UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PESSOA CONSTRUCTION COMPANY,	)	
	)	
Respondent,	)	
and	)	Case Nos. 5-CA-34547
	)	5-CA-34761
LABORERS' INTERNATIONAL	)	5-CA-35083
UNION OF NORTH AMERICA,	)	
	)	
Charging Party.	)	

RESPONDENT PESSOA CONSTRUCTION COMPANY'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted by:

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March 17, 2010

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EXCEPTIONS OF RESPONDENT PESSOA CONSTRUCTION COMPANY
TO SUPPLEMENTAL DECISION

Comes now Respondent Pessoa Construction Company ("Pessoa" or "Company"), pursuant to Rule 102.46 of the Board's Rules and Regulations, and excepts to the Supplemental Decision of the Administrative Law Judge (JD-92-13) in the above styled case.

Exception 1. Respondent excepts to the ALJ's finding at 2 ll.22-24, that the parties agreed to proceed to trial while allowing Respondent to respond to the General Counsel's Motion for Partial Summary Judgment filed on the first day of the hearing.

Exception 2. Respondent excepts to the ALJ's finding at 2 ll.1-28, that the General Counsel's Motion for Partial Summary Judgment could be part of the record in this case as no such motion was either filed with the Board or admitted into the record as a hearing exhibit in this case.

Exception 3. Respondent excepts to the ALJ's failure to find that any Motion for Partial Summary judgment was subsumed by the evidentiary record when counsel for the General Counsel agreed to proceed to hearing to present evidence in the case.

Exception 4. Respondent excepts to the ALJ's finding at 2 ll.22-24, that Respondent agreed to move forward with the trial while leaving it exposed to the General Counsel's Motion for Partial Summary Judgment.

Exception 5. Respondent excepts to the ALJ's ruling allowing the General Counsel to file Objections to the Subpoena of William Membrino, R9, challenging Respondent's request for Membrino to produce his income tax returns,

weekly unemployment compensation benefits received, rental property applications, books and records of self employment, medical records of treatments and medications, financial statements, records of sales of automobiles, trucks or personal and real property.

Exception 6. Respondent excepts to the ALJ's finding that Respondent's answer setting forth an alternate end date of the backpay period, ALJD 3 ll.37-39, (referring to Aneco, Inc., 330 N.L.R.B. 969 (2000), enf'd denied in part, Aneco, Inc. v. NLRB, 285 F.3d 326, 333 (4th Cir. 2002)), "was deficient." ALJD 4 ll.1-2.

Exception 7. Respondent excepts to the ALJ's finding that Respondent's answer setting forth an alternate end date of the backpay period, ALJD 4 ll.1-9, when Membrino "was in fact not qualified to perform CDL duties for Respondent under U.S. Department of Transportation regulations applicable to him during the backpay period," set forth as Affirmative defenses 7-9, was not sufficient.

Exception 8. Respondent excepts to the ALJ's finding at 4 n.2, that an unidentified affirmative defense "raised" by Respondent should be stricken as a defense to Answer ¶ 2.

Exception 9. Respondent excepts to the ALJ's finding at 4 ll.29-32, that William Membrino worked an average of 444.6 regular hours and 61.1 overtime hours per quarter in 2008.

Exception 10. Respondent excepts to the ALJ's failure to find that William Membrino worked a weekly average of 32.5 regular and 4.5 overtime hours in 2008.

Exception 11. Respondent excepts to the ALJ's failure to find that Membrino's base wage rates during the backpay period was $18 hour regular and $27 hour overtime.

Exception 12. Respondent excepts to the ALJ's finding at 6 n.4, that he would not address Respondent's objections to additional compounded interest and taxes set forth in its affirmative defenses as applied to its answers to paragraphs 3 & 4 of the Compliance Specification.

Exception 13. Respondent excepts to the ALJ's finding at 6 n.5, wherein he fails to address Respondent's argument that interest should not be compounded.

Exception 14. Respondent excepts to the ALJ's failure to make any specific findings based upon the demeanor of witnesses.

Exception 15. Respondent excepts to the ALJ's findings that are not based upon an assessment of what he considered to be the demeanor of witnesses.

Exception 16. Respondent excepts to the ALJ's failure to find that the Membrino's uncorroborated testimony as the beneficiary of the backpay award, cannot be independently credited.

Exception 17. Respondent excepts to the ALJ's failure to find that the testimony of disinterested witnesses are weighed in favor of their facts when contradicted by the party (Membrino) with the financial interest in the outcome of the backpay case.

Exception 18. Respondent excepts to the ALJ's trial ruling barring Respondent from adducing prior felony convictions of William Membrino relevant to his credibility on tr. 393-94, regarding his failure to be hired by Hertz in 2009.

Exception 19. Respondent excepts to the ALJ's finding at 7 n.6, that Membrino's two felony convictions for dealing cocaine and possessing an illegal handgun were not admissible evidence relevant to Membrino's inability to obtain work during the backpay because of misconduct in lying about his criminal background on all his employment applications to prospective employers.

Exception 20. Respondent excepts to the ALJ's finding at 7 n.6, that Membrino's misconduct by making "false statements on job applications" including lying on employment applications about his two prior felony convictions for dealing cocaine and possessing an illegal handgun were not admissible evidence relevant to Membrino's wilful violation of the FMCSA regulations and the reason why he was denied work in 2009 by Hertz Equipment Rental in the second quarter of 2009. Resp. Ex. 2 p.7.

Exception 21. Respondent excepts to the ALJ's ruling at 7 n.6, to shield NLRB official from the public record via personal email, concerning the "pleadings related to my Rule 609 inquiry...shall remain under seal (except as needed for possible review on appeal or for other valid purposes."

Exception 22. Respondent excepts to the ALJ's rulings regarding the General Counsel's Motion for an Erratum which was an "unauthorized communication" within the meaning of Section 102.128(e) of the Board's Rules and Regulations.

Exception 23. Respondent excepts to the ALJ's ruling at 7 n.6, that the "pleadings related to my Rule 609 inquiry" of matters that are already in the public domain shall be placed under seal.

Exception 24. Respondent excepts to the ALJ's ruling at 7 n.6, that evidence of Membrino's felony convictions lacked "any probabative value" because of the passage of time, without an unarticulated basis that the value of the evidence did not outweigh its prejudicial value, and that counsel for the General Counsel did not receive written notice of the intent to introduce this information under Rule 609 because the General Counsel had produced the information the day before on the first day of the hearing.

Exception 25. Respondent excepts to the ALJ's ruling at 7 n.6, that evidence of Membrino's felony convictions presented within the Board's own documents submitted to it by Membrino, could not be admitted to reinforce and show his lack of credibility, when the Board's document, Resp. Ex. 2, was only provided to Respondent on the first day of the hearing.

Exception 26. Respondent excepts to the ALJ's finding at 9 ll.15-19, that Membrino complied with the State of Maryland requirements for unemployment compensation.

Exception 27. Respondent excepts to the ALJ's failure to find that the State of Maryland did not require Membrino to "demonstrate that [he was] actively searching for work" to receive unemployment compensation.

Exception 28. Respondent excepts to the ALJ's finding at 9 n.11, that Membrino credibly testified that he applied for work when he produced no contemporaneous records to prove he did so, "including [additional] job applications that he did not list on his reports to the Board" that he testified to at the hearing. Tr. 372 l.16-373 l.12 (USPS). 390 l.17-391 l.4 (Home Depot and Lowe's).

Exception 29. Respondent excepts to the ALJ's finding at 9 n.11, that Membrino credibly testified even when he failed to comply with the Board's written requirement to "KEEP A LOG OF YOUR JOB SEARCH DURING THE PERIOD OF YOUR UNEMPLOYMENT, INCLUDING DATE OF CONTACT, AND NAME AND ADDRESS OF *ALL EMPLOYERS YOU CONTACTED*." Tr. 391 ll.180-23 (emphasis added).

Exception 30. Respondent excepts to the ALJ's failure to find that Membrino's

documentation of his search for work was not credible when he testified on cross-examination that "they told me keep track of everything, you know, I wrote down everything., tr. 221 ll.11-12, and that despite this admitted knowledge and directions from Regional personnel, "I didn't know I had to put down every job." Tr. 391 ll.12-13.

Exception 31. Respondent excepts to the ALJ's finding at 9 n.11, that Membrino credibly testified of searching for work even when the only evidence that Membrino performed any job search was unsigned and not certified. Tr. 391 l.24-392 l.2.

Exception 32. Respondent excepts to the ALJ's finding at 9 n.11, that Membrino credibly testified he performed any job search when he could not identify a single person who took to apply for work or witnessed him searching for work prior to 2011.

Exception 33. Respondent excepts to the ALJ's credit of Membrino's testimony that he was "clear and forthright" at 9 n.11, that his dire need of employment permitted him to deliberately lie to all prospective employers that he never had a suspended or revoked driver's license, that he had no criminal convictions, and about his work history.

Exception 34. Respondent excepts to the ALJ's failure to find that Membrino's testimony was not credible, when Membrino's testified he was acting contrary to specific requirements in FMCSA safety regulations that he notify prospective employers truthfully about his driving background, including his license suspensions and revocations, and his criminal record.

Exception 35. Respondent excepts to the ALJ's finding at 9 n.11, that Membrino used a notebook to document his work efforts, and that it was stolen. Tr. 263 l.21.

Exception 36. Respondent excepts to the ALJ's failure to find that Membrino maintained no notebook to document his work efforts at any time and the Compliance Officer never saw one. Tr. 54 l.20.

Exception 37. Respondent excepts to the ALJ's failure to find that Membrino's testimony was not credible that a composition book he purportedly maintained was stolen in 2010, when he produced no evidence of any stolen vehicle, no witness that he ever kept a book or a police report of the theft. 221 l.22-222 l.7.

Exception 38. Respondent excepts to the ALJ's failure to find that Membrino was not credible when he failed to maintain NLRB Form 4288 as part of his required search for work, R-10. 222 ll.8-19.

Exception 39. Respondent excepts to the ALJ's failure to admit R10 (NLRB Form 4288) as record Membrino failed to maintain. 222 ll.8-19.

Exception 40. Respondent excepts to the ALJ's failure to take judicial notice of NLRB Form 4288. 222 ll.8-19.

Exception 41. Respondent excepts to the ALJ's finding at 10 n.15, to give no weight to the Baden Medical Services medical report, GC12, finding Membrino's "myocardial infarction (MI or heart attack)."

Exception 42. Respondent excepts to the ALJ's finding at 10 n.15, to give no weight to the Baden Medical Services medical report of Membrino's "myocardial infarction (MI or heart attack)," GC12, without any medical testimony to the contrary, simply, because the "myocardial infarction (MI or heart attack)," did not show up in the incomplete medical report at Washington Adventist Hospital, GC10, without Membrino's discharge sheets. Tr. 243 ll.17-25.

Exception 43. Respondent excepts to the ALJ's finding at 10 n.15, to give no weight to the Baden Medical Services medical report of Membrino's "myocardial infarction (MI or heart attack)," GC12, without the General Counsel adducing any expert medical testimony.

Exception 44. Respondent excepts to the ALJ's finding at 10 n.15, to not credit Membrino's two Board affidavits where he swore he had a "heart attack" and his confirming admission to a former coworker that he had a heart attack in November 2008, because Membrino had no medical training.

Exception 45. Respondent excepts to the ALJ's failure to find that Membrino's admission of a heart attack in November 2008 in his Board affidavit in January 2009, is an admission against interest under the Federal Rules of Evidence from Tr. 241 ll.10-15.

Exception 46. Respondent excepts to the ALJ's failure to find that Membrino had "bypass" surgery at Washington Adventist Hospital as stated int the Baden Medical Services report on April 22, 2009. GC 12; tr. 248 ll.5-7.

Exception 47. Respondent excepts to the ALJ's finding at 10 n.15, that the

Doctor's Community Hospital and Washington Adventist hospital reports are more "reliable" then the Baden Medical Services report without any expert medical basis for doing so.

Exception 48. Respondent excepts to the ALJ's finding at 11 n.18, not to credit the testimony of subpoenaed third-party witness Christine Norwood of Portable Storage, that Membrino was discharged because for the business reason that he failed to report for work for three consecutive days. R8; tr. 504 l.24.

Exception 49. Respondent excepts to the ALJ's finding at 11 n.18, not to credit subpoenaed third-party witness Christine Norwood of Portable Storage, who had no reason not to testify credibly, over Membrino's testimony that he was discharged for lack of work when Membrino had everything to gain by uttering one more falsehood.

Exception 50. Respondent excepts to the ALJ's finding at 11 n.18, to find that Membrino's work at Portable Storage, was not rebutted by reliable evidence, when Norwood's testimony is presumed to be more reliable.

Exception 51. Respondent excepts to the ALJ's failure to find or to infer at 12 n.20, that Membrino threw away his DOT cards predating the hearing because they would show he was not qualified to drive a commercial motor vehicle between November 3, 2008 and 2010.

Exception 52. Respondent excepts to the ALJ's failure to find or to infer at 12 n.20, that Membrino engaged in improper spoliation of evidence in his possession when he threw away his DOT cards predating the hearing and therefore raise the presumption that the DOT cards would show Membrino was not qualified to drive a commercial motor vehicle (CMV) between November 3, 2008 and 2010.

Exception 53. Respondent excepts to the ALJ's failure to find at 12 n.20, that Membrino's explanation for throwing away DOT cards is not credible purportedly because of his unverified claim that possession of an expired card when driving a CMV, the police might prevent him from driving, when no corroborating evidence of such a policy or by any other CDL driver was introduced.

Exception 54. Respondent excepts to the ALJ's failure to find at 12 n.20, that Membrino's engaged in spoliation of evidence by throwing away his DOT cards for all periods of time beginning in 2010 when he was not driving a commercial truck for any interim employer and for these later periods that the General Counsel seeks backpay.

Exception 55. Respondent excepts to the ALJ's finding at 12 n.20, that Pessoa did not require Membrino to complete a physical or provide a valid DOT card, when Respondent produced Membrino's personnel file, Respondent maintains these physicals and cards, Tr. 711 ll.15-25 (reviewing R42 DOT physical of Class A driver Martinez), and FMCSA regulations require employers to require CDL drivers possess valid DOT cards.

Exception 56. Respondent excepts to the ALJ's finding at 14 ll.17-18, that Membrino's discharge by Aggregate Industries was for unintentional or accidental conduct.

Exception 57. Respondent excepts to the ALJ's failure to find at 14 ll.17-18, that Membrino's discharge by Aggregate Industries was for multiple instances of reckless employee misconduct (including driving without a valid DOT card), and violation of company work rules.

Exception 58. Respondent excepts to the ALJ's failure to find at 14, that Aggregate Industries human resources specialist Terri Coomaraswamy who terminated Membrino, found "that he [Membrino] was not" truthful. Tr. 695 ll.20-23.

Exception 59. Respondent excepts to the ALJ's failure to find at 14, that Membrino was terminated for cause and misconduct by Aggregate Industries.

Exception 60. Respondent excepts to the ALJ's failure to find at 14, that Membrino's wilful acts causing his discharge by Aggregate Industries, terminated the backpay period.

Exception 61. Respondent excepts to the ALJ's failure to find at 14-15, that Membrino was terminated for cause by Cylos for damaging his truck which terminated the backpay period.

Exception 62. Respondent excepts to the ALJ's failure to find at 16 n.25, that Membrino testified falsely that an undisclosed judge in an undisclosed court at an undisclosed time, allowed him to drive a CMV with a suspended license.

Exception 63. Respondent excepts to the ALJ's failure to find that Membrino's drove CMV's in knowing violation of FMCSA regulations and public safety without a license.

Exception 64. Respondent excepts to the ALJ's finding at 17 l.20, that Pessoa "generally maintained" a complement of 5 drivers.

Exception 65. Respondent excepts to the ALJ's failure to find at 17 l.20, that Pessoa employed several employees with CDL licenses (without identifying types Class A-C), but did not use them "generally" to do any driving requiring a CDL license of its CMVs.

Exception 66. Respondent excepts to the ALJ's failure to finding at 17 l.20, that General Counsel established no admissible evidence that all persons holding a CDL license at Pessoa were employed for the purpose of driving trucks or other CMVs that required a CDL license.

Exception 67. Respondent excepts to the ALJ's finding at 16-17 n. 25, that Membrino ever notified an employer he had a suspended license.

Exception 68. Respondent excepts to the ALJ's failure to find at 16-17 n.25, that Membrino was not credible by his testimony that he notified employers of his suspended license, when he never informed Pessoa or WSSC of any of his license suspensions.

Exception 69. Respondent excepts to the ALJ's exclusion of salaried drivers P.S. and J.M. in his consideration of hours worked and available, ALJD 19 n.23, when they cost the employer less and their use is preferred because they do not get paid overtime.

Exception 70. Respondent excepts to the ALJ's exclusion of salaried drivers P.S. and J.M. in his consideration of hours worked and available, ALJD 19 n.23, because doing so artificially inflates the number of chargeable regular and overtime hours Pessoa drivers worked per quarter.

Exception 71. Respondent excepts to the ALJ's rendition of his credibility findings at 19-20, based upon no independent identification of the reasons why particular witnesses such as Membrino should not be discredited when they admit to making false claims in violation of federal regulations, such as regulations issued by the FMCSA.

Exception 72. Respondent excepts to the ALJ's finding at 20 n.33, federal holidays are not excluded from the quarterly wage amounts which does not count the wages, but counts the hours Membrino worked.

Exception 73. Respondent excepts to the ALJ's finding at 21 ll.2-5, that Respondent maintained a five or more drivers with the required licenses to actually drive its trucks.

Exception 74. Respondent excepts to the ALJ's inference at 21 ll.16-19, that

Membrino would have maintained his rate of pay at $22 after October 2008.

Exception 75. Respondent excepts to the ALJ's "fact" at 21 ll.18-19, that Membrino had a "good track record" after being involved in an expensive accident of the Class B dump truck he regularly drove, that would justify maintenance of his $22 hourly Class A rate after October 2008.

Exception 76. Respondent excepts to the ALJ's inference and "fact" at 21 ll.16-19, that Respondent preferred Membrino over its other Class A drivers for available Class A vehicles.

Exception 77. Respondent excepts to the ALJ's failure to find that Membrino could not drive all of Respondent's trucks, tr. 738 l.13, because of his lack of CDL authorized endorsements, *e.g.*, the fuel truck. Tr. 528 ll.3-5 (Jose Ramirez fuel truck driver).

Exception 78. Respondent excepts to the ALJ's finding at 21 ll.21-34, that average weeks worked did not include Membrino's two-week vacation in 2008 while employed at Pessoa and thereby placing his average working hours over 39 rather than 37 weeks.

Exception 79. Respondent excepts to the ALJ's finding at 21 ll.33-34, that Membrino's two-week vacation in 2008 would not be included in average weeks available because "there is no evidence that Membrino ever took a similar vacation before or during the backpay period," when the July 2008 vacation was in fact "before" the backpay period.

Exception 80. Respondent excepts to the ALJ's failure to find at 21, that Membrino would have continued to take a two-week family vacation if he remained employed with Pessoa.

Exception 81. Respondent excepts to the ALJ's finding at 21 l.32 that Membrino's two-week vacation in 2008 was "essentially an anomaly."

Exception 82. Respondent excepts to the ALJ's finding at 21 n.32, that employee ledgers of Pessoa drivers other then Membrino were provided at the first day of hearing.

Exception 83. Respondent excepts to the ALJ's finding at 21 n.32, that employee ledgers of other Pessoa drivers except for Brian Loving were requested prior to the first day of hearing when there no such evidence was introduced.

Exception 84. Respondent excepts to the ALJ's finding at 21 n.32, that Richard Smith ("R.S.") could not be considered a replacement employee for Membrino since R.S. only worked for Pessoa during a portion of the backpay period.

Exception 85. Respondent excepts to the ALJ's finding at 21 n.32, that R.S. could not be considered a replacement employee for Membrino since the record did not show Membrino would have been limited to the period of time R.S. worked.

Exception 86. Respondent excepts to the ALJ's failure to finding that R.S. was the next Class A CDL hire for Pessoa to be considered a replacement employee for Membrino.

Exception 87. Respondent excepts to the ALJ's failure to find that R.S. Membrino's work for Pessoa would have been limited to the period of time R.S. worked for Pessoa.

Exception 88. Respondent excepts to the ALJ's finding at 22 ll.4-9 accepting the General Counsel's gross backpay calculation, and formula showing $199,285.20 in gross backpay.

Exception 89. Respondent excepts to the ALJ's finding at 22 n.35 that Membrino would not have been terminated by Pessoa for knowingly driving on a suspended license.

Exception 90. Respondent excepts to the ALJ's failure to find that backpay should not be terminated by Membrino's wilful misconduct in knowingly driving for Pessoa on a suspended license at the time of his discharge in violation of FMCSA regulations. Cf. Tr. 444 l.6-22.

Exception 91. Respondent excepts to the ALJ's failure to find that the backpay period should be terminated by Membrino's wilful misconduct in knowingly driving for Pessoa on a suspended license at the time of his discharge in violation of FMCSA regulations. Cf. Tr. 444 l.6-22.

Exception 92. Respondent excepts to the ALJ's finding at 22 n.35 that Membrino's concealment of his license suspension from Pessoa during his active employment is not misconduct to terminate the backpay period.

Exception 93. Respondent excepts to the ALJ's failure to find that Membrino's concealment of his license suspension in violation of FMCSA

regulations controlling CDL driving privileges before and after his termination, was misconduct inimical to federal policy and terminating his entitlement to backpay.

Exception 94. Respondent excepts to the ALJ's finding at 22 n.35, that Membrino's did not engage in misconduct by listing on his employment applications during the backpay period his work for Membrino Trucking and Membrino Delivery Service, which was "false" in violation of FMCSA regulations.

Exception 95. Respondent excepts to the ALJ's failure to find that Membrino's engaged in misconduct by listing on his employment applications during the backpay period his fictional work for Membrino Trucking and Membrino Delivery Service, in violation of FMCSA safety regulations, and therefore disqualified him for the periods he worked for Membrino Trucking and Membrino Delivery Service for the periods October 2008 through February 2010, R17 p.2, June 2, 2010 to December 17, 2010, R20 p.2, and December 1, 2008 to May 2010, R20 p.2.

Exception 96. Respondent excepts to the ALJ's failure to find at 22 n.36, that Membrino failed to report his earnings to the Board of work for Portable Storage and Reddy Ice, R1.

Exception 97. Respondent excepts to the ALJ's finding at 23 n.36, that Membrino's failure to report his earnings to the Board of his work for Portable Storage and Reddy Ice in 2010 on his reporting form, R1, was not wilful or part of a scheme to obtained unjustified personal gain.

Exception 98. Respondent excepts to the ALJ's failure to find that Membrino's failure to report his earnings to the Board of his work for Portable Storage and Reddy Ice in 2010 on his reporting form, R1, was part of a scheme to increase his personal gain by maximizing remedial lost earnings.

Exception 99. Respondent excepts to the ALJ's finding at 23 ll.28-32, that discredited Membrino's testimony that he had a "'heart attack' or coronary bypass procedure."

Exception 100. Respondent excepts to the ALJ's finding at 23 ll.32-36, without medical expert testimony, that Membrino's diagnosis did not include a "'heart attack' or coronary bypass procedure."

Exception 101. Respondent excepts to the ALJ's failure to find that Membrino 's

testimony that he had a "'heart attack' or coronary bypass procedure."

Exception 102. Respondent excepts to the ALJ's failure to find that Membrino had experienced a medical condition disabling him from driving a commercial motor vehicle without a DOT physical after a "diagnosis of...angina pectoris," under 49 C.F.R. § 391.41(b), when the ALJ found at 23 ll.32, that Membrino indeed suffered from "angina pectoris (unstable)."

Exception 103. Respondent excepts to the ALJ's finding at 24 n.37, that "any medical professional" had not "determined" that Membrino's "clinical diagnosis of angina pectoris or cardiovascular disease" was "accompanied by synope, dyspnea, collapse or congestive cardiac failure."

Exception 104. Respondent excepts to the ALJ's misreading and misquoting FMCSA regulation 49 C.F.R. § 391.41(b), by inserting an additional requirement that a diagnosis of angina pectoris be "accompanied by synope, dyspnea, collapse or congestive cardiac failure."

Exception 105. Respondent excepts to the ALJ's misreading and misquoting FMCSA regulation 49 C.F.R. § 391.41(b), by failing to find that "angina pectoris" is an independent CDL disqualification and not included in a requirement that "any other cardiovascular disease of a variety known to be accompanied by synope, dyspnea, collapse or congestive cardiac failure," requiring additional medical evidence.

Exception 106. Respondent excepts to the ALJ's finding at 25 n.37, that Membrino's "high blood pressure or vascular disease" needed to "interfere[] with his ability to control and operate a motor vehicle safely," when the federal regulation, FMCSA regulation 49 C.F.R. § 391.41(b)(6) & (7), stated the requirement is to show interference with the ability "to operate a *commercial* motor vehicle."

Exception 107. Respondent excepts to the ALJ's finding at 25 n.37, that Washington Adventist Hospital told Membrino to refrain from driving for two days included a Comerica motor vehicle.

Exception 108. Respondent excepts to the ALJ's failure to find that the Membrino concealed from his doctors that he was a commercial motor vehicle driver. Tr. 246 l.16-247 l.5, 249 ll.11-19.

Exception 109. Respondent excepts to the ALJ's failure to find that no doctor at Washington Adventist Hospital told Membrino he could drive a commercial motor vehicle.

Exception 110. Respondent excepts to the ALJ's finding at 25 ll.6-9, that there was "no evidence of a period of time" when Membrino would "not have been able to pass a DOT physical when requested.

Exception 111. Respondent excepts to the ALJ's failure to find at 25 ll.6-9, that Membrino's hospitalization and medical condition incurred on November 3, 2008, was not a "period of time" when Membrino would "not have been able to pass a DOT physical when requested.

Exception 112. Respondent excepts to the ALJ's failure to find at 25 ll.6-9, that Membrino's hospitalization and medical condition incurred on November 3, 2008, was an event not covered by FMCSA regulation 49 C.F.R. § 391.41(b), as a "period of time" when Membrino would "not have been able to pass a DOT physical when requested."

Exception 113. Respondent excepts to the ALJ's finding at 25 ll.6-9, that Membrino's period of FMCSA medical disqualification was limited to the November 3-28, 2008, period the General Counsel requested no backpay.

Exception 114. Respondent excepts to the ALJ's finding at 25 ll.6-9, that backpay was not tolled during the entire period Membrino was unable to show he was qualified under FMCSA regulations.

Exception 115. Respondent excepts to the ALJ's finding at 25 ll.6-9, that Membrino's period of FMCSA medical disqualification was limited solely to the November 3-28, 2008, time period the General Counsel requested no backpay.

Exception 116. Respondent excepts to the ALJ's finding at 25 n.38, that Membrino did not conceal his medical condition from state and federal authorities during the backpay period.

Exception 117. Respondent excepts to the ALJ's failure to find at 25 n.38, that Membrino avoided obtaining DOT medical certification for CMV driving from November 3, 2008, to 2010.

Exception 118. Respondent excepts to the ALJ's failure to find when Membrino would have been able to obtain a DOT medical certification after November 3, 2008.

Exception 119. Respondent excepts to the ALJ's failure to find that HIPPA prevents an employer from obtaining medical information without a person's authorization.

Exception 120. Respondent excepts to the ALJ's failure to find that because HIPPA prevents an employer from obtaining medical information without a person's authorization, the burden to show Membrino was qualified to drive a CMV after November 3, 2008, remained on the discriminatee Membrino, not Pessoa.

Exception 121. Respondent excepts to the ALJ's failure to find Membrino was in the best position to present evidence of when he was first able to meet FMCSA commercial motor vehicle medical qualifications after November 3, 2008.

Exception 122. Respondent excepts to the ALJ's finding at 25 n.38, that FMCSA regulations did not require Membrino to pass a DOT physical before applying for CDL jobs.

Exception 123. Respondent excepts to the ALJ's failure to find that Membrino was not able to pass a DOT physical under FMCSA regulations at any time after November 3, 2008, before applying for CDL jobs in 2010.

Exception 124. Respondent excepts to the ALJ's failure to find that Membrino was unfit to take and pass a DOT physical under FMCSA regulations at any time after November 3, 2008, before applying for CDL jobs in 2010.

Exception 125. Respondent excepts to the ALJ's finding at 25 l.19-26 l.3, that Membrino's unlawful earnings for driving without a CDL for his interim employer during August 30-Sept 3, 2010, should not be offset against Pessoa's backpay liability.

Exception 126. Respondent excepts to the ALJ's finding at 25 l.19-26 l.3, that it is contrary to federal policy to allow Membrino to retain the benefit of his unlawful earnings for driving without a CDL during August 30-Sept 3, 2010, as a windfall against any backpay owed.

Exception 127. Respondent excepts to the ALJ's finding at 27 ll.17-19, that Membrino's illegal gains from employment where he was disqualified for working without a license should not be included as interim earnings.

Exception 128. Respondent excepts to the ALJ's finding at 27 n.27, that Saturdays and Sundays were days in the backpay period that should be

excluded from days Membrino was unavailable for work due to his suspended CDL license.

Exception 129. Respondent excepts to the ALJ's failure to find that Pessoa's work week included Saturdays and Sundays. Tr. 536 ll.3-16.

Exception 130. Respondent excepts to the ALJ's failure to find that Membrino worked for interim employers on Saturdays and Sundays. Tr. 536 ll.3-16.

Exception 131. Respondent excepts to the ALJ's finding that Membrino would not have been laid off by December 1, 2008. ALJD 27 ll.27-29.

Exception 132. Respondent excepts to the ALJ's finding at 28 ll.1-7, that Membrino as a highly paid Class A driver would not have been laid off when Pessoa only had need for lower paid Class B drivers after November 2008.

Exception 133. Respondent excepts to the ALJ's failure to find that any persons hired by Pessoa after November 2008 possessing a Class B CDL actually or regularly drove commercial motor vehicles for Pessoa.

Exception 134. Respondent excepts to the ALJ's finding at 28 ll.37-29, that the General Counsel met his burden of proof by producing competent evidence of when and which prospective employer Membrino first applied to when he allegedly began a search for work during the backpay period under St. George Warehouse, 351 N.L.R.B. 951, 965 (2007).

Exception 135. Respondent excepts to the ALJ's failure to find that General Counsel failed to produce "the testimony of someone familiar with the discriminatee's job search." Id. 964.

Exception 136. Respondent excepts to the ALJ's failure to find that Membrino was not eligible for backpay until he produced a date and place where he first applied for work.

Exception 137. Respondent excepts to the ALJ's finding at 28 ll.38-39, that Membrino testified credibly of an extensive job search without any records to show he submitted an application for work at any time prior to 2010.

Exception 138. Respondent excepts to the ALJ's finding at 28 l.39, that Membrino searched for alternative employment without any records.

Exception 139. Respondent excepts to the ALJ's finding at 28 ll.40-41, that the State of Maryland required Membrino to engage in a job search to qualify for unemployment compensation benefits.

Exception 140. Respondent excepts to the ALJ's failure to find that the State of Maryland did not require persons such as Membrino to prove an actual search for work in order to receive unemployment compensation benefits."

Exception 141. Respondent excepts to the ALJ's failure to find that the Board's presumption that the receipt of unemployment compensation from the State of Maryland require Membrino to search for work.

Exception 142. Respondent excepts to the ALJ's finding at 28 n.43, that Membrino's receipt of Maryland unemployment benefits in February 2009, along with some evidence of job openings, show he diligently pursued work during the backpay period prior to February 2009.

Exception 143. Respondent excepts to the ALJ's failure to find that a diligent search for work under the Board's mitigation requirement is to produce evidence of dates, names, and addresses of all places in which a discriminatee searched for work.

Exception 144. Respondent excepts to the ALJ's failure to find that Membrino failed to conduct a diligent search for work until no earlier then November 2, 2009, when some detailed evidence of where and when he contacted an employer for work was produced. R1.

Exception 145. Respondent excepts to the ALJ's finding at 29 n.44, that Membrino had kept a notebook of some unidentified search for work that was stolen.

Exception 146. Respondent excepts to the ALJ's failure to find that Membrino kept no notebook.

Exception 147. Respondent excepts to the ALJ's failure to find that Board did not require Membrino to keep a record of his search for work. Tr. 222 l.8-19.

Exception 148. Respondent excepts to the ALJ's failure to find that Board did not require Membrino to maintain his search for work in Form NLRB-4288. Tr. 222 l.8-19.

Exception 149. Respondent excepts to the ALJ's failure to find that Board did not

require Membrino to maintain a diary of his search for work. Tr. 54 ll.18-20.

Exception 150. Respondent excepts to the ALJ's failure to find that the Maryland Circuit Court's judgment against Plaintiff Membrino, R23, in a wage lawsuit against Respondent Pessoa that was "credible to the Defendant's position"R22 p.13 ll.3-4, R23, and placed in the Rejected Exhibits file, tr. 404 ll.17-19, which also failed to take judicial notice from this judgment, that Membrino is not a credible witness. Tr. 404 ll.21-24.

Exception 151. Respondent excepts to the ALJ's failure to admit or take judicial notice of the admission of Form NLRB-4288 as R10.

Exception 152. Respondent excepts to the ALJ's failure to require the General Counsel to produce Form NLRB-4288. St. George Warehouse, 351 N.L.R.B. 961, 966 (2007).

Exception 153. Respondent excepts to the ALJ's finding at 29 n.44, that discriminatees have no obligation to keep documentation of their search for work.

Exception 154. Respondent excepts to the ALJ's failure find that if discriminatees have no obligation to keep documentation of their search for work, then no documentation of this burden in mitigation will ever be kept by a discriminatee.

Exception 155. Respondent excepts to the ALJ's finding at 29 l.6, that there was considerable evidence about Membrino's efforts to search for work.

Exception 156. Respondent excepts to the ALJ's finding at 29 ll.8-12, that Membrino's false statements on job applications prevented Membrino from getting a job.

Exception 157. Respondent excepts to the ALJ's failure to find that Membrino lost work at Hertz Equipment Rental in June 2009, because he lied in his employment application about his background of felony convictions on his job application. R1 (April 1 to June 30, 2009) ("because of my Felony").

Exception 158. Respondent excepts to the ALJ's finding at 29 ll.12-13, that Membrino did not narrow or limit his search for work unreasonably by lying about the identify of his prior employers, his CDL status, and criminal convictions on his job applications.

Exception 159. Respondent excepts to the ALJ's failure to find that Membrino's falsehoods were egregious misconduct in direct violation of FMCSA regulations, 49 C.F.R. §383.35 (a) & (c), requiring Membrino to "provide at the time of application for employment...employment history information for the 10 years preceding the date the application...to the prospective employer by the applicant."

Exception 160. Respondent excepts to the ALJ's finding at 29 ll.13-14, that Respondent's liability for backpay should be adjusted for the time when he violated FMCSA safety regulations to obtain work.

Exception 161. Respondent excepts to the ALJ's failure to find that Membrino's deliberate violation of FMCSA safety regulations, while employed by Pessoa and after his discharge from Pessoa, enabled his deception to deprive him of work from diligent employers until certain interim employers hired him (by believing his falsehoods), enabled him to receive unemployment compensation during the period despite his deceptions, and then enabled him to be entitled to receive a potential additional windfall of backpay from Pessoa during this period until he declined Pessoa's offer of employment.

Exception 162. Respondent excepts to the ALJ's failure to find that Membrino's deliberate violation of FMCSA safety regulations, which deprived him of employment from FMCSA compliant employers, and permitted him to receive unemployment compensation from the State of Maryland, should cause State of Maryland unemployment benefits to be an offset against backpay.

Exception 163. Respondent excepts to the ALJ's finding at 29 ll.34-35, 30 11.1-2, that Membrino's "voluntarily" quit of CDL work from Reddy Ice for 1.5 weeks before his purported employment with WSSC was reasonable.

Exception 164. Respondent excepts to the ALJ's failure to find that Membrino's quit of work from Reddy Mix because he agreed to be placed as a "standby driver," Tr. 271 ll.11-19, was not reasonable.

Exception 165. Respondent excepts to the ALJ's finding at 30 1.10, that Membrino's employment with Reddy Mix "offered only sporadic employment" after he announced he had obtained a job with WSSC.

Exception 166. Respondent excepts to the ALJ's finding at 30 l.6-31 l.2, that Membrino was terminated by interim employers for wilful misconduct.

Exception 167. Respondent excepts to the ALJ's finding at 30 ll.29-33, that the subpoenaed witness Christina Norwood for Portable Storage lacked personal knowledge that Membrino was fired for failing to show up for work, when she testified she knew the circumstances of Membrino's termination" at the time. Tr. 503 l.1 ("memory"), 507 l.23 ("I recall"), 508 ll.16-21 ("recollection of events").

Exception 168. Respondent excepts to the ALJ's failure to find that subpoenaed witness Christina Norwood for Portable Storage who produced a company business record, R8, was more credible then Membrino because Membrino's testimony was based on self-serving hearsay of the reason for his discharge. Tr 183 ll.19-24.

Exception 169. Respondent excepts to the ALJ's failure to find that Membrino's failure to show up for work for three days at Portable Storage tolls backpay as stated by the Compliance Officer. Tr. 122 l.18-123 l.2.

Exception 170. Respondent excepts to the ALJ's finding at 30 ll.42-43, that Membrino's discharge was based on a hearsay miscommunication by Membrino with unidentified Cylos mechanic.

Exception 171. Respondent excepts to the ALJ's finding at 30 ll.42-43, that Membrino's discharge from Cylos was because Membrino did not shut down his truck properly by draining water in his truck's lines, which damaged the truck, R7, which a professional driver should have known how to do. Tr. 482 l.24-483 l.2.

Exception 172. Respondent excepts to the ALJ's failure to find that Membrino's discharge from Aggregate Industries was for wilful misconduct, including his failure to maintain his DOT physical status. R5.

Exception 173. Respondent excepts to the ALJ's failure to find that Aggregate Industries' termination of Membrino was "for cause" and that he was not eligible for rehire as set forth in the termination letter. Tr. 695 ll.3-8; R5.

Exception 174. Respondent excepts to the ALJ's failure to credit Terry Coomaraswamy of Aggregate Industries who fired Membrino, that Mr. Membrino is not an honest person. Tr. 114 ll.23-24.

Exception 175. Respondent excepts to the ALJ's failure to find that Membrino's discharge from Aggregate Industries that was based on his violation of the Company's work rules, standard operating procedures leaving his chute down, having a flat spot on his rollers, failing to conduct pre-trip inspections, discharging concrete

he made too wet, failing to report to work with a valid DOT physical card, failing to report for work for a night pour, chipping concrete onto grass, and failing to close a water valve ruing concrete, was not evidence of wilful misconduct. R5.

Exception 176. Respondent excepts to the ALJ's failure to discredit Membrino when he told the Compliance Officer he was left Aggregate Industries because "it wasn't working out," rather then discharge for misconduct. Tr. 107 ll.23-24.

Exception 177. Respondent excepts to the ALJ's finding at 30 l.45-31 l.2, that Membrino's continuous subpar job performance for interim employers Aggregate and Cylos was not evidence of wilful misconduct. Tr. 462.

Exception 178. Respondent excepts to the ALJ's finding at 31 n.45, that Membrino's false statements on job applications should limit backpay.

Exception 179. Respondent excepts to the ALJ's finding at 31 n.45, that Membrino's false statements on his job application to Hertz Equipment should limit entitlement to backpay.

Exception 180. Respondent excepts to the ALJ's finding at 31 n.45, that there is no evidence that Membrino's false statements on job applications would not have been hired.

Exception 181. Respondent excepts to the ALJ's finding at 31 n.45, that Membrino's false statements on job applications would not have been cause for discharge from any interim employment. Tr. 705 ll.16-22 (Aggregate Industries).

Exception 182. Respondent excepts to the ALJ's finding at 31 n.47, that Pessoa's alternative method of showing backpay was not appropriate.

Exception 183. Respondent excepts to the ALJ's finding at 31 n.47, that Pessoa's alternative method was excluded because it included weekends when Membrino was available to work.

Exception 184. Respondent excepts to the ALJ's failure to find that Pessoa's alternative method should be used because all paychecks issued to Membrino began and ended on a weekend.

Exception 185. Respondent excepts to the ALJ's finding at 32 nn.28-56, that incorporated fractional weeks into the calculation of backpay.

Exception 186. Respondent excepts to the ALJ's finding at 32 nn.48-55, deducted 12 days in 2Q 2009, 24 days in 3Q 2010, 44 days in 4Q 2010, 23 days in 2Q 2011, 10 days in 3 Q 2011, 43 days in 1Q 2012, and 14 days in 4Q 2012.

Exception 187. Respondent excepts to the ALJ's failure to find that Membrino's backpay for suspended license periods should be deducted by 6 days in Q2 2010, 32 days in Q3 2010, 61 days in Q4 2010, 31 days in Q2 2011, 11 days in Q3 2011, 4 days in Q3 2012, 92 days in Q4 2012, 59 days in Q1 2012, and 19 days in Q4 2013. R3.

Exception 188. Respondent excepts to the ALJ's failure to find that Membrino's backpay for suspended license periods

Exception 189. Respondent excepts to the ALJ's finding at 32 n.53, that omitted a $7,760.00 offset for interim earnings in the fourth quarter of 2011.

CONCLUSION

For the foregoing reasons, Respondent Pessoa respectfully requests that the Board grant these Exceptions to the Administrative Law Judge's Supplemental Decision and dismiss the finding of backpay.

Respectfully submitted,

PESSOA CONSTRUCTION COMPANY

BY: /s/ Michael E. Avakian

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Dated: March 17, 2014

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PESSOA CONSTRUCTION COMPANY,	)	
	)	
Respondent,	)	
and	)	Case Nos. 5-CA-34547
	)	5-CA-34761
LABORERS' INTERNATIONAL	)	5-CA-35083
UNION OF NORTH AMERICA,	)	
	)	
Charging Party.	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Pessoa's Exceptions to the Board was served by email on the following persons on this the 17th day of March 2014:

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