U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 October 2017

Case No.: 2014-STA-00002

In the Matter of:

BRUCE TREUR,
Complainant,

v.

MAGNUM EXPRESS, INC.,
Respondent.

Appearances: Heather Carlson, Esq.
McDonald, Woodward & Carlson, P.C.
Davenport, Iowa
For the Complainant

James Spolyar, Esq. & John-Thomas Young, Esq.
Scopelitis, Garvin, Light, Hanson & Feary
Indianapolis, Indiana
For the Respondent

Before: Stephen R. Henley
Chief Administrative Law Judge

DECISION AND ORDER ON REMAND DISMISSING COMPLAINT

This matter arises under the whistleblower protection provisions of the Surface Transportation Assistance Act of 1982 ("STAA" or "Act"), 49 U.S.C. § 31105, as amended by the Implementing Recommendations of the 9/11 Commission Act of 2007, and corresponding regulations found at 29 C.F.R. Part 1978. The matter now comes before the Office of Administrative Law Judges ("OALJ") on remand from the Administrative Review Board ("ARB" or "Board").

Procedural History

On February 15, 2013, Bruce Treur ("Complainant" or "Treur") filed a formal complaint with the Occupational Safety and Health Administration ("OSHA"), U.S. Department of Labor, pursuant to the STAA, alleging that his former employer, Magnum Express Inc. ("Respondent" or "Magnum Express"), terminated his employment in retaliation for refusing to drive his delivery vehicle in adverse weather conditions. After conducting an investigation, the Secretary of Labor, acting through the Regional Administrator of OSHA, issued a final determination letter dated September 4, 2013 ("Secretary's Findings"), concluding there was no reasonable cause to believe Respondent violated the STAA and dismissed the complaint.

On October 16, 2013, Complainant appealed the Secretary's Findings to the OALJ. The case was assigned to Chief Administrative Law Judge Stephen L. Purcell and a formal hearing before Judge Purcell was held on July 24, 2014 in Davenport, Iowa. On September 22, 2014, Judge Purcell issued a *Decision and Order* dismissing the claim for finding that Complainant's failed to establish that he engaged in protected activity under the STAA. Complainant appealed the *Decision and Order* to the ARB.

On July 28, 2016, the ARB issued a *Decision and Order of Remand* vacating Judge Purcell's *Decision and Order*. Notably, the ARB determined that Judge Purcell's findings "must be reexamined because they were influenced by the ALJ's incorrect legal interpretation that a reasonable apprehension of serious bodily injury must always be based upon conditions existing at the time and place of a driver's refusal to drive." The ARB remanded the case to OALJ for further proceedings consistent with its decision. The record was received by this office on October 24, 2016.

As Judge Purcell had since retired from federal service, the case was reassigned to the undersigned pursuant to 29 C.F.R. § 18.12(a). Given that credibility determinations appeared necessary in order to resolve the issues remanded for my consideration, I convened a hearing on May 4, 2017, in Davenport, Iowa.[1] Both parties and their respective attorneys attended. The parties offered Joint Exhibits ("JX") 1 through 23, which were admitted into evidence without objection. (*See* Tr. 5-6).[2] In support of his case, Complainant also offered Complainant's Exhibit ("CX") 1, which was admitted into evidence without objection, (Tr. 39), and the testimony of him and his wife. (Tr. 16-87). Respondent called Robert G. Smith and Eric B. Haut. (Tr. 88-154). At the close of the hearing, I directed the parties to file written post-hearing briefs addressing the merits of the case, with the filing deadline to be determined based on the date of receipt of the hearing transcript.

On June 9, 2017, I issued an *Order Setting Briefing Schedule* instructing the parties to file simultaneous file post-hearing briefs by August 15, 2017, with any responses due by September 1, 2017. Complainant submitted his *Post-Hearing Brief* ("Compl. Br.") on August 8, 2017, and

[1] On November 18, 2016, I issued a *Notice of Hearing* setting the matter for hearing on May 3, 2017, with the location of the hearing designated by order issued March 21, 2017. The hearing date was ultimately changed with the consent of the parties by order issued April 13, 2017.

[2] Citations to the transcript of the May 4, 2017 hearing will be abbreviated as "Tr." followed by the cited page number.

Respondent submitted its *Post-Hearing Brief* ("Resp't Br.") on August 15, 2017. On August 30, 2017, Complainant filed *Response to Respondent's Post-Hearing Brief* ("Compl. Resp."), and on September 1, 2017, Respondent likewise filed *Response to Complainant's Post-Hearing Brief* ("Resp't Resp.").

The record is now closed and the matter is ready for determination. The findings and conclusions that follow are based on a complete review of the entire record in light of the arguments of the parties and applicable statutory provisions, regulations, and pertinent precedent. Although not every exhibit in the record is discussed below, each was carefully considered in arriving at this decision. For the reasons set forth in greater detail following, I find Complainant did not engage in protected activity under the Act and again dismiss his complaint.

Summary of the Evidence

Testimonial Evidence

Complainant Bruce Treur [3]

Complainant was born on August 5, 1969. After graduating high school in 1988, he joined the U.S. Air Force and served for six years. During his time in the Air Force, Complainant drove a truck, and loaded and unloaded airplanes. Complainant obtained a Commercial Drivers' License ("CDL") in or around 1997, and has been a fulltime truck driver since. (Tr. 17-18; JX 1 at 22-23). Throughout his professional driving career, Complainant has driven "every kind of conventional truck[] there are out there today." (JX 1 at 23-24).

In October 2012, Complainant got a job with Magnum Express, a trucking company based in Plainfield, Indiana, as a driver transporting and delivering pharmaceutical products to Walmart. (Tr. 21; JX 1 at 26-27). The job paid $15.00 per hour, with time-and-a-half for overtime. (JX 1 at 30).

During his employment with Magnum Express, Complainant was required to drive a "straight truck," with which he did not have previous professional driving experience. Complainant described a straight truck as a "single-axle vehicle, basically a very large truck," and stated that it was large enough for a forklift to get in and out, but had no sleeper berth. (Tr. 21). During his one-day orientation at Magnum Express's headquarters, Complainant was informed that the customer required a straight truck, rather than a more economical semi-truck, due to the need for security in hauling pharmaceuticals. (JX 1 at 90-91). Complainant explained, "It's a lot more difficult to steal a straight truck [than to steal a trailer], plus also the customer wanted to keep track of whoever literally put their hands on the product." (JX 1 at 91).

Complainant drove the same route five days per week, Monday through Friday. (Tr. 18). He divided up the route with another driver. Complainant's portion of the route began at a Ryder rental facility in Davenport, Iowa, located about five to ten miles from his home. Complainant

[3] This summary is derived from the testimony given by Complainant at the May 2017 hearing on remand (Tr. 16-66), the initial July 2014 hearing (JX 1), and at his deposition on February 28, 2014 (JX 17). Citations to the July 2014 hearing transcript and Complainant's deposition transcript will referred to the transcripts' internal pagination, rather than that marked by the parties.

would meet Eric Haut, the driver of the other portion of the route, at the Ryder facility between 5:00 and 6:00 p.m. each night. From Davenport, Complainant drove west via Interstate 80 to Des Moines, Iowa, which took about 2 to 2.5 hours. In Des Moines, he delivered a portion of his load, which took another 30 to 60 minutes. From Des Moines, he drove west another 3.5 to 4 hours to Omaha, Nebraska, also via Interstate 80, spending 1 to 2 hours unloading when he arrived. He then drove the now empty truck back to Davenport, Iowa, via Interstate 80. The return trip took between 5 and 5.5 hours. Complainant's portion of the route ended back at the Ryder facility in Davenport and he typically finished his shift between 4:00 and 6:00 a.m. (Tr. 18; JX 1 at 32-35).

Complainant was scheduled to work for Magnum Express on Wednesday, December 19, 2012. He woke that morning around 10:00 a.m., "knowing that there was a possibility of inclement weather for the route that evening" based on a television report he had watched the night before. (Tr. 25, 28; JX 1 at 36-37). Complainant "looked on the computer and s[aw] that out in Omaha, Nebraska, that the weather had already turned significantly bad at that location." (Tr. 25). Complainant checked the Iowa Department of Transportation's ("IDOT") website and saw that a blizzard warning had been posted for Des Moines, Iowa.[4] Complainant testified, "[I]n my mind, [the Des Moines blizzard warning] meant that Des Moines, Iowa knew that the weather conditions looking at Omaha had already turned bad enough to where it was heading to Des Moines, Iowa by 6 o'clock." (Tr. 25). Further, IDOT's website stated that tow service was not being provided, which Complainant interpreted as meaning that IDOT had "determined even at that point the weather conditions were so bad that they were not allowing tow trucks to go on the road to do any services because they were scared that the weather conditions were too bad even for them." (JX 1 at 38). However, the weather in Davenport that morning was "[c]lear and fine," it was not snowing, and the roads were "drivable." (Tr. 64).

Because of the information he saw on IDOT's website and the prior evening's weather forecast, Complainant sent a text message to Chris McCormick, a Magnum Express dispatcher located in Plainfield, Indiana, around 11:00 a.m. on December 19, stating that he would not be able to make the deliveries that night. (Tr. 28-29). Shortly thereafter, Mr. McCormick called Complainant and informed him that he still needed to try to make the deliveries. In response, Complainant stated, "[T]he weather conditions were already bad in Omaha, Nebraska, and Des Moines, Iowa[,] and because it is the straight truck, I was not comfortable driving that particular vehicle into blizzard conditions." Mr. McCormick told Complainant that "the only way that he could tell [the customer] that [Complainant] was not going to be able to make the deliveries is if [he] could prove that I-80 was closed." After their short telephone conversation, Complainant printed out some weather reports[5] and faxed them to Mr. McCormick so that Magnum Express

[4] This blizzard warning was submitted into evidence as JX 3. (*See* Tr. 25-26).

[5] Complainant's testimony is inconsistent regarding which reports he sent to Magnum Express around noon on December 19. 2012. During the May 2017 hearing, Complainant testified that the IDOT News and Info bulletin submitted as JX 3 was the "only thing that [he] faxed to Magnum [Express]," and that he did not see or print the Traveler's Report submitted as CX 1 until around 9 p.m. (Tr. 31, 37, 62). He did not mention the National Weather Service Blizzard Warning submitted as JX 5. During the July 2014 hearing, Complainant initially testified that he printed CX 1 (which was then marked as JX 2) at the same time as JX 3 and faxed it to Magnum Express, but then quickly corrected himself upon inspection of the time notation on CX 1. When asked clarifying questions by Judge Purcell, Complainant testified that CX 1 was printed after he was terminated and not sent to Magnum Express, and

could try to figure out an alternative delivery method with the customer. (JX 1 at 51). However, even after Complainant provided him with information regarding the weather, Mr. McCormick was unwilling to contact the customer about being unable to make the delivery. (Tr. 31).

Complainant also had a telephone conversation with Bob Smith, the safety director for Magnum Express, around 1:00 p.m. (Tr. 32-33; JX 17 at 33-34). He told Mr. Smith that he would not drive his route that night because a straight truck does not handle safely in adverse weather conditions. (JX 1 at 52). Mr. Smith and Mr. McCormick both told Complainant that he needed to try to make the deliveries and could stop at a motel if the road conditions turned bad and he no longer felt comfortable driving. (JX 1 at 34, 53).

At around 2:00 or 3:00 p.m. on December 19, Mr. McCormick[6] called Complainant again. Complainant recalled the conversation as follows:

> Mr. McCormick . . . asked me once again if I was willing to take the straight truck after [Mr. Haut] had arrived in Davenport, take it out, and try to go out and drive into the blizzard and make the deliveries. I informed him no, taking the straight truck out into those weather conditions was not something I felt safe doing. And he said, "Well since you can't do that, then you're terminated from employment here at Magnum." . . . After he terminated me, . . . he specifically said to me, "You are not the – I knew that you were not the type of driver Magnum Express needed working for this account."

(JX 1 at 54-55).

About ten or twenty minutes after he was terminated, Complainant spoke with Mr. Haut over the telephone. According to Complainant, Mr. Haut had called to tell Complainant that "he was trying his best to get to Davenport, Iowa earlier than what he normally would, because he also knew of the bad weather conditions that were going on out there." (Tr. 35). Complainant informed Mr. Haut that he had been terminated and gave Mr. Haut detailed instructions on how to complete his portion of the route." (Tr. 36).

Complainant stated that his decision not to report to work on December 19 was based on "the conditions [he saw] on the computer in Omaha, Nebraska, and also the weather forecast." (Tr. 46). When asked whether he had any reason to doubt that the forecasted weather conditions would come to fruition, Complainant responded, "No, because I was basing the blizzard warning on what was already happening in Omaha, Nebraska, at the time that I was talking to Magnum Trucking." (Tr. 31). His knowledge of the actual Omaha weather conditions came from IDOT's

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that he sent only JX 3 to Magnum Express around noon on December 19. (JX 1 at 38-41). Complainant later testified that he faxed JX 5 to Magnum Express on December 19. (JX 1 at 70).

[6] During the May 2017 hearing, Complainant testified that Mr. Smith was the person who had terminated him. (Tr. 33). I find this inconsistency immaterial to this case and attribute it to passage of time.

website. (Tr. 31-32). However, Complainant's testimony regarding his knowledge of conditions along the route and the source of this knowledge was inconsistent.[7]

When asked why he contacted Magnum Express at 11:00 a.m., rather than closer to the start of his shift, Complainant explained that he was "concerned about the customer" and wanted Magnum Express to let them know in advance that the load would not be delivered that night because people rely on pharmaceutical drugs to be delivered daily. (Tr. 29). Complainant also stated that even if he were not terminated earlier in the day, he would not have reported to the Ryder facility at his scheduled start time on December 19 due to the blizzard warning in Des Moines. (Tr. 34).

Complainant was not willing to begin the route and stop at a hotel if he encountered unsafe driving conditions, as suggested by Mr. McCormick and Mr. Smith, for several reasons. He explained that the first motel on the route that had space for such a large truck was in Brooklyn, Iowa, which would have been within the blizzard conditions and was further than Complainant was willing to drive. (Tr. 34). Additionally, Complainant was uncomfortable with parking the straight truck at a hotel and leaving it unattended because he had been told that the customer "was very keen on security of the equipment and the cargo that was inside of it." (Tr. 35).

Complainant was also concerned about leaving Davenport to drive into blizzard conditions. He stated that he would have tried to drive the route if he had a semi-truck with a sleeper on the trailer, but he was not willing to drive the straight truck into blizzard conditions given how it handled when he had previously driven it in inclement weather. (Tr. 30). Specifically, when driving the straight truck in high wind and thunderstorm conditions, Complainant found that "the vehicle was almost uncontrollable, especially when it [was] empty," and seemed to "want to tip over." (Tr. 30-31; JX 1 at 30). Complainant was therefore afraid that the truck would flip over in the blizzard conditions and injure him, possibly knocking him unconscious. (JX 1 at 30-31). Because the truck was white and "near whiteout conditions were already occurring in Des Moines, Iowa, and Omaha Nebraska," Complainant was also "scared that [he] would end up in the ditch and no one would see [him] there and [he] would literally die in the ditch." (JX 1 at 31).

[7] At the initial July 2014 hearing, Complainant testified on cross-examination that his decision not to report to work on December 19 was based on the actual road conditions at the time he first spoke with Chris McCormick. (JX 1 at 63-64). However, he also seemed to indicate that he based his decision on the current conditions reported in Des Moines, Iowa, and Omaha, Nebraska, and the blizzard warning in Davenport, Iowa. (JX 1 at 75). Additionally, when asked whether there was evidence of snow conditions between 11:00 a.m. and 1:00 p.m. on December 19, Complainant responded, "[Y]es, I think [there is]. We have blizzard warnings up for Des Moines, Iowa, and Omaha, Nebraska." (JX 1 at 79). Later, when asked whether he had any evidence of the current conditions in Omaha between 11:00 a.m. and 1:00 p.m. on December 19, Complainant responded, "No." (Tr. 82). Similarly, he stated that he based his refusal on the blizzard warning in effect for Des Moines when he first contacted Magnum Express, but that all he knew about the actual weather conditions in Des Moines at that time was that there was a blizzard warning. (JX 1 at 93). I have fully detailed these inconsistencies in the *Findings of Fact and Conclusions of Law*, Section II.a., *supra*.

Complainant elaborated,

> I was concerned about driving out and the blizzard conditions getting so bad that I couldn't handle the equipment; and that with the crosswinds and the snow and the conditions that were already evident on the computer in Omaha, that I wouldn't be able to make it to Des Moines, Iowa, and I would either be blown over, stranded on the side of the road, or get in an accident with that equipment in those weather conditions. And I was just not willing to drive that particular vehicle out into those weather conditions.

(Tr. 35).

Additionally, Complainant was worried about running out of fuel between Davenport and the first fuel stop of the route, which was in Brooklyn, Iowa. He stated that blizzard conditions require that the truck keep idling, and noted that if something happened to him between Davenport and the first fuel stop, he would have to park the truck and sleep in it. He explained, "With it continuously running and only having a 50-gallon tank, that's very risky of running out of fuel." (Tr. 33). Additionally, he testified, "I was afraid of the fuel gelling up," and noted that they had been using a new fuel additive that he was afraid would not work. (JX 1 at 47).

After being terminated from Magnum Express on December 19, 2012, Complainant had about three or four full days of unemployment before being hired by Worldwide Transportation. (Tr. 40). In March 2014, Complainant left his job at Worldwide Transportation and began working at Commercial Transportation. He was still employed by Commercial Transportation at the time of the May 2017 hearing. (Tr. 41).

Tammy L. Treur[8]

Tammy Treur has been married to Complainant for over twenty years. (JX 1 at 99). At the time of the May 2017 hearing, she worked as a driver recruiter for Florilli Transportation. (Tr. 67).

Mrs. Treur was with Complainant at their home on December 19, 2012, when Complainant was looking at the weather conditions. (Tr. 67). She stated that IDOT's website showed that there was a winter storm between Des Moines, Iowa, and Omaha, Nebraska, with 50 to 65 mile per hour wind. At the hearing, Mrs. Treur confirmed that the IDOT "News and Info" bulletin submitted as JX 3 looked like what she saw on the IDOT website the morning of December 19. She testified that she interpreted this document to mean "[t]hat the roads should not be traveled. You should not be on that road at all. I mean, even the plows weren't allowed on the roads. So if you would have gotten in an accident, they wouldn't have been able to save you, anybody." (Tr. 68). However, Mrs. Treur could not recall where she read that plows were not allowed on the roads. (Tr. 68-69). Mrs. Treur also saw a National Weather Service alert for Des

[8] This summary is derived from the testimony given by Ms. Treur at the May 2017 hearing on remand, the initial July 2014 hearing (JX 1), and at her deposition on February 28, 2014 (JX 20).

Moines, which she printed.[9] (Tr. 82). Additionally, although her recollection was "not one-hundred percent," she remembers watching the news on television around 11:00 a.m. to 12:00 p.m., which had a Quad Cities forecast indicating that a storm was moving east into the Davenport area from Omaha later that evening. (Tr. 73-74). Mrs. Treur confirmed that she "absolutely" had read on the Internet that it was already snowing in Omaha at around 11:00 a.m. on December 19. (Tr. 69-70).

Mrs. Treur was also present for and overheard most of Complainant's side of the conversations he had with Mr. McCormick and Mr. Smith. She heard Complainant explain that he did not want to drive in the storm and wanted to try to reschedule the load to avoid it, and that Magnum Express terminated his employment in a telephone conversation occurring at around 1:00 or 2:00 p.m. (Tr. 70). After Complainant's termination, Mrs. Treur printed a page from the IDOT website showing the actual weather conditions as of 8:55 p.m. on December 19 to "prove that the roads were closed down."[10] (Tr. 71). According to Mrs. Treur, she and Complainant discussed whether he would have decided to travel the night of December 19 had he not be terminated, and Complainant "still would not have went out" had he reported to the Ryder facility at his usual time. (Tr. 84-85).

After he was terminated from Magnum Express, Mrs. Treur helped Complainant get a job with her employer, which he has since left for his current position. (Tr. 72).

Robert G. Smith[11]

Mr. Smith is the safety director and risk management officer for Magnum Express. He manages all safety-related issues for the company, including Department of Transportation compliance, all insurance matters, and building security. (Tr. 88). He also conducts new employee orientation and road tests, which he considers to be part of his safety-related duties. (Tr. 90). At the time of the hearing, Mr. Smith had been an employee of Magnum Express for over nineteen years, since the company first began, and has been the safety director during his entire tenure. (Tr. 89).

Mr. Smith testified that Magnum Express "operates basically within a 250-mile radius of Plainfield, Indiana." The company currently maintains approximately thirty-eight trucks, consisting of seven single-axle semi-trucks without sleepers, with the rest being conventional over-the-road trucks with sleepers. (Tr. 89).

According to Mr. Smith, safety is Magnum Express's top priority. He testified, "One of the things I talk to them about in orientation is, that there's not a load we haul that's worth your life or anybody else's. I mean, we are not hauling heart transplants or anything. A load can be late." (Tr. 93). Mr. Smith confirmed that he discusses winter driving with drivers in his capacity

[9] Mrs. Treur could not recall the time on December 19 at which she printed the National Weather Service Blizzard Warning, submitted as JX 5. She initially testified that she printed the document after Complainant's termination, possibly around 6:00 p.m., but then agreed that it could have been printed earlier in the day. (Tr. 81-82).

[10] Mrs. Treur stated that this document is submitted into evidence as CX 1. (Tr. 71).

[11] This summary is derived from the testimony given by Mr. Smith at the May 2017 hearing on remand and at the initial July 2014 hearing (JX 1).

as safety director, telling them to "go slow or don't go." He elaborated, "If you are in bad weather, I expect you to slow down in everything. If it gets that bad, you are supposed to pull over and stop." (Tr. 94). Mr. Smith also explained that Magnum Express relies on the drivers to determine whether travel conditions are safe and stated, "They're professional drivers. They know their safety capability. We're in Plainfield, Indiana. They're out over-the-road. We rely on their determination." (JX 1 at 122).

Mr. Smith testified that weather conditions often effect Magnum Express's operations and cause loads to be late. (Tr. 96). When asked whether he knew of any instance in which a driver had been terminated or disciplined for refusing to drive when experiencing adverse weather conditions, Mr. Smith responded no. (Tr. 97). He also recounted two specific instances where he was contacted by drivers refusing to drive because of weather conditions that they felt were unsafe, and none were terminated or disciplined as a result. (Tr. 95-96).

As risk management officer, Mr. Smith is responsible for Magnum Express's cargo insurance. He indicated that one of the reasons the company carries such insurance is because "[t]hings will happen" to the cargo, such as theft. However, Magnum Express has never disciplined a driver for the theft of cargo from his or her truck. (Tr. 94).

Mr. Smith testified regarding the events of December 19, 2012. Around 12:00 p.m. (Eastern) that day, Mr. Smith was informed by Chris McCormick that Complainant had called to say that "there was a forecast of a blizzard coming in later that night, and he was refusing to report to work and assess the conditions at that time." (Tr. 99-100). Complainant then called Mr. Smith approximately fifteen to twenty minutes later, and relayed that he had concerns about the forecasted weather conditions but was being told to wait and report to work to assess the conditions at that time. (Tr. 100). Mr. Smith discussed with Complainant various options if Complainant decided to try driving the route and advised on what he would do if going out in similar conditions, such as bringing extra blankets, food, water, and fuel. (Tr. 100-101). Further, Mr. Smith testified,

> I told him, if he tried it, and if it got too bad, he could turn around, come back, find a motel room. We would pay for the motel room. The thing we wanted him to do was—this was at noon east coast time. It wasn't going to hit until 7 o'clock east coast time. We wanted him to at least wait until the time that he would meet Eric and let us know what was going on then. You know, had, in fact, the blizzard come this way and it did what it was supposed to do, or did it fizzle out, exactly what was going on.

(Tr. 101). Mr. Smith did not tell Complainant that he had to start his route from Davenport at any point in the conversation. (Tr. 101). Rather, Mr. Smith informed Complainant that "if he did not wait until it was time to report to work, assess the conditions then and then let us know, he could possibly lose his employment." (Tr. 104). To his knowledge, Magnum Express did not contact the customer on December 19 to inquire whether the loads could be stopped that day. (Tr. 123).

Mr. Smith testified, "[Complainant] was terminated because he would not come and assess the conditions later on in the day like we asked him. He could have assessed the [weather] conditions from home. . . . He would have had the . . . same weather reports he said he sent to

Magnum at 11 o'clock, but it would have been updated." When asked whether Complainant would have been terminated if he had produced updated weather reports from 5:30 p.m. showing the same conditions, Mr. Smith responded, "I would say no." (Tr. 116). Mr. Smith also stated that Complainant would not have been terminated for refusing to drive at the time his shift began based on the weather conditions along the whole route, even if the conditions in Davenport were fine at that time. (Tr. 115-116).

When asked whether a forecast of six to twelve inches of snow is significant for driving a straight truck, Mr. Smith agreed that it could be. (Tr. 117). Additionally, wind impacts the straight truck "because of the height of the box." (Tr. 118). Mr. Smith acknowledged that a straight truck is not designed for overnight travel. (JX 1 at 146). He also acknowledged that a straight truck has a 50-gallon fuel tank, less than that of a semi-truck trailer, and runs on diesel fuel that "tends to gel up" in cold weather. (Tr. 109, 111-112). However, drivers can put fuel additives into the tank to prevent this, and many diesel trucks now have fuel recirculating engines that "help[] keep the fuel in the tank at a higher temperature than outside." (Tr. 109-111). Mr. Smith knew that the type of straight truck Complainant drove for Magnum Express was equipped with a fuel recirculating engine, having looked up the year, make, and model of the truck's cab and chassis. (Tr. 110). Mr. Smith "ha[d] no idea" if Complainant knew about this recirculation feature, but opined that "most professional drivers that have driven for any amount of time would [know], because they deal with the diesel engine in the winter." (Tr. 112). He noted that Complainant knew where all of the fuel stops and exits were because he always drove the same route. Further, Magnum Express provides drivers "an EFS fuel card so that they can fuel up whenever and wherever they need to." (Tr. 106).

When asked whether Magnum Express had ever disciplined a driver for refusing to drive due to a forecast of bad weather, Mr. Smith indicated that it depended on the timing of the refusal. Mr. Smith explained, "If he called in a day ahead of time, we would ask him to do the same thing: wait until it is time for you to leave, and then assess the situation." (Tr. 122). He estimated that he had terminated drivers for failure to report to work due to forecasted weather for the following day two or three times at most during his time with Magnum Express. (JX 1 at 157-58). Mr. Smith explained that Magnum Express's progressive discipline policy is not used in these scenarios because failure to report to work is considered a major issue. He elaborated, "The other times we write drivers up and then suspend them is for minor issues. Failing to report to work and assessing the situation would be put in the same category as failing a drug test." (JX 1 at 158). However, Mr. Smith later admitted that failing a drug test would be a more severe infraction. (JX 1 at 162-63).

Eric Haut

Eric Haut worked as a driver for Magnum Express in December 2012 and knew Complainant through this job. He voluntarily left his employment with Magnum Express in 2013 for personal reasons. At the time of the hearing, Mr. Haut had held a CDL and had been a professional driver for over seventeen years. (Tr. 126-129).

During the relevant period of his employment with Magnum Express, Mr. Haut's job was to drive the daytime leg of the dedicated route delivering pharmaceuticals to Walmart, while Complainant drove the nighttime leg. Mr. Haut picked up the straight truck at the Ryder facility

in Davenport and drove to Crawfordsville, Indiana, where he delivered empty containers and picked up the load. He then drove the load back to Davenport, stopping to deliver a portion of the load before handing the truck off to Complainant for the nighttime leg. (Tr. 129-30). Mr. Haut and Complainant drove the same vehicle on their respective legs of the route. (Tr. 131).

Mr. Haut testified about his route on December 19, 2012, which started out as a typical day. (Tr. 135). He conducted his pre-trip inspection in Davenport at the beginning of his shift and then drove to Crawfordsville. In Crawfordsville, he fueled the truck and then drove to Walmart to pick up the load. Mr. Haut spent an hour-and-a-half on the loading process at Walmart. He explained that the loading process should only take up to forty-five minutes if the order is ready, but often took longer because Walmart did not have the orders ready. (Tr. 134). He denied that Walmart was late with the order on December 19 due to weather conditions and stated that it was "[j]ust the normal Walmart slow day." (Tr. 136).

Mr. Haut spoke with Complainant at least twice on December 19 regarding the weather conditions, though he could not remember the specific times of the calls. (Tr. 136). He recalled the substance of the first call as follows: "[Complainant] told me specifically on two occasions [] that it was going to snow and that the weather was going to get bad. I do remember telling him that there's not a snowflake in the air yet, it is still clear, and that traffic and everything coming from Crawfordsville was fine." (Tr. 136-37). Additionally, Mr. Haut told Complainant, "[Y]ou need to at least come out and try . . . because they will probably fire you if you don't." During the second call, Complainant informed Mr. Haut that he had been terminated for refusing to drive, and Mr. Haut responded by asking him why he "didn't [] just come out and try?" When asked whether he told Complainant that he would try to get back to Davenport early on December 19, Mr. Haut responded, "I try to get back early every single time. We are at the mercy of Walmart." (Tr. 137).

Mr. Haut also had a telephone conversation with Bob Smith at some point during his leg of the route on December 19, in which he was asked to cover Complainant's leg of the route that night. Specifically, Mr. Smith directed Mr. Haut to "pick up what [he] could and try to get the stuff delivered. (Tr. 135).

Mr. Haut arrived back in Davenport with the load at 6:30 p.m. (Tr. 138). It was not yet snowing in Davenport when he arrived. (Tr. 139). He then unloaded some of the pallets, got signatures on the paperwork, and took off to drive Complainant's leg of the route. (Tr. 138-39). Mr. Haut checked the Weather Channel's report for Des Moines and checked the IDOT website when he left Davenport to "make sure that the road was open and it wasn't closed at that point." (Tr. 139, 148). He also inquired about the weather via the CB radio he kept in the truck and was informed that "it was passable and that it was snowing in Des Moines, but that was it." (Tr. 139). When he left Davenport around 7:00 p.m., the roads were "still clear" and the snow had started, but it was "just barely flurries at that time." (Tr. 139, 141). Mr. Haut testified that he felt it was safe to begin driving Complainant's leg of the route based on his professional driving experience. (Tr. 141).

From Davenport, Mr. Haut drove west toward Des Moines via I-80, which had a speed limit of 70 miles per hour. (Tr. 141-142). He stated, "I vaguely remember it snowing in Walcott or out past Walcott pretty good. But when I got back to Iowa City, it was clear again." (Tr. 139).

When asked how fast he was driving, Mr. Haut responded, "There was a time between Walcott and Iowa City, I did slow down some, 40 to 50 miles per hour. And then once I got past Iowa City, it was about 45, 50 miles per hour. So it was snowing." (Tr. 140). At times, Mr. Haut was able to drive at the 70 mile-per-hour speed limit. Mr. Haut stated that he saw plows on the road, despite there being only about an inch of snow accumulation, and commercial vehicles driving on both sides of the I-80. (Tr. 142-144). However, he also observed a couple of vehicles in the ditches along the road. (Tr. 149).

In discussing the weather conditions that evening, Mr. Haut testified, "I know it snowed, and it snowed heavy at times, but I drove in lots of weather. So, you know, I have seen terrible, terrible—I've seen highways shut down. I-80 was never shut down." (Tr. 147). He did recall that "travel was not advised," but explained that, "the Department of Transportation had a history of doing travel not advised, because they want their equipment to be out there to clear the road instead of having drivers out there [] clogging it up." Mr. Haut concluded that "for me, the roads were passable." (Tr. 149).

Mr. Haut ultimately stopped in Brooklyn, Iowa at 9:00 p.m. on December 19, when he ran out of allotted hours. (Tr. 140, 146). He stated that by the time he "got over to [Brooklyn,] where [he] stopped, it was snowing again." (Tr. 139-40). According to Mr. Haut, Brooklyn is approximately 100 miles from Davenport and the trip took two hours on December 19. (Tr. 140). Mr. Haut got a room at a hotel next to the fuel station in Brooklyn and left the locked truck parked at the fuel station overnight. Mr. Haut indicated that he stayed at the hotel for the duration of his required 10-hour break and left the next day to finish the route as soon as he was legally allowed. (Tr. 146).

In completing Complainant's leg of the route on December 20, Mr. Haut noted that it looked like the area from Des Moines to Omaha had gotten more snow than the area from Davenport to Brooklyn. (Tr. 149-50). He saw more vehicles in ditches along the road while driving from Brooklyn to Omaha. (Tr. 149). However, "the roads were fairly clear" by the time he began traveling on December 20. (Tr. 150). He completed the stops in Des Moines and Omaha, and then drove back from Omaha to Davenport. (Tr. 153). When asked whether he believed that it was safe to drive the route on December 20, Mr. Haut testified, "I'm not saying that [the roads] weren't slick in spots, but they were safe to drive by my opinion. I drove on them and I didn't get in a ditch, so they were safe for me." (Tr. 153-54).

Weather Reports and Data

JX 3 is a "News and Info" bulletin for Ames, Iowa from the IDOT website dated December 19, 2012. The bulletin states, "In advance of forecasted blizzard conditions in the state, the Iowa Department of Transportation is advising motorists that travel across the majority of Iowa is not advised from 8 p.m. tonight through noon Thursday, Dec. 20." It further advises, "In addition to heavy snowfall of 6 to 10 inches, very strong northwest winds (25-35 mph, with gusts exceeding 45 mph) will produce considerable blowing and drifting of snow and blizzard conditions late tonight through Thursday afternoon." It also warns that the strong winds may cause snow drifts several feet deep and "[v]isibility at times will be reduced to one-quarter mile or less to whiteout conditions." (JX 3 at 1).

JX 4 is a "Quality Controlled Local Climatological Data Hourly Observations Table"[12] for December 19, 2012, in Des Moines, Iowa, prepared by the National Climatic Data Center of the National Oceanic & Atmospheric Administration ("NOAA"), U.S. Department of Commerce. This table recorded the following pertinent weather data:

- 12:54 a.m. to 2:54 p.m.: mist (BR) and haze (HZ), with wind speeds ranging from 0 to 11 miles per hour ("MPH").
- 3:12 p.m.: first recorded precipitation, a mix of rain (RA) and snow (SN), with wind speeds of 16 MPH and wind gusts of 22 MPH.
- 3:44 to 3:54 p.m.: rain (RA) and haze (HZ), with wind speeds of 13 MPH and wind gusts of 23 MPH.
- 4:33 to 11:54 p.m.: snow (SN) and mist (BR) or fog (FG), with wind speeds of 10 to 23 MPH and wind gusts of 25 to 33 MPH.

JX 5 is a National Weather Service Alert "Blizzard Warning" for Des Moines, Iowa, dated December 19, 2012, accessed at accuweather.com. This alert states that a "blizzard warning remains in effect from 6 p.m. this evening until 6 p.m. on Thursday, [December 20,]" with "life threatening blizzard conditions [] expected to develop late tonight into Thursday." Precipitation will begin late afternoon into early evening as a mix of rain and snow, which will change to all snow by late evening December 19 or early morning December 20. A total snow accumulation of 6 to 12 inches is expected by Thursday morning, with the possibility of snow drifts several feet deep. The alert also warns of "very strong" winds of 25-35 miles per hour, with gusts over 45 miles per hour possible, and "visibilities near zero and whiteout conditions." Travel will be difficult or impossible due to blowing and drifting snow. Finally, the report notes, "A blizzard warning means severe winter weather conditions are expected or occurring." (JX 5 at 1).

JX 11 is "Quality Controlled Local Climatological Data Hourly Observations Table" for December 19, 2012 in Davenport, Iowa, prepared by NOAA. This table recorded the following pertinent weather data:

- 12:52 a.m. to 3:52 p.m.: mist (BR) or haze (HZ), with wind speeds of 0 to 15 MPH.
- 4:52 to 9:13 p.m.: rain (RA) or unknown precipitation (UP) and mist (BR), with wind speeds of 14 to 18 MPH and wind gusts of 21 to 24 MPH.
- 9:19 to 9:41 p.m.: thunderstorms in the vicinity (VCTS), mist (BR), and rain (RA) or snow (SN), with wind speeds of 13 to 15 MPH.
- 9:34 to 10:36 p.m.: snow (SN) and mist (BR) or fog (FG), with wind speeds of 14 to 21 MPH and wind gusts of 23 to 24 MPH.
- 10:50 to 11:36 p.m.: freezing rain (FZRA) and mist (BR), with wind speeds of 16 to 23 MPH and wind gusts of 29 to 31 MPH.
- 11:52 to 11:59 p.m.: thunderstorms in the vicinity (VCTS), mist (BR), and rain (RA) or freezing rain (FZRA), with wind speeds of 11 to 16 MPH and wind gusts of 21 MPH.

[12] NOAA's Hourly Observations Tables contain multiple abbreviations, the meanings of which are not readily apparent. An explanation of the format and abbreviations used in these datasets are available on NOAA's website at https://www1.ncdc.noaa.gov/pub/data/cdo/documentation/LCD_documentation.pdf.

CX 1 is a "Traveler Information" posting from the IDOT website dated December 19, 2012, with time markers indicating that the relevant information was updated at 8:55 p.m. At that time, travel was not advised on I-80 between Davenport and Omaha. (CX 1 at 1, 3). In addition to the I-80, travel was not advised across virtually all major highways statewide. (CX 1 at 2).

Magnum Express Documents and Records

On December 19, 2012, at 1:34 p.m., Chris McCormick sent an email to a "Termination" email group stating that Complainant "has been terminated for refusing dispatch due to possible bad weather." (JX 13 at 1). By letter dated December 19, 2012, Bob Smith provided written confirmation to Complainant that his employment with Magnum Express had been terminated effective that date. (JX 12 at 1).

Eric Haut's Daily Log for December 19, 2012, submitted as JX 14, shows the following schedule on that date: Off-duty from 12:00 -7:30 a.m.; On-duty performing pre-trip inspection in Davenport from 7:30-8:00 a.m.; driving from 8:00 a.m. to 12:30 p.m.; on-duty fueling and loading the truck from 12:30-2:00 p.m.; driving from 2:00-6:30 p.m.; on-duty unloading the truck in Davenport from 6:30-7:00 p.m.; driving from 7:00-9:00 p.m.; on-duty performing post-trip inspection in Brookland, Iowa, from 9:00-9:30 p.m.; and off-duty from 9:30-11:59 p.m. (JX 14). Mr. Haut's time sheet for the week ending December 22, 2012, reflects that he was on-duty for a total of 14 hours, from 7:30 a.m. to 9:30 p.m., on December 19. (JX 19).

JX 18 is an email chain between Mr. Smith and Mr. Haut dated February 26, 2014, in which Mr. Haut confirms that he received reimbursement from Magnum Express for the cost of his motel room in Brooklyn, Iowa on December 19, 2012. (JX 18).

JX 2 is Respondent's response to Requests for Admissions. Respondent acknowledges that the distance between the Des Moines drop-off location and the Omaha drop-off location on Complainant's route was approximately 140 miles. Respondent also admits that Chris McCormick and Bob Smith were both located in Indiana on December 19, 2012. (JX 2 at 4).

Legal Framework

The STAA's whistleblower protection provisions provide, in general, that a covered employer "may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment," because the employee engaged in certain protected activities. 49 U.S.C. § 31105(a)(1). To prevail on a STAA whistleblower complaint under the applicable burden-of-proof framework,[13] a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer took an adverse action against him, and that the protected activity was a contributing factor in the unfavorable personnel action alleged. 49 U.S.C. § 42121(b)(2)(B)(iii). If Complainant fails to prove any one of these elements, the entire complaint fails. *See, e.g.*, *Coryell v. Ark. Energy Servs., LLC*, ARB No. 12-033, ALJ No. 2010-STA-042, slip op. at 4 (Apr. 25, 2013). If the complainant makes this showing, the employer can avoid liability by demonstrating with clear

[13] The current version of the STAA provides that whistleblower complaints shall be governed by the legal burdens of proof set forth in the whistleblower protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121(b)(2)(B)(i). 49 U.S.C. § 31105(b)(1).

and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected conduct. 49 U.S.C. § 42121(b)(2)(B)(iv).

As is relevant here, the STAA protects employees from retaliation for "refus[ing] to operate a vehicle because (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health, or security; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition." 49 U.S.C. § 31105(a)(1)(B). Subsection (1)(B)(i) is commonly referred to as the "actual violation" subsection and deals with conditions as they actually exist, while subsection (1)(B)(ii) is known as the "reasonable apprehension" subsection and deals with conditions as a reasonable person would believe them to be. *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, OALJ No. 2005-STA-002, slip op. at 5 (Sept. 30, 2008).

Findings of Fact and Conclusions of Law

As there is no dispute that Complainant suffered an adverse employment action when he was fired, the initial, and most critical, issue is whether Complainant has established that he engaged in protected activity.

Complainant posits that he engaged in protected activity under the reasonable apprehension subsection of the STAA's refusal to operate clause on or about 11:00 a.m. on December 19, 2012, when he informed Magnum Express that he was unwilling to begin his route later that evening due to his reasonable concern that driving the straight truck in inclement weather conditions would be unsafe.[14] Respondent disagrees, arguing that Complainant's actions are outside the scope of the STAA because he was terminated for refusing to report to work to assess the driving conditions, rather than for refusing to operate his truck. Alternatively, Respondent contends that any apprehension of injury that Complainant may have had was objectively unreasonable under the STAA's reasonable apprehension standard.

I. Whether Complainant's Actions Constitute a Refusal to Operate

Respondent submits that Complainant's actions are outside of the scope of the STAA's protections for refusing to "drive." Respondent argues "[i]t is undisputed that Complainant's employment was terminated because he refused to wait and see if the weather forecast materialized before making his decision on whether to drive," rather than because he refused to drive. (Resp't Br. at 2). Respondent emphasizes that Complainant was never told by Magnum Express that he was required to start driving his route that night, and that he could have simply assessed the conditions from his house at the time his duty was to begin. (Resp't Br. at 12-13). It avers, "The STAA affords protection to a driver who refuses to drive when operation of a vehicle violates the law or gives rise to a reasonable apprehension of serious injury, not a driver who refuses his employer's request to wait and assess weather conditions closer to the time of his scheduled departure before deciding whether to drive." Because Complainant was terminated for

[14] Because the parties appear to agree that the reasonable apprehension subsection is the only applicable provision, I do not determine whether Complainant's conduct was protected under the actual violation subsection of the refusal to operate clause.

refusing to report to work to assess conditions, and not for refusing to drive, his actions are not encompassed by the STAA's protections. (Resp't Br. at 13).

Complainant challenges Respondent's argument as unsupported, noting that "the STAA applies to drivers who refuse to operate a vehicle and does not specify a time or require an employee to report to work." Further, Complainant states that the case cited by Respondent in support of its position relied on different facts than present here. Specifically, "[i]n this case, there is no dispute that [Complainant] contacted [Magnum Express] and informed it of the weather conditions and his concerns about the weather conditions, prior to the time he was supposed to drive." (Compl. Resp. at 1).

As noted by both parties, the materials facts regarding Complainant's conduct on December 19 are essentially undisputed. Around 11:00 a.m. on December 19, 2012, Complainant sent a text message to Mr. McCormick stating that he would not be making his deliveries to Walmart that evening because he was uncomfortable driving the straight truck in hazardous blizzard conditions. Complainant made similar statements to Mr. McCormick and Mr. Smith during his telephone conversations with them at around 11:00 a.m. and 1:00 p.m., on December 19, 2012 and during his telephone conversation with Mr. McCormick in which he was informed of his termination. When asked by Mr. McCormick and Mr. Smith to at least attempt to drive the route and stop if necessary, Complainant refused because "taking the straight truck out into those weather conditions was not something [he] felt safe doing." (Tr. 28-29, 32-35; JX 1 at 49-55; JX 17 at 25-48). In response to Mr. Smith's statement that he could be terminated if he did not "show up and assess the circumstances" at his time of duty, Complainant refused to report for duty because he "wasn't willing to go out" in the straight truck. (Tr. 58-59; JX 17 at 43-46).

Complainant's account of these conversations is confirmed by Mr. Smith's testimony admitting that he was informed by Mr. McCormick and by Complainant that Complainant was refusing to report to work because of his concerns about driving in the forecasted blizzard conditions. (Tr. 99-101; JX 1 at 126-127). Complainant's account is also corroborated by Mrs. Treur, who testified that she overheard Complainant state that he did not want to drive in the storm during his telephone calls to Magnum Express, and by Mr. Haut, who testified that Complainant told him that he had refused to drive because of the snow. (Tr. 70, 136-137; JX 1 at 98; JX 20 at 11-12). Thus, the entirety of the testimonial evidence is consistent regarding the Complainant's conversations with Magnum Express from 11:00 a.m. to 1:00 p.m. on December 19, 2012. Based on this undisputed evidence, I find that Complainant informed Magnum Express about six hours prior to his scheduled dispatch on December 19, 2012, that he would not begin driving his route that evening because he was concerned about the hazardous blizzard conditions along the route.

Under the circumstances presented here, the cases cited by Respondent in support of its argument are inapposite. In *LaRosa v. Barecelo Plant Growers, Inc.*, the ARB held that the Complainant did not engage in a refusal to drive under the STAA because he "never expressly refused to take the 3:00 a.m. run, he just did not show up." Case No. 1996-STA-010, slip op. at 3 (ARB Aug. 6, 1996). In so holding, the ARB reasoned that it cannot simply assume that the employer "was aware, not only of the fact that [Mr. LaRosa] could not take the 3:00 a.m. run, but that the reason for refusing to take the run was safety related." *Id.* In contrast, I find that, on

December 19, 2012, Complainant repeatedly informed his supervisors at Magnum Express that he refused to begin driving his route that evening due to his concern about the weather conditions. In other words, it is clear from the weight of the evidence that Complainant actually informed Magnum Express of his refusal to report to work to begin driving his route and of the safety basis for his refusal.

The other case cited by Respondent, *Calhoun v. United Parcel Service*, ALJ No. 2002-STA-031 (ALJ June 2, 2004), actually undermines its position that Complainant's refusal to report does not constitute a refusal to operate. In that case, the ALJ found that the Complainant engaged in a refusal to operate despite that his refusal was conditioned on his ability to conduct personal inspections of his truck prior to driving and that he eventually drove his vehicle. *Calhoun*, ALJ No. 2002-STA-031, slip op. at 23-24. As the ALJ's determination in *Calhoun* illustrates, the term "operate," as used in the Act's refusal to operate clause, is broadly defined and is not coextensive with the term "drive." Thus, "[c]ertain refusals or insubordinate acts arising out of the complainant's employment as a truck driver may be covered under the 'refusal to operate' clause even where the activity does not strictly constitute a refusal to operate the vehicle." *Maddin v. TransAm Trucking, Inc.*, ARB No. 13-031, ALJ No. 2010-STA-020, slip op. at 8 (Nov. 24, 2014), *aff'd sub nom TransAm Trucking, Inc. v. Admin. Review Bd., U.S. DOL*, 833 F.3d 1206, 1212 (10th Cir. 2016) ("The ARB's interpretation of § 31105(a)(1)(B)(ii) furthers the purpose of the STAA by prohibiting an employer from discharging an insubordinate employee whose insubordination was motivated by the employee's reasonable apprehension of serious injury to himself or members of the public."); *see, e.g., Beveridge v. Waste Stream Envtl., Inc.*, ARB No. 97-137, ALJ No. 1997-STA-015 (ARB Dec. 23, 1997); *McGavock v. Elber, Inc.*, Case No. 1986-STA-005 (Sec'y July 9,1986). To the extent that Respondent's argument implies that the STAA protects only refusals to drive in a narrow sense, precedent clearly refutes this position. Although Complainant did not refuse to drive his vehicle at the time he was to actually begin his route, his refusal did arise out of his employment as a truck driver for Magnum Express and falls within the broad ambit of the STAA's refusal to operate clause.

I thus reject Respondent's argument that Complainant's refusal to report to work is outside the scope of the STAA's refusal to operate clause. I find that between 11:00 a.m. and 1:00 p.m. on December 19, 2012, Complainant informed Magnum Express that he refused to report to work that evening because he was unwilling to begin driving his route due to hazardous weather conditions. Respondent does not suggest, nor does the evidence support, that Complainant's job duties on December 19 involved anything other than driving the delivery route and attendant tasks, such as conducting the pre-trip inspections and unloading the product. Rather, as Mr. McCormick and Mr. Smith's instructed, Complainant was expected to assess the weather conditions at the beginning of his tour of duty and either attempt the route or make a decision not to based on the weather conditions existing at the time. Complainant refused to do so because he had already determined at 11:00 a.m. that driving the straight truck that evening would be unsafe based the information he knew at that time.[15] While the most prudent course of action may have been to wait until closer to when he was to begin his leg to determine whether

[15] During his deposition, Complainant aptly summarized the relationship between his reporting to work and driving the route in testifying about his response to Mr. McCormick's instruction to report to work to assess the weather conditions at that time: "I said I wasn't willing to take the truck out into the blizzard. And so reporting to work, I mean, I only had one job to do. So reporting to work is something that I wasn't willing to do." (JX 17 at 43).

driving would be safe, the refusal to operate clause contains no limitations when a refusal must be made. While it may affect the reasonableness of his apprehension of serious injury, the fact that Complainant made a determination that beginning his route was unsafe several hours before his tour of duty was to begin does not negate the fact that he refused to drive his scheduled route on December 19, 2012 due to safety concerns.

Respondent's argument that Complainant was terminated for refusing "to wait and see if the weather forecast materialized" before refusing to drive is based implicitly on the premise that a refusal to drive due to future weather conditions is outside the scope of the STAA if contrary to an employer's instruction. This position is fundamentally at odds with precedent interpreting the reasonable apprehension subsection to encompass "refusals to drive in the hazardous weather conditions in the future (or prior to dispatch) because 'logic and common sense require that the driver can refuse to begin his assigned trip if he is aware that he will encounter hazardous road conditions.'" *Treur*, ARB No. 15-001, slip op. at 7 (quoting *Robinson v. Duff Truck Line, Inc.*, 1986-STA-003, slip op. at 3 (Sec'y Mar. 6, 1987)). As the Board has stated in this case,

> [A]n employee who refuses to drive an assigned route prior to dispatch because of forecasted inclement weather does not automatically lose protected status because similar inclement weather conditions do not exist at the location and time when the driver informs his or her employer of his refusal to drive. In other words, contrary to the ALJ's ruling, failure to assert existing weather conditions as grounds for refusing to drive does not necessarily preclude finding that an employee's refusal to drive in the future is protected.

Treur, ARB No. 15-001, slip op. at 8. If employers were permitted to require drivers to assess the safety of driving based on existing conditions, refusals to drive based on forecasted conditions would be precluded from protection, which is antithetical to the purpose of the STAA. Under the circumstances, Complainant's refusal to report to work and assess weather conditions at the time of his shift equates to a refusal to drive based on forecasted conditions.

II. Whether Complainant's Refusal to Operate was Based on a Reasonable Apprehension of Serious Injury

Because Complainant's refusal report to work to begin his route on December 19, 2012 constitutes a refusal to operate, I must now determine whether his refusal was based on a "reasonable apprehension of serious injury to [himself] or the public because of the vehicle's hazardous safety or security condition." 49 U.S.C. § 31105(a)(1)(B)(ii).

In establishing a protected refusal under the reasonable apprehension subsection, an employee must demonstrate that he had an objectively reasonable apprehension of serious injury by showing that "a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health."[16] 49 U.S.C. § 31105(a)(2). As discussed

[16] Additionally, to qualify for protection under the reasonable apprehension subsection, the employee "must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition." 49 U.S.C. § 31105(a)(2). When a driver notifies the employer that he is refusing to drive because of current or forecasted hazardous weather conditions, this notification serves as the driver's seeking a correction under the

above, a driver aware of impending hazardous weather conditions forecasted along his route may be found to have a reasonable apprehension of serious injury to himself or the public should he drive in those conditions. "All of the circumstances surrounding a refusal to drive – including but not limited to existing conditions, weather forecasts, timing, the condition and nature of the vehicle, and the driver's experience – must be considered in determining the reasonableness of the driver's refusal and whether the refusal constitutes protected activity." *Treur,* ARB No. 15-001, slip op. at 8.

The Secretary of Labor's determination in *Robinson v. Duff Truck Line, Inc.* is illustrative.[17] In that case, the Complainant called a dispatcher at Duff Truck Line around 3:00 or 4:00 p.m. to "report off" his run that evening, which typically began at 8:30 p.m., because it had begun to snow and television stations were reporting advisories against driving on the highways along his route. Around 6:00 p.m., Duff's branch manager called Mr. Robinson to advise that his refusal would be considered a voluntary quit, to which the Complainant protested. Complainant was then informed by his union steward that the state highway patrol stations reported that one highway on his route was closed and another was almost impassable. When the Complainant continued to refuse to drive before he was scheduled to report to work, the branch manager mailed him a letter advising that the refusal to drive was considered a voluntary quit. *Robinson*, Case No. 1986-STA-003, slip op. at 1-2. The Secretary held that the Complainant had a reasonable apprehension of serious injury because a reasonable person faced with the circumstances confronting him at the time of his refusal would conclude that there was a bona fide danger of accident or injury. *Id.*, Case No. 1986-STA-003, slip op. at 9-10. In so holding, the Secretary relied on the following facts:

> Robinson observed the snow and ice and the conditions of the roads around his house. He heard the weather warnings advising against driving on the highways he would have had to take. He was familiar with the roads, having driven the Lima run five days a week for ten or eleven years, and on many occasions had driven that route in ice and snow. Furthermore, as indicated above, he knew the driving problems presented by his tractor and how much more dangerous the tractor became on icy and snowy roads. Robinson's refusal to drive was thus based on his personal observations of existing weather conditions, on weather reports and a traveler's advisory, on his long personal experience with the route and on his personal experience with the tractor that he was assigned to drive.

STAA. *Robinson*, Case No. 1986-STA-003, slip op. at 10; *see also Eash v. Roadway Express, Inc.*, ARB Nos. 02-064, 02-008, ALJ No. 2000-STA-047, slip op. at 7 (June 27, 2003); *Yellow Freight Sys., Inc. v. Reich*, 38 F.3d 76, 84 (2d Cir. 1994).

[17] Although the decision in *Robinson* and other cases issued before 1994 interpret statutory language that is different from the STAA's current provisions, both versions contain an actual violation clause and a reasonable apprehension clause with similar language. The reasonable apprehension clause of the former iteration of the STAA protected refusals to operate a vehicle "because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition.'" *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1062-63 (5th Cir. 1991) (quoting 49 U.S.C. App. § 2305).

> Additionally, Robinson received no information from [branch manager] Abell or any other Duff official as to weather conditions, which might have led Robinson to alter his assessment of the danger of driving his assigned trip.

Id., Case No. 1986-STA-003, slip op. at 9.

Complainant here claims that he "reported to [Magnum Express] that he had an apprehension of serious injury to himself and the public on December 19, 2012, and his apprehension was reasonable," both subjectively and objectively. (Compl. Resp. at 3; Compl. Br. at 11). Complainant avers, "A reasonable person in [his] circumstances would have concluded, as did [he] 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 [himself] or the public." (Compl. Br. at 11). He posits that the case is "virtually on all fours" with the *Robinson* case, and cites the following as facts supporting this position: Complainant "heard the weather warnings advising against driving on the I-80, the highway he would take, he was familiar with the roads and had driven them in ice and snow;" Complainant "knew the driving problems presented by driving a straight truck and how much more dangerous the straight truck became on icy and snowy roads;" and Magnum Express provided Complainant with no information on weather conditions that "may have led [him] to alter his assessment of the danger of driving his assigned trip." (Compl. Br. at 9). Although Complainant "did not see snow or freezing rain falling around his hours in Davenport," this fact is irrelevant because "the majority of [his] job duties on December 19[] were to occur outside Davenport, [and] therefore the current conditions in Davenport were not indicative of the hazards he would face on his route." (Compl. Br. at 8-9). Complainant states that "the weather was already bad in Omaha and Des Moines" when he woke up on December 19 and that, "at the time the blizzard warning was to take effect[,] he would have been approximately an hour into his drive and in the path of the blizzard, complete with snow and high winds." (Compl. Br. at 9; Compl. Resp. at 2).

Respondent counters that Complainant has failed to establish that he had an objectively reasonable apprehension of serious injury. Respondent cites the following as facts in support of its contention that Complainant has not met the STAA's reasonable apprehension test: "Complainant had no knowledge of actual adverse weather conditions in Des Moines or Omaha" at the time of his refusal; the weather forecast on which Complainant based his refusal indicates that the travel advisory was not to begin until 8:00 p.m., nine hours after Complainant's initial refusal; Magnum Express attempted to alleviate Complainant's concerns by giving him more time to make a determination on whether to drive; and Complainant had "numerous safeguards at his disposal in the event he elected to drive," including the ability to return to Davenport or get a hotel room at Magnum Express's expense. (Resp't Br. at 14-17). Respondent concludes, "A forecast for inclement weather in seven hours, when the weather conditions at the departure location and first delivery stop are fine, does not constitute a hazardous condition confronting the driver, much less one that establishes a 'real danger' of accident, injury, or serious impairment to health." (Resp't Resp. at 2).

I note that the parties appear to dispute some of the facts material to the issue of whether Complainant had a reasonable apprehension of serious injury. That is, they disagree both on what the circumstances confronting Complainant were at the time of his refusal and whether a reasonable individual in those circumstances would conclude that the hazardous condition

establishes a real danger of accident, injury, or serious impairment to health. For the sake of clarity, I first determine what the circumstances confronting Complainant at the time of his refusal were, and then evaluate whether his apprehension of serious injury was objectively reasonable under those circumstances.

a. Circumstances Confronting Complainant at the Time of Refusal to Operate

Based on my review of the entire record, I have made the following factual findings pertinent to the issue of what circumstances confronted Complainant on December 19, 2012 at the time of his refusal to drive, around 11:00 a.m. to 1:00 p.m.

First, I find that the weather in the Davenport area, where Complainant was to begin his route, was clear between 11:00 a.m. to 1:00 p.m. on December 19. Complainant has consistently testified that the weather in Davenport was "clear and fine" at the time of his communications with Magnum Express on December 19, that there was no snow, and that the roads were "drivable." (*See* Tr. 64; JX 1 at 39; JX 17 at 39). Complainant's testimony is corroborated by Mrs. Treur, who confirmed that the weather in Davenport "was fine" the morning of December 19, (*See* Tr. 78; JX 20 at 10), and by the NOAA climatological data for Davenport, which shows that there was no precipitation or winds above 15 miles per hour in Davenport until 4:52 p.m. on December 19. (JX 11 at 1).

Second, I have resolved the conflicting testimonial and documentary evidence regarding Complainant's knowledge of the actual weather conditions between Des Moines and Omaha on December 19, 2012. Complainant's testimony at the hearings and his deposition is internally and externally inconsistent regarding his knowledge of the existing conditions along the route and the source of this knowledge. At various points, he has testified to the following regarding the conditions in Omaha and Des Moines around 11:00 a.m. to 1:00 p.m.: that actual bad weather conditions had already existed in both Omaha and Des Moines;[18] that actual bad weather conditions were already present in Omaha, but there was only a blizzard warning in Des Moines forecasting bad weather to begin around 6:00 p.m.;[19] and that there were only blizzard warnings for both Omaha and Des Moines.[20] Likewise, he has testified to the following regarding the basis of his knowledge of the existing weather conditions in Des Moines and Omaha around 11:00 a.m. to 1:00 p.m.: that his knowledge of the existing inclement conditions in Omaha was from reports and camera feeds on IDOT's website that he did not print out, send to Magnum Express, or submit into evidence;[21] that his knowledge of the existing inclement conditions in Omaha and

[18] For example, Complainant testified, "[T]he weather at that point at 11:00 a.m. was already bad in Omaha and Des Moines, and . . . nobody should be travelling even at 11:00 a.m. on those road conditions because the road conditions were bad." (JX 1 at 37; *see also* JX 1 at 49-51, 54; JX 17 at 30, 75-76).

[19] For example, Complainant testified, "[I]n Omaha, Nebraska, [] the weather had already turned significantly bad at that location," and "there was a blizzard warning already posted for Des Moines . . . where it was heading to Des Moines, Iowa, by 6 o'clock." (Tr. 25; *see also* Tr. 28, 31, 54, 65; JX 1 at 75-76).

[20] Complainant testified, "[T]here [was] blizzard warnings up for Des Moines, Iowa, and Omaha, Nebraska." (JX 1 at 77).

[21] For example, Complainant testified, "I don't have any information . . . printed off to provide the Court today. When I was talking to Magnum Trucking at the time on the IDOT website at 11:00 a.m., the weather conditions

Des Moines was from the IDOT reports that he printed and faxed to Magnum Express around noon on December 19;[22] and that he had no knowledge of the existing conditions in Des Moines because he only knew that there was a blizzard warning issued for that area.[23] These inconsistencies greatly diminish the credibility of Complainant's testimony that he knew of existing adverse weather conditions in Omaha and Des Moines at the time of his refusal.

Mrs. Treur's testimony contains similar inconsistencies. Mrs. Treur has testified that around 11:00 a.m. to 1:00 p.m.: Des Moines and Omaha had already been hit with bad weather;[24] and that Des Moines had not yet been hit with bad weather, but inclement conditions already existed in Omaha.[25] Mrs. Treur was also unclear regarding the source of any knowledge about the actual conditions in Omaha and Des Moines during the relevant period. At various points, she testified that: she got information about the weather from both the IDOT website and the television news;[26] that her only source of information about the weather was the IDOT website, and she did not watch any television news;[27] that the documents she printed provide information regarding current weather conditions along the route; that she did not print any documents showing the actual conditions in Omaha around 11:00 a.m. to 1:00 p.m.; and that she printed one document showing that it was snowing in Omaha around 11:00 a.m. to 1:00 p.m. and that the purpose of printing documents was "[t]o fax over to Magnum to show that there was bad weather in Omaha."[28] Thus, while Mrs. Treur's testimony somewhat corroborates Complainant's varying

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were already bad in Omaha, Nebraska, at that point," (Tr. 65) but did not retain any such documents because he "thought that the dispatcher and [Mr. Smith] [were] also looking online with me, on [I]DOT website with me, and [saw] the current weather conditions . . . like I was." (Tr. 60-61; *see also* Tr. 31-32, 49, 54).

[22] For example, when asked whether he knew what the weather conditions were like in Omaha and Des Moines despite not being physically present, Complainant testified, "Yes. I looked up on the IDOT website. That was one of the documents I faxed at noon to Magnum, stating that weather in Omaha and Des Moines, Iowa, was already bad at noon and would continue to get worse throughout the night." (JX 1 at 45; *see also* JX 1 at 64, 70-71, 79; JX 17 at 27-28, 39-40). Complainant further explained, "I know I printed these out and faxed them to [Mr. McCormick] because I wanted him to have – if he wasn't able to for some reason look up the [I]DOT website himself on his computer, I wanted him to have the information in his hand so that he could have something to send to the customer . . . [to] understand why I wasn't able to go out." (JX 1 at 39).

[23] For example, Complainant testified, "At the time I first contacted Magnum Trucking there was a blizzard warning up for Des Moines, Iowa. . . . I didn't know about the actual conditions." (JX 1 at 93; *see also* Tr. 64-65).

[24] For example, Mrs. Treur testified that around 11:00 a.m., "Des Moines and west had been hit by a storm, snowstorm; there was winds 50 to 60 miles per hour; and that the DOT were not even allowing plows on the road because of the wind and the snow, how thick it was coming down." (JX 1 at 104; *see also* Tr. 68; JX 1 at 108-09).

[25] For example, when asked about the weather conditions in Des Moines around 11:00 a.m., Mrs. Treur testified, "[I]t had not hit Des Moines yet. It was in Omaha." (Tr. 78; *see also* Tr. 69).

[26] For example, when asked whether she only looked at weather reports on the internet on December 19, Mrs. Treur replied, "There was some weather on the news too." (Tr. 73) (*see also* Tr. 74).

[27] For example, when asked whether she watched the weather on December 19, she responded, "I didn't watch it on the news. I looked it up on the [I]DOT website," (JX 1 at 98; *see also* JX 1 at 101).

[28] When asked whether she printed any documents showing that it was snowing in Omaha at 11:00 a.m., Mrs. Treur responded, "No. I don't think so. I'm sorry, I don't remember. I don't remember what time. I printed one off. It was, like, at 11:30, 12 o'clock, I want to say, I printed something off. I'm sorry. The times, they are just going through

accounts, her testimony is not particularly helpful in determining what Complainant knew of the actual conditions on his route because it is likewise inconsistent.

Despite the many inconsistencies in their testimony, Complainant and Mrs. Treur have both consistently stated that they reviewed and printed the IDOT News and Info bulletin submitted as JX 3 around midday on December 19, 2012. They may have also reviewed and printed the National Weather Service's Blizzard Warning submitted as JX 5.[29] In contrast, the Traveler Information submitted as CX 1 could not have been reviewed or printed during the period of 11:00 a.m. to 1:00 p.m., given that it is marked as having been updated at 8:55 p.m. Further, both Complainant and Mrs. Treur indicated that they faxed the printed materials to Mr. McCormick as evidence of bad weather on the route in case "he wasn't able to for some reason look up the [I]DOT website himself on his computer." (JX 1 at 39; *see also* Tr. 69; JX 1 at 64, 70-71, 79; JX 17 at 27-28, 39-40). Thus, regardless of their inconsistent testimony on the significance of these documents and on whether they reviewed other materials not submitted into evidence, I conclude that Complainant's understanding of conditions along the route at the time of his refusal came, at least in part, from JX 3 and JX 5.

However, JX 3 and JX 5 indicate only that a blizzard warning was to be in effect for Des Moines beginning around 6:00 p.m., with a travel advisory beginning at 8:00 p.m., due to the predicted snow, wind and whiteout conditions. While Complainant's testimony regarding the significance of JX 3 and JX 5 is contradictory,[30] I find that JX 3 and JX 5 cannot be reasonably read as containing any information about the conditions existing in Des Moines at the time he printed the documents midday on December 19. Specifically, both documents: clearly state that the blizzard warning goes into effect from 6:00 p.m. on December 19 to 6:00 p.m. on December

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my head not the right way." (Tr. 69). Although she testified that her purpose in printing weather reports on December 19 was to send to Magnum as evidence of bad weather in Omaha, (Tr. 69), Mrs. Treur also testified that she saw weather reports showing existing road closures and inclement weather in Omaha the morning of December 19 but "did not print that off." (Tr. 76). When asked why she did not print any information the conditions in Omaha at 11:00 a.m., she responded, "At that point, we didn't know – we discussed over the last couple of – over a few hours what we were going to do about it, and then that's when we decided to print the actual report I had." (Tr. 77).

[29] For the purpose of this analysis, I have assumed that Complainant had printed JX 5 at the time of his refusal. However, I note that neither Complainant nor Mrs. Treur was clear on what time they saw JX 5 or whether it was faxed to Magnum Express on December 19. As fully explained herein, JX 5 cannot reasonably be read as reporting contemporaneous blizzard conditions in Des Moines. Thus, regardless of what time Complainant saw JX 5 on December 19, I cannot infer from JX 5 that Complainant knew of existing blizzard conditions on his route at the time of his refusal. Accordingly, I need not decide whether Complainant had printed and reviewed JX 5 around 11:00 a.m. to 1:00 p.m. on December 19.

[30] Complainant stated that the blizzard warnings, submitted into evidence as JX 3 and JX 5, "do[n]'t say anything about current conditions." (JX 1 at 74; *see also* Tr. 48, 50; JX 1 at 45, 68-73, 93). He also agreed that in his experience looking at weather forecasts, warnings take effect before actual events occur. (JX 1 at 69). However, when asked whether there was any evidence of snow conditions between 11:00 a.m. and 1:00 p.m. on December 19, Complainant testified, "According to what we've admitted here today, me, personally, yes, I think we do. We have blizzard warnings up for Des Moines, Iowa, and Omaha, Nebraska. And as a professional driver, even if you get word that there is a blizzard where you are going to, you don't drive it into the blizzard." (JX 1 at 79; *see also* JX 1 at 43, 64). He also affirmed that JX 3 and JX 5 indicate that there was existing snow and white-out conditions. (*See* JX 1 at 71, 80; JX 17 at 40). I need not reconcile Complainant's conflicting testimony about his subjective understanding of JX 3 and JX 5 as I have found that these documents cannot be reasonably interpreted as containing any information on the existing conditions in Des Moines or Omaha. Thus, even if Complainant understood JX 3 and JX 5 as such, his interpretation could not support an objectively reasonable apprehension of serious injury.

20, with a travel advisory in effect from 8:00 p.m. on December 19 to noon on December 20; discuss possible snow accumulation and wind speeds in the future tense; and state that the listed conditions are "expected" or "will be possible." This language can only be reasonably interpreted as a forecast of severe winter weather conditions in Des Moines, predicted to begin around 6:00 p.m. Further, JX 3 and JX 5 contain no absolutely information about the current or forecasted weather in Omaha. Because these documents contain no information about the current weather in Des Moines or Omaha, JX 3 and JX 5 contradict Complainant and Mrs. Treur's testimony that the reports they printed and faxed to Magnum Express midday on December 19 were the source of their knowledge of existing inclement conditions along the route from Davenport, Iowa to Omaha, nebraska.

Additionally, Complainant's testimony that the weather was already bad in Des Moines at the time of his refusal is contradicted by the NOAA climatological data submitted as JX 4. JX 4 shows that the weather in Des Moines was misty with wind speeds mostly in the single digits during the period of 11:00 a.m. to 1:00 p.m. on December 19, and there was no precipitation of any kind or wind exceeding 11 miles per hours in Des Moines until 3:12 p.m. (JX 4 at 1). I find NOAA's climatological data to be an extremely reliable indicator of the actual weather conditions occurring at each listed time. This credible evidence that snow and high winds did not begin in Des Moines until 3:12 p.m., at the earliest, undercuts Complainant's testimony that he knew of existing blizzard conditions in Des Moines at the time he was communicating with Magnum Express. Specifically, although Complainant did not review JX 4 on December 19 and does not claim to have known the information contained therein at the time of his refusal, the fact that snow and wind conditions were not actually occurring in Des Moines during the period of 11:00 a.m. to 1:00 p.m. make it unlikely that Complainant would have seen any reports to the contrary at the time of his refusal.

Further, the lack of documentation regarding the current weather conditions in Omaha or Des Moines during the period of 11:00 a.m. to 1:00 p.m. undermines the portions of Complainant and Mrs. Treur's testimony indicating that they saw reports of existing inclement conditions. Complainant testified that he did not print any documentation of the current conditions in Omaha at the time of his refusal because he thought that Mr. McCormick and Mr. Smith were "also looking online, [] on the [I]DOT website with me, and see[ing] the current weather conditions . . . like I was." (Tr. 60-61). However, this proffered explanation is contradicted by his testimony that he printed JX 3 and JX 5 for the purpose of sending to Mr. McCormick as proof of inclement conditions in case Mr. McCormick could not look up this information on IDOT's website himself. (*See* JX 1 at 39). Similarly, Mrs. Treur's statement that they did not print any documentation of the weather in Omaha at 11:00 a.m. because they hadn't decided "what [they] were going to do about it" is contradicted by her testimony that their purpose in printing weather reports was "[t]o fax over to Magnum to show that there was bad weather in Omaha." (Tr. 69). Given Complainant's statements that the existing weather conditions in Omaha were a basis for his refusal, and that they later printed CX 1 showing conditions in Omaha and throughout Iowa, Complainant and Mrs. Treur clearly understood that the weather conditions in Omaha and west of Des Moines were relevant to their assessment of whether it would be safe for Complainant to drive. In fact, Mrs. Treur even testified that the reason they printed documentation to fax to Magnum Express midday on December 19 was "to show that there was bad weather in Omaha." (Tr. 69). Given that Complainant did print JX 3 and JX 5 as documentation of the Des Moines blizzard forecast around noon on December 19 to

show Magnum Express that conditions would be too dangerous to drive that evening, and that he knew conditions in Omaha were relevant to this showing, I find that Complainant would have printed and retained any reports of existing bad weather conditions in Omaha and Des Moines seen around 11:00 a.m. to 1:00 p.m. on December 19. His failure to do so suggests that he, in fact, did not see any such reports.

In sum, Complainant and Mrs. Treur's testimony that they knew of actual inclement conditions in Omaha and/or Des Moines during the period of 11:00 a.m. to 1:00 p.m. is belied by the reports that Complainant reviewed and sent to Magnum Express during that time showing a blizzard forecast for Des Moines, the NOAA climatological data documenting the actual conditions in Des Moines, and the lack of documentation of any inclement weather between Des Moines and Omaha.

Accordingly, I find that Complainant had no knowledge of the actual conditions between Des Moines and Omaha at the time of his refusal to drive. As JX 3 and JX 5 confirm the portions of the testimony indicating that Complainant knew of a blizzard forecast in Des Moines predicted to begin around 6:00 p.m. that evening, I further find that, at the time of his refusal, Complainant knew only that there was a blizzard warning for Des Moines beginning at 6:00 p.m. and a travel advisory beginning at 8:00 p.m.

Third, I find that Complainant knew that straight trucks handled poorly in inclement weather based on his past experience. In particular, Complainant testified that he had difficulty handling the straight truck when driving in wind and thunderstorm conditions in the past, especially when light on cargo, and knew how the relatively small fuel tank posed a risk if continually running. (*See* Tr. 30-31, 33-35; JX 1 at 30-31, 47; JX 17 at 36-38). I find his testimony to be credible in this regard, as it is corroborated by the testimony of Mr. Smith. Specifically, Mr. Smith admitted that snow and wind conditions impacted the handling of the straight truck given the height of the box, and that the straight truck has a smaller fuel tank compared to other commercial vehicles. (Tr. 111-112, 117-118). Mr. Haut's testimony also bolsters Complainant's statements about the small capacity of the straight truck's fuel tank, as he also testified that the straight truck had a 50-gallon fuel tank, which was the smallest size they ever had, and that the truck could have idled for about twenty to twenty-five hours on a half-full tank. (Tr. 144-145).

Fourth, I find that Magnum Express provided no information to Complainant regarding the safety of weather conditions on December 19, but did make him aware of various safeguards to aid in his assessment of the safety of driving the route. In particular, I have already found that Mr. Smith and Mr. McCormick informed Complainant that if he began the route and encountered hazardous weather, he could return to Davenport or get a hotel at Magnum Express's expense. Additionally, I have also found that Mr. Smith advised Complainant to at least wait until dispatch to decide whether to begin the route based on his assessment of conditions at that time. As Mr. Smith explained, Complainant was given the opportunity to wait to make his safety assessment to allow him to see whether the blizzard had, in fact, come as predicted or instead "fizzle[d] out." (Tr. 101). Finally, I credit Mr. Smith's testimony that he and Complainant discussed safety precautions should he attempt the route that evening, including taking extra clothing, food, water, and a blanket in case he had to stop. (Tr. 100-101; JX 1 at 128). Complainant's testimony confirms that Mr. Smith spoke with him about these precautions,

though he did not feel them sufficient to allay his concerns. (JX 1 at 52-53; JX 17 at 33-34, 37-38). However, by Mr. Smith's own admission, Magnum Express did not independently check the weather conditions along Complainant's route at any time on December 19, as it is the company's practice to rely on the driver's representations regarding the safety of the weather conditions. (Tr. 96, 102-103). Thus, Complainant and Mr. Smith's concordant testimony evidences that Magnum Express provided no information on the safety of the weather conditions on December 19, but did inform Complainant of safeguards available to him if he began driving and encountered hazardous weather, and of his ability to make his safety determination on the weather conditions along the route around the time he was to begin work.

Reasonableness of Refusal under the Circumstances

I have evaluated the totality of the circumstances surrounding Complainant's refusal to drive, including the relevant factors outlined by the Board in this case. I find the instant case and *Robinson* can be distinguished. First, Complainant observed that the weather conditions were "fine" and the roads were drivable in Davenport at the time of his refusal, while the Complainant in *Robinson* saw snow and ice around his home at the time of his refusal. A reasonable individual is more likely to conclude that a forecast of severe winter weather conditions will actually manifest along the route if snow and icy roads are already present in his location where the route is to begin. Thus, the fact that conditions in Davenport were fine at the time of Complainant's refusal weighs against a finding that his apprehension of serious injury was objectively reasonable.

Second, the only information Complainant had about conditions along the route was weather forecasts indicating that a blizzard warning and travel advisory would be in effect beginning at 6:00 p.m. and 8:00 p.m., respectively. In contrast, the Complainant in *Robinson* saw that television stations had issued weather warnings advising against travelling the highways on his route at the time of his refusal, and then received confirmation from his union steward that these highways were shut down or almost impassable. Thus, while both Robinson and Complainant could only predict what weather conditions would be along the route at the time they were to drive it, Robinson's prediction of bad weather was much more likely to be accurate given his knowledge that there was existing bad weather and roads were shut down and impassable at the time of his refusal. Therefore, the fact that Complainant had no knowledge of actual inclement conditions on his route at the time of his refusal or that the roads were shut down or impassable weighs against a finding that his apprehension of serious injury was objectively reasonable.

Third, the timing of Complainant's refusal was more protracted from the time he was to begin driving and the effective time of the travel advisory. Specifically, Robinson's initial refusal occurred after weather warnings advising against traveling highways on his route had already been issued and about five hours before he was to begin driving his route at 8:30 p.m.; Complainant first informed Mr. McCormick of his refusal to drive about seven hours before the effective time of the blizzard warnings and his usual 6:00 p.m. dispatch, and nine hours before the effective time of the travel advisory. Not only was the timing of Robinson's refusal closer to the start of his shift than was Complainant's refusal, Robinson's refusal was concurrent with effectuated travel advisories. Complainant's refusal, on the other hand, was both hours before he

was to begin driving and hours before blizzard conditions were even predicted to begin along the route.

Likewise, Robinson's refusal to drive several hours before his dispatch was reasonable given the totality of the information known about the existing and forecasted weather at the time of refusal. Because Robinson knew of actual snow and ice conditions around his home, was aware of reports of current closed or impassable roads, and saw weather reports of inclement conditions, there was little reason for him to doubt that the inclement conditions forecasted for the time he was to begin driving would actually manifest.

Conversely, the information known to Complainant at the time of his refusal was far more speculative: he observed clear conditions in Davenport where he was to start the route, had no knowledge of existing conditions along the route, and knew only that inclement weather was forecasted to begin in Des Moines at the time he was to start the route in Davenport. As Complainant only knew of a blizzard forecast and inclement conditions predicted to begin many hours later, and given the changing nature of weather, it was likely that the forecasted conditions would change or improve in the numerous intervening hours before Complainant was scheduled to start his route.[31] A reasonable individual faced with only a forecast of inclement weather predicted to begin several hours in the future would appreciate the likelihood that the forecasted conditions that may not manifest, as evidenced by Mr. Smith and Mr. Haut's testimony that they have frequently experienced situations in the area where a forecasted storm did not develop as predicted. (*See* Tr. 96-97).[32] For this reason, the prudent course of action would be to wait to receive more concrete information about the predicted weather conditions before refusing to drive. This is particularly true in light of the fact that Complainant was asked to assess the weather conditions later in the evening before making a decision whether driving the truck would be safe. Accordingly, the timing of Complainant's refusal weighs against a finding that his apprehension of serious injury was objectively reasonable.

I do note that the instant case does share some similarities with *Robinson*. Namely, both Complainant and Robinson were aware of blizzard forecasts predicting inclement conditions on the route at the time they were to be driving and both had experienced difficulty handling their vehicles in inclement weather. However, the significance of these factors is minimized by the considerations discussed above. Given that Complainant knew only of forecasted conditions along the route predicted to begin seven to nine hours in the future and had no evidence of any existing conditions, the likelihood that the forecasted weather would not bear out diminishes the importance of the fact that the straight truck was difficult to handle in inclement weather.

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[31] I decline to consider evidence of what the conditions on the route actually turned out to be during the time Complainant would have been driving on December 19, as the issue of the reasonableness of a complainant's apprehension that driving a truck could result in possible injury to himself of the public must focus on the information available to the complainant at the time of the work refusal. *See, e.g., Caimano v. Brink's, Inc.*, Case No. 1995-STA-004, slip op. at 7 (Sec'y Jan. 26, 1996). Thus, whether the forecast actually bore out is of minimal relevance to the questions before me.

[32] When asked whether he had experienced such circumstances during his 19 years of employment with Magnum Express, Mr. Smith testified, "Oh, definitely. I mean, living in Indiana, they forecast six or ten inches of snow, you get ready for the storm, and maybe you get half an inch. It goes north. It goes south. It just winds down, doesn't develop. Because that's what it is, it is a forecast." (Tr. 96-97; *see also* Tr. 137, 149; JX 1 at 149).

Additionally, neither Complainant nor Robinson had received from their respective employers any information as to weather conditions, which may have altered their assessment of driving the assigned trip. However, unlike in *Robinson*, where the employer simply told Robinson that "marking off due to weather is not an excused absence," Magnum Express did attempt to alleviate Complainant's safety concerns by discussing precautions he should take if he attempted the route, allowing him to turn around or stop and get a hotel at the expense of Magnum Express if conditions became bad, and, most significantly, simply asking Complainant to wait until his time of duty to assess the weather conditions.

Under the circumstances, I find that a reasonable person's assessment of the safety of driving the route would be bolstered by the information provided by Magnum Express. Specifically, given that the only information known to Complainant at the time of his refusal was that there was a blizzard forecast for Des Moines and that the inclement weather was not predicted to begin until 6:00 p.m. with a travel advisory not in effect until 8:00 p.m., the information provided by Magnum Express would lead a reasonable person to reassess the conditions as less dangerous than initially determined, even if still potentially hazardous. Thus, while Magnum Express may not have given Complainant information about the weather conditions, the significance of this factor is greatly diminished because it provided him with information about safety precautions and alternatives that could have led a reasonable person to alter their safety assessment.

On balance, I find that a reasonable individual in the circumstances then confronting Complainant on December 19, 2012 during the period of 11:00 a.m. to 1:00 p.m. would not conclude that the blizzard conditions forecasted on the route for the time he would actually be driving establish a real danger of accident, injury, or serious impairment to health. Specifically, the factors indicating that Complainant's refusal was unreasonable – such as the existing conditions in Davenport, Complainant's knowledge only of forecasted weather and lack of information about existing conditions on the route, and the timing of the refusal in light of the forecast and his time of duty – outweigh any factors supporting the reasonableness of his refusal. I therefore conclude that Complainant did not have a reasonable apprehension of serious injury because a reasonable person faced with the circumstances confronting him at the time of his refusal would not conclude that there was a bona fide danger of accident or injury.

Accordingly, Complainant has failed to meet his burden of establishing that he engaged in protected activity under the reasonable apprehension subsection of the refusal to operate clause.[33]

[33] Given the apparent shortage of drivers in the trucking industry, I do question the wisdom of Respondent's decision to fire an otherwise competent and well-qualified truck driver under the facts of this case. However, the Surface Transportation Assistance Act only protects employees who engage in protected activities from suffering adverse personnel actions. It does not protect employees from poor personnel decisions. *See Toy Collins v., American Red Cross* No. 11-3345 (7th Cir. Mar. 8, 2013); *Brown v. Advocate S. Suburban Hosp*., 700 F.3d 1101, 1106 (7th Cir. 2012) (The [STAA] does not forbid sloppy, mistaken, or unfair terminations; it forbids retaliatory ones.").

Conclusion

I find that Complainant has failed to demonstrate that he engaged in protected activity under the STAA. Because he has failed to establish one of the required elements of his case, his claim for damages under the STAA's whistleblower protection provisions must be denied.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that the complaint filed by Bruce Treur against Magnum Express Inc. is DISMISSED with prejudice.

SO ORDERED:

STEPHEN R. HENLEY
Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. See 29 C.F.R. § 1978.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You may be found to have waived any objections you do not raise specifically. See 29 C.F.R. § 1978.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. See 29 C.F.R. § 1978.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1978.109(e) and 1978.110(b). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. See 29 C.F.R. § 1978.110(b).