that NPI had registered the trucks' gross weight limit with the Kentucky transportation board as 44,000 pounds.⁹ Agee said that a "tag axle" had been added to both trucks. Agee testified that a tag axle is a third axle which allows the truck "to carry a larger load" and allows the driver to "disperse the weight on the bed of the truck."¹⁰

Irwin testified that he explained to Angel and Agee that the manufacturer's GVWR includes all of a truck's components, including the brakes, transmission, axles and frame, and suspension, and that just because a truck is registered for 44,000 pounds does not mean that the vehicle can safely transport that amount of weight.¹¹ In other words, while it may be possible to make structural modifications to increase a vehicle's GVWR, there may be additional modifications needed, such as to the front axle, suspension, and tires, to allow for the increased weight.¹² Agee testified that NPI had a bed and tag axle added, but did not make any modifications to the truck's suspension or axles.¹³ Irwin testified that Agee, who does not have a CDL, told him to drive the truck, and "that it was safe and legal."¹⁴ Despite thinking it was unsafe, Irwin drove the truck that day.¹⁵

Irwin testified that in the summer of 2013 he complained a second time about an overloaded truck. Irwin told Meredith that the load he was to drive from Hopkinsville to Nashville was "well over 20,000 pounds" and that they needed to take at least one bundle off the flatbed. Irwin refused to take the load and another driver made the trip.¹⁶

On December 9, 2013, Irwin was scheduled to drive from Hopkinsville to Nashville in the Kenworth truck. He noticed that the tickets indicated the load was well over 20,000 pounds, that the front end of the loaded flatbed trailer "was sloped downwards towards the pavement" and the pressure on the tires showed "a lot of weight."¹⁷ In addition, the product was loaded

⁹ TR at 85-86.

¹⁰ D. & O. at 4 (quoting TR at 28-29, 36).

¹¹ TR at 87-88.

¹² *Id.* at 28, 30.

¹³ *Id.* at 28.

¹⁴ *Id.* at 88.

¹⁵ D. & O. at 8 (citing TR at 90).

¹⁶ TR at 91-92. While Respondents' Brief states they have no record of this Complaint, Irwin testified about it and the ALJ stated numerous times that he found his testimony credible. Irwin also testified that on another occasion he complained to Angel about two by fours loaded above the headboard, but on that occasion ultimately agreed to drive the truck. TR at 89-90.

¹⁷ D. & O. at 9; TR at 96, 99.

above the headboard of the truck.¹⁸ Irwin testified that he had complained several times to management about the truck being overloaded and that he decided to get documentation “that showed without a doubt that there was too much weight on the front of the truck.”¹⁹

Irwin drove the truck to a weigh station a few miles away. On the way, he noted that the “steering was almost non-responsive.”²⁰ After weighing the truck, he obtained a Certified Automated Truck (CAT) scale ticket indicating that the front or “steer” axle weighed 12,980 pounds, that the “drive” axle, including the tag axle, weighed 23,300 pounds, and that the truck had a gross weight of 36,280 pounds, thus exceeding the truck’s 33,000 pound GVWR.²¹ Under Kentucky law, the maximum gross weight one axle can carry is 20,000 pounds, and axles less than forty-two inches apart are considered a single axle.²² Irwin testified that the regular axle and tag axle were less than 42 inches apart. Irwin drove the truck back to Hopkinsville and told Meredith that the truck was overloaded again and unsafe:

I told Mr. Meredith that the truck was overloaded again and I told him that I had been put in this position time and time again and I explained to him that it was unsafe and there was too much weight on the front. . . .

And I told him that I couldn’t drive the truck because it was unsafe. I wasn’t going to do it anymore and that I was going to go home and I would be back in the morning and we could discuss it further.^[23]

Complainant testified that Meredith did not offer to remove any product from the truck and ultimately instructed another driver to drive the truck. Irwin then went home. When asked at the hearing why he left, Irwin responded:

They had previously convinced me to drive the truck even though deep down I felt like it was unsafe on other occasions and I thought that by taking a stand and refusing to drive the truck that we would have maybe a third party come in and mediate as far as the registered weight versus the gross vehicle weight rating by the manufacturer. I was also—I’m sure I was upset. It had happened

¹⁸ TR at 99.

¹⁹ *Id.* at 100-101.

²⁰ *Id.* at 101.

²¹ Joint Exhibit (JX) 1; TR at 102-103.

²² D. & O. at 17 (citing Kentucky Revised Statutes and Department of Transportation regulations).

²³ TR at 104-05.

time and time again and I just decided that it'd be better if I went home. I had left. It was a pretty laid back place to work. If you had an obligation, a doctor's appointment or you needed to go somewhere, there was never an issue with leaving. So, I assumed that since I wasn't driving that I could leave.^[24]

Meredith testified that he could not recall whether Irwin said it would be unsafe to drive the truck, but agreed that Irwin complained that the truck was overloaded. Meredith did not tell the Complainant that there was other work for him to do, though he stated there was insufficient time to tell him anything before Irwin left.²⁵ The ALJ found the Complainant's testimony credible, as he "provided detailed and consistent accounts of his alleged protected activity," and specifically found it more credible than that of Meredith, who provided conflicting accounts.²⁶

The next day, Irwin reported for work at 7:00 a.m. and Respondents terminated his employment. Meredith said he had spoken with Agee who told him to tell Irwin, if he showed up for work, to go home. Irwin asked if that meant he was fired, and Meredith said yes. Later that day, Irwin called Meredith, told him that he was going to file for unemployment and therefore asked him for the exact reason he had been fired.²⁷ Irwin testified that Meredith responded it was because "he refused to drive the truck to Nashville" and that he "was not supposed to take the trucks to a scale."²⁸ Meredith disputes that Complainant called him later that day.

The ALJ found that Irwin sought other positions and mitigated his damages. He also found Irwin's testimony about how the termination affected him credible; Irwin testified that he felt "betrayed," "worthless," and "depressed" following the termination and that "he could not provide his two nieces, who live with him, a meaningful Christmas because he did not have disposable income."²⁹

Irwin filed a complaint with the Occupational Safety and Health Administration (OSHA) on February 19, 2014. On June 2, 2014, OSHA dismissed the complaint. Irwin timely requested a hearing, which the ALJ held on November 5, 2014. The ALJ heard telephonic testimony from Meredith on April 24, 2015. The ALJ issued a decision on December 29, 2015, finding that Irwin engaged in protected activity, that NPI terminated his employment, and that NPI failed to show by clear and convincing evidence that it would have terminated his employment absent his

²⁴ D. & O at 10 (quoting TR at 110).

²⁵ D. & O. at 13.

²⁶ *Id.* at 16.

²⁷ TR at 120.

²⁸ *Id.* at 120-21.

²⁹ D. & O. at 26.

protected activity. The ALJ awarded Complainant reinstatement, \$15,620.55 in back pay plus prejudgment interest, \$15,000 in compensatory damages, and abatement. NPI timely appealed.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the Board to issue final agency decisions in STAA cases.³⁰ 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.³¹ We uphold an ALJ's credibility findings unless they are "inherently incredible or patently unreasonable."³² An ALJ's evidentiary rulings are reviewed for abuse of discretion.³³

DISCUSSION

On appeal, NPI challenges several of the ALJ's findings of fact, conclusions of law, and evidentiary rulings. We do not find any legal error in the ALJ's comprehensive, well-reasoned decision, and his factual findings are supported by substantial evidence on the record as a whole.³⁴ We affirm the ALJ's conclusions that Irwin engaged in protected activity when he complained about the overloaded truck in August 2012 and complained about and refused to drive the overloaded truck in December 2013; that his refusal to drive the truck was a contributing factor in NPI's decision to fire him; and that NPI failed to establish by clear and convincing evidence that it would have fired Irwin absent his complaints and refusal to drive.

³⁰ 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).

³¹ 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).

³² *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 3 (ARB June 15, 2012).

³³ *Baiju v. Fifth Ave, Comm.*, ARB No. 10-094, ALJ No. 2009-LCA-045, slip op. at 5 (ARB Mar. 30, 2012).

³⁴ *Bobreski v. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at (ARB June 24, 2011) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)). NPI contends that the ALJ erred in finding that Irwin was more credible than Meredith, based on the former's demeanor and statements while testifying, because Meredith testified on the telephone and thus the ALJ could not evaluate his demeanor. Respondents' Brief at 12 n.2. The ALJ did not abuse his discretion in concluding that Meredith was less credible; Meredith initially denied that Irwin had ever reported overweight loads and then described the incident on December 9 when Irwin "did exactly that."

The record evidence also supports the ALJ’s award of compensatory damages and he did not abuse his discretion by admitting two expert reports.³⁵

A. Legal standards

The STAA provides that a person may not “discharge an employee” because the employee has engaged in certain protected activities, including participating in proceedings relating to the violation of a commercial motor vehicle safety regulation or refusing to operate a motor vehicle when doing so would violate a regulation related to safety.³⁶ STAA complaints are governed by 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).³⁷

To prevail on an 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. If the complainant meets this burden, the employer may avoid 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.³⁸ “Clear and convincing evidence denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain.”³⁹ As the employer, NPI has a “steep burden” under the AIR 21 burden-shifting framework; the burden is intentionally high because “Congress intended to be protective of plaintiff-employees.”⁴⁰

³⁵ In his decision, the ALJ cited *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014) and *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB Apr. 21, 2015) (en banc) (reissued with full dissent), but his legal analysis does not ultimately depend on either case. D. & O at 14-25. The ARB has since vacated the *Powers* decision and overturned *Fordham*. *Palmer v. Canadian Nat’l R.R.*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB Sept. 30, 2016) (reissued with full dissent Jan. 4, 2017).

³⁶ 49 U.S.C.A. § 31105(a)(1).

³⁷ *Id.* at § 31105(b)(1); *see also* 49 U.S.C.A. § 42121 (Thomson/West 2007).

³⁸ 49 U.S.C.A. § 42121(b)(2)(B).

³⁹ *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015).

⁴⁰ *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 160, 162 (3d Cir. 2013).

B. Substantial evidence supports the ALJ’s findings of fact and he did not err in holding that Complainant engaged in protected activity

NPI contends that the ALJ erred in two ways in concluding that Irwin engaged in protected activity on August 30, 2012, and December 9, 2013, when he orally complained that the trucks were overweight and unsafe to drive. The STAA provides in relevant part:

(a) Prohibitions.—(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—

(A)(i) the employee, or another person at the employee’s request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or

(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^[41]

NPI initially claims that the ALJ erred in finding protected activity under subsection 31105(a)(1)(A)(i). It is undisputed that Irwin complained to Respondents on August 30, 2012, and again on December 9, 2013, that his assigned truck was overloaded. NPI appears to argue that he did not engage in protected activity either because he subsequently drove the truck, or because this complaint should be categorized as a “refusal to drive situation,” which would fall under section 31105(a)(1)(B) of the Statute.⁴² NPI similarly argues that the December, 2013 complaint involved a refusal to drive, and therefore is not covered by this subsection. Neither argument is successful.

That Irwin subsequently drove the truck in August 2012 does not mean that section 31105(a)(1)(A)(i) does not protect his complaint. A complaint, which may be oral, informal, or unofficial, is protected if it concerns a reasonably perceived violation of a safety regulation.⁴³ Irwin credibly testified that the state-registered, allowable weight and the manufacturer’s GVWR are two “different things,” so he considered the truck to exceed its permissible weight. He also testified that the truck was dangerously loaded above the headboard, establishing that he

⁴¹ 49 U.S.C.A. § 31105 (Thomson/West).

⁴² Respondents’ Brief at 11-12.

⁴³ *Ulrich v. Swift Transp. Corp.*, ARB No. 11-016, ALJ No. 2010-STA-041, slip op. at 4 (ARB Mar. 27, 2012); *Guay v. Burford’s Tree Surgeons, Inc.*, ARB No. 06-031, ALJ No. 2005-STA-045, slip op. at 7-8 (ARB June 30, 2008).

complained about reasonably perceived violations of a regulation related to safety.⁴⁴ Although Irwin drove the truck after making his concerns known, he still engaged in protected activity.

Additionally, it is possible to engage in more than one protected activity. On December 9, 2013, Irwin both complained about and refused to drive the truck. Irwin's refusal to drive provides another basis of protection, but does not deprive him of protection for his complaints under section 31105(a)(1)(A)(i).⁴⁵

NPI also contends that the ALJ erred in finding protected activity on December 9, 2013, under 49 U.S.C.A. § 31105(a)(1)(B)(i), because Irwin presented no evidence demonstrating that an actual violation of a regulation would have resulted if he had driven the truck.⁴⁶ NPI claims that Irwin did not carry his burden of proof because he "just guessed" that the distance between the drive and tag axles was less than 42 inches, and the ALJ ignored other witnesses's testimony that Irwin could control the tag axle and the weight distribution among the axles.⁴⁷

Substantial evidence and the law support the ALJ's detailed conclusion that driving the Kenworth truck on December 9, 2013, would have violated a commercial motor vehicle safety regulation. 49 C.F.R. § 392.2, for example, provides 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."⁴⁸ As the ALJ noted, "Kentucky law prohibits a single axle from

⁴⁴ While not included in the ALJ's D. & O., Irwin's complaints about loading above the headboard are also related to violations of commercial motor vehicle safety regulations. *See, e.g.*, 49 C.F.R. §§ 392.9 ("A driver may not operate a commercial motor vehicle . . . unless—(1) The commercial motor vehicle's cargo is properly distributed and adequately secured"), 393.100 (referencing cargo securement).

⁴⁵ *See, e.g., Maddin v. Transam Trucking, Inc.*, ARB No. 13-031, ALJ No. 2010-STA-20, slip op. at 6-9 (ARB Nov. 24, 2014) (finding protected activity under both subsection (a)(1)(A) and (a)(1)(B)); *see also* 29 C.F.R. § 1978.102(a) ("No person may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee engaged *in any of the activities* specified in paragraphs (b) or (c) of this section.") (emphasis added; paragraphs (b) and (c) note that it is a violation to retaliate against an employee who has filed a complaint or refuses to operate a vehicle where doing so would violate a commercial motor vehicle regulation related to safety).

⁴⁶ Respondents also argue that there is no protected activity under section 31105(a)(1)(B)(ii). Respondents' Brief at 16-18. The Board does not address this contention because Irwin never argued, nor did the ALJ conclude, that Complainant engaged in protected activity under subsection (a)(1)(B)(ii).

⁴⁷ Respondent's Brief at 13-15.

⁴⁸ The ALJ also concluded that operation of the truck would have violated 49 C.F.R. § 392.1 (requiring a motor carrier employee comply with all the rules set forth in Part 392).

carrying beyond 20,000 pounds, and two tandem axles spaced less than forty-two inches apart are considered one axle.”⁴⁹

Irwin weighed the Kenworth truck on a CAT scale on December 9, 2013, and received a ticket showing 23,300 pounds on the drive axle.⁵⁰ Irwin testified that the tag axle was down, but that the two axles were fewer than 42 inches apart and therefore counted as one axle. The ALJ credited Irwin’s un rebutted testimony that the tag axle was fewer than 42 inches from the drive axle and that a Kenworth truck cannot displace weight with a tag axle. Substantial evidence supported the ALJ’s findings that if Irwin had driven the truck from Hopkinsville to Nashville, he would have violated several regulations “related to commercial motor vehicle safety, health, or security.”⁵¹ The Board therefore affirms the ALJ’s findings on protected activity.

C. Substantial evidence supports the ALJ’s finding that Respondents would not have terminated Irwin absent his protected activity

NPI is also unsuccessful in arguing that it proved its affirmative defense. NPI avers that it presented evidence that it fired Irwin because Meredith did not give him permission to leave the facility on December 9, 2013, and argues it would fire any employee who left work before the end of his shift without his supervisor’s permission.⁵²

The ALJ concluded that NPI did not meet its burden of proving by clear and convincing evidence that it would have fired Irwin absent his protected activity.⁵³ The ALJ credited Irwin’s

⁴⁹ D. & O. at 19 (citing KRS (Kentucky Revised Statutes) § 189.222(c)); *see also* KRS § 189.224 (“It is unlawful for the owner, or any other person, employing or otherwise directing the operator of any vehicle, to require or knowingly to permit the operation of such vehicle upon a highway in any manner contrary to law.”); 603 KAR 5:066 (prohibiting operation of a commercial vehicle on highways where the weight on a single axle exceeds 20,000 pounds, and noting that two tandem axles spaced less than 42 inches apart are treated as a single axle). The ALJ further noted that Department of Transportation (DOT) regulations also state that the maximum weight on an axle or group of axles can be 20,000 pounds. D. & O. at 19 (citing 23 C.F.R. § 658.17(c)). Complainant argues in his brief that additional regulatory violations would have also resulted related to loading restrictions on the truck’s tires. *See, e.g.*, 49 C.F.R § 393.75.

⁵⁰ JX 1.

⁵¹ 29 C.F.R. § 1978.102. While Respondents argue that the driver controls the tag axle and could have displaced some of the weight, there is no evidence that Complainant could have removed enough weight from the rear axle by transferring it to the front steering axle to comply with Kentucky and federal law, and not raise new safety concerns. The ALJ did not err in concluding that driving the truck, as loaded and described in Irwin’s un rebutted testimony, would have violated a commercial safety regulation. *See Maddin*, ARB No. 13-031, slip op. at 7-8.

⁵² Brief at 19-20.

⁵³ D. & O. at 23-24.

testimony that he always received his assignments when he first reported for work at 7:00 a.m., that in the last few weeks before his discharge he did not perform other work if he was not driving, and that he had no other assignments on December 9, 2013.⁵⁴ The ALJ noted the undisputed testimony that Meredith did not assign Irwin any other duties that day, stop him from going home, or warn him that he would terminate his employment if he left. Moreover, the ALJ credited Meredith's testimony that Irwin told him before leaving, "I'll see you and talk to you in the morning" as further indication that his employment was not terminated because he left work early.⁵⁵ NPI offered no evidence that it had a policy of automatically terminating an hourly employee who left work early when he had no other assignments. Finally, Irwin testified that when he called Meredith to ask why he had been fired, he was specifically told it was because "he refused to drive the truck to Nashville" and that he "was not supposed to take the trucks to a scale."⁵⁶ NPI did not tell him he was fired because he had left early. The ALJ consistently found Irwin's testimony credible. We affirm because substantial evidence supports the ALJ's finding that Respondents did not meet their "steep burden" of showing they would have terminated Irwin absent his refusal to drive the truck that day.⁵⁷

D. Substantial evidence supports the ALJ's award of compensatory damages

NPI contends, without citation to any legal authority, that Irwin is not entitled to compensatory damages because he had no legal or other obligation to support his sister and two nieces. There is no requirement in the law that the factors forming the basis for compensatory damages include legal obligations. "Moreover, the Secretary and the Board consistently have held that compensatory damages under the STAA include damages for pain and suffering, mental anguish, embarrassment, and humiliation."⁵⁸ Substantial evidence supports the ALJ's award based on Irwin's testimony that his firing caused him financial distress, made him feel "betrayed," "worthless," and "depressed," and that this was exacerbated by being fired in December and being unable to provide for his loved ones during the holidays.⁵⁹

E. The ALJ did not abuse his discretion in admitting untimely expert reports

NPI also avers that the ALJ erred by violating his own scheduling order and admitting two untimely expert reports into evidence. NPI cites no legal authority for its position. As NPI

⁵⁴ TR at 110.

⁵⁵ TR 2 at 8.

⁵⁶ TR at 120-21.

⁵⁷ *Araujo*, 708 F.3d at 162.

⁵⁸ *Michaud v. BSP Transp., Inc.*, ARB No. 97-113, ALJ No. 1995-STA-029, slip op. at 9 (ARB Oct. 9, 1997).

⁵⁹ TR at 128.

concedes in its brief, the ALJ has discretion to make evidentiary decisions, and we find that he was well within his discretion to admit the reports.⁶⁰

CONCLUSION

For the reasons provided, we **AFFIRM** the ALJ's decision ordering reinstatement, back pay, and compensatory damages.

To recover reasonable attorney's fees and litigation costs incurred in responding to this appeal before the Board, Irwin 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 opposing counsel. Respondents have 30 days from their receipt of the fee petition to file a response.⁶¹

SO ORDERED.

TANYA L. GOLDMAN
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

⁶⁰ Furthermore, the D. & O. does not cite to the expert reports, so it does not appear the ALJ relied on them or that NPI was prejudiced by their admittance.

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