

Occupational Safety and Health Administration (OSHA) alleging that Respondent Weatherford U.S., L.P. violated the STAA first by reducing his hours of work and later terminating his employment in retaliation for raising safety concerns. OSHA dismissed the complaint and Ayres appealed.

Following a hearing on the complaint, a Department of Labor Administrative Law Judge (ALJ) concluded that Weatherford violated the STAA. The ALJ issued a Decision and Order (D. & O.) in which he awarded Ayres back pay and damages, and an Attorney Fee Order awarding attorney's fees and costs. Weatherford appealed both rulings to the Administrative Review Board (ARB or Board). For the following reasons, the D. & O. is affirmed in part and reversed in part, and we affirm the Attorney Fee Order.

BACKGROUND

Weatherford is a company that provides drilling services to companies engaged in the exploration or production of oil and gas. At all times relevant to this case it conducted fracking operations in Williston, North Dakota, and operated vehicles transporting hazardous materials. Weatherford hired Ayres as an Equipment Operator on April 22, 2012. From April through July 2012, Weatherford provided Ayres with training in Texas and Colorado. Ayres arrived in Williston on July 10, 2012. In addition to operating equipment his job duties included driving Weatherford's vehicles.

Weatherford's Williston employees were divided into fleets, and each fleet was broken down into crews. The crews were managed by supervisors and included between fifteen and twenty Equipment Operators. Ayres' crew supervisor was Lee Hammons, and Hammons reported directly to Terry Crabb, a Weatherford District Manager. Employees worked "rotations," a schedule in which they would usually work for three weeks followed by two weeks off. When Ayres began at Williston he agreed to work for six weeks straight instead of a regular three-week rotation.

Drivers at the Williston site were sometimes asked to drive outside of their certification, and this was a safety concern among certain employees who feared losing their licenses.² The issue of the lack of state permits came up often and

² D. & O. at 54. Drivers with commercial driver's licenses are required to have an additional hazardous materials (HAZMAT) certification that would allow them to transport hazardous materials.

“equipment operators were unhappy about the situation.”³ The practice was to ask the driver to drive the load, and to then “find out from the response whether the driver had the proper certification—or would even raise the issue.”⁴ The consequence of this practice was that “it put the onus on the driver to refuse the assignment if it was outside of his or her certification.”⁵

Work at the Williston site was slow during July and August 2012, and supervisors tried to find non-Equipment Operator duties for employees like Ayres to keep them busy. On one occasion between July 12 and 31, 2012, Ayres refused to drive outside his certification despite being directed to do so by Hammons.⁶ Hammons thereafter reassigned the task to another employee. Around this same time, Ayres participated in the investigation of various work-related complaints raised by another Weatherford employee.

On August 13, 2012, Ayres had a conversation by telephone with James Nicholson, a Human Resources (HR) Assistant Manager located in Houston, Texas. During this conversation Ayres complained to Nicholson about being directed to drive outside his certification.⁷ Around that same date, Crabb stated during a meeting with employees, including Ayres, that anyone who presented any complaints to Weatherford’s HR department would be fired.⁸ According to Crabb, he was “old school in an oilfield and that was the way it worked, that you went through your supervisor.”⁹

As a result of the lack of work, Weatherford created a list of fifteen non-essential employees. The appearance of an employee’s name on the list did not mean that they were laid off, but meant that they would not receive a call back for their next rotation. The employees on the list were still considered to be employed by the company at the minimum 40 hours per week and they received pay while they remained at home, but without site work they were precluded from earning overtime pay.

³ *Id.* at 57.

⁴ *Id.* at 50.

⁵ *Id.* at 50-51.

⁶ *Id.* at 62, 68-69; Deposition of Lee Hammons (Hammons Dep.) at 6-7.

⁷ D. & O. at 31 (citing Deposition of James Nicholson at 31), 57-58, 62, 68-69, 77.

⁸ Transcript (Tr.) 82-83, 239.

⁹ *Id.* at 231.

Crabb and Hammons “evinced an awareness” that Ayres had spoken to HR, viewed him as a “troublemaker,” and were aware that he “was involved in a lawsuit with a previous employer.”¹⁰ A decision to put Ayres on the list occurred the week before August 20, 2012.¹¹ Crabb and Hammons were involved in the decision to put Ayres on the list, as was Marcus Moore, Weatherford’s Operations Manager.¹²

On August 20, 2012, the last day of Ayres’ rotation, he was escorted off Weatherford’s premises following a verbal altercation with another employee. Based on his three week on and two week off schedule, Ayres had been scheduled to return to Williston on September 5, 2012. By September 20, Weatherford had not instructed him to return for his next rotation.

Ayres sent an email message to Nicholson on September 20, 2012, in which he asked about his employment status and whether he was “being improperly retaliated against for making reports in accordance with the Anti-Corruption Compliance Manual and Enterprise Excellence Policy that is incorporated in the Weatherford personnel policies and procedures.”¹³ He stated that he contacted HR and was told that his allegations were being investigated. He also stated that among the items he had reported were complaints about employees being asked to “carry loads in violation of DOT regulation[s],” employees “being asked to perform security assignments alone which was in violation of Weatherford safety policies,” Crabb’s threat to fire anyone he caught contacting HR, and supervisors “drinking and driving company vehicles.”¹⁴

Weatherford did not formally implement a Reduction-in-Force (RIF) based on the list of non-essential personnel “until the middle of October 2012.”¹⁵ Weatherford discharged Ayres on October 19, 2012. Ayres did not return to Williston but he received pay up to that date.

Ayres filed a STAA complaint with OSHA on February 15, 2013. On November 6, 2014, OSHA dismissed the complaint. Ayres requested a hearing on

¹⁰ D. & O. at 69.

¹¹ *Id.* at 59, citing Hammons Dep at 19.

¹² D. & O. at 70, 73.

¹³ Joint Exhibit 36.

¹⁴ *Id.*

¹⁵ D. & O. at 61.

the complaint, and the ALJ conducted a hearing on August 26, 2015. At the hearing the ALJ heard testimony from Ayres, Crabb, and Lisa Mora, a Weatherford HR Manager. Ayres died on March 30, 2016, and his estate proceeded with this case.

On September 25, 2017,¹⁶ the ALJ issued a D. & O. in which he concluded that Ayres engaged in STAA-protected activities that contributed to his placement on the non-essential list and subsequent discharge, and Weatherford failed to present clear and convincing evidence that it would have taken those actions in the absence of Ayres' protected activities. The ALJ awarded Ayres' estate back pay, compensatory damages, and punitive damages, and directed the estate to submit an application for attorney's fees and costs. On August 22, 2018, the ALJ awarded the estate \$36,219.01 in fees and costs. Weatherford appealed the ALJ's rulings to the Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to issue agency decisions under the STAA.¹⁷ The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations as long as they are supported by substantial evidence.¹⁸ Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹⁹ The ARB will uphold ALJ credibility determinations unless they are "inherently incredible or patently unreasonable."²⁰

DISCUSSION

¹⁶ In serving the parties the ALJ inadvertently mailed a copy of the D. & O. to an old address of Respondent's counsel. On October 20, 2017, the ALJ issued an Amended Decision and Order identical to the D. & O. and containing a footnote indicating that the parties discussed the incorrect service of the D. & O.

¹⁷ Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020); see 29 C.F.R. § 1978.110(a).

¹⁸ 29 C.F.R. § 1978.110(b); *Jacobs v. Liberty Logistics, Inc.*, ARB No. 2017-0080, ALJ No. 2016-STA-00007, slip op. at 2 (ARB Apr. 30, 2019) (reissued May 9, 2019) (citation omitted).

¹⁹ *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

²⁰ *Jacobs*, ARB No. 2017-0080, slip op. at 2 (quotations omitted).

1. Governing Law

The STAA provides that an employer may not discharge or otherwise retaliate against an employee with respect to the employee's compensation, conditions, or privileges of employment because the employee engaged in STAA-protected activity.²¹ Complaints filed under the STAA 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).²²

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.²³ If the employee makes such a showing, the employer can avoid providing relief by demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.²⁴

2. Protected Activity

Under the complaint clause of the STAA whistleblower statute, a complainant may engage in protected activity by making a complaint "related to a violation of a commercial motor vehicle safety or security regulation, standard, or order"²⁵ A complainant may also engage in protected activity by refusing to drive under certain conditions. The refusal to drive provision sets out two distinctly different kinds of protected activity. In the first instance, a driver is protected if he refuses to drive because operation of the vehicle would violate a safety regulation; in the second instance, a driver is protected if he refuses to drive because he has a reasonable concern that operation would cause a safety hazard.

The record supports the ALJ's conclusion that Ayres engaged in protected activity by refusing to operate a vehicle for which he lacked certification in July

²¹ 49 U.S.C. § 31105(a)(1); 29 C.F.R. §1978.102(a).

²² 49 U.S.C. § 31105(b)(1); *see* 49 U.S.C. § 42121.

²³ 49 U.S.C. § 42121(b)(2)(B)(iii); *Buie v. Spee-Dee Delivery Serv., Inc.*, ARB No. 2019-0015, ALJ No. 2014-STA-00037, slip op. at 3 (ARB Oct. 31, 2019).

²⁴ 49 U.S.C. § 42121(b)(2)(B)(ii).

²⁵ 49 U.S.C. § 31105(a)(1)(A).

2012 and discussing his concerns with Nicholson on August 13, 2012. The ALJ found that Hammons corroborated Ayres' testimony by agreeing that on at least one occasion Ayres refused to drive outside of his certification when asked to do so.²⁶ It is also clear that Ayres engaged in protected activity by sending an email to Nicholson on September 20, 2012, further describing his concerns.

3. Adverse Action

The record supports the ALJ's conclusion that Ayres suffered an adverse personnel action when he was placed on the non-essential list and not brought back to Williston in accordance with his expected rotation. The ALJ noted that, even though work had slowed down, Ayres lost the opportunity to compete for whatever overtime work existed and that he was deprived of a privilege of employment.²⁷ Further, there is no dispute that Ayres suffered an adverse action when his employment was formally terminated.

4. Contributing Factor

The ALJ found that there was "an abundance of circumstantial evidence involving animus, temporal proximity, and pretext"²⁸ supporting a conclusion that Ayres' protected activity contributed to his being placed on the non-essential list and discharge. The ALJ presented this chronology as the basis for his ruling that Weatherford violated the STAA:

Accordingly, I find that the evidence supports that 1) the Complainant engaged in protected activity by refusing to drive outside his certification sometime between July 12, 2012, and July 31, 2012; 2) he had spoken to HR about his complaints, including safety concerns, by August 13, 2012; 3) within a week of his conversation on August 13, 2012,

²⁶ D. & O. at 50 (Hammons testified that the reason that he reassigned a task to another frack pump operator was that "the Complainant first refused, citing his lack of certification ... While Hammons denied threatening to fire the Complainant over the incident, and stated that the issue of his license certification never came up again, the fact remains that Hammons did, in fact, corroborate the Complainant's testimony by agreeing that on at least one occasion he refused to drive outside of his certification when asked.").

²⁷ D. & O. at 61.

²⁸ *Id.* at 63.

his name was placed on a list of non-essential personnel; 4) around the same time as the Complainant's telephone call to HR on August 13, 2012, Crabb admitted that he threatened to fire anyone who went to HR over his head; 5) during this same period both Crabb and Hammonds evinced an awareness that the Complainant had spoken to HR and viewed him as a troublemaker; 6) on August 20, 2012, the Complainant was escorted off the premises, but not fired, after a verbal altercation, which was most likely with a supervisor, not a fellow employee; and 7) thereafter, the Complainant was not brought back on his regular two-week rotation and subsequently informed that he was terminated after an alleged investigation into his complaints for which there is no proof that anyone was ever contacted.²⁹

The record supports the ALJ's findings that "both Hammons and Crabb had an animus toward employees who took their complaints to HR without first consulting them"³⁰ and that "when employees brought their complaints directly to Hammons or Crabb they experienced a hostile reaction."³¹ The ALJ observed that "Weatherford did not present any contemporaneous records of the Complainant being disciplined for any rules violation during his entire time at Williston."³² And although Ayres was escorted off Weatherford's premises following a verbal altercation with another employee, this altercation did not contribute to Ayres' discharge. We therefore conclude that substantial evidence supports the ALJ's conclusion that Ayres' STAA-protected activity contributed to Weatherford's adverse employment actions.³³

5. Same Action Defense

The record supports the ALJ's conclusion that Weatherford failed to demonstrate, by clear and convincing evidence, that it was highly probable that

²⁹ *Id.* at 69.

³⁰ *Id.* at 63.

³¹ *Id.* at 65.

³² *Id.* at 79

³³ The ALJ states on page 77 of the D. & O. that "Crabb's protected activity contributed to Weatherford's actions against him." This is clearly a typographical error.

Ayres would have been placed on the non-essential list and later discharged if he had not presented his complaints to Weatherford's HR department.³⁴ Weatherford did not present evidence contemporaneous with Ayres' employment showing that he was a poor performer. To the contrary, Weatherford admits in its brief that "[a]fter Ayres was selected for the reduction-in-force, Respondent attempted to find him another position but was unable to do so."³⁵

6. Other Issues Raised on Appeal

Weatherford asserts in its brief that "the ALJ used the incorrect standard of review for Ayres' claims, which resulted in the ALJ misapplying the law and facts and inappropriately finding judgment for Ayres" because he should not have applied the AIR 21 burdens of proof to this case.³⁶ This assertion is manifestly incorrect. Ayres' STAA complaint is governed by the legal burdens of proof set forth in the employee protection provision of AIR 21.

Weatherford also argues that Ayres' STAA claims are barred by the doctrine of collateral estoppel "because they involve identical facts and substantially similar legal issues to the claims set forth in a retaliation claim" he pursued before the U.S. District Court for the Northern District of Ohio.³⁷ Collateral estoppel would apply if: (1) the same issue was actually litigated; (2) the issue was necessary to the outcome of the federal court case; and (3) precluding litigation of the issue in this case will not constitute basic unfairness to Ayres.³⁸

The ALJ rejected Weatherford's collateral estoppel argument in his January 29, 2016 Order Denying Respondent's Motion to Dismiss. The ALJ noted that Ayres pursued relief in District Court under the Ohio Whistleblower's Protection Act (OWPA) and the Fair Labor Standards Act (FLSA). He concluded that the District

³⁴ D. & O. at 79 ("I find that Weatherford failed to demonstrate, by clear and convincing evidence, that it was highly probable that the Complainant would still have been placed on the RIF-list and sat home, earning a base salary, for several weeks before being terminated on October 19, 2012 as part of a RIF if he had never run afoul of Crabb by going to HR with complaints, which included those protected by the STAA.").

³⁵ Respondent's Initial Brief (Resp. Br.) at 22.

³⁶ Resp. Br. at 12.

³⁷ *Id.* at 12-13.

³⁸ *Siemaszko v. First Energy Nuclear Operating Co.*, ARB No. 2009-0123, ALJ No. 2003-ERA-00013, slip op. at 12-13 (ARB Feb. 29, 2012).

Court did not consider the merits of the OWPA claim because Ohio law did not govern Ayres' employment in North Dakota. He also concluded that the FLSA claim involved the litigation of issues of law and burdens of proof different from those in this STAA case. We concur with the ALJ's conclusions.

7. Back Pay

Under the STAA, a successful complainant is entitled to "compensatory damages, including back pay."³⁹ Substantial evidence supports the ALJ's back pay analysis. The ALJ based his analysis on Ayres' earnings at Weatherford at the rate of \$1,217.67 per week for the period from the date of his discharge until the date of the hearing.⁴⁰ He denied pay for a six-month period during which Ayres did not seek comparable employment, subtracted his "business income" earnings in 2014, and subtracted the salary Ayres earned while employed at other employers following his discharge.⁴¹ We therefore affirm the ALJ's conclusion that Ayres is entitled to \$82,119.90 in back pay.

8. Emotional Distress

An employer who violates the STAA may be held liable to the employee for damages for mental or emotional distress. These damages are designed to compensate whistleblowers not only for direct pecuniary loss, but also for such harms as loss of reputation, personal humiliation, mental anguish, and emotional distress.⁴²

The record supports the ALJ's finding that Ayres suffered emotional harm, mental anguish, sleeplessness and marital strain. We therefore affirm the ALJ's conclusion that Ayres is entitled to \$10,000 in compensatory damages for mental distress.

³⁹ 49 U.S.C. § 31105 (b)(3)(A)(iii); 29 C.F.R. § 1978.109(d)(1).

⁴⁰ The ALJ found that, given Ayres' medical condition and the fact that he died soon after the hearing, it would be "overly speculative to predict" how long it would have been before Ayres voluntarily withdrew from the workforce because of his health. D. & O. at 88.

⁴¹ D. & O. at 82-88. Respondent argued below and on appeal that the ALJ should have denied back pay following Ayres' termination for cause. The ALJ found insufficient basis to determine that Ayres was terminated for cause. We affirm the ALJ's finding.

⁴² 49 U.S.C. § 31105(b)(3)(A)(iii); *Simon v. Sancken Trucking Co.*, ARB No. 2006-0039, -0088, ALJ No. 2005-STA-00040 (ARB Nov. 30, 2007).

9. Punitive Damages

The ALJ held that Ayres was entitled to \$25,000 in punitive damages.⁴³ Remedial claims such as back pay survive the death of a party. But penal claims, including the right to recover punitive damages, abate upon the death of the injured party.⁴⁴ We therefore reverse the ALJ's conclusion that Ayres' estate is entitled to punitive damages.

10. Attorney's Fees and Costs

A prevailing STAA complainant is entitled to be reimbursed for litigation costs, including attorney's fees.⁴⁵ In accordance with Supreme Court precedent, the starting point is the "lodestar" method of multiplying a reasonable number of hours by a reasonable hourly rate.⁴⁶ The party seeking a fee award must submit "adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent [with] practice in the local geographic area,' as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs."⁴⁷

Ayres' representative has been fully successful in his prosecution of the case and is therefore entitled to an attorney's fee to be paid by Weatherford. Weatherford repeats on appeal its argument before the ALJ that Ayres requested payment of

⁴³ D. & O. at 91.

⁴⁴ See, e.g., *Fulk v. Norfolk S. Ry. Co.*, 35 F. Supp. 3d 749, 764 (M.D.N.C. 2014) (punitive damages claims sought by widow of railroad employee pursuant to the anti-retaliation provision of the Federal Railroad Safety Act (FRSA) after employee's suicide, allegedly caused by the employer's retaliation, did not survive the employee's death and widow was precluded from seeking such damages under 49 U.S.C.A. § 20109(e)(2)(C)); see also *E.E.O.C. v. Marquez Brothers Int'l, Inc.*, No. 1:17-CV-44 AWI-EPG, 2018 WL 3197796, *10 (E.D. Cal. June 26, 2018), and cases cited therein.

⁴⁵ 49 U.S.C. § 31105(b)(3)(B) ("[T]he Secretary [of Labor] may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant in bringing the complaint.").

⁴⁶ *Jackson v. Butler & Co.*, ARB Nos. 2003-0116, -0144; ALJ No. 2003-STA-00026, slip op. at 10-11 (ARB Aug. 31, 2004).

⁴⁷ *Gutierrez v. Regents, Univ. of Cal.*, ARB No. 1999-0116, ALJ No. 1998-ERA-00019, slip op. at 11 (ARB Nov. 13, 2002).

attorneys' fees and costs for both this STAA case and the District Court case.⁴⁸ In answer, ALJ explained that, because he did not have authority to award fees for work solely related to the District Court case, he discounted those fees.⁴⁹

The ALJ found that the attorney hours expended were reasonably incurred and the requested hourly rate was reasonable. The record supports his conclusions. Accordingly, we affirm the ALJ's award of \$33,740.00 in fees and \$2,479.01 in costs for a total of \$36,219.01.

CONCLUSION

Substantial evidence supports the ALJ's conclusions that Ayres engaged in STAA-protected activities, was subjected to adverse employment actions, and his protected activities contributed to those adverse actions. The record also supports the conclusion that Weatherford failed to show by clear and convincing evidence that it would have taken those actions in the absence of Ayres' protected activities. Accordingly, we **AFFIRM** the ALJ's conclusion that Weatherford violated the STAA.

Weatherford shall provide to Ayres' estate (1) back pay in the amount of \$82,119.90 plus interest as ordered in the D. & O.; (2) \$10,000 in compensatory damages for emotional distress; and (3) \$36,219.01 in attorney's fees and costs.

To recover reasonable attorney's fees and litigation costs incurred in responding to this appeal before the Board, Ayres' representatives must file a sufficiently supported petition for such costs and fees within 30 days after receiving this Decision and Order, with simultaneous service on opposing counsel.⁵⁰ Thereafter, Weatherford shall have 30 days from its receipt of the fee petition to file a response.

SO ORDERED.

⁴⁸ Respondent's Initial Brief (regarding Attorney Fee Order) at 7.

⁴⁹ Attorney Fee Order at 4-5.

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