U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 07 October 2016

Case No.: 2016-STA-00028

In the Matter of:

KELVIN STALLION,
Complainant,

v.

K & B TRANSPORTATION, INC.
Respondent.

Appearances: Kelvin Stallion, *Pro Se*

K&B TRANSPORTATION, INC. *Pro Se*

Before: Larry A. Temin
Administrative Law Judge

DECISION AND ORDER DENYING CLAIM

This proceeding arises from a claim of whistleblower protection under Section 405 of the Surface Transportation Assistance Act ("STAA" or "the Act"), as amended.[1] The STAA and implementing regulations[2] protect employees from discharge, discipline and other forms of discrimination for engaging in protected activity, such as reporting violations of commercial motor vehicle and safety rules or refusing to operate a vehicle because of its unsafe condition. In this case, Complainant alleges that he was constructively discharged because he refused to operate his truck when he was ill.

[1] 49 U.S.C. § 31105 (2015).
[2] 29 C.F.R. Part 1978 (2015).

STATEMENT OF THE CASE

The Complainant in this matter is Kelvin Stallion (hereafter "Complainant" or "Stallion"). The Respondent is K&B Transportation, Inc. (hereafter "Respondent" or "K&B"). On January 6, 2016,[3] Mr. Stallion filed a complaint against K&B with the Occupational Safety and Health Administration ("OSHA") alleging retaliation by Respondent in violation of the STAA, referencing 49 C.F.R. § 392.3. The complaint alleges that Complainant was constructively discharged by Respondent and that Respondent included negative information about his performance report on a DAC report[4] because he refused to drive Respondent's motor vehicle while he was sick and in pain.

On January 28, 2016, OSHA issued its findings on the complaint. It found that the complaint was timely filed and that Complainant and Respondent are covered by the Act. OSHA determined that its preliminary screening did not support a finding of an adverse action. Mr. Stallion objected to OSHA's finding and requested a hearing.[5]

Both parties in this matter are unrepresented. On April 11, 2016, I held a telephone conference with the parties[6] to inform them of their right to be represented and what is required to prove a violation of the Act.[7] Both parties stated that they wished to proceed without representation. Respondent requested that the hearing be conducted by telephone and Complainant agreed. The hearing was scheduled for May 11, 2016, but had to be postponed because Complainant stated he did not receive the proposed exhibits sent to him by Respondent. An amended notice of hearing was issued on May 11, 2016 setting the hearing for June 7, 2016 and extending to May 20, 2016 the date for Complainant to file any objections to Respondent's proposed testimony or documentary evidence.

The hearing, by telephone, was held on June 7, 2016. At the beginning of the hearing the parties confirmed their agreement to hold the hearing by telephone and their desire to proceed unrepresented. I again discussed the applicable burdens of proof in this case, which the parties stated they understood. Two pending motions were discussed.[8] Both parties were afforded a full

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[3] The handwritten complaint is not dated but the findings letter issued by OSHA gives the above filing date.

[4] A DAC (Drive-a-Check) report is a report used in the trucking industry setting forth the driver's employment history, maintained by HireRight Solutions, Inc., a consumer reporting agency, which may contain negative information from former employers. *See Beatty v. Inman Trucking Mgmt., Inc.* at footnote 13; s*ee* hearing transcript ("Tr."). at 98-103 and Complainant's Exhibits C and D.

[5] Complainant's filing requesting a hearing is dated February 21, 2016 but is date-stamped March 15, 2016. An email from the Assistant Regional Administrator states that the appeal was received by OSHA on February 25, 2016.

[6] Michael Ratkiewicz, Respondent's executive vice-president, was the company representative throughout this proceeding.

[7] Unfortunately, for unclear reasons, neither the beginning nor the end of the telephone conference were able to be transcribed.

[8] On April 22, 2016, Complainant filed a "Motion to Limme," which I interpreted to be a motion in limine. Respondent filed its response on April 25, 2016. I addressed this motion at the hearing. The motion sought to exclude an EEOC complaint and findings that Mr. Stallion said Respondent intended to offer into evidence. I noted that Respondent's proposed exhibits did not include such documents. Respondent's company representative at the hearing, Michael Ratkiewicz, stated at the hearing that it did not intend to introduce such documents. Complainant stated that he wished to rescind the motion. The motion was thus withdrawn and was not ruled upon. On May 23,

opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 C.F.R. Part 18A.

On April 22, 2016, Complainant filed proposed exhibits CX A through G.[9] On May 23, 2016, after the cut-off date of April 26 for submission of exhibits, Complainant filed CX H through S. On June 7, 2016, Complainant filed a "corrected" CX H. CX H, Mr. Stallion's "Declaration" submitted in support of his summary judgment motion, was not admitted in evidence at the hearing and he was told he could testify to the matters that were the subject of the declaration. CX K, a copy of Respondent's response to Complainant's motion in limine, and a document submitted by Claimant marked as CX A-8 (submitted with the May 23, 2016 filing), which is a copy of the OSHA findings letter with added underlining, were not admitted in evidence as the response to the motion in limine and the findings letter with added underlining were already part of the record.[10] Complainant's Exhibits A, B, C, D, E (CX A though E all consist of one page each), F (two pages), G (one page), I (two pages), J (three pages – same document as RX 4 with pages in different order), L, M, N, O, P, Q, R, and S (CX L through S all consist of one page each) were admitted in evidence. On April 20, 2016, Respondent filed its proposed exhibits, consisting of Exhibits 1 through 15. On May 17, 2016, Complainant filed objections to several of the exhibits. I ruled on the objections at the hearing, admitting over objection Respondent's Exhibits 1 through 15;[11] Respondent's Exhibit 7 was admitted with the exception of one statement as specified at the hearing. Tr. at 17-19.[12] Respondent's Exhibits 1, 2, 3, 5, 6, 8, 9, 10, 11, and 13 each consist of one page. RX 4 consists of three pages; RX 7 consists of two pages; RX 12 consists of two pages; RX 14 consists of 11 pages; and RX 15 consists of three pages.[13] ALJ Exhibit 1, the Prehearing Order and Notice of Hearing, was also admitted into evidence.

2016, Complainant filed a motion for summary judgment. Respondent filed its response on June 6, 2016. At the hearing, I noted that the motion was not timely filed as the prehearing order required motions to be filed by May 4, 2016. I also stated that there were disputed factual issues to be resolved. I stated I would not rule on the motion and we would proceed with the hearing, but would consider the parties' arguments in deciding the case. Tr. at 9-10.

[9] In this Decision and Order, ALJX refers to the Administrative Law Judge's Exhibit, CX refers to the Claimant's Exhibits, and RX refers to the Respondent's Exhibits. Complainant submitted lettered exhibits and Respondent submitted numbered exhibits. Complainant's second submission of proposed exhibits, filed on May 23, 2016, included many of the same documents previously filed as proposed exhibits by Respondent on April 20, 2016.

[10] The hearing transcript incorrectly refers to CX A-8 as exhibit "AA". CX A (the January 28, 2015 findings letter from OSHA with added underlining), which is the same document as CX A-8, was admitted into evidence. The transcript also states that CX A through H were excluded, which is incorrect. On July 15, 2016, I issued a Notice of Correction to Hearing Transcript indicating that Claimant's Exhibits A through G were admitted into evidence. On August 16, 2016, I issued a Second Notice of Correction to Hearing Transcript clarifying that CX H and CX A-8 were not admitted into evidence. CX K, a copy of Respondent's response to the motion in limine, was also not admitted. Tr. at 15.

[11] Complainant filed objections to Respondent's Exhibits 2, 3, 5, 7, 9, and 14 as irrelevant. He objected to RX 15 because of the date of the document. His submission also indicated objections to the Respondent's prehearing statement and to three of the witnesses, Mr. Fengler, Ms. Nuno and Mr. Ratkiewicz. These objections were overruled at the hearing with the exception of a portion of RX 7 as indicated above. Tr. at 10-21.

[12] Page 20 of the transcript incorrectly refers to the exhibit with the excluded statement as RX 15 instead of RX 7.

[13] As noted in footnote 9, several documents were offered and admitted both as Complainant's exhibits and Respondent's exhibits. The duplicate exhibits are as follows: CX B/RX 6; CX J/RX 4 (with pages in different order); CX L/RX 8; CX M/RX 9; CX N/RX 10; CX O/RX 11; CX P/first page of RX 12 (except CX P contains added underlining); CX Q/second page of RX 12; CX R/RX 13.

In reaching my decision, I have reviewed and considered the entire record, including the exhibits admitted into evidence, the testimony at the hearing and the arguments of the parties.

ISSUES

The issues in this case are whether Complainant engaged in protected activity within the meaning of the STAA; whether Respondent violated the STAA by constructively discharging the Complainant; and, if so, whether Respondent has established by clear and convincing evidence that it would have terminated Complainant even absent protected activity.

APPLICABLE STANDARDS

The Employee Protection section of the STAA provides in part:

§ 31105. Employee protections

(a) PROHIBITIONS. – (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because-

(A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or

(ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

(B) the employee refuses 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;

(C) the employee accurately reports hours on duty pursuant to chapter 315;

(D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

(E) the employee furnishes, or the person perceives that the employee is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local

> regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.
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> (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if 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. To qualify for protection, 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). This provision was enacted "to encourage employee reporting of noncompliance with safety regulations governing commercial motor vehicles. Congress recognized that employees in the transportation industry are often best able to detect safety violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations."[14]

STAA whistleblower complaints are governed by the legal burdens set forth in whistleblower provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("Air 21").[15] In order to prevail on his case, Mr. Stallion must show, by a preponderance of the evidence, that he engaged in a protected activity, that Respondent took an adverse employment action against him, and that the protected activity was a contributing factor to the adverse action. If Complainant does not prove one of these elements, his claim fails.[16] If Complainant proves that Respondent discriminated against him because of his protected activity, then Respondent may avoid liability by showing by clear and convincing evidence that it would have taken the same unfavorable employment action in the absence of the protected activity.[17]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. CONTENTIONS OF THE PARTIES

Complainant's Contentions:

The complaint filed by Complainant alleges that he was constructively discharged and given a negative performance evaluation in his DAC report. Complainant alleges that he was constructively discharged by Respondent on approximately September 28, 2015 when he was ill and unable to drive. The complaint states that Respondent took this action because he refused to drive a company motor vehicle. The complaint references 49 C.F.R. § 392.3, which includes a

[14] *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987).
[15] 49 U.S.C. § 42121(b) (2015). *See* 49 U.S.C. § 31105(b)(1).
[16] *Palmer v. Canadian National Railway/Illinois Central Railroad* Company, ARB Case No. 16-035 (FRS) September 30, 2016; Dick *v. Tango Transport*, ARB Case No. 14-054 (STAA) August 30, 2016.
[17] 49 U.S.C. § 42121(b)(2)(B); *see Palmer*, ARB Case No 16-035 (FRS) September 30, 2016; *Beatty v. Inman Trucking Management, Inc.*, Case No. 13-039 (ARB May 13. 2014) (STA), PDF at 7-10; *Dick v. Tango Transport*, Case No. 14-054 (August 30, 2016).

prohibition on operating a commercial motor vehicle while impaired by illness. The complaint states that when Respondent rehired him it was "well aware that I had a chronic skin disease."

Complainant filed a prehearing statement on April 22, 2016, repeating his allegations of constructive discharge and blacklisting by reason of the language in the DAC report. The statement indicates that Complainant is seeking compensatory damages in the amount of $250,000 for emotional distress and for the negative notations on the DAC report for loss of "repetition' [*sic*] (presumably meaning loss of reputation) and punitive damages of $250,000.

In his post-hearing brief, filed on July 5, 2016, Complainant states that he refused to drive because he was too sick to drive. He says he was told by safety manager Matt Tipton over the phone that if Respondent had to have someone come and pick up the truck it would constitute abandonment. Therefore, Complainant states that he had no choice but to quit. He states that Respondent blacklisted him from employment with negative notations on his DAC report. He said that Matthew "finger" (presumably meaning Matthew Fengler, one of Respondent's supervisors) lied in his testimony about his efforts to get Complainant to comply with policies and about statements made to Complainant verbally or over Qualcomm (an electronic messaging system accessible through truck cabs). He states he never had any communications with Mr. Fengler either verbally or over Qualcomm on September 28, 2015. He contends that Matt Tipton also gave false testimony in stating that he did not have a conversation with Complainant on September 28, 2015.

Respondent's Contentions:

Respondent did not file a response to the complaint. Respondent's prehearing statement (included with its list of exhibits and witnesses filed on April 20, 2016) states that company policies and procedures, including RX 1, RX 2 and RX 3, were explained to Complainant at orientation. Respondent states that Complainant delivered a load on September 25, 2015 and was scheduled for off time until September 28, 2015. A load had been booked for him at 9:00 a.m. on September 28, 2015. Complainant sent in a message at 9:10 a.m. on that day stating he wasn't feeling well and would be off until Wednesday, September 30th, and that his phone would be shut off. Mr. Fengler, the dispatch supervisor, messaged Complainant back, requesting that he call in as soon as possible. Complainant messaged back stating that he had seen a doctor and was quitting to take care of medical issues. Mr. Fengler sent him a responding message reiterating company policy that he must provide a doctor's diagnosis and a return to work certification. Respondent states that Complainant admitted he did not see a doctor. Respondent states that because there was no verification of the illness, Respondent accepted the resignation and recovered its truck and trailer. Respondent contends that Complainant made false statements regarding his illness and violated written policy. Respondent alleges Complainant fabricated his illness to get more time off.

Respondent filed its post-hearing brief on August 3, 2016. Citing to the exhibits and testimony, it contends that the record contains no evidence to establish constructive discharge. It notes that Complainant has never submitted credible evidence of his illness and notes its policy requiring verification of illness and verification that the driver is able to return to work. Respondent states it was forced to recover the equipment.

B. **SUMMARY OF THE EVIDENCE**

Stipulations

At the hearing, the parties stipulated to the following (Tr. at 21-24):

1. During the period of August 1, 2015 to September 28, 2015, the Complainant was an employee of Respondent as defined in 49 U.S.C. § 31101(2).

2. Complainant had a prior period of employment with Respondent from March 18, 2014 to June 26, 2014.

3. Complainant resides in Milwaukee, Wisconsin.

4. During the period of Complainant's employment, and currently, Respondent is an employer as defined at 49 U.S.C. § 31101 (3) and is subject to 49 U.S.C, § 31105, entitled "Employee Protections."

5. Respondent maintains a place of business at 4700 Dakota Avenue, South Sioux City, Nebraska 68776.

6. During his employment with Respondent, Complainant was not a member of a labor union.

7. Complainant's employment was not subject to the terms of a collective bargaining agreement.

8. Complainant's last day of work with Respondent was September 28, 2015.

9. On January 6, 2016, Complainant filed a timely complaint with the Occupational Safety and Health Administration ("OSHA"), alleging a violation of the employee protection provisions of the Surface Transportation Assistance Act, as amended.

10. On January 28, 2016, OSHA issued its finding dismissing the complaint.

11. On February 21, 2016, Complainant filed a timely request for a formal hearing.

12. The United States Department of Labor, Office of Administrative Law Judges, has jurisdiction over the parties and subject matter of this proceeding.

Exhibits

Following are the significant Qualcomm messages involved in this matter, in chronological order:

CX L/RX 8, sent 9/25/15 at 13:20: Mr. Ratkiewicz identified this message as indicating that Mr. Stallion had unloaded at his final destination and was back in Milwaukee. Tr. at 43.

CX M/RX 9, sent 9/28/15 at 9:10 from Mr. Stallion to his dispatcher, Devin Groenhagen, stating: "TO SICK TO DRIVE GOT THE FLU TAKING A FEW DAYS OFF TILL WED EVENING MY PHONE IS OFF WILL UP DATE LATER TOMORROW". Mr. Groenhagen received the message and reported it to his supervisor, Mr. Fengler. Tr. at 37, 47 and 50.

CX N/RX 10, sent 9/28/15 at 11:43 from Mr. Fengler to Mr. Stallion's truck, identified as the reply to CX M/RX 9: "CALL IN ASAP!!!" Tr. at 37 and 50.

CX O/RX 11, sent 9/28/15 at 15:59 from Mr. Stallion to Mr. Fengler: "I TOLD YOU TODAY THAT I WAS SICK AND COULDN'T DRIVE AFTER SEEING A MEDICAL DOCTOR I CALLED THE OFFICE AND TOLD THEM I WAS QUITTING TO TAKE CARE OF MEDICAL ISSUES AND TO MAKE ARRANGEMENT FOR ME TO BRING THE TRUCK BACK BUT THEY INSISTED TO HAVE SOMEONE GET THE TRUCK." Tr. at 38 and 51.

CX P and Q/RX 12,[18] sent 9/28/15 at 16:05 from Mr. Fengler to Mr. Stallion's truck: "No, you called in and said you were sick. I asked for paperwork from your doctor. You said you didn't go to the doctor and had no paperwork. I offered to load you in the yard provided you were available to load today as agreed upon when you arrived at home. You said you would not be able to do that. We made commitments to our customers based on your agreement to come back to work today. Without a doctor's note and no guarantee as to when you will be available you forced us to recover the equipment." Tr. at 38 and 52.

CX R/RX 13, sent 9/28/15 at 23:42 to Respondent from Bob Lake, the driver who recovered the truck and trailer Complainant was driving, indicating that he had recovered the equipment. Tr. at 43-44 and 52-53.[19]

RX 7: an email thread with messages related to the incident. Tr. at 40.

Other exhibits:

CX A: a copy of the OSHA findings letter of January 28, 2015 dismissing the Complaint, with added underlining. There was no specific testimony about this exhibit at the hearing.

CX B/RX 6: the September 30, 2015 letter from Respondent (Mr. Tipton) documenting a voluntary separation from employment by Complainant. Tr. at 42-43 and 98.

CX C: Mr. Stallion's DAC report. Tr. at 98-101.

CX D: a letter dated March 15, 2016 from HireRight to Mr. Stallion concerning its investigation resulting from Mr. Stallion's inquiry. Tr. at 101-103.

[18] CX P has added underlining, presumably by Complainant. RX 12 is a two-page exhibit; CX P is the first page of RX 12 and CX Q is the second page of RX 12.

[19] RX 14 is the paperwork related to the recovery of the equipment. Tr. at 44.

CX E: an email dated March 21, 2016 to Complainant from a Department of Transportation employee concerning Complainant's communication about Respondent. There was no specific testimony about this exhibit at the hearing.

CX F: a communication from HireRight acknowledging Mr. Stallion's complaint about HireRight's investigation. There was no specific testimony about this exhibit at the hearing.

CX G: a record from Aurora Sinai Medical Center dated February 10, 2016 which documents a history of hidradenitis. There was no specific testimony about this exhibit at the hearing.

CX I: a record from Rochelle Community Hospital documenting an emergency room visit on August 11, 2015 for an abscess incision and drainage. This exhibit was not specifically mentioned at the hearing but presumably this is the emergency room visit Complainant referred to in his testimony at page 89 of the transcript.

CX J/RX 4: a Medical Examination Report for Commercial Driver Fitness Determination on July 31, 2015.[20] Tr. at 44.

CX S is a document dated January 8, 2016 from the Equal Employment Opportunity Commission. There was no specific testimony at the hearing regarding this exhibit.

CXs L, M, N, O, P, Q and R are duplicative of RXs 8, 9, 10, 11, 12, and 13 and are discussed in the above section listing significant Qualcomm messages.

RX 1: Respondent's Driver Time Off/Illness/Leave policy, signed by Complainant on July 31, 2015. Tr. at 35-37.

RX 2: Respondent's Company Equipment Policy, signed by Complainant on July 31, 2015. Tr. at 105.

RX 3: Respondent's form containing three acknowledgments, specifically: an acknowledgment of receipt of a safety handbook; an acknowledgment of the requirement to report work-related injuries; and a "Sign-off Procedure Acknowledgment," requiring a two-week written and telephone notice of decision to cease employment. Each of these separate acknowledgments was signed by Complainant on July 31, 2015. There was no specific testimony about this exhibit at the hearing.

RX 5: Respondent's Driver Job Description. There was no specific testimony about this exhibit at the hearing.

RX 6: Duplicate of CX B, discussed above.

[20] The handwritten date signed indicates "2014" but the typed "Date of Exam" at the top of page one of the document says "2015", and Mr. Ratkiewicz testified that the exam was on July 31, 2015. Tr. at 44.

RXs 7, 8, 9, 10, 11, 12, 13 are duplicative of CXs L, M, N, O, P, Q and R and are discussed in the above section listing significant Qualcomm messages.

RX 14: Documents regarding recovery of the truck in Milwaukee. Tr. at 44.

RX 15: a Medical Examination Report for Commercial Driver Fitness Determination on March 14, 2014. Tr. 41-42.[21]

Testimony

Kelvin Stallion

Mr. Stallion testified that he was rehired by Respondent on August 1, 2015.[22] He made them aware of his chronic skin condition before he was rehired. He said K&B was fine with the medical condition. He testified he was on the road driving for three and one-half weeks and was scheduled for "home time"[23] on September 26, 2015. Starting on approximately September 26, 2015 he became "very ill." He thought he had the flu but it ended up being an infection from his skin condition.[24] On September 28, 2015, he submitted a Qualcomm message to K&B stating he was "too sick to drive got the flu taking a few days off till Wed evening my phone is off will update later tomorrow."[25] CX M/RX 9. He said that he did not tell K&B that his illness was due to his skin condition rather than the flu. He called in on the same day, September 28th, and told the safety supervisor "Matthew," that he could not work because he was too ill to drive. He testified that he went to the doctor on September 28, 2015 and has a copy of the medical record but did not submit it. He testified that he was told during his telephone call with the supervisor that if someone else has to come get the truck it would be an abandonment. He thought this was a threat and that he had a choice whether to drive sick and risk his or someone else's life or quit his job. He said he sent a Qualcomm message that indicated he offered to drive the truck once he felt better. CX O/RX 11. He said he and his truck were in Milwaukee when he had the conversation. Tr. at 27-32 and 86-90. With regard to the Qualcomm messages between the parties, he testified that CX M/ RX 9 was the first message he sent and CX O/RX 11 was the last. Tr. at 71-72. He did not read CX N/ RX 10 or CX P&Q/RX 12. He testified that his only telephone conversation with Respondent on September 28, 2015 was with Matt Tipton, whom he understood to be the safety manager. He said that conversation took place about five to seven minutes before he sent CX O/RX 11. Tr. at 28-32, 70-75, 81-83.

[21] In his testimony Mr. Ratkiewicz misidentified this examination as occurring in 2015. The 2015 examination is CX J/RX 4.

[22] The Complainant's testimony is at transcript pages 28-33, 35, 39-40, 42, 69-75, 81-83, 85-93 and 115.

[23] Off time.

[24] CX J/RX 4 (two pages) is a medical examination report dated July 31, 2015 that indicates that Complainant has a history of hidradenitis suppurativa. The date signed by Complainant indicates 2014, but Mr. Ratkiewicz testified that the examination was done when Complainant came to work in 2015, which is consistent with the typed date at the top right of the first page of RX 4.

[25] Qualcomm is an onboard computer, electronic satellite tracking and messaging service used by the trucking industry for communication, to determine the location of the truck and to keep track of drivers' hours of service. *See Dick v. Tango Transport*, ARB Case No. 14-054, ALJ No. 2013-STA-060; Tr. at 38-39 (testimony of Mr. Ratkiewicz).

The Complainant testified that he had never had a previous incident with Respondent where he called in and said he was too sick to drive. When asked if he was aware of K&B's policy requiring documentation for time off due to illness,[26] he said he was not really aware of it. He admitted he saw a copy of the illness policy at orientation and that he scanned it but didn't really read it. He stated the he was "not really" aware that the policy required him to submit documentation from a medical source about his illness, and said "I figured they already know my condition" (referring to his skin condition). He said that while he worked for K&B he went to the ER and had an abscess incision done; he said there was no problem with a doctor's statement at that time and that it was at the driver's discretion whether he was able to drive.[27] He said he did see a doctor before he sent the Qualcomm message on September 28, 2015 saying that he was sick (it is not clear if the message referred to is CX M/RX 9 or CX O/RX 11), but the doctor told him there was nothing he could do other than refer him to a surgeon or dermatology. Tr. at 85-89.

With reference to the statement in CX O/RX 11 that he was "quitting to take care of medical issues," Mr. Stallion stated that he meant he was terminating his employment. He testified that he had no option but to quit. He said Mr. Tipton threatened him by telling him that if he had to have someone pick up the truck it would be an abandonment. He understood that to mean that it would be reflected as abandonment on his DAC report and meant that the driver left the truck without notifying the company that he was quitting. Tr. 90-91.

With regard to CX D, the HireRight letter, Mr. Stallion stated that he didn't have any proof that Respondent gave prospective employers more information than it was supposed to give. Tr. at 103.

Michael Ratkiewicz

Mr. Ratkiewicz, who was the designated company representative at the hearing, testified that he is Respondent's Executive Vice-President.[28] He stated that Respondent is an over-the-road truckload refrigerated carrier that transports perishables in refrigerated boxes, and has been in business since 1987. The equipment its drivers operate is company-owned. He testified that the company's Director of Safety is Matthew Tipton. There are four safety managers under Mr. Tipton. The company has two operational supervisors, one of whom is Matthew Fengler. Mr. Ratkiewicz identified RX 1 as the company's Driver Time Off/Illness/Leave Policy. He stated that the policy provides that drivers who are too ill to safely drive must submit written verification from a medical source. He noted that Mr. Stallion signed the policy on July 31, 2015 when he was rehired.

Mr. Ratkiewicz testified that the Complainant delivered a load on September 25, 2015 and was scheduled to be off for two days and then to reload on Monday, September 28, 2015. Referencing RX 9/CX M, he stated that Mr. Stallion messaged his dispatcher, Mr. Groenhagen, on September 28 at 9:10 in the morning, stating that he was too sick to drive and was taking a

[26] *See* RX 1.
[27] CX I documents an emergency room visit for an abscess incision and drainage on August 11, 2015. The record does not indicate whether or not that was a work day for Mr. Stallion.
[28] Mr. Ratkiewicz's testimony is at transcript pages 33-44, 93-94 and 104-114.

few days off until Wednesday evening, and that his phone would be off and he would update Mr. Groenhagen later tomorrow. Mr. Groenhagen reported this to Mr. Fengler, who sent a message to Mr. Stallion's truck to "call in ASAP." RX 10/CX N. Mr. Ratkiewicz testified that RX 11/CX O is Mr. Stallion's reply to Mr. Fengler at 15:59 hours on September 28, 2015. The message states:

> I told you that I was sick and couldn't drive after seeing a medical doctor I called the office and told them I was quitting to take care of medical issues and to make arrangement for me to bring the truck back but they insisted to have someone get the truck

Mr. Fengler responded by message at 16:05 hours stating:

> No, you called in and said you were sick. I asked for paper work from your doctor. You said you didn't go to the doctor and had no paperwork. I offered to load you in the yard provided you were available to load today as agreed upon when you arrived at home. You said you would not be able to do that. We made commitments to our customers based on your agreement to come back to work today. Without a doctor's note and no guarantee as to when you will be available you forced us to recover the equipment.

RX 12/CX P.

Mr. Ratkiewicz testified that RX 8/CX L shows when Mr. Stallion unloaded in Milwaukee, on September 25, 2015. RX13/CX R is a message from the driver who recovered the truck Complainant was driving. RX 14 consists of documents relating to the recovery of the truck. Mr. Ratkiewicz identified RX 4/CX J as Complainant's physical on July 31, 2015 when he returned to work at K&B. He testified that Mr. Stallion never brought his skin condition to Respondent's attention or made a request for accommodation. He testified that the exhibits show that Mr. Stallion first said he was sick with the flu and that he had seen a doctor and then admitted he had not seen a doctor. He testified that because there was no evidence Complainant was sick, Respondent recovered the truck. He stated that Respondent never received any evidence that Complainant had seen a doctor. He said Mr. Stallion violated policy. Tr. at 33-44. He stated that he (Ratkiewicz) probably decided on the content of the "Voluntary Separation from Employment" letter dated September 30, 2015. RX 6/CX B. He said that based on his twenty-year experience with K&B, if there is an alleged illness and the driver refuses to work and doesn't provide documentation either with regard to illness or return to duty and leaves the truck, it is considered to be a voluntary quit. He said that there was no notice given in this instance because it all occurred on September 28, 2015, and the truck was left in Milwaukee, which was not an authorized location. He stated that Mr. Stallion was to have returned the truck to South Sioux City, Nebraska where K&B is located. He referenced RX 2, the "Company Equipment Policy," signed by Complainant on July 31, 2015.[29] He said that Mr. Stallion was supposed to pick up another load on the morning of the September 28th. Tr. at 104-105.

[29] RX 2 provides, among other things, that an employee is to give "a minimum of two weeks operating notice in advance of their employment departure date to facilitate the timely loading of the vehicle back to the SSC, NE facility." RX 2 also states that "the equipment is agreed to be loaded back to SSC, Nebraska in the event that the employee opts to change jobs."

Mr. Ratkiewicz stated that Complainant was scheduled to return to work on September 28, 2015. He confirmed Mr. Fengler's testimony that the Complainant could not drive until he had medical clearance to drive. He stated that K&B would not require Complainant to drive if he was ill, even without medical evidence. He testified that Respondent had no choice except to recover the truck because there was no documentation that Mr. Stallion was sick or when he would be able to return to work. He stated that if Respondent had been given a note from a doctor that Complainant was ill, it would have left the truck where it was if Complainant was going to return to work within a couple of days with a return to work authorization from the doctor. Because K&B did not know how long he was going to out, it recovered the truck. He said that Complainant abandoned the truck because he failed to provide documentation that he was ill or when he could return to work, as required by company policy. He noted that Mr. Stallion first said he went to the doctor and then said that he did not go to the doctor, and told K&B that he was quitting to seek medical attention.[30] He testified that K&B never received any documentation regarding the illness. Tr. 106-109. He testified that he was not aware of any telephone call between Mr. Stallion and Mr. Tipton. Tr. at 93.

Mr. Ratkiewicz testified that K&B contacted Mr. Stallion's daughter because it was unable to contact him.[31] Tr. 110. He testified that if K&B cannot establish contact with a driver, the safety department tries to contact the driver's emergency contacts; if unsuccessful, a "welfare check" is done, *i.e*. the local authorities are asked to attempt to locate the driver to check on his well-being. Tr. at 110. Mr. Ratkiewicz testified that if a driver is too sick to get to a doctor, K&B has made arrangements for transportation to one. He stated there have been situations where a driver, with medical documentation, has been off for up to a month, and if the documentation is approved the driver remains an employee. He stated that if Complainant had provided medical documentation to K&B by September 30th (the date of RX 6, the "Voluntary Separation letter), Respondent would have returned him to duty. Tr. at 111-112.

Mr. Ratkiewicz stated that he was likely the person responsible for the language in RX 6, the September 30, 2015 letter of termination, that Mr. Stallion's record would reflect "voluntary quit no notice and unauthorized location without notice/abandonment." He testified that this language is used if a driver refuses to work and does not provide documentation of illness or return to duty and leaves the truck in an unauthorized location. He said that because Complainant failed to provide the documentation required by company policy, *i.e*, that he was sick or when he would return to work, Respondent had "no choice" except to recover the truck. He stated they would not direct the Complainant to drive while he was ill. He said the Complainant was asked for such documentation and it was not provided. He said that if Mr. Stallion had provided documentation at a later time his employment status would have been reconsidered. Tr. at 105-109.

When asked how Respondent interpreted the statement in RX 11/CX O that Complainant was "quitting to take care of medical issues," Mr. Ratkiewicz stated that they were confused about what Mr. Stallion meant because Complainant first said he had been to the doctor and then

[30] *See* RX 11 and RX 12.

[31] Complainant's phone was shut off. *See* RX 9. The voicemail contact with Complainant's daughter is documented on RX 7.

recanted that. He said the decision to recover the truck was made on the afternoon of September 28, 2015 because Complainant was either too sick to drive or was refusing to drive and there was no documentation from a doctor. He testified that his belief that Mr. Stallion never went to the doctor was based on the fact that Respondent never received any information from a doctor. Tr. at 112-114.

Matthew Fengler

Mr. Fengler identified his position as "dispatch supervisor, operations supervisor."[32] His job is to oversee the dispatchers, who manage the drivers. He testified that on September 28, 2015, Mr. Groenhagen brought to his attention that he was having an issue with getting in touch with Mr. Stallion and his return to work. Referencing the Qualcomm messages, Mr. Fengler stated that K&B was trying to get Mr. Stallion to provide medical documentation. He said they required a note from his doctor indicating that Complainant needed time off until a certain date when he could return to full duty status.

He testified that, after Mr. Stallion sent his message (RX 9/CX M), he had a telephone conversation with Mr. Stallion concerning his availability to work and where his medical documentation was. He said he is not aware of anyone else the Complainant spoke to (other than Mr. Groenhagen, who transferred the call to Mr. Fengler). He said Mr. Stallion told him he had the flu. He said he tried to determine when Mr. Stallion would be able to work and where his medical documents stating he could not work were. Mr. Stallion told him that he did not have medical documentation because he had not been to the doctor yet. Mr. Fengler testified that if a driver claims he is too sick to drive he would not instruct the driver to operate the equipment. He denied Mr. Stallion's statement in RX 11 that K&B insisted on having someone come get the truck, stating that all they insisted on was medical documentation stating he is sick and cannot work and when he can return to work. He identified his response to Mr. Stallion in RX 12/CX P&Q, in which he summarized their conversation. He said that K&B could not let Mr. Stallion drive without medical verification. He testified that he could not let Complainant drive the truck back because he was sick, and that he was going to send someone to retrieve the truck. Tr. at 45-55. Mr. Fengler further explained the operation of the Qualcomm messaging system and the dates reflected on the Qualcomm message exhibits. Tr. at 66-69, 75-77 and 114-116.

Gabriello Nuno

Gabriella Nuno testified that she is Respondent's "health work comp supervisor."[33] One of her duties is to help drivers find medical providers if needed. She stated that she did not have contact with Mr. Stallion regarding this incident, indicating that she was unable to reach him and that he was supposed to contact her on September 28, 2015 but did not. She referenced the email thread (RX 7) and the 10:39 a.m. message from Mr. Fengler. She said she told her supervisor that because of company policy Mr. Stallion could not drive without a doctor's slip because she did not know his medical condition or whether he was taking medication and when he could return to work. She stated that RX 1 is the company policy she was referring to. She said she was included in the email thread because she was supposed to get a doctor's slip from Mr.

[32] Mr. Fengler's testimony is at transcript pages 45-55, 66-69, 75-77, 83-84 and 114-116.
[33] Ms. Nuno's testimony is at transcript pages 56-65 and 77-81.

Stallion and make sure he was safe and to assist him in getting medical attention if needed. She confirmed that because of company policy (RX 1), Respondent could not let Complainant drive without medical documentation. Tr. at 57-63 and 77-81.

Matthew Tipton

Mr. Tipton identified his position as Safety Director.[34] Referring to RX 7, he testified that it appears he attempted to contact Mr. Stallion on September 28, 2015 and left a message for his daughter to contact K&B. He did not recall having a telephone conversation with the Complainant. The only other involvement in this matter that he recalled was the letter he sent Mr. Stallion on September 30th (RX 6/CX B). He testified that the information on CX C came from K&B. He said that CX C is part of a DAC report, which is a system used by employers in the trucking industry for reference checks. With respect to CX D, the letter from HireRight, he stated that K&B would have responded to HireRight with its side of the story. Tr. at 95-103.

C. **DISCUSSION**

Complainant worked as a truck driver for Respondent twice, first from March 18, 2014 to June 26, 2014 and then from August 1, 2015 to September 28, 2015. He resides in Milwaukee, Wisconsin. Respondent is an over-the-road truckload refrigerated carrier. The drivers it employs operate company-owned equipment. Respondent maintains a place of business in South Sioux City, Nebraska. Complainant was not a member of a labor union and his employment was not subject to the terms of a collective bargaining agreement.

On September 26, 2015, Complainant returned to Milwaukee for off time after having been on the road driving for over three weeks. He was to report back to work to pick up a load at 9:00 a.m. on September 28, 2015. At 9:10 on the 28th Mr. Stallion sent a message to his dispatcher, Devin Groenhagen, stating that he had the flu, was too sick to drive and was taking a few days off until Wednesday evening[35] The message said his phone would be off and that he would provide an update "later tomorrow." CX M/RX 9. At 10:33 a.m. that day, Matthew Fengler, a dispatch supervisor/operations supervisor for Respondent, sent Complainant a message telling him to "call in ASAP!!" CX N/RX 10. Mr. Stallion testified that he called in and spoke to someone whom he initially identified only as "Matthew" and later identified as Matthew Tipton, and told him he was too ill to drive. Mr. Stallion said he was told during the call that if K&B had to recover the truck it would be an abandonment. He stated this conversation occurred about five to seven minutes before CX O/RX 11. He said he did not have any other telephone conversation with anyone else at K&B on that day. Matthew Tipton testified that he did not recall a conversation with the Complainant, and that his only involvement was his attempt to contact Complainant by telephone (*see* RX 7) and authorship of the September 30th letter (CX M/RX 6). At 15:59 on September 28, 2015, Mr. Stallion sent a message in reply to CX N/RX 10 stating that he called and "told you today that I was quitting to take care of medical issues and to make arrangement for me to bring the truck back but they insisted to have someone get the truck." CX O/RX 11. He testified that when he said he was quitting he meant he was terminating his employment.

[34] Mr. Tipton's testimony is at transcript pages 95-103.
[35] I take official notice that September 28, 2015 was a Monday and September 30, 2015 was a Wednesday.

Respondent's employees testified that Complainant was to return to work on September 28, 2015 when he was scheduled to reload. They testified that because Mr. Stallion stated he was ill, they could not permit him to drive without clearance from a doctor. They stated that K&B's policy requires that a driver who is ill must provide documentation from a doctor so stating and indicating when the driver will be able to return to work. They stated they attempted to obtain medical documentation from Complainant. Mr. Tipton did not recall a telephone conversation on the 28th with Mr. Stallion, but Mr. Fengler testified that he spoke to Mr. Stallion that day. He said Mr. Stallion told him he had the flu and that he did not have medical documentation because he had not yet been to a doctor. Mr. Fengler stated that his objective was to obtain medical documentation that Complainant was ill and when he could return to work. He stated that Respondent could not let Mr. Stallion drive without medical documentation. With regard to Complainant's statement that he was "quitting to take care of medical issues," Mr. Ratkiewicz stated that they were confused because Mr. Stallion first said he had seen a doctor and then said he had not. He said his belief that Complainant never went to a doctor was based on the fact that Respondent never received any documentation that he did.

By letter to Complainant dated September 30, 2015, signed by Mr. Tipton, Respondent stated that Mr. Stallion had voluntarily separated from employment on September 28, 2015, did not give adequate notice that he was quitting and failed to return the equipment to South Sioux City as agreed. The letter stated that Complainant's record would reflect "voluntary quit no notice and unauthorized location without notice/abandonment." CX B/RX 6.

Complainant's claim of protected activity

Complainant's initial burden in this case is to prove by a preponderance of the evidence that he engaged in protected activity. He contends he was ill and unable to drive because of his illness, citing 49 C.F.R. § 392.3. This provision, sometimes referred to as the fatigue rule, states in pertinent part:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

A claim of refusal to operate a commercial motor vehicle may constitute a violation of either section 31105(a)(1)(B)(i) or section 31105(a)(1)(B)(ii). Those sections provide that an employee may not be discharged, disciplined or discriminated against regarding pay, terms, or privileges of employment because:

(B) the employee refused 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;

Whether a refusal to drive qualifies for protection under the Act requires evaluation of the circumstances surrounding the refusal under the requirements of each of the above provisions. *See Eash v. Roadway Express, Inc.*, ARB No. 04-036. ALJ Case No. 1998-STA-28 (ARB September 30, 2005 (PDF at 6). A refusal to drive may be protected activity under subsection (1)(B)(i) if the driver's operation would have violated 49 U.S.C. § 392.3. *Eash*, PDF at 6. A refusal to drive may also be protected under subsection (1)(B)(ii) if the driver's physical condition, including fatigue, could cause him to have a reasonable apprehension of serious injury to himself or the public if he operated the vehicle. *Eash*, PDF at 7. *See also Garcia v. AAA Cooper Transportation*, ARB No. 98-162, ALJ No. 98-STA-23 (ARB December 3, 1998), at 4; *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005-STA-02 (ARB September 30, 2008), PDF at 5-6.

Here, Complainant does not allege a safety problem with the motor vehicle, but alleges that his illness impaired his ability to drive. With regard to violation of the fatigue rule, the Administrative Review Board has held that a complainant must prove that operation of the vehicle would in fact violate the specific requirements of the rule at the time of the refusal, and that a "mere good-faith belief in a violation does not suffice." *Eash*, PDF at 6, citing *Yellow Freight Sys. V. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993); *Melton*, PDF at 6; *Cortes v. Lucky Stores, Inc.*, ARB No, 98-019, ALJ No. 96-STA-30, slip op. at 4 (ARB Feb. 27, 1998). A complainant must thus introduce evidence sufficient to show that his driving ability is or would be so impaired that actual unsafe operation of the vehicle would result. *Eash*, PDF at p. 6, citing *Wrobel v. Roadway Express, Inc.*, ARB No, 01-091, ALJ No. 00-STA-48, slip op at 6 (ARB July 31, 2003) (complainant who claimed sickness failed to produce sufficient evidence to demonstrate an actual violation of the fatigue rule).

Complainant has not shown that his refusal to drive constituted protected activity under subsection (1)(B)(i). Complainant never substantiated his complaint of illness by medical documentation or otherwise. He testified at the hearing that he saw a doctor on September 28, 2015 "before I Qualcommed that I was too sick to drive" and before his conversation on that same day with the supervisor. Tr. at 87 and 32. He testified that he learned from the doctor that his skin condition was causing an infection. Tr. at 87-88.[36] The reference to a message saying he was too sick to drive seems to refer to CX M/RX 9, which was sent at 9:10 in the morning of the 28th, but could be a reference to CX O/RX 11, sent at 15:59. He also testified that when he spoke to the person he identified as Matt Tipton, he told him that he had the flu, "not knowing that I really had an infection." Tr. at 86-87. However, as noted above, he testified that he saw the doctor at about 1:30 (Tr. at 88) and that his visit with the doctor was before his conversation with the supervisor (Tr. at 32). Therefore, if Mr. Stallion did see the doctor as he testified, he would have known, before his conversation with the supervisor, that his sickness was due to an

[36] Mr. Stallion inconsistently testified that he did not know what was making him sick. Tr. at 89. Complainant appears to suggest that Respondent discriminated against him because of his skin condition. It is undisputed, however, that Complainant told Respondent on September 28, 2015 that he was sick because of the flu (CX M/RX 9), and that he never informed Respondent otherwise. In any event, there is no documentation that he was sick from any cause during the period at issue here.

infection and not the flu. If he was indeed sick and if his illness was due to his skin condition, he would have no reason to tell his supervisor during the telephone conversation that his condition was due to the flu. These inconsistencies negatively affect Mr. Stallion's credibility.

Mr. Stallion testified that he did see a doctor and has a copy of the medical record from that visit but did not submit the documentation for the hearing. Tr. at 31-33. I do not find this testimony credible, nor do I find credible his explanation as to why he did not submit any such documentation. Mr. Stallion admitted that he knew the prehearing order in this case specified a date by which exhibits had to be submitted and that he understood that.[37] Tr. at 32-33. He testified that he just picked up a copy of the records "the other day" and that "I just haven't sent them in. I was just too sick to do it." Tr. at 32.[38] Mr. Stallion has sent in other filings in connection with this case, including two motions, a prehearing statement, a list of objections to Respondent's exhibits, and two submissions of a total of nineteen proposed exhibits. It is not credible that he has been too sick since the alleged visit on September 28, 2015 to submit the medical note, if it existed. Moreover, if Complainant had seen a doctor, it seems probable that he would have submitted any such documentation when he received RX 6, indicating that his record would reflect abandonment. He also stated that he did not have to submit a doctor's note because of the "United States Equity Act of 2010."[39] He further stated that he understood he could submit any document after the hearing, even though he also testified that he understood that the prehearing order required all exhibits to be submitted by a certain date.[40]

Further, Mr. Fengler, who testified that it was he who had the telephone conversation with Complainant, testified that Mr. Stallion told him he did not see a doctor. Tr. at 50. This is consistent with Mr. Fengler's reply to CX O/RX 11(the 15:59 message from Stallion) stating that Complainant said during the telephone call that he did not go to a doctor and had no paperwork (CX P/RX 12). I find Mr. Fengler to be a credible witness, and I find that it was Mr. Fengler with whom Complainant had the conversation on September 28, 2015. Mr. Tipton testified that he did not have a telephone conversation with Complainant in connection with this incident. Mr. Fengler testified that it was he (Mr. Fengler) who had the conversation, and he gave a detailed account of that conversation.[41] When Mr. Stallion testified he initially could recall only that he spoke to "Matthew" and not his last name. He testified that he only had one telephone call with Respondent concerning this incident (Tr. at 29-30), and the record includes no reference to a second conversation. I find that the record does not establish that Complainant saw a medical provider for his illness. Because the record does not support a finding that Complainant was in fact ill or otherwise impaired on the relevant dates, he has not produced evidence sufficient to

[37] The Prehearing Order and Notice of Hearing is ALJX 1. I note that Complainant did submit some exhibits after the cut-of date, specifically CXs H through S. *See* earlier discussion at p 2.

[38] Mr. Stallion also inconsistently testified that "I went to the doctor, which I do have a statement, I just haven't went down there and got it, my medical record." Tr. at 29

[39] Tr. at 32. It is not clear what legislation Complainant is referring to. I note that there is an "Equality Act of 2010" in the United Kingdom, which appears to include certain protections for employees with disabilities. *See https://en.wikipedia.org/wiki/**Equality**_Act_2010.*

[40] Complainant did not request to submit the alleged medical note after the hearing.

[41] In his post-hearing brief filed July 5, 2016, Complainant states that he had no communication with Mr. Fengler "either verbally of over the Qualcomm on 9/28/15" (page 2 of brief). The record clearly shows two Qualcomm messages from Mr. Fengler, *i.e.*, RX 10/CX N and RX 12/CX P&Q, and I find that Mr. Stallion's telephone conversation on that date was with Mr. Fengler.

show that his driving ability was so impaired that actual unsafe operation of the vehicle would result. *See Eash*, PDF at 6.

Complainant has also not shown that his refusal to drive constituted protected activity under subsection (1)(B)(ii). A driver's physical condition, including fatigue, could cause the driver to have a reasonable apprehension of serious injury to himself or the public if he drove in that condition. *Eash,* PDF at 7, citing *Somerson v. Yellow Freight Sys., Inc.* ARB Nos. 99-005, 036, ALJ Nos. 98-STA-9,11, slip op at 14 (ARB Feb. 18, 1999). The employee's refusal to drive must be based on an objectively reasonable belief that operation of the vehicle would pose a risk of serious injury to the employee or the public. *Eash*, PDF at 7, citing *Jackson v. Protein Express*, ARB No, 96-194, ALJ No. 95-STA-38, slip op at 3 (ARB Jan. 9, 1997). Here, Complainant cannot be found to have a reasonable apprehension of harm to himself or others if he drove the vehicle because he has not shown that he was in fact ill or impaired in any way. *See Melton,* PDF at 6, citing *Jackson v. Protein Express*, ARB No. 96-194, ALJ No. 1995-STA-038, slip op at 3 (ARB Jan. 9, 1997).

Complainant has thus not proven by a preponderance of the evidence that he engaged in protected activity.

Complainant's claim of adverse action

Although Complainant cannot prevail on his claim under the Act because he has not carried his burden to prove activity protected under the Act, I will address his allegation of adverse action. Complainant contends that he was constructively discharged and negative information was included in his DAC report. Specifically, he alleges he had no choice but to quit because of the threat that if he did not return the truck Respondent would consider this to be abandonment of the equipment. Complainant contends that this was based upon his conversation with Mr. Tipton. As noted above, I find that the conversation Mr. Stallion had on September 28th with Respondent was with Mr. Fengler. There was no testimony that Mr. Fengler made such a statement.

Further, courts have held that a constructive discharge occurs where working conditions are so difficult or unpleasant that a reasonable person in the employee's position would feel compelled to resign. *See Held v. Gulf Oil Co.*, 684 F.2d 427, 434 (6th Cir. 1982); *NLRB v.Haberman Construction Co.,* 641 F.2d 351 (5th Cir. 351 1981); *Cartwright Hardware Co. v. NLRB*, 600 F.2d 268 (10th Cir. 1979). In *Jackson v. Protein Express*, ARB No. 98-104, ALJ No. 95-STA-38, the Board stated that "whether an employee has been discharged depends on the reasonable inferences that the *employee* could draw from the statements or conduct of the employer" (emphasis in original), citing *Pennypower Shopping News, Inc. v. N.L.R.B.*, 726 F.2d 626, 629 (10th Cir. 1984). In *Earwood v. D.T.X. Corporation*, 88-STA-21 (Sec'y Mar. 8 1991), the Secretary held that a constructive discharge had occurred where the Secretary found that complainant's primary complaint was that he was ill with influenza. It was noted that complainant had been examined by his physician. The complainant stated he believed himself discharged as a result of his refusal to drive because he was ill. His employer told him that he "could" be discharged for refusing the assignment and that he could not be off sick. The Secretary found that complainant engaged in protected activity when he refused to operate a

motor vehicle while impaired due to illness.[42] The Secretary noted that the adverse consequences from a harmful employment decision such as demotion, failure to promote or failure to provide equal pay are generally insufficient for a finding of constructive discharge, in the absence of "aggravating factors". *Id.*, citing *Clark v. Marsh*, 665 F.2d 1168, 1174 (D.C. Cir 1981). In discussing what is required to find constructive discharge, the Secretary stated that whether a constructive discharge has occurred depends on whether working conditions were so difficult, unpleasant, unattractive or unsafe that a reasonable person would have felt compelled to resign. *Id.*, citing *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361-362 (9th Cir. 1987) and *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 887-888 (3d Cir. 1984). In *Earwood*, the Secretary found that Respondent's history of driving hours' violations and falsification of records was "reprehensible." *Id.* at 4. *See also Dietz v. Cypress semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002, wherein the Board stated that the legal standard to determine what constitutes a constructive discharge is whether the employer has created working conditions so intolerable that a reasonable person in the employee's position would feel forced to resign.

No comparable situation exists here. Respondent did not insist that Mr. Stallion drive while ill; it insisted only that the policy that Complainant agreed to when he was hired be followed, *i.e.*, that he provide documentation of his illness if he was ill, or return to work if he was not. Respondents imposed no discipline and did not threaten any discipline. The requirement to follow a policy requiring a medical note to document illness is not a working condition that would lead a reasonable person to feel compelled to resign, nor has Complainant shown that such a policy is of itself unlawful. Respondent's "Driver time Off/Illness/Leave Policy" is contained in RX 1. It clearly requires that a driver submit medical documentation of illness and provides that a decision will then be made as to whether the truck will be picked up or additional time off approved. The policy was signed by Complainant, indicating that he received and understood it.[43] RX 2, Respondent's Company Equipment Policy, which was also signed by Complainant, requires that if an employee leaves employment he must give a two-week notice and return the equipment to South Sioux City, Nebraska. RX 3, signed by Complainant, also sets forth the requirement to give a two-week notice of intent to cease employment. Respondent testified that it has had situations where drivers have been off for extended periods, with supporting medical documentation, and are then returned to regular status. Tr. at 112. Mr. Stallion testified that his choice was either to quit or to drive sick and risk his or someone else's life. He said he had no option but to quit. However, assuming he was in fact sick, he had the obvious option of seeing a doctor and obtaining documentation of his illness, as required by the company policy. There was no evidence that Respondent suggested he quit or wanted him to quit. Respondent sent the letter documenting Complainant's separation on September 30, 2015 (RX 6/CX B), which Mr. Ratkiewicz noted was two days after he was supposed to have reported for work. Tr. at 111. Mr. Ratkiewicz testified that Mr. Stallion did not contact Respondent or submit documents after recovery of the truck. He testified that if he had submitted documentation after the incident, Respondent would have reconsidered his status. Tr. at 41-42.

Respondent did not terminate Complainant. It simply accepted his resignation. CX B/RX 6. Complainant did not provide the required medical documentation to establish he was

[42] Unlike here, there was apparently no question as to the fact of complainant's illness; complainant had seen a physician the day following his complaint of sickness. *See* footnote 4.
[43] He testified that the saw a copy of the policy at orientation and scanned it but did not really read it. Tr. at 88.

sick and did not request more time to do so or state why he could not provide the documentation. He stated he was quitting without giving K&B the required two-week notice (RX 2 and RX 3) and without returning the equipment to South Sioux City, Nebraska as required by K&B's written policy (RX 2). Accepting Mr. Stallion's unsolicited resignation was not an adverse action.

D. **CONCLUSION**

For the reasons discussed above, I find that Complainant has not established that he engaged in protected activity. Therefore, he cannot prevail on his STAA complaint.[44]

ORDER

Because Complainant has not established that he engaged in protected activity, his complaint filed with OSHA on January 6, 2016 is **DENIED**.

Digitally signed by Larry A. Temin
DN: CN=Larry A. Temin,
OU=Administrative Law Judge, O=US
DOL Office of Administrative Law
Judges, L=Cincinnati, S=OH, C=US
Location: Cincinnati OH

LARRY A. TEMIN
ADMINISTRATIVE LAW JUDGE

[44] *See Palmer v. Canadian National Railway/Illinois Central Railroad Company*, ARB Case No. 16-035 (FRS) September 30, 2016, at 14, 16 and 52.