U.S. Department of Labor Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

RONALD C. STAUFFER, **ARB CASE NO. 00-062**

COMPLAINANT, **ALJ CASE NO. 99-STA-21**

v. **DATE: July 31, 2001**

WAL-MART STORES, INC.,

RESPONDENT.

BEFORE: **THE ADMINISTRATIVE REVIEW BOARD**[1/]

Appearances:

For the Complainant:
Ronald C. Stauffer, *pro se*, *Heidelberg, Mississippi* [2/]

For the Respondent:
Andy Sarwal, Esq., Gregory Muzingo, Esq., *Wal-Mart Stores, Inc., Bentonville, Arkansas*

FINAL DECISION AND ORDER

The case arises under the employee protection ("whistleblower") provision of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C. §31105 (1994). Complainant Ronald C. Stauffer ("Stauffer") claimed that his employer, Respondent Wal-Mart Stores, Inc. ("Wal-Mart"), violated the STAA when it discharged him on August 8, 1998, for insubordinate refusal of a dispatch work assignment. Stauffer requested a hearing and Wal-Mart moved for summary decision. In a July 6, 1999 decision an Administrative Law Judge ("ALJ") recommended granting Wal-Mart's motion. Stauffer appealed to this Board, and we

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[1/] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,979 (1996).

[2/] Stauffer was represented by legal counsel in the proceeding on remand before the ALJ, but appeared *pro se* before the Board on appeal.

remanded the case for hearing. *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 1999-STA-21 (ARB Nov. 30, 1999). Upon remand, the ALJ held a hearing and issued a June 14, 2000 decision recommending that Stauffer's complaint be denied (1) because Stauffer did not prove that his refusal of a work assignment was protected activity under the STAA, and (2) because the termination was not retaliatory.

Stauffer contests the ALJ's recommended decision. We have jurisdiction under 49 U.S.C. §31105(b)(2)(C) and 29 C.F.R. §1978.109(c) (2000). We concur with the ALJ's conclusion that Stauffer did not prove that he engaged in a protected work refusal, and therefore dismiss Stauffer's complaint.

STANDARD OF REVIEW

Under the STAA, the Board is bound by the factual findings of the ALJ if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. §1978.109(c)(3); *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995).

In reviewing the ALJ's conclusions of law, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C. §557(b) (1994). *See also* 29 C.F.R. §1978.109(b). The Board reviews the ALJ's conclusions of law *de novo*. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

BACKGROUND

1. Factual background.[3/]

Wal-Mart employed Stauffer as a commercial motor vehicle operator in the company's distribution system from July 1987 until he was discharged on August 8, 1998. Stauffer's basic job consisted of delivering loaded trailers to Wal-Mart stores and returning to Wal-Mart's distribution center with an empty trailer.

Stauffer began a typical work day between 8 and 9 a.m. at the Wal-Mart store where he had spent the previous night in the sleeper of his truck tractor. He usually went to sleep at about 11:00 p.m (plus or minus an hour) and slept for seven to eight hours. In the morning, after inspecting his equipment, he usually returned to the distribution center with an empty trailer. At the distribution center he would receive his driving assignment for the day. Stauffer had several hours between the time he received his driving assignment and the time he began his itinerary. Because he lived over 100 miles from the distribution center, Stauffer did not return home. The distribution center had facilities for showering and personal hygiene as well as areas for taking meals, sleeping and for personal business. Other time at the distribution center could be spent in meetings and waiting for paperwork.

[3/] The facts of this case have been extensively recounted in the ALJ's two prior decisions and the previous decision of this Board. We will recapitulate briefly.

On Friday, August 7, 1998, Stauffer began his day at 8:45 a.m. in Slidell, Louisiana. From there he drove to Wal-Mart's Brookhaven, Mississippi, distribution center, arriving at 12 noon. At 12:45 p.m. he received his driving assignment for that day: (1) to transport a trailer to the Wal-Mart store in Gonzalez, Louisiana, and pick up an empty trailer on his return to Brookhaven; and (2) to transport another trailer from Brookhaven to Wal-Mart's Denham Springs, Louisiana, store making sure it was available for unloading by 4:00 a.m. on August 8, 1998. From past experience Stauffer knew that he would arrive at Denham Springs at approximately 12 midnight and that a dock would not be available for him to park the loaded trailer until 2:00 a.m. on August 8. This would require him to stay awake at least until 2:00 a.m. or to take a nap and be awakened when the dock was available. In the past, Stauffer tried to avoid dispatches where he anticipated that he would be awakened from his sleep in order to "shuttle trailers."[4/]

Stauffer started his itinerary at 3:15 p.m. when he left Brookhaven for the Gonzalez store, arriving at 6:30 p.m. He left the Gonzalez store at 7:00 p.m. and was back at Brookhaven by 9:30 p.m. At 10:00 p.m. Stauffer left Brookhaven for Denham Springs where he arrived at midnight.

When he arrived at the Denham Springs store, its two loading docks were occupied by loaded trailers. Store personnel informed Stauffer that the first trailer would be emptied in approximately one and one-half to two hours. They suggested that Stauffer get some sleep in his truck, and that they would awaken him when he could exchange his loaded trailer with an empty one. Stauffer declined this suggestion and informed the store's personnel that he would be leaving. He also informed his dispatcher of the situation, explaining that he had already been awake a long time. Stauffer then disengaged his trailer and drove approximately five miles to another store, where he spent the night. Another driver placed Stauffer's trailer into the loading dock by 4:00 a.m.

When Stauffer awoke the next morning, he returned to the Denham Springs store, picked up an empty trailer, and returned to the Brookhaven distribution center. When he arrived at Brookhaven he was informed that his employment had been terminated for "Refusal of a Dispatch Work Assignment (Insubordination)."

2. STAA.

The employee protection provision of the STAA provides in relevant part:

[4/] "Shuttling trailers" normally takes 20 to 30 minutes, and consists of the following: parking the loaded trailer; disconnecting the air hoses and the light cord between the truck and the loaded trailer; letting down the landing gear on the loaded trailer; releasing the fifth-wheel coupling from the trailer kingpin; pulling the truck away from the loaded trailer; driving to the empty trailer; backing the truck under the empty trailer; engaging the fifth wheel-coupling; raising the landing gear on the empty trailer; coupling the air hoses and light cord. The sequence is then repeated until the truck is reattached to the loaded trailer. The driver then backs the loaded trailer into the loading dock and unhooks the truck. Hearing Transcript ("TR") at 280-310, 797.

> (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 -
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> * * * * *
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> (B) the employee refuses to operate a vehicle because -
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> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
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> (ii) the employee has a reasonable apprehension[5/] of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. §31105(a)(1).

Department of Transportation ("DOT") regulations contain the following commercial motor vehicle safety rule dealing with fatigue:

> 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 other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

49 C.F.R. §392.3 (2000). Thus, an employee who refuses to operate a vehicle because his "ability or alertness is so impaired, or so likely to become impaired" as to be unsafe is protected under 49 U.S.C. §31105(a)(1)**(B)(i)** because driving in an impaired condition would violate DOT's fatigue rule. *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 984 (4th Cir. 1993).

Under certain circumstances, the Secretary and the Board have held that an employee who refuses to operate a vehicle because of concerns about current or impending fatigue also would be protected under 49 U.S.C. §31105(a)(1)**(B)(ii)**, the "reasonable apprehension of serious injury" test, which has been interpreted to apply whenever there is a serious safety issue:

> The protections under subsection (ii), which are applicable whenever there is a serious safety issue, are considerably broader and are applicable even when the DOT safety regulations do not

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5/ "Reasonable apprehension" is defined in the statute, which provides that "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 unsafe condition establishes a real danger of accident, injury, or serious impairment to health." 49 U.S.C. §31105(a)(2).

> directly and specifically address the safety concern. However, in order to prove a fatigue related claim under subsection (ii), a complainant must prove that "a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury if he drove."
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> Under this standard, a driver's claim of fatigue, standing in isolation and without context, is insufficient for protection under the STAA to attach. Instead, the Secretary, and now the Board, examines the facts surrounding each incident to determine if a reasonable person in the circumstances would have been justified in refusing an assignment due to fatigue. In practice, most drivers have found little difficulty meeting this standard when the circumstances of the driver's refusal to work point clearly to the immediate cause of the driver's fatigue concerns.

Somerson v. Yellow Freight Sys., Inc., ARB Nos. 99-05/036, ALJ Nos. 98-STA-9/11, slip op. at 15-16 (ARB Feb. 18, 1999) (footnote and citations omitted)[6/]; *see also Robinson v. Duff Truck Line, Inc.*, No. 86-STA-3, slip op. at 9 (Sec'y Mar. 6, 1987), *aff'd sub nom. Duff Truck Line, Inc. v. Brock*, 848 F.2d 189 (6th Cir. 1988) (table).

ISSUES PRESENTED

Whether actual or anticipated fatigue impaired or would have impaired Stauffer's ability to shuttle trailers safely at the Denham Springs Wal-Mart store on the morning of August 8, 1998.

Whether Stauffer had a reasonable apprehension of serious injury to himself or the public related to fatigue when he refused to shuttle trailers on the morning of August 8, 1998.

ALJ'S RECOMMENDED DECISION

The ALJ held a hearing from February 29, 2000, through March 2, 2000. Based upon the testimony presented at the hearing, and the briefs and evidence submitted by the parties, the ALJ recommended that Stauffer's complaint be dismissed because he had not established a *prima facie* case under the STAA. The ALJ noted:

> In order to establish a prima facie case for relief under the STAA, an employee must show that he engaged in protected conduct, that he was subject to adverse action, and must present evidence sufficient to raise the inference that the protected conduct was the likely reason for the adverse action.

[6/] For a review of STAA whistleblower cases dealing with work refusals based on current or anticipated fatigue under the "reasonable apprehension of serious injury" test, see *Somerson* at 16.

ALJ's Recommended Decision and Order ("R. D. & O.") slip op. at 9 (citations omitted).

Because Wal-Mart had dismissed Stauffer, the ALJ found that Stauffer had suffered an adverse personnel action. However, the ALJ found that Stauffer had not engaged in protected activity when he refused to exchange the trailers at the Denham Springs store.

The ALJ found that Stauffer's refusal was not covered by the "actual violation" provision of the STAA (49 U.S.C. §31105(a)(1)(B)(i)) because he was not too fatigued, nor was he likely to become too fatigued, to shuttle the trailers safely. In making this finding, the ALJ specifically rejected Stauffer's testimony regarding the level of his fatigue and anticipated fatigue. *Id.* at 11, 12.

The ALJ also found that Stauffer's refusal was not covered by the "apprehension of serious injury" provision of the STAA (49 U.S.C. §31105(a)(1)(B)(ii)) because "a reasonable driver, in the circumstance confronting Stauffer, reasonably would not have concluded that he would be too fatigued to operate his vehicle safely under the circumstances that Stauffer anticipated." *Id.* at 13.

Finally, the ALJ found that, even assuming Stauffer had engaged in protected activity, Stauffer had not established that Wal-Mart was aware of his fatigue when it fired him. *Id.* at 14.

DISCUSSION

The issue of driver fatigue as it relates to motor vehicle safety is very important because research has shown that fatigue impacts safety. According to the Department of Transportation's Federal Motor Carrier Safety Administration,[7/] "755 fatalities and 19,705 injuries occur each year on the Nation's roads because of drowsy, tired, or fatigued [commercial motor vehicle] drivers." 65 Fed. Reg. 25,540 (2000).

Under the STAA, the Department of Transportation is assigned the central authority to establish safety regulations governing commercial motor vehicle transportation, including regulations such as the driver fatigue rule. Congress has assigned the Department of Labor a limited role in addressing transportation safety: enforcing the employee protection provision of the STAA. 49 U.S.C. §31105. As noted, the STAA whistleblower provision prohibits any person from taking an adverse action against an employee who refuses to operate a motor vehicle because operating the vehicle would violate a safety standard, 49 U.S.C. §31105(a)(1)(B)(i), or the driver has a reasonable apprehension of serious injury, 49 U.S.C. §31105(a)(1)(B)(ii).

[7/] The Federal Motor Carrier Safety Administration was established within the Department of Transportation by the Motor Carrier Safety Improvement Act of 1999, Pub.L. No. 106-159, 113 Stat. 1748, and was charged by the Secretary of Transportation with carrying out the responsibilities of the Department related to motor carrier safety. 65 Fed. Reg. 25,541.

Both the evidentiary record and the briefs in this case focus broadly on the question of human sleep patterns, and Stauffer's frequently-expressed concern that being awakened during his regular sleep period in order to shuttle trailers was a very undesirable practice and contributed significantly to feelings of fatigue. This issue of the human body's daily cycle ("circadian rhythm") and its relationship to a driver's ability to be alert and to drive safely is a recognized concern and is receiving consideration as part of DOT's reexamination of its Hours of Service regulation. *See generally* 49 C.F.R. Part 395 (2000); 65 Fed. Reg. 65,540. However, no party has alleged that Wal-Mart's suggestion in the early hours of August 8 that Stauffer get some rest and then be awakened to shuttle the trailers violates the existing DOT Hours of Service regulation.[8/]

Nonetheless, Stauffer argues that Wal-Mart's Custom Night Receiving System – which sometimes requires drivers to be awakened from their sleep to perform brief tasks – is illegal *as implemented* because it contributes to driver fatigue. Complainant's Brief at 1-2, 28. To the extent that Stauffer is arguing that a facially lawful scheduling policy does not adequately protect drivers and the public, he effectively is calling for a change in current DOT safety regulations – a remedy beyond the Labor Department's authority under the STAA. As we have noted before, this type of policy argument must be addressed to the DOT, which (unlike the Department of Labor) has both legal authority and technical expertise in the field. *Somerson,* ARB Nos. 99-05/036, slip op. at 16-17.

This is not to say, however, that the Department of Labor has no role to play in driver safety complaints. Our concern, however, is comparatively narrow. Rather than addressing the global concern that Stauffer raises (*i.e.*, whether it generally is an unsafe practice to require drivers to operate their vehicles after being awakened from the normal sleep cycle), our concern is whether a *specific* refusal to drive is protected activity under the STAA under the facts presented. Thus our Remand Order directed the ALJ:

> to receive evidence on the level of Stauffer's fatigue when he arrived at Denham Springs and on the basis for Stauffer's claim that, by waiting until an empty trailer was available, his ability or

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[8/] A driver is not considered to be "on duty" if the driver has access to a sleeper berth and can get some rest. 49 C.F.R. §395.2. Therefore Stauffer, who still had hours of duty and driving time available, could have rested in his sleep berth until called upon to shuttle the trailers without violating DOT regulations. He could then have returned to his sleeper berth for the "8 consecutive hours off duty" required by DOT's driving time regulation, 49 C.F.R. §395.3(a).

Even if Stauffer did not have hours of duty or driving time available and needed to begin his rest period, he could still have slept in his sleeper birth until called because a driver "using sleeper berth equipment . . . may cumulate the required 8 consecutive hours off duty, as required by §395.3, resting in a sleeper berth *in two separate periods totaling 8 hours, neither period to be less than 2 hours*." 49 C.F.R. §395.1(g) (emphasis supplied).

> alertness was "so likely to become impaired through fatigue . . . as to make it unsafe for him" to swap the trailers.

Stauffer, ARB No. 99-107, slip op. at 10. We also directed the ALJ

> to receive evidence concerning the circumstances confronting Stauffer at the time he refused to wait for the trailer to be emptied at Wal-Mart's Denham Springs store . . . [and] to consider what a reasonable driver, in the circumstances confronting Stauffer, reasonably would have concluded regarding his current and prospective physical condition and his ability to operate his vehicle safely.

Id. slip op. at 12.

In a STAA whistleblower case, the complainant has the burden of proving by a preponderance of the evidence that he engaged in protected activity, and that he was subjected to adverse employment action because of that activity. *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), *citing Moon v. Transp. Drivers, Inc.*,836 F.2d 226, 229 (6th Cir. 1987). As the ALJ aptly noted,

> "[M]ost of the cases in which the Secretary or Board has ruled against a complainant asserting fatigue or illness retaliation claims have involved drivers who refused to work *in anticipation of becoming* fatigued, without evidence to support that anticipation." The converse, however, is also true: that a complainant who produces sufficient evidence in support of a future fatigue claim could establish that a refusal to drive was protected activity.

ALJ's R.D. & O. at 10, quoting *Somerson* (emphasis supplied).

Stauffer chose to present this evidence in the form of testimony. He offered his own testimony, the testimony of Dr. Allan C. Richert, Jr. (a psychiatrist specializing in sleep disorders), and the testimony of former Wal-Mart truck drivers Lowell LeDoux and Troy Daigle.[9/]

The ALJ found Stauffer's testimony regarding his level of fatigue to be less than credible because it was argumentative, contradictory and unclear. R. D. & O. at 11. Based upon this

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[9/] Stauffer submitted extensive exhibits with his brief to the Board, some of which were not part of the record developed before the ALJ. Because the Board's decision is "based on the record and the decision and order of the administrative law judge," we have not considered those extra-record exhibits. 29 C.F.R. §1978.109(c).

finding the ALJ concluded "that Stauffer was not suffering from fatigue nor anticipating fatigue as to make it unsafe for him to shuttle the trailers." *Id.* at 10. The Board gives great deference to an ALJ's credibility findings that "rest explicitly on the evaluation of the demeanor of witnesses." *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983). This is so because the ALJ "sees the witnesses and hears them testify while . . . the reviewing court look[s] only at cold records." *Pogue v. U.S. Dep't of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991)(*quoting NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962)). Here the ALJ based his opinion upon his direct observation of Stauffer's demeanor while testifying at the hearing. We will not disturb the ALJ's conclusion that Stauffer's testimony regarding his level of fatigue lacked credibility.

As we discuss below, the testimony of Dr. Richert[10/] and drivers Daigle and LeDoux ultimately is not persuasive evidence that Stauffer was so fatigued when he arrived at the Denham Springs store that he could not shuttle the trailers safely, or that he reasonably anticipated he was likely to become so fatigued, or had a reasonable apprehension of serious injury if he shuttled the trailers.

1. Whether Stauffer's present level of fatigue when he arrived at Denham Springs was such that he was unable to shuttle the trailers safely.

The most persuasive fact supporting the ALJ's conclusion that Stauffer was not so impaired that he could not drive safely at the time he first arrived at the Denham Springs store is that Stauffer drove some five miles to another store to spend the night, rather than remaining at Denham Springs. If Stauffer believed he was too fatigued to shuttle the trailers safely when he first arrived at Denham Springs, it follows logically that he also should have been too fatigued to drive safely to another store.

Stauffer also offered the testimony of Dr. Richert in support of his claim that he was fatigued upon arriving at Denham Springs. Dr. Richert testified at some length concerning the body's natural sleep cycle, offering his general opinion that someone like Stauffer who was accustomed to going to sleep at a particular hour naturally would become tired and less alert past the beginning of the normal sleep time. However, Dr. Richert had never examined Stauffer – in fact, he had never met Stauffer until the morning of the hearing – and therefore could not offer any specific opinion regarding the actual extent of Stauffer's fatigue when he arrived at Denham Springs. With the ALJ, we conclude that Stauffer did not prove that he was so fatigued when he

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[10/] The ALJ discounted Dr. Richert's testimony because he "is an expert in sleep disorders [and t]here is no evidence that Stauffer has a sleep disorder." R. D. & O. at 11 n.4. Although we share the ALJ's view that Dr. Richert's testimony was not very persuasive regarding the specific questions to be resolved in this case, we disagree that it was not useful because Dr. Richert's medical practice focuses on "sleep disorders," rather than "sleep." In our view, a medical doctor who has expertise in the speciality of "sleep disorders" necessarily has knowledge that may be useful to a court in more general area of "sleep."

arrived that Denham Springs such that his refusal to shuttle the trailers would be protected activity under 49 U.S.C. §31105(a)(1)(B)(i) and the DOT's fatigue rule.

2. Whether Stauffer was likely to be so fatigued later on the morning of August 8 that he would be unable to shuttle the trailers safely.

A refusal to drive based on future fatigue may be protected under the STAA. However, as we noted in our Remand Order "a complainant must provide some proof that his or her ability will likely become impaired due to fatigue." *Stauffer*, ARB No. 99-107, slip op. at 10. Here Stauffer's claim fails because he did not supply the necessary proof.

The ALJ discredited Stauffer's testimony regarding his anticipated fatigue, based on both his demeanor and inconsistencies.[11/] This leaves the testimony of Dr. Richert.

Under the rules of practice and procedure for formal hearings, 29 C.F.R. Part 18, expert testimony is admissible where "scientific, technical, or other specialized knowledge will assist the judge as trier of fact to understand the evidence or to determine a fact in issue" and "a witness [is] qualified as an expert by knowledge, skill, experience, training or education." 29 C.F.R. §18.702 (2000). In the present case Dr. Richert's testimony is not irrelevant or unreliable simply because he is a specialist in sleep disorders and Stauffer does not suffer from a sleep disorder. As noted above, we assume that Dr. Richert, who practices in the area of sleep medicine, would be familiar through experience and training with the fundamental principles of human sleep.[12/]

As noted, Dr. Richert had never examined or even met Stauffer prior to the hearing, and therefore had no specific knowledge of Stauffer's body rhythms generally or his condition on the morning of August 8. Therefore, Dr. Richert's testimony can only be relevant as expert scientific testimony. However, his testimony failed when it extended beyond the fundamentals.

The most serious deficiency in Dr. Richert's testimony is its equivocal nature. The primary purpose of expert testimony is to "assist the judge as trier of fact to understand the evidence or to determine a fact in issue." 29 C.F.R. §18.702. Dr. Richert's testimony does not fulfill this function. For example, when asked whether it would be hazardous to drive after being awake for sixteen hours Dr. Richert first testified "I think that's not the best situation in which to be driving," then testified "Well, the body does have the ability to kind of alert itself in certain

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[11/] "I just do not believe Stauffer's self-serving testimony that he was fatigued or that he anticipated fatigue which would make it unsafe for him to shuttle the trailers safely." R. D. & O. at 12.

[12/] Among other things, Stauffer offered Dr. Richert's testimony "to explain to us what the human body goes through, what makes it want to sleep. And that, we believe, will help the trier of fact determine whether or not Mr. Stauffer was impaired due to fatigue and sleepiness on August 8, 1998." TR at 421. Apparently recognizing this, the ALJ permitted Dr. Richert great latitude in testifying about these fundamental principles, over Wal-Mart's objections. *See, e.g.*, TR at 412; 414-15; 418-19.

situations," and finally testified "In that case, I think it would be more probable that you would be sleepy, because it's not a very exhilarating case." TR at 459-60; *see also* TR at 482-83; 487-88; 490-92. This testimony simply is not very helpful in establishing the key facts needed to show that Stauffer's work refusal was protected: whether he was so impaired or likely to become impaired from fatigue on August 8 as to make driving unsafe.

Dr. Richert's testimony also fails because he never clearly identified the reasoning or methodology underlying his opinions:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Daubert v. Dow Pharm., Inc., 509 U.S. 579, 592-93 (1993). We find it significant that Dr. Richert never referred to any studies, publications or the opinion of any other specialist in support of his testimony. These deficiencies undermine the relevance and reliability of Dr. Richert's testimony as a scientific expert.

3. Whether Stauffer had a reasonable apprehension of serious injury that would justify refusing the work assignment.

Under the "reasonable apprehension of serious injury" provision of the STAA, "an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health." 49 U.S.C. §31105(a)(2). Thus, in order for activity to be protected under this standard the employee *subjectively* must fear injury (that is, the fact finder must be convinced that the employee actually was apprehensive that serious injury might result from driving) *and* the employee's fear must be *objectively* reasonable (that is, a "reasonable individual" would have the same apprehension).

The ALJ expressed skepticism that Stauffer subjectively feared that there was a likelihood of serious injury if he was awakened to shuttle the trailers, finding that

> Stauffer was not concerned with being fatigued nor did he anticipate fatigue. His only concern, as was reflected in several years of crusading and in his statements made [to Wal-Mart's loading dock supervisors and dispatchers] on August 8 was being awakened from his sleep.

R.D. &. O. at 11. More significantly, however, the ALJ found that any claimed fears of injury on Stauffer's part were not objectively reasonable:

> [T]here was no evidence presented at the hearing of any accidents or injuries resulting from drivers being awakened to shuttle trailers. Stauffer himself had been awakened to shuttle trailers at least 500 times and never had an accident or injured anyone. Nor was he aware of any accidents or injuries resulting from drivers being awakened to shuttle trailers. The lack of previous accidents is further proof that Stauffer's alleged apprehension on the evening of August 7 was not reasonable.

R.D. & O. at 14.

The testimony of Stauffer's witnesses LeDoux and Daigle, both former Wal-Mart drivers, is particularly noteworthy on this issue and does not support Stauffer's contention that he had a reasonable apprehension of serious injury due to fatigue. Neither driver could identify a single instance where fatigue had caused a serious accident while shuttling vehicles, a routine that they had performed many times while working for Wal-Mart. Moreover, both testified that under circumstances similar to those confronting Stauffer on August 8, they would have been able to shuttle the trailers safely.

CONCLUSION

The ALJ's fact findings are supported by substantial evidence in the record, and the ALJ's legal analysis is sound. Stauffer failed to establish that he was fatigued or anticipated fatigue such that shuttling the trailers on August 8, 2001, would have violated DOT's fatigue rule. Similarly, Stauffer failed to establish that he had a reasonable apprehension of serious injury if he shuttled the trailers. We therefore agree with the ALJ that Stauffer has not demonstrated that his work refusal on August 8, 2001, was protected activity under the STAA, and we **DISMISS** his complaint.

SO ORDERED.

PAUL GREENBERG
Chair

E. COOPER BROWN
Member