



In the Matter of:

ROBERT E. GERMANN,

ARB CASE NO. 04-009

COMPLAINANT,

ALJ CASE NO. 99-STA-15

v.

DATE: March 30, 2005

CALMAT COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

John G. Platt, Esq., *Hangtown Legal, Placerville, California*

For the Respondent:

**Michael W. Monk, Esq., Michael R. Goldstein, Esq., Elizabeth H. Cudd, Esq.,
*Musick, Peeler & Garrett, LLP, Los Angeles, California***

FINAL DECISION AND ORDER

This matter arises under the whistleblower protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (West 1996), and the implementing regulations at 29 C.F.R. Part 178 (2004). On September 30, 2003, the Administrative Law Judge (ALJ) ordered Respondent CalMat Company (CalMat) to pay Complainant Robert Germann's (Germann) attorney's fees in the amount of \$57,795.15. We affirm the ALJ's recommended decision and order CalMat to pay the ALJ's fee award as modified.

BACKGROUND

Germann is a former CalMat employee, who on May 18, 1998, filed a complaint alleging that he was wrongfully suspended for reporting safety violations to the California Highway Patrol. The Occupational Safety and Health Administration (OSHA)

dismissed Germann's complaint on November 11, 1998, and Germann requested a hearing on the matter before the Office of Administrative Law Judges (OALJ).

On August 6, 1999, after a five-day hearing, the ALJ issued a Recommended Decision and Order concluding that suspending Germann violated STAA and that Germann was entitled to attorney's fees if the ARB affirmed the liability decision. CalMat appealed the ALJ's recommended order to the ARB, and on August 1, 2002, the ARB affirmed the liability finding. CalMat appealed the ARB's final decision to the Ninth Circuit Court of Appeals on September 30, 2002.

On April 16, 2003, Germann filed a petition for attorney's fees with the Department's OALJ. Germann contended that he was entitled to recover a 1.5 times enhancement on attorney's fees and requested a total award of \$91,181.85. CalMat opposed Germann's petition on various grounds and each party submitted briefs to the ALJ. After reviewing all of the submitted evidence and disallowing certain travel fees and expenses, the ALJ awarded Germann attorney's fees in the amount of \$57,795.15.

On October 14, 2003, CalMat petitioned this Board for review of the ALJ's fee award and also moved to stay its implementation until the Ninth Circuit Court of Appeals resolved CalMat's appeal of the underlying suspension decision. On October 21, 2003, the ARB issued a notice of review and set out a briefing schedule for the parties. CalMat timely filed a brief in opposition to the fee award and repeated its request for a stay of the implementation of the award. Germann notified the ARB that he would not file a brief.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to decide this matter by authority of 49 U.S.C.A. § 31105(b)(2)(C). *See* Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). Pursuant to 29 C.F.R. § 1978.109(c)(1), the Administrative Review Board "shall issue the final decision and order based on the record and the decision and order of the administrative law judge."

Under STAA, the ARB is bound by the factual findings of the ALJ if substantial evidence on the record considered as a whole supports those findings. 29 C.F.R. § 1978.109(c)(3); *BSP Transp., Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998). In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision" 5 U.S.C.A. § 557(b) (West 1997).

DISCUSSION

We are reviewing: (1) the ALJ's recommended award to Germann of \$57,795.15 in attorney's fees, and (2) CalMat's request for a stay of the fees award until the appeal of the underlying liability finding is complete. CalMat Brief in Opposition to Rec. Dec. and

Ord. Awarding Attorney Fees and Request to Stay Implementation of Fee Award, Oct. 29, 2003, pp. 3-5.

The second issue is easily resolved. On April 19, 2004, the Ninth Circuit Court of Appeals affirmed the ARB's finding that, by suspending Germann because he engaged in protected activity, CalMat violated the whistleblower provisions of STAA. *CalMat Co. v. United States Dep't of Labor*, 364 F.3d 1117 (9th Cir. 2004). Because the appeals process is concluded, we **DENY** as moot CalMat's request for a stay.

The remaining issue is whether the ALJ's fee award is supported by substantial evidence on the record as a whole and whether it is consistent with the law. *See* 29 C.F.R. § 1978.109(c)(3). The ALJ found that \$225 was an appropriate hourly rate for Germann's attorney to charge and that \$105¹ was an appropriate hourly rate for the attorney's law clerk. Recommended Decision and Order Awarding Attorney Fees (R. D. & O.) at 4. The ALJ also found that the number of hours the attorney claimed had been expended on the case was fair and reasonable. *Id.* Our review of the record satisfies us that the ALJ's findings regarding the hourly rate and the hours worked are supported by substantial evidence and consistent with the law. *See Jackson v. Butler & Co.*, ARB Nos. 03-116, 03-144, ALJ No. 03-STA-26, slip op. at 10-11 (ARB Aug. 31, 2004). Accordingly, we **AFFIRM** the ALJ's fee award as modified below.

Although not brought to our attention by either party, we have determined that there was an arithmetic error in the ALJ's calculation which understated the award by \$420. The ALJ incorrectly noted that the award for the law clerk's work amounted to \$27,960.15. R. D. & O. at 5, fn.3. The correct calculation using the ALJ approved rate and hours is \$28,380.15.² Adding this corrected figure to the attorney's fees calculation of \$29,835, we arrive at a total award for legal expenses of \$58,215.15. Accordingly, we **AFFIRM** the fee award as modified and **ORDER** CalMat to pay Germann attorney's fees in the amount of \$58,215.15

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

¹ The ALJ found that the law clerk's work should be reimbursed using two hourly rates: \$105/hr. for work performed before she was a licensed attorney and \$150/hr. for work performed after being admitted to the Bar.

² The ALJ found that the law clerk worked 264.43 hours at the \$105/hr. rate and 4.1 hours at the \$150/hr. rate. The calculation of rate times hours (264.3 x \$105 = \$27,765.15 and 4.1 x \$150 = \$615) produces an award for the law clerk's work of \$28,380.15.