In the Matter of:

LARRY E. EASH,

COMPLAINANT,

v.

ROADWAY EXPRESS, INC.,

RESPONDENT.

ARB CASE NOS. 02-008
02-064

ALJ CASE NO. 2000-STA-47

DATE: March 13, 2006

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paul O. Taylor, Esq., ***Truckers Justice Center, Eagan, Minnesota***

For the Respondent:
John T. Landwehr, Esq., Katherine T. Talbot, ***Eastman & Smith, LTD., Toledo, Ohio***

ORDER OF REMAND

Larry E. Eash complained that Roadway Express, Inc. violated the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (West 1997), and its implementing regulations, 29 C.F.R. Part 1978 (2005), when it issued him five warning letters and imposed a five-day suspension. An Administrative Law Judge (ALJ) granted Roadway's motion for summary decision in part but concluded that Roadway had violated the STAA in disciplining Eash. Both parties appealed, and the Administrative Review Board (ARB) affirmed the ALJ's decision in all respects. *Eash v. Roadway Express, Inc.*, ARB Nos. 02-008, 064, ALJ No. 00-STA-47 (ARB June 27, 2003) (*Eash I*).

Subsequently, Eash and Roadway appealed to the United States Court of Appeals for the Sixth Circuit. At the request of the Solicitor of Labor, who represented the ARB, the court remanded this case for the ARB to reconsider its affirmance of the ALJ's partial summary decision. *Roadway Express, Inc. v. Administrative Review Board*, 2004 WL 2671728 (6th Cir. 2004).

In its unpublished decision, the court noted the ARB had reversed the ALJ's recommended decision granting summary decision in another case that Eash had filed against Roadway, *Eash v. Roadway Express Inc.*, ARB No. 00-061, ALJ No. 98-STA-28 (ARB Dec. 31, 2002) that was based on similar facts.[1] The Sixth Circuit found that remand was necessary in this case "to explain the different results in nearly identical cases" and to correct a "possible misapplication" of the law. The court affirmed the remainder of the ARB's determination that Roadway had violated the STAA in disciplining Eash for his refusal to drive in adverse weather conditions.

Meanwhile, the ARB issued *Eash v. Roadway Express, Inc.*, ARB No. 04-036, ALJ No. 98-STA-28 (ARB Sept. 30, 2005) (*Eash II*). That case involved Eash's refusals to drive due to fatigue on two other occasions, for which Roadway issued a warning letter and suspended him. The ARB affirmed the ALJ's conclusion that Eash had failed to prove he had engaged in protected activity. But we held that the ALJ erred when he concluded that, as a matter of law, Eash was not entitled to protection under the STAA because he had deliberately made himself unavailable for work. *Id.* at 10.

The only issue before us here is whether, in light of our decision in *Eash II*, summary decision was appropriate in *Eash I*. We conclude that we must vacate, in part, our *Eash I* decision and remand for further proceedings.

DISCUSSION

The legal standard

The STAA protects employees who engage in certain activities from adverse employment actions. The STAA provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order," 49 U.S.C.A. § 31105(a)(1)(A); has "refuse[d] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health," 49 U.S.C.A. § 31105(a)(1)(B)(i); or has "refuse[d] to operate a vehicle because . . . the employee has a

[1] In that case, Eash submitted an affidavit disputing Roadway's allegation that he had deliberately made himself unavailable for work, and was therefore not entitled to whistleblower protection under the STAA. The ARB held Eash had demonstrated a genuine issue of material fact and therefore reversed the ALJ's decision and remanded for an evidentiary hearing.

reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition," 49 U.S.C.A. § 31105(a)(1)(B)(ii).

The STAA protects two categories of an employee's refusal to drive, commonly referred to as the "actual violation" and "reasonable apprehension" subsections. *Leach v. Basin Western, Inc.*, ARB No. 02-089, ALJ No. 02-STA-5, slip op. at 3 (ARB July 31, 2003). While subsection (1)(B)(i) deals with conditions as they actually exist, section (1)(B)(ii) deals with conditions as a reasonable person would believe them to be.

An employee's refusal to drive may be protected activity under subsection (1)(B)(i) if his operation of a motor vehicle would violate Department of Transportation (DOT) regulations. The pertinent DOT regulation involved here reads:

> 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.

49 C.F.R. § 392.3 (2005). This regulation, known colloquially as the fatigue rule, plainly covers a driver who anticipates that his or her ability or alertness is so likely to become impaired that it would be unsafe to begin or continue driving. *Eash II*, citing *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 1999-STA-21, slip op. at 5 (ARB July 31, 2001).

Under subsection (i), a complainant must prove that operation of the vehicle would in fact violate the specific requirements of the fatigue rule at the time he refused to drive – a "mere good-faith belief in a violation does not suffice." *Yellow Freight Sys. v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993); *Cortes v. Lucky Stores, Inc.*, ARB No. 98-019, ALJ No. 96-STA-30, slip op. at 4 (ARB Feb. 27, 1998). Thus, a complainant must introduce sufficient evidence to demonstrate that his driving ability is or would be so impaired that actual unsafe operation of a motor vehicle would result. *See 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).

A complainant's refusal to drive may also be protected under subsection (1)(B)(ii) if he has "a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition." This clause covers more than just mechanical defects of a vehicle – it is also intended to ensure "that employees are not forced to commit . . . unsafe acts." *Garcia v. AAA Cooper Transp.*, ARB No. 98-162, ALJ No. 98-STA-23, slip op. at 4 (ARB Dec. 3, 1998). Thus, a driver's physical condition, including fatigue, could cause him to have a reasonable apprehension of serious injury to himself or the

public if he drove in that condition. *Somerson v. Yellow Freight Sys., Inc.*, ARB Nos. 99-005, 036, ALJ Nos. 98-STA-9, 11, slip op. at 14 (ARB Feb. 18, 1998).

Furthermore, the employee's refusal to drive must be based on an objectively reasonable belief that operation of the motor vehicle would pose a risk of serious injury to the employee or the public. *Jackson v. Protein Express*, ARB No. 96-194, ALJ No. 95-STA-38, slip op. at 3 (ARB Jan. 9, 1997). The STAA provides that "an employee's apprehension of serious injury is reasonable only if a reasonable [person] in the circumstances . . . confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury or serious impairment [to] health." Moreover, to "qualify for protection, the employee must have sought from the employer and been unable to obtain, correction of the unsafe condition." 49 U.S.C.A. § 31105(a)(2).

The October 13, 1998 refusal to drive due to fatigue

The only incident at issue concerns Eash's two rest breaks on October 13, 1998. For the purpose of ruling on summary decision, the ALJ accepted Eash's version of the facts. Those are that, after driving to West Seneca, New York, Eash went off duty to a hotel to rest at 9:45 a.m. on October 12, 1998. At about 3:00 p.m. that day, he received a telephone call from his attorney. The conversation left him upset and unable to sleep any more. Eash then received a work call at 8:00 p.m. He left West Seneca at 1:00 a.m. on October 13 to drive to Roadway's Copley, Ohio, terminal.

While on the road, Eash attested that he became drowsy. He stopped and rested in the cab of his truck from 2:30 a.m. to 4:00 a.m. He then drove until 5:45 a.m. and rested again for 45 minutes due to fatigue. Eash arrived at the Copley terminal at 7:30 a.m., an hour and a half beyond the "agreed-to running time" of five hours. Initial Recommended Decision and Order at 2-3.

Roadway issued Eash a warning letter on October 16, 1998, stating that Eash had failed to meet the running time and advising him that a hearing would be conducted to review his overall work record for the previous nine months. Complainant's Exhibit, CX, 18. In April 1999, after the hearing, Roadway suspended Eash for five days.

In granting Roadway's motion for summary decision, the ALJ accepted Eash's allegations that he was fatigued on the morning of October 13. The ALJ stated, however, that "the dominant theme" in the ARB's case law that holds rest periods to be protected activity is that the employer's actions in some way precipitated the employee's fatigue.

Citing *Porter v. Greyhound Bus Lines*, ARB No. 98-116, ALJ No. 96-STA-23 (ARB June 12, 1998), the ALJ held that the STAA does not protect an employee who, through no fault of the employer, makes himself unavailable for work. The ALJ concluded as a matter of law that, since Eash had adequate time to be rested and available for work and was fatigued through no fault of Roadway, he had not engaged in protected

activity when he stopped twice to rest on October 13. Initial Recommended Decision and Order at 9-10.

The ALJ misapplied Porter

In *Eash I*, the ARB accepted the ALJ's analysis and affirmed his summary decision, noting only that *Porter* "supports the ruling that Eash was not engaged in protected activity on October 13, 1998." Slip op. at 9.

Later, as noted, the ARB reviewed Eash's appeal of an ALJ's decision in another complaint he had filed against Roadway. In *Eash II*, the ALJ also relied on *Porter* and concluded, as a matter of law, that Roadway was entitled to summary decision because Eash deliberately made himself unavailable for work by not taking advantage of his time off to become rested. Slip op. at 4. The ARB clarified its *Porter* decision and held that *Porter* did not establish an exception to the fatigue rule and that the ALJ erred in relying on *Porter* to conclude that "even if Eash were fatigued, he deliberately made himself unavailable for work and was therefore not entitled to protection under the STAA." *Eash II*, slip op. at 10.

We reasoned as follows:

> An employee does not automatically lose whistleblower protection by failing in an alleged "duty" to be ready for work. Nor does an employer's adherence to its work rules relieve it of obligations that are grounded in the statute and regulations. While those factors may be considered in testing the legitimacy of an employee's claim of fatigue, they are not a talismanic test.
>
> Evidence of deliberately being unavailable for work does not always disprove that a complainant was in fact fatigued. Such evidence may persuade the fact-finder, as it did in this case, to disbelieve the complainant's contention that he was fatigued. But whether or not a complainant makes himself available for work is only one of the factors bearing on (1) his assertion that driving would actually violate a regulation or (2) his reasonable apprehension that driving would result in serious injury to himself or the public. In determining whether a complainant's refusal to drive constitutes protected activity, the ALJ must consider all the circumstances of the incident.
>
> Similarly, a mere finding that a respondent's operating rules and procedures comply with the regulations governing a driver's hours of service or that a respondent

> did not contribute to a complainant's fatigue do not necessarily remove a complainant's STAA protection. *See Ass't Sec'y of Labor & Ciotti v. Sysco Foods*, ARB No. 98-103, ALJ No. 97-030, slip op. at 7 (ARB July 8, 1998) (company's absentee policy which imposed a suspension after eight refusals to work constituted adverse action against Ciotti because driving while sick would have violated the fatigue rule).

Id. Cf. Blackann v. Roadway Express, Inc., 2005 WL 3448289 (6th Cir. 2005), *aff'g Blackann v. Roadway Express, Inc.*, ARB No. 02-115, ALJ No. 00-STA-38 (ARB June 30, 2004) (noting with approval the "common sense" test that protects a driver "who may unexpectedly encounter fatigue in the course of a journey" but permits an employer to "sanction an employee for chronically tardy conduct").

Therefore, in light of this holding and rationale, we now hold that the ALJ here erred. He misapplied *Porter* in concluding as a matter of law that Eash's two fatigue breaks on October 13, 1998, were not protected activity because Eash had deliberately made himself unable for work through no fault of Roadway.

CONCLUSION

We vacate that portion of our decision in *Eash I* that Roadway is entitled to summary decision on the issue of whether Eash's refusal to drive on October 13, 1998, was protected activity. Therefore, we remand to the ALJ for further proceedings consistent with our decision in *Eash II*.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER TRANSUE
Administrative Appeals Judge