In the Matter of:

ROBERT FINK,

COMPLAINANT,

v.

R&L TRANSFER, INC., and R&L CARRIERS SHARED SERVICES, LLC,

RESPONDENTS.

ARB CASE NO. 13-018

ALJ CASE NO. 2012-STA-006

DATE: March 19, 2014

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

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

For the Respondents:
Peter J. Boyer, Esq., *Hyland Levin LLP*, Marlton, New Jersey

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended,[1] and its implementing regulations.[2] Respondents R&L Carriers Shared Services, LLC, and R&L Transfer (collectively referred to as "R&L") appeal from a Decision and Order (D. & O.) issued on November 20, 2012, in which the

[1] 42 U.S.C.A. § 31105 (Thomson/West Supp. 2012).

[2] 29 C.F.R. Part 1978 (2013).

presiding Administrative Law Judge (ALJ) held that R&L terminated Complainant Robert Fink's employment in violation of the STAA's whistleblower protection provisions. For the following reasons, the ARB summarily affirms the ALJ's decision.

BACKGROUND SUMMARY AND PROCEEDINGS BELOW

Complainant Fink is an experienced truck driver with an unblemished record of almost thirteen years operating large commercial trucks including tractor trailers hauling double trailers. R&L employed him as a truck driver operating tractor trailers from approximately August 24, 2010, until R&L terminated his employment on or about January 11, 2011. D. & O. at 2, 9. The night of January 11, 2011, R&L assigned Fink to haul a double trailer approximately 175 miles, from Hagerstown, Maryland, to Norristown, Pennsylvania. Based on wintry weather conditions that evening and forecasted severe winter conditions on his assigned route, Fink concluded that it was not safe for him to drive the scheduled run. *Id.*

Fink called and informed the R&L dispatcher of his decision. The dispatcher in turn informed the R&L terminal manager of Fink's refusal to drive. Fink subsequently spoke directly by phone with the terminal manager, who informed Fink that if he refused to drive his scheduled run R&L would consider Fink to have resigned. Fink refused to drive, restating his safety concerns. The next day, the terminal manager informed Fink that he was no longer employed by R&L. *Id.* at 8.

Fink filed a complaint with the Occupational Safety and Health Administration (OSHA) on January 13, 2011, alleging that R&L terminated his employment in violation of the STAA's whistleblower protection provisions because he refused to drive on January 11, 2011. CX-1. Following an investigation, OSHA issued a determination letter rejecting Fink's complaint, and Fink filed objections and requested a hearing before a Department of Labor ALJ. After an evidentiary hearing on the merits, the ALJ issued a D. & O. holding that Fink proved by a preponderance of the evidence that his refusal to drive constituted whistleblower protected activity under the STAA, and that R&L's termination of Fink's employment because he engaged in protected activity was unlawful discrimination under the Act. The ALJ ordered R&L to reinstate Fink to employment, and awarded back pay, compensatory and punitive damages, and attorney's fees. R&L timely appealed the D. & O. to the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB authority to issue final agency decisions under the STAA, and implementing regulations.[3] The ARB reviews the ALJ's

[3] Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); see also 29 C.F.R. Part 1978.

factual findings under the substantial evidence standard.[4] The ALJ's conclusions of law are reviewed de novo.[5]

DISCUSSION

The STAA provides that an employer may not discharge, discipline, or discriminate against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity.[6] To prevail on a STAA claim, the complainant must prove by a preponderance of the evidence that he engaged in protected activity; that he was subjected to adverse employment action; and that his protected activity was a contributing factor in that adverse action.[7] If the complainant proves by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel action, the respondent may avoid liability by demonstrating by clear and convincing evidence that it would have taken the same adverse action even absent the protected activity.[8]

In support of its petition challenging the ALJ's Decision and Order, R&L argues that the evidentiary record does not support the ALJ's finding that Fink engaged in STAA-protected activity when he refused to drive on January 11, 2011. Resp. Br. at 6-15. Should the ARB affirm the ALJ's finding of protected activity, R&L argues that the ALJ's compensatory and punitive damages awards should nevertheless be vacated as excessive and without evidentiary support. *Id.* at 15-20.[9]

The ALJ correctly identified the issue presented in this case as "whether the Complainant had a reasonable apprehension of serious injury to himself or the public if

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[4] 29 C.F.R. § 1978.110(b).

[5] *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

[6] 42 U.S.C.A. § 31105(a)(1).

[7] *Salata v. City Concrete, LLC*, ARB Nos. 08-101, 09-104; ALJ Nos. 2008-STA-012, -041; slip op. at 9 (ARB Sept. 15, 2011); *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011); *Riess v. Corp.-Vulcraft-Texas, Inc.*, ARB No. 08-137, ALJ No. 2008-STA-011, slip op. at 4 (ARB Nov. 30, 2010).

[8] *Salata*, ARB Nos. 08-101, 09-104; slip op. at 9.

[9] It is noted that beyond the challenge to the ALJ's determination that Fink engaged in STAA-protected activity and the issues of damages, Respondent does not challenge the ALJ's finding of causation or any other aspect of the ALJ's decision.

he drove his shift the evening of January 11, 2011." D. & O. at 11. In holding that Fink's refusal to drive constituted STAA-protected activity under the "reasonable apprehension" provision of the Act, 49 U.S.C.A. § 31105(a)(1)(B)(ii), the ALJ concluded that Fink's apprehension of serious injury to himself or the public was both subjectively and objectively reasonable. The ALJ found Fink to be a "completely credible witness," noting his extensive experience operating double tractor trailers and his due diligence in assessing weather conditions the evening of January 11th. *Id.* at 12. The ALJ also credited Fink's testimony regarding the particular dangers posed by double-axle tractor trailers on icy roads or in high winds. Both conditions can result in loss of control by the driver with the possibility of jackknifing on ice and the "crack the whip" effect in high winds. Against Fink's assessment of weather conditions, the ALJ weighed that of R&L, which was based on the opinion of the company's safety office in another state and R&L policy that provided that the out-of-state office was authorized to halt operations if weather conditions were considered too dangerous, but that a driver could not do so until he was behind the wheel. *Id.* at 11. Moreover, the ALJ noted that not only was there no evidence to suggest that R&L provided Fink with any information about the weather conditions along his route, but that there was also no evidence that R&L "took any steps to determine if the current or forecasted weather conditions along Mr. Fink's route in fact posed a hazard." *Id.* at 11, 12. Based on the foregoing, the ALJ not only held that Fink's apprehension was subjectively reasonable, but that a reasonable person in Fink's circumstances would have concluded, as did Fink, that the winter weather conditions along the route he was scheduled to drive "established a real danger of accident, injury, or serious impairment to the health of Mr. Fink and the public." D. & O. at 15.

We consider the ALJ's finding that Fink's refusal to drive his shift the evening of January 11th was based on a reasonable apprehension of serious injury to himself or the public to be supported by the substantial evidence of record. Furthermore, we find the ALJ's conclusion that Fink's refusal to drive constituted STAA-protected activity under 49 U.S.C.A. § 31105(a)(1)(B)(ii) to be in accord with applicable law and ARB precedent.[10]

We thus turn to the issues Respondent raised concerning the propriety of the compensatory and punitive damages awards the ALJ awarded. The ALJ held that Fink was entitled to the award of compensatory damages in the amount of $100,000.00, and punitive damages in the amount of $50,000.00. *Id*. at 18-22. Substantial evidence supports the factual findings underlying the ALJ's damage awards. To make the compensatory damages award, the ALJ relied upon Fink's testimony that "his termination made him disappointed, upset, mad, hurt, and embarrassed," that "he had to tell his wife that they needed support from the state, when Mr. Fink had worked for everything he had," that he and his family lost their home that they had had since 2004, due to his lack of work, that the family had to move into a mobile home, that Fink had to borrow money from family members, and even since finding another job, that Fink has not been able to participate in his hobbies because he cannot afford it, and finally, that Fink "has restless

[10] *Wainscott v. Pavco Trucking, Inc.*, ARB No. 05-089, ALJ No. 2004-STA-054, slip op. at 5 n.4 (ARB Oct. 31, 2007) ("Protected activity under the STAA encompasses a refusal to drive in hazardous weather conditions . . . .").

nights, and trouble sleeping wondering how he will be able to support his family." *Id.* at 20. The ALJ found that "the Respondent's termination of Mr. Fink, which [he] found was unlawful, had a significant emotional impact on Mr. Fink, in the effect it had on his dignity and self-esteem, his ability to support his family, and the vulnerable economic position in which he was placed." *Id.* at 21. The ALJ further found that "the evidence, including Mr. Fink's fully credible testimony, amply supports an award of compensatory damages, which I assess at the amount of $100,000.00, an amount that I find to be to be fully supported by the evidence in this case, as well as consistent with awards in similar cases. *Id.*

To determine whether a punitive damages award was warranted, the ALJ found significant that R&L's terminal manager did not make any attempt to determine if there was any substance to Fink's concerns about driving the route in the snowy and icy weather, and only consulted persons in other states about whether the route should be driven. *Id.* at 22. He also observed that the terminal manager "by characterizing Mr. Fink's termination as a "resignation," [] foreclosed any possibility that Mr. Fink might participate in the peer review process and retain his job" and delayed Fink's receipt of unemployment benefits. *Id.* The ALJ found "that the Respondent's conduct reflects a degree of conscious disregard for how its practices obstruct Congress' mandate in the Surface Transportation Assistance Act, and that punitive damages are appropriate to correct and deter this conduct." *Id.*

Moreover, the ALJ's analysis regarding her award amounts is consistent with applicable law. "Compensatory 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. A key step in determining the amount is a comparison with awards made in similar cases. To recover compensatory damages for mental suffering or emotional anguish, a complainant must show by a preponderance of the evidence that the unfavorable personnel action caused the harm."[11] An award of punitive damages may be warranted where there has been "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law."[12]

CONCLUSION

For the foregoing reasons, the Board affirms the ALJ's finding that Fink engaged in STAA-protected activity, and that R&L's decision to terminate Fink's employment because of his protected activity violated the STAA's whistleblower protection provisions. Accordingly, the Board affirms the ALJ's Decision and Order, including the ALJ's order of reinstatement, the ALJ's awards of back pay, compensatory damages, punitive damages, and the ALJ's order with respect to attorney's fees and costs.

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[11] *Evans v. Miami Valley Hosp.*, ARB Nos. 07-118, -121; ALJ No. 2006-AIR-022, slip op. at 20 (ARB June 30, 2009) (citations omitted).

[12] *Youngerman v. United Parcel Serv. Inc.*, ARB No. 11-056, ALJ No. 2010-STA-047, slip op. at 4-5 (ARB Feb. 27, 2013).

As the prevailing party, Fink is also entitled to costs, including reasonable attorney's fees, incurred before the Board. Fink'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 simultaneous service on opposing counsel. Thereafter, counsel for R&L shall have 30 days from its receipt of the fee petition to file a response.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge