



In the Matter of:

BRUCE TREUR,

ARB CASE NO. 15-001

COMPLAINANT,

ALJ CASE NO. 2014-STA-002

v.

DATE: July 28, 2016

MAGNUM EXPRESS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Heather L. Carlson, Esq.; McDonald, Woodward & Carlson, P.C.; Davenport, Iowa

For the Respondent:

James T. Spolyar, Esq.; Scopelitis, Garvin, Light, Hanson & Feary, P.C.; Indianapolis, Indiana

Before: E. Cooper Brown, Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; and Luis A. Corchado, Administrative Appeals Judge. Judge Corchado, dissenting.

DECISION AND ORDER OF REMAND

This case arises under the Surface Transportation Assistance Act of 1982 (STAA or the Act), as amended, 49 U.S.C.A. § 31105 (Thomson/West 2007 & Supp. 2015), and its implementing regulations, 29 C.F.R. Part 1978 (2015). Complainant Bruce Treur filed a complaint alleging that Respondent Magnum Express, Inc. retaliated against him in violation of the STAA's whistleblower protection provisions. Treur appeals from a Decision and Order (D.

& O.) issued by a Department of Labor Administrative Law Judge (ALJ) on September 22, 2014, after a hearing on the merits, finding that Treur failed to establish the existence of any protected activity that contributed to his discharge.

BACKGROUND¹

Following his graduation from high school, Treur was in the U.S. Air Force for 6 years, where he drove a truck and loaded and unloaded aircraft. He obtained his commercial driver's license in 1992 and began working as a truck driver in 1997. He testified that he had driven nearly every kind of conventional truck and tractor-trailer (except for a tanker) throughout the continental United States and Canada and through extreme winter conditions. However, the first time he drove a "straight truck" was in October 2012 when Treur began working as a driver for Magnum Express transporting and delivering pharmaceutical supplies.² He drove the same route, Monday through Friday, for the duration of the time he worked for Magnum Express, which was approximately two months. His route started at the Ryder truck facility in Davenport, Iowa, typically between 5:00 and 6:00 p.m., when he would begin his route to Des Moines, Iowa. The trip between Davenport and Des Moines took him about an hour and a half to two hours and he would usually arrive around 7:30 to 8:00 p.m. In Des Moines, he would unload product for a half an hour to one hour. Next he would drive to Omaha, Nebraska, a trip that took three and a half to four hours, where he would spend an hour or two unloading product. Finally, he would drive back to Davenport, returning between 4:00 and 5:00 a.m. Treur's route took him along I-80 west from Davenport to Omaha and I-80 east on his return trip. Treur drove this route on December 18, 2012.

On December 19, 2012, Treur woke up around 10:00 or 11:00 a.m., and checked the Iowa Department of Transportation (DOT) website, which was predicting bad weather conditions between Des Moines, Iowa, and Omaha, Nebraska.³ Based on the information he saw on the website and a weather forecast from the day before that predicted blizzard conditions for the 19th, Treur texted his supervisor, Chris McCormick,⁴ at approximately 11:00 a.m. about the Iowa DOT weather reports. He informed McCormick that the weather in Omaha and Des Moines, Iowa was already bad and he would not be able to drive the run that evening so that McCormick could make alternate arrangements—either by delaying the run or assigning another

¹ The Background Statement is based on the uncontroverted evidence in the record, as found in the ALJ's Decision and Order (D. & O.), as well as the ALJ's limited findings of fact found at pages 16-17 of the D. & O.

² The references in this paragraph are to D. & O. at 3, 16.

³ The references in this paragraph are to D. & O. at 3-4, 16.

⁴ McCormick was at Magnum Express's offices in Plainfield, Indiana, approximately five hours from Treur's location in Davenport, Iowa.

driver. McCormick called Treur after receiving his text and told him that he must drive the route as scheduled and that the customer would not excuse any failure to deliver unless I-80 was closed. Treur explained to McCormick that he was not comfortable driving a “straight truck” into blizzard conditions. After they talked, Treur faxed McCormick a copy of the Iowa DOT website report (JX 3) and a weather alert from the National Weather Service website (JX 5) stating that a Blizzard Warning was then in effect for Des Moines, Iowa.

Later, McCormick called Magnum Express’s safety director, Robert Smith,⁵ to tell him about McCormick’s conversation with Treur.⁶ Smith and Treur then talked on the phone; Smith told Treur that he needed to try to make the scheduled trip and that if he encountered bad road conditions and Treur did not feel comfortable driving at that time, he could stop at a motel. Smith asked Treur what the weather conditions were like in Davenport, and Treur told him that they were fine. Treur told Smith that his “straight truck” did not handle safely in high winds, that he was concerned about a lack of hotels along his route, and that he did not want to get stuck in a cold cab overnight. Smith responded that he should “bring extra clothing, water and other supplies with him in case he got caught in bad weather” and that “Treur needed to report to work and assess the situation at that time.” Smith also told Treur that if he started the trip and ran into bad weather, he could either turn around and come home or find a motel that the company would pay for him to stay in. Smith warned Treur that if he did not report to work and assess the situation at that time, his employment could be terminated. Following the phone call, Smith reported to McCormick that his impression from talking to Treur, and from hearing Ms. Treur in the background,⁷ was that Treur was not going to report to work later that day. Around 12:30 pm (EST), McCormick called Treur and asked him if he was willing to drive the route that day. When Treur indicated that he was not, McCormick fired him. McCormick, the deciding official, did not testify, but Exhibit JX 13 is a copy of the e-mail McCormick sent to Smith (at 1:34 p.m. or 12:34 pm EST) that stated that McCormick had fired Treur “for refusing dispatch due to possible bad weather.”

Exhibit JX 3 is a copy of information with the subject “News and Info,” for December 19, 2012, from the Iowa DOT website. Treur faxed this document to Magnum Express on December 19, 2012.⁸ It lists the following:

- “Travel not advised in much of Iowa beginning at 8 p.m.”

⁵ Smith was also at Magnum Express’s offices in Plainfield, Indiana.

⁶ The references in this paragraph are to D. & O. at 4-5, 16-17.

⁷ Hearing Transcript (Tr.) at 133 (Smith).

⁸ D. & O. at 16; Tr. at 41.

- “In advance of forecasted blizzard conditions in the state, the Iowa Department of Transportation is advising motorists that travel across the majority of Iowa is not advised from 8 p.m. tonight through noon Thursday, Dec. 20”
- “The National Weather Service has issued a blizzard warning beginning at 6 p.m. tonight and continuing through 6 p.m. Thursday”
- “In addition to heavy snowfall of 6 to 10 inches, very strong northwest winds (25-35 mph, with gusts exceeding 45 mph) will produce considerable blowing and drifting of snow and blizzard conditions late tonight through Thursday afternoon”
- “Snow drifts several feet deep will be possible given the strong winds”
- “Visibility at times will be reduced to one-quarter mile or less to whiteout conditions”
- “The Iowa DOT does not recommend travel during this dangerous winter storm . . .”

Exhibit JX 5 is a copy of the National Weather Service Alerts for Des Moines, Iowa. Treur faxed this document to Magnum Express on December 19, 2012.⁹ The National Weather Service alert stated the following:

- “Blizzard warning Now-Thursday, Dec. 20, 6:00 p.m.”
- “Blizzard warning remains in effect from 6 pm this evening to 6 pm Thursday”
- “Timing . . . precipitation will begin to spread across the area by late this afternoon into early this evening. Snow is expected along and north of a Indianola to Tama Line . . . Rain is expected in Southern Iowa South and East of a Lamoni to Ottumwa Line. In between . . . a rain and snow mix is expected. Precipitation will change over to all snow from northwest to southeast by late evening into the early morning hours Thursday. The snow will taper off by mid to late morning Thursday”
- “Storm total accumulation . . . 6 to 12 inches of snow is expected by Thursday morning. The heaviest snow axis will be along a line from near Des Moines to Waterloo The lowest amounts are expected near the Missouri border. Snow drifts several feet deep will be possible given the strong winds”
- “Winds/visibility . . . Winds will become very strong and gusty tonight from the north northwest . . . sustained winds of 25 to 35 mph are expected with gusts over 45 mph possible . . . the strongest winds are expected tonight through Thursday morning. Widespread blowing and drifting snow will combine to create blizzard conditions with visibilities near zero and whiteout conditions”
- “Impacts . . . life-threatening blizzard conditions are expected to develop late tonight into Thursday. Travel will become difficult . . . if not impossible due to blowing and drifting snow.”
- “Precautionary/preparedness actions. A blizzard warning means severe winter weather conditions are expected or occurring. Falling and blowing snow with strong winds and poor visibilities are likely. This will lead to whiteout conditions . . . making travel

⁹ D. & O. at 16 (the ALJ appears to have accepted Treur’s testimony that Treur faxed both JX 3 and JX 5 to Magnum Express); Tr. at 42-43.

extremely dangerous. Do not travel. If you must travel . . . have a winter survival kit with you. If you get stranded . . . stay with your vehicle.

Treur drove the same truck every day on his route for Magnum Express.¹⁰ His truck was a “straight truck,” which Treur described as “a very large U-Haul that you would use to move if you’re going to move your own furniture out of your house.”¹¹ Treur testified that he did not feel safe driving his truck into a blizzard after learning that a Blizzard Warning was currently in effect for Des Moines, Iowa and that blizzard conditions were predicted for the rest of the state beginning at 6:00 p.m. on the evening of December 19. Treur testified that his straight truck did not handle well during thunderstorms and windy conditions, and that he had to reduce his speed greatly in such conditions so that the vehicle would not flip over. With regard to the forecasted blizzard on his route during the time he was scheduled to drive Thursday evening, Treur was concerned that the wind, blowing from north to south, would blow his truck over and that it would either land on the car next to him or on the driver’s side window, leaving him injured and/or unconscious. He was also worried because the truck was white, so other vehicles might not be able to see him if his truck became disabled. He thought that white-out conditions in the blizzard might leave him stranded in a ditch where no one could see him and that he “would literally die in the ditch.”¹² Treur was also concerned because his truck only had a 50-gallon fuel tank and was not equipped with a sleeper, meaning that if the weather got extremely cold the fuel would turn to gel and the truck could stall, causing him to have to park somewhere on the road, where he would freeze to death.

Treur further testified, “[A]s a professional driver, even if you get word that there is a blizzard where you’re going to, you don’t drive it into the blizzard. You don’t risk driving that vehicle into a storm, hoping the blizzard isn’t bad, because if the National Weather Service has listed a blizzard warning, that means they’re tell[ing] you, don’t drive into that blizzard.”¹³

Magnum Express has a written policy on progressive discipline.¹⁴ Although Treur had never previously been disciplined and was a good employee, Respondent asserted that Treur’s situation was not suitable for progressive discipline because it considers failure to report to work as “analogous to failing a drug test.”¹⁵ Robert Smith, the safety director, stated that Respondent

¹⁰ The references in this paragraph are to D. & O. at 3-5.

¹¹ *Id.* at 3.

¹² *Id.*

¹³ *Id.* at 6.

¹⁴ The references in this paragraph are to D. & O. at 9.

¹⁵ *Id.* at 9.

had fired two or three other drivers at Magnum Express for refusing to report to work because of weather forecasts; that “to his knowledge there has never been an instance where a driver has refused to come to work and assess weather conditions at that time who has not been fired.”¹⁶

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated his authority to this Board to issue final agency decisions in STAA cases.¹⁷ The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ’s factual determinations if they are supported by substantial evidence.¹⁸

DISCUSSION

The STAA provides that a person may not discharge, discipline, or discriminate against an employee “regarding pay, terms, or privileges of employment” because the employee has engaged in certain protected activities.¹⁹ More specifically, 49 U.S.C.A. § 31105(a)(1)(B) provides: “A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because . . . 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” The statute specifies at section 31105(a)(2) that under section 31105(a)(1)(B)(ii), “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,” and “[t]o qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.”²⁰

¹⁶ *Id.*

¹⁷ Secretary’s Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012); 29 C.F.R. § 1978.110(a).

¹⁸ 29 C.F.R. § 1978.110(b); *Lachica v. Trans-Bridge Lines*, ARB No. 10-088, ALJ No. 2010-STA-027, slip op. at 2, n.3 (ARB Feb. 1, 2012) (citation omitted).

¹⁹ 49 U.S.C.A. § 31105(a)(1).

²⁰ The Board has explained that “[w]hether a refusal to drive qualifies for STAA protection requires evaluation of the circumstances surrounding the refusal under the particular requirements of each of the provisions.” *Melton v. Yellow Transp., Inc.*, ARB No. 06-052, ALJ No. 2005-STA-002, slip op. at 5 (ARB Sept. 30, 2008).

Complaints filed under the STAA are governed by the legal burdens of proof set forth in the employee protection provision of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).²¹ To prevail on a STAA claim, a complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer took an adverse employment action against him, and that the protected activity was a contributing factor in the unfavorable personnel action.²² Once the complainant has established that the protected activity was a contributing factor in the employer's decision to take adverse action, the employer may escape liability only by proving by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity.²³

After reviewing the ALJ decision and the record, we remand this case for reconsideration because the ALJ did not properly analyze the issue of whether Treur engaged in protected activity under 49 U.S.C.A. § 31105(a)(1)(B)(ii).²⁴

The ALJ found that Treur failed to engage in protected activity on December 19, 2012.²⁵ Specifically, the ALJ found that Treur lacked a reasonable apprehension of serious injury (under section 31105(a)(1)(B)(ii)) due to the weather when he refused to drive because he relied on

²¹ 49 U.S.C.A. § 31105(b)(1); *see* 49 U.S.C.A. § 42121 (Thomson/West 2007).

²² 49 U.S.C.A. § 42121(b)(2)(B)(iii).

²³ 49 U.S.C.A. § 42121(b)(2)(B)(iv).

²⁴ The ALJ below pointedly addressed Treur's refusal to drive under section 31105(a)(1)(B)(ii) (the "reasonable apprehension" section) only, and did not consider whether Treur also engaged in protected activity under section 31105(a)(1)(B)(i) (the "actual violation" section). We decline to address whether Treur's refusal to drive constituted protected activity under section 31105(a)(1)(B)(i) because the issue was not adequately preserved or argued on appeal. We note in this regard that Treur agreed with the ALJ's determination that the only relevant inquiry was "what the Complainant knew at the time he refused to drive his assigned route on December 19, 2012." (D. & O. at 15). Consistent with that understanding, Treur did not appeal the ALJ's exclusion of Treur's proffered evidence of the actual meteorological conditions on Treur's route when he would have encountered them. Tr. at 68. In *Robinson*, the Secretary explicitly considered such evidence (unknown to the complainant at the time of his refusal) in connection with the issue whether the complainant would have committed an actual violation of a federal regulation had he not refused to drive: "it is appropriate to examine the record evidence as to weather conditions during the period Robinson would have been driving." *Robinson v. Duff Truck Line*, No 1986-STA-003, slip op. at 6 (Sec'y Mar. 6, 1987), *aff'd in part sub nom., Duff Truck Line v. Brock*, 848 F.2d 189 (6th Cir. 1988) (unpublished).

²⁵ The references in this paragraph are to D. & O. at 17-18.

weather forecasts pertaining to his upcoming scheduled drive as opposed to *existing* weather conditions at the time of his refusal to drive. The ALJ considered it significant that Treur did not know what the actual weather conditions were between Davenport and Des Moines, Iowa, at the time he refused to drive; that in refusing to drive he relied exclusively on the forecast of the anticipated weather conditions at the time of his scheduled drive. The ALJ reasoned that if weather conditions had become hazardous by the time Treur was supposed to have started his route, he could have declined the trip at that time or, if Treur had started his trip and encountered hazardous conditions, he could have turned around or found a motel at Magnum Express's expense. The ALJ found it unreasonable that Treur would refuse to drive based on *predicted* weather forecasts; that instead Treur should have postponed any assessment of whether it was safe to drive due to the weather conditions until he reported to work later in the day.

For the following reasons, we believe the ALJ erred in his analysis of the facts and law pertaining to Treur's refusal to drive. First, the ALJ's analysis foreclosed the possibility that Treur's refusal could constitute protected activity under 49 U.S.C.A. § 31105(a)(1)(B)(ii) and (a)(2) based solely on forecasted weather conditions. The language at section 31105(a)(1)(B)(ii) ("reasonable apprehension") has been interpreted by the Department of Labor as encompassing refusals to drive in hazardous weather conditions in the future (or prior to dispatch) because "logic and common sense require that the driver can refuse to begin his assigned trip if he is aware that he *will encounter* hazardous road conditions."²⁶ In *Eash v. Roadway Express, Inc.*, the Board explained that although "§ 31105(a)(1)(B)(i) deals with conditions as they actually exist, § 31105(a)(1)(B)(ii) deals with conditions as a reasonable person would believe them to be."²⁷ We are unaware of precedent holding that a refusal to drive may be protected under section 31105(a)(1)(B)(ii) based *solely* on forecasted adverse weather conditions. Nevertheless, an employee who refuses to drive an assigned route prior to dispatch because of forecasted inclement weather does not automatically lose protected status because similar inclement weather conditions do not exist at the location and time when the driver informs his or her employer of his refusal to drive. In other words, contrary to the ALJ's ruling, failure to assert *existing* weather conditions as grounds for refusing to drive does not necessarily preclude finding that an employee's refusal to drive in the future is protected. Whether or not the *existing* conditions are safe is only one of the factors bearing on a driver's reasonable apprehension that driving would result in serious injury to the driver or public. All the circumstances surrounding a refusal to drive—including but not limited to existing conditions, weather forecasts, timing, the condition and nature of the vehicle, and the driver's experience—must be considered in

²⁶ *Robinson*, No. 1986-STA-003, slip op. at 3 (emphasis added); see *Id.*, slip op. at 9 ("Certainly, where driving is hazardous as a result of weather conditions, the equipment becomes unsafe on the road. This is particularly so . . . where there is evidence that the steering of [the] truck became more difficult on icy and snowy roads."); see also *Roadway Exp., Inc., v. ARB*, 116 Fed.Appx. 674 (6th Cir. 2004) (unpublished).

²⁷ *Eash v. Roadway Express, Inc.*, ARB Nos. 02-008, 02-064; ALJ No. 2000-ALJ-047, slip op. at 6 (ARB June 27, 2003).

determining the reasonableness of the driver's refusal and whether the refusal constitutes protected activity.

49 U.S.C.A. § 31105(a)(1)(B)(ii) provides that a person may not discharge, discipline, or discriminate against “an employee because the employee refuses to operate a vehicle because 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.” This language does not speak to the immediacy of the hazardous safety or security condition. However, one of the principal definitions of “apprehension” is “anticipation of adversity or misfortune; suspicion or fear of future trouble or evil,”²⁸ suggesting that future weather conditions might satisfy the statutory refusal requirements. Section 31105(a)(2) however further provides that “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.”²⁹ The ALJ below appears to have interpreted the clause “in the circumstances then confronting the employee” as requiring an employee's knowledge of “existing (weather) conditions.” In our view, depending upon the totality of circumstances, a *blizzard forecast* of which a driver is aware that covers the time a driver is scheduled to drive (even though several hours in the future) and covers the area of his route, may constitute a “circumstance[] then confronting an employee.” Stated another way, depending on other relevant factors such as the suitability and condition of the vehicle, the driver's experience, and timing of the refusal to drive, a driver aware of weather predictions of a blizzard, high winds, and white-out conditions might be found to have a reasonable apprehension of serious injury to himself or the public because of those impending hazardous conditions.

Robinson v. Duff Truck Line, cited by Treur in his brief, is illustrative.³⁰ Robinson, like Treur, called his employer to “report off” four or five hours prior to his scheduled shift after

²⁸ *Apprehension*, RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d Ed. 2001).

²⁹ 49 U.S.C.A. § 31105(a)(2)(emphasis added). Section 31105(a)(2) further provides: “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.” When a driver notifies an employer that he or she is refusing to drive because of current or forecasted hazardous weather, that notification serves as seeking correction under the statute. *Robinson*, No. 1986-STA-003, slip op. at 10; see also *Eash*, ARB Nos. 02-008, 02-064; *Yellow Freight Sys., Inc. v. Reich*, 38 F.3d 76 (2d Cir. 1994).

³⁰ Although the decision in *Robinson* and other cases issued before 1994 interpret statutory language that is different from the STAA's current provisions, the language is very similar and both versions contain an “actual violation” clause and a “reasonable apprehension” clause. The former provisions of the STAA of 1982, 49 U.S.C.A. (1988 Ed.) § 2305, at § 405(b) stated: “No person shall discharge, discipline, or in any manner discriminate against an employee with respect to the employee's compensation, terms, conditions, or privileges [of] employment for refusing to operate a vehicle when such operation constitutes a violation of any Federal rules, regulations, standards, or

television stations issued weather warnings advising against driving on highways along Robinson's route.³¹ Robinson also felt that the design and tires on the tractor he customarily drove rendered it much more dangerous on icy and snowy roads. Duff managers generally urged drivers to begin their runs despite bad weather and then stop driving if the road conditions become sufficiently dangerous. Thus when Robinson again refused to drive, Duff fired him before his scheduled shift had begun.³² Based upon these and other facts, the Secretary found that Robinson's refusal to drive was protected activity. The Secretary listed the following facts to find that Robinson had a reasonable apprehension of accident or injury to himself or the public had he driven on the night in question: Robinson testified that he observed snow and ice on the roads around his house at the time he reported off (well before his shift began), he heard the weather warnings advising against driving on the highways he would have had to take, he was familiar with the roads and route and had taken the route in ice and snow, and he knew the driving problems associated with his tractor and how much more dangerous the tractor became on ice and snow. Thus, the Secretary determined that "Robinson's refusal to drive was . . . based on his personal observations of existing weather conditions, on weather reports and a traveler's advisory, on his long personal experience with the route and on his personal experience with the tractor that he was assigned to drive."³³ The Secretary also observed that Robinson provided evidence that, in hindsight, supported the reasonableness of his assessment "as to the weather conditions he would encounter from the beginning of his trip . . . until his return" That evidence included U.S. Department of Commerce meteorological records showing dropping temperatures and snow during the period and location of Robinson's scheduled route.³⁴ The

orders applicable to commercial motor vehicle safety or health, or because of the employee's reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment. The unsafe conditions causing the employee's apprehension of injury must be of such nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition. In order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition." *Roadway Express, Inc., v. Dole*, 929 F.2d 1060, 1062-63 (5th Cir. 1991) (quoting 49 U.S.C. App. § 2305).

³¹ *Robinson*, No. 1986-STA-003, slip op. at 2 (Robinson called the Duff dispatcher at 3 or 4 p.m., and he normally began his shift after 8:30 p.m.). The ALJ distinguished *Robinson* in part by asserting that Robinson, unlike Treur, made a "bona fide timely attempt[] to report to work." D. & O. at 18. This statement is unsupported by the facts of the case.

³² *Robinson*, No. 1986-STA-003, slip op. at 2 (Duff's general manager informed Robinson that because he refused to drive, he considered him to have voluntarily quit.).

³³ *Id.* at 9.

³⁴ *Robinson*, No. 1986-STA-003, slip op at 6-7.

Secretary also noted that Robinson’s employer did not provide him with any information as to weather conditions that might have led Robinson to alter his assessment of the danger of driving the assigned trip; the employer had simply told Robinson that he had to drive or he would be considered to have voluntarily quit. The Secretary found that Robinson also satisfied the requirement that he seek correction of the unsafe condition when he reported off and advised the employer that he was doing so due to weather conditions. The Secretary rejected the employer’s argument that it could not take corrective measures because it could not change the weather—“Obviously, the way to correct the unsafe condition of driving in hazardous weather is not to dispatch the driver and to permit the driver to report off (mark off).”³⁵

The case before us is very similar to *Robinson*, with the biggest difference being that Treur did not see snow or freezing rain falling around his house as Robinson did.³⁶ A lack of snow or freezing rain at a time and place *not* on a driver’s route may be relevant but it is, as previously discussed, not determinative. More relevant is what weather is or will be along the route a driver is to drive *at the time* that he is scheduled to drive it. Refusing to work in the future inevitably entails a measure of prediction or forecast. In Robinson’s case, he knew in the afternoon that there was ice and snow on the roads, but could only predict what the weather conditions would be at the start of his shift that evening and later on his route. In Treur’s case, while fully aware that the weather in Davenport when he refused to drive (between 11 am and 12:30 pm) was “fine,” he also knew, based on official weather reports, that a Blizzard Warning was then in effect in Des Moines, Iowa and that blizzard conditions were predicted for much of his route for the entire time he was to drive it—the critical time periods were (1) when Treur was supposed to drive (approximately 6 p.m. December 19, 2012, to 6 a.m., December 20, 2012) and (2) when the forecasted blizzard was to occur (6 p.m. December 19, 2012, to 6:00 p.m. December 20, 2012, according to the National Weather Service and the Iowa DOT warned motorists against travel across the majority of Iowa between 8 p.m. December 19, 2012, to 12 p.m. December 20, 2012.).

Furthermore, as the ALJ recognized in his summary of the evidence, Treur repeatedly informed his employers that the weather along his route—between Des Moines and Omaha—was already bad when he called to report off.³⁷ Treur’s testimony was corroborated by his wife, Tammy Treur, who testified in detail about hazardous weather conditions west of Des Moines

³⁵ *Id.* at 10.

³⁶ We make clear that we are not mandating a finding of protected activity based on a reasonable apprehension in this case. Instead, we remand to the ALJ to reexamine the evidence and applicable law in the case and, consistent with this opinion, determine in the first instance whether Treur engaged in protected activity when he refused to drive.

³⁷ D. & O. slip op. at 4, 6; Tr. at 37(Treur) (“They had already said that the weather at that point at 11:00 a.m. was already bad in Omaha and Des Moines, Iowa, and I should not be traveling—nobody should be traveling even at 11:00 a.m. . . .”).

that they learned of from the Iowa DOT website sometime around 11 am on December 19th.³⁸ Without explanation, the ALJ either ignored or discounted this testimony and instead found that Treur based his refusal to drive solely on “the *possibility* of adverse weather conditions on his route” and that Treur thus “lacked both an objective and subjective belief of serious injury because of *existing* conditions.”³⁹ It is true, as the ALJ found, that Treur “freely admitted that he had no knowledge of adverse road conditions from Davenport to Des Moines at the time that he communicated to the Respondent his decision not to drive his route that night.”⁴⁰ The ALJ fails to take into account, however, the evidence that Treur knew (and communicated to his employer) the existing conditions between Des Moines and Omaha—locations where he would spend the majority of his scheduled travel.⁴¹

The ALJ speculated that Treur could have started his trip and turned around or driven to a motel room if conditions on the road became hazardous. However, Treur informed Smith that his “straight truck” did not handle safely in blizzard conditions, that there was a lack of hotels on his route, and he feared getting stuck in his cold cab.⁴² In our view, a driver should not be required to drive into a blizzard before a refusal to drive is warranted—such a requirement, as the Secretary reasoned in *Robinson*, would “create the absurd situation of drivers being compelled to take their vehicles at least out of the terminal gate in order to avoid driving in ‘sufficiently dangerous’ conditions.”⁴³ Nevertheless, the ALJ found that it was “patently

³⁸ Tr. at 104 (Tammy Treur) (according to the Iowa DOT website at around 11:00 a.m., “Des Moines and west had been hit by a storm, snowstorm; there was winds 50 to 60 miles per hour; and that the DOT were not even allowing plows on the road because of the wind and the snow . . .”).

³⁹ D. & O. at 17.

⁴⁰ *Id.*

⁴¹ Treur’s testimony was not clear on this point. On direct examination, Treur initially testified that the weather in Omaha and Des Moines was already bad at 11:00 a.m. (Tr. at 37). However, when the ALJ asked him what he knew about the weather conditions in Des Moines at that time, Treur testified: “At the time I first contacted Magnum Trucking there was already a blizzard warning up for Des Moines, Iowa. Basing—I based me not leaving going to Des Moines, Iowa, on the fact that there was a blizzard warning.” When the ALJ asked Treur what he knew about *actual* weather conditions in Des Moines at that time, Treur testified: “At that time, that’s all I knew. I didn’t know about the actual conditions.” (Tr. at 93). On remand, the ALJ should make an express finding of fact regarding what Treur knew about the actual weather conditions between Omaha and Des Moines around 11:00 am, and the ALJ should explain how he resolved ambiguous or conflicting evidence to reach this ultimate finding. See 5 U.S.C.A. § 557(c) (the ALJ’s decision must “include findings of fact and conclusions of law, with supporting reasons, upon each material issue of fact or law presented on the record.”).

⁴² *Id.* at 4-5, 17; *cf.* D. & O. at 6.

⁴³ *Robinson*, No. 1986-STA-003, slip op. at 5.

unreasonable” for Treur to dismiss “out of hand any possibility that he could safely drive that night.”⁴⁴ But it is not a complainant’s burden to prove that there was *no possibility that he could safely drive*—a complainant’s burden based on a refusal under (a)(1)(B)(ii) is simply to show that he had “a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s hazardous safety or security condition.”

To demonstrate that a refusal to work is protected under the “reasonable apprehension” clause, a complainant must show not only that he had a subjective apprehension of serious injury but also an objectively reasonable apprehension; that is, that a reasonable person in his position given the information available at the time of the refusal would have concluded that operation of the vehicle would pose a risk of serious injury.⁴⁵ In the present case, the ALJ failed to adequately evaluate the circumstances surrounding Treur’s refusal—including Treur’s driving experience, the condition of his vehicle, the timing of his refusal, and existing and predicted weather conditions along his route—to ascertain whether Treur’s apprehension was reasonable. Instead, the ALJ simply jumped to the improper legal conclusion that Treur could not possibly have had either an objective or subjective belief of serious injury because he was unaware of the road conditions on his route at the time and place he refused to drive.⁴⁶ This was error as a matter of law.

As the Tenth Circuit recently observed, “STAA was enacted, *inter alia*, to ‘promote the safe operation of commercial motor vehicles,’ ‘to minimize dangers to the health of operators of commercial motor vehicles,’ and ‘to ensure increased compliance with traffic laws and with . . . commercial motor vehicle safety and health regulations and standards.’ 49 U.S.C. §31131(a).”⁴⁷ Interpreting the “reasonable apprehension” clause—consistent with the Secretary’s interpretation in *Robinson*—to include protected refusals based upon weather *predictions* furthers these purposes of STAA. Depending upon the circumstances, a weather *forecast* of inclement and hazardous driving conditions might support a driver’s reasonable apprehension of serious injury to himself or the public should he drive in such inclement weather conditions. The ALJ in this case did not allow for this possibility and failed to properly analyze the relevant facts surrounding Treur’s refusal to drive in determining whether Treur’s concerns resulting in his

⁴⁴ D. & O. at 18. The ALJ incorrectly cites *Robinson* as consistent with his finding that refusals to work in the future are “patently unreasonable” claiming that the complainant in *Robinson* (as distinguished from Treur) made a “*bona fide* timely attempt[] to report to work.” This claim is unsupported by the facts in *Robinson*. See *Robinson*, No. 1986-STA-003, slip op. at 2.

⁴⁵ *Barnett v. Lattimore Materials, Inc.*, ARB No. 07-053, ALJ No. 2006-STA-038, slip op. at 4 (ARB Sept. 22, 2008).

⁴⁶ D. & O. at 17.

⁴⁷ *Transam Trucking, Inc. v. Admin. Review Bd.*, --- Fed.Appx. ---, 2016 WL 3909526, at *4 (10th Cir. July 15, 2016).

refusal to drive were both subjectively and objectively reasonable. The ALJ's findings on the issues must be reexamined because they were influenced by the ALJ's incorrect legal interpretation that a reasonable apprehension of serious injury must always be based upon conditions existing at the time and place of a driver's refusal to drive.

CONCLUSION

Accordingly, for the reasons stated, we **VACATE** the ALJ's decision and **REMAND** this case to the ALJ for further proceedings consistent with this decision. If the ALJ finds upon remand that Treur engaged in STAA-protected activity, he shall consider whether Treur established the other elements of his claim, and if so, whether Magnum Express has established by clear and convincing evidence that it would have taken the same action absent protected activity.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

Judge Corchado, dissenting:

This is a troubling case because of the very serious blizzard warnings that unfortunately were poorly handled by the parties. But, in deciding whether Treur engaged in protected activity, the question is whether Treur, at the time he refused to drive, had a reasonable apprehension of potential injuries and not whether the employer acted reasonably. The ALJ found that Treur did not have a reasonable apprehension when he refused to drive and this finding is supported by substantial evidence. Yet, if I understand the majority decision correctly, it appears that it requires the ALJ to revisit this question on evidence the ALJ has already considered and rejected. Therefore, I must dissent.

The remand order rests solely on the protected activity described in section 31105(a)(1)(B)(ii), as further defined by section 31105(a)(2). Section 31105(a)(1)(B)(ii) protects drivers who have a "reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition." Section 31105(a)(2) further provides that the apprehension 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.”

The ALJ found that Treur was “patently unreasonable” in his refusal to drive under the very specific circumstances of this case and this finding is supported by substantial evidence.⁴⁸ The ALJ explained that Treur should have “postpone[ed] his assessment of the weather conditions to when he was actually supposed to report to work”⁴⁹ The ALJ was fully aware of the forecasts and considered them but found them obviously to be “predictions” of what was to occur hours later. The ALJ was troubled by the fact that Treur “dismissed out of hand any possibility that he could safely drive that night.”⁵⁰ There was no evidence showing that the severe weather had started when Treur refused to drive and, in fact, Treur admitted that the weather was “fine.”⁵¹ The ALJ credited the testimony that Treur was told to report to work and “assess the situation at that time” and found it was unreasonable not to follow this request.⁵²

The employer’s testimony and Treur’s testimony provide substantial evidence for the ALJ’s findings. Smith testified for Magnum Express and his trucking experience matched or exceeded Treur’s trucking experience (“substantial experience as a dispatcher, as driving straight-trucks, daily cab tractors, cab-over tractors with sleepers, conventional tractors with sleepers, and 53-foot box tractor-trailers; he previously owned his own tractor and trailer for several years, and he had been safety director at Magnum for over 16 years”).⁵³ Consequently, where there was conflict in the testimony, it was within the ALJ’s province to rely on either

⁴⁸ In *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 13-001, ALJ No. 2008-ERA-003, slip op. at 13-14 (ARB Aug. 29, 2014), the Board articulated a methodical three-part test for conducting a “substantial evidence review” based on the various general definitions often assigned to that term. The *Bobreski* test attempts to more objectively spell out the process of reviewing each finding of fact relevant to the issues on appeal, examining: (1) whether the ALJ and/or the parties have identified record evidence for each of the material fact findings; (2) whether the supporting evidence logically supports the fact finding; and, if so, (3) whether the record as a whole overwhelms the fact finding or contains factual disputes that expose the fact finding as still unresolved.

⁴⁹ D. & O. at 18.

⁵⁰ *Id.* I do not read this finding the same way as the majority. I understand the ALJ’s point to be that Treur was too quick to refuse to drive rather than wait and see what the weather was like hours later. I understood the ALJ to say that nobody truly can be sure what the weather will be hours later and it was more reasonable to wait in this case.

⁵¹ *Id.* at 16.

⁵² *Id.*

⁵³ *Id.*

Smith's or Treur's testimony in deciding what a reasonable trucker would do hours before the start of a shift after hearing a weather forecast.

In the end, I do not understand what the ALJ is required to do that he did not already do. The ALJ's finding in this case is limited to the specific facts of this case and, given such facts, the ALJ determined it was unreasonable for Treur to refuse to drive hours before his shift started rather than report to the worksite in Davenport where he lived. Upon reporting to work, the parties could have better assessed the weather conditions and decided whether Treur should drive or whether alternative plans needed to be made, such as driving only to Des Moines or perhaps asking the client for permission to use a safer truck. If the majority finds that Treur's apprehension based solely on the weather forecast was objectively reasonable as a matter of law, I respectfully suggest that such point needs additional clarification, as the evidence will not change unless the ALJ reopens the record.

LUIS A. CORCHADO
Administrative Appeals Judge