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. 99-107**

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

v. **DATE: November 30, 1999**

WAL-MART STORES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

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

For the Respondent:
Bryan W. Riley, Esq., *Wal-Mart Stores, Inc., Bentonville, Arkansas*

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of §405 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 §405 when it discharged him on August 8, 1998, for insubordination due to refusal of a dispatch work assignment. Before the Administrative Law Judge (ALJ), Wal-Mart moved for summary decision, which the ALJ recommended granting in a Recommended Decision and Order (R. D. & O.). For the reasons discussed below, we conclude that the ALJ did not apply the correct standard for summary decision in this case, and we find that summary decision is not appropriate on the record before us. Accordingly, we vacate the ALJ's R. D.& O. and remand the case for hearing.

PROCEDURAL HISTORY

On September 23, 1998, Stauffer filed a timely complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) pursuant to 29 C.F.R. §1978.102 (1999). He claimed that Wal-Mart had violated STAA §405 by discharging him in reprisal for

his refusal, on the basis of fatigue, to wait until an empty trailer was available for him to exchange with his full trailer.

In accordance with 29 C.F.R. §1978.104, OSHA's Assistant Secretary issued written findings on January 27, 1999, concluding that Wal-Mart's discharge of Stauffer did not violate STAA §405. Stauffer filed timely objections to the Assistant Secretary's written findings and requested a hearing under 49 U.S.C. §31105(b)(2)(B) and 29 C.F.R. §1978.105. The case was assigned for hearing before an ALJ pursuant to 29 C.F.R. §1978.106(b).

Before the ALJ, Respondent Wal-Mart moved for summary decision under 29 C.F.R. §18.40 (1999). On July 6, 1999, the ALJ issued a R. D. & O. which recommended granting Wal-Mart's motion for summary decision. Pursuant to 29 C.F.R. §1978.109(a), the ALJ forwarded his R. D. & O. to the Administrative Review Board (Board) for final consideration.

We have jurisdiction under 49 U.S.C. §31105(b)(2)(C) and 29 C.F.R. §1978.109(c).

STANDARD OF REVIEW

A grant of summary decision is reviewed *de novo*, that is, our review is governed by the same standard used by the ALJ. *See Han v. Mobil Oil Corp.*, 73 F.3d 872, 874-75 (9th Cir. 1995). The standard for summary decision before a Labor Department ALJ is set forth at 29 C.F.R. §18.40(d). This section, which is modeled on Rule 56 of the Federal Rules of Civil Procedure, permits an ALJ to enter a summary decision for either party where "there is no genuine issue as to any material fact and . . . a party is entitled to summary decision." *Id.* Accordingly, viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law. *Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan,* 46 F.3d 938, 942 (9th Cir.1995).

BACKGROUND

Wal-Mart employed Stauffer as a commercial motor vehicle operator from July 1987 until he was discharged on August 8, 1998.

The events leading up to Stauffer's termination occurred on August 7 and 8, 1998. On the morning of August 7, Wal-Mart's dispatch personnel assigned Stauffer to a delivery route which was scheduled to terminate at the Wal-Mart store in Denham Springs, Louisiana, at 4:00 a.m. on August 8. Deposition of Ronald Stauffer (Dep.) 30. Although Stauffer's assigned delivery time was 4:00 a.m., he informed the dispatcher when he received his assignment that he projected that he would arrive at the Denham Springs store earlier, at midnight. He also informed the dispatcher that he was concerned that an empty trailer would not be ready for him to pick up at midnight, and that he would be forced to wait for an empty trailer to become free. This concern was based upon the fact that the Denham Springs store had only two loading docks

both of which, Stauffer believed, would be occupied at midnight by trailers delivered earlier that day. At least one of the trailers would have to be emptied prior to his arrival so that Stauffer could swap the empty trailer with the loaded trailer that he would be hauling to the store. Dep. 30-31.

The dispatcher assured Stauffer that an empty trailer would be ready for him on his arrival at Denham Springs. Dep. 32. Stauffer explained that he sought this reassurance because his practice was to decline assignments which required him to be wakened. Dep. 16, 32, 72. He knew that if an empty trailer was not ready at midnight he would go to sleep and have to be wakened from that sleep to change trailers. Dep. 32. Stauffer knew from past experience that Wal-Mart store personnel would waken sleeping drivers for any reason. Dep. 16. He believed that being wakened after sleeping for a couple of hours after working a long day would cause him to be too fatigued to drive the truck safely. Dep. 37.

At midnight, when Stauffer arrived at the Denham Springs store, the two loading docks were occupied by loaded trailers. Dep. 31, 35. Store personnel informed Stauffer that the trailers would be emptied in approximately one and one-half to two hours. Dep. 36. They suggested that Stauffer get some sleep in his truck, and that they would waken him when he could exchange his loaded trailer with an empty one. Dep. 39. Stauffer declined the suggestion and informed the store's personnel that he did not want to move the trailers later, in a fatigued state, because it would be unsafe. Dep. 40, 133-37. He also informed his dispatcher of the situation, explaining that if he stayed on the site to move the trailers, he would be too fatigued to do so safely. Dep. 45-47, 137-38. He was concerned at the time he spoke with the store personnel and his dispatcher that, based on his present condition, another hour to two hours of waiting would place him in a position where he would be too fatigued to make the trailer switch safely, particularly if he were to sleep during this waiting period. Dep. 47-48, 78-80, 133-34.

Stauffer then disengaged his trailer and drove approximately five miles to another store, where he spent the night. Dep. 64-65. His apparent reason for so doing was that he did not want to have his sleep interrupted, which he believed would be the case if he attempted to sleep at the Denham Springs store. When he awoke the next morning, he returned to the Denham Springs store, picked up an empty trailer, and returned to Wal-Mart's Brookhaven truck yard. When he arrived at Brookhaven he was informed that his employment had been terminated for "Refusal of a Dispatch Work Assignment (Insubordination)." Dep. 19-21.

THE ALJ'S RECOMMENDED DECISION AND ORDER

The ALJ concluded that there was no genuine issue of material fact and that, based upon what the ALJ determined to be the undisputed facts, Stauffer had not engaged in STAA-protected activities. The ALJ recommended granting summary judgment for Wal-Mart, pursuant to 29 C.F.R. §18.40(d).

The ALJ began by analyzing whether Stauffer had established a *prima facie* case for relief under the STAA. He noted that a complainant must show that he or she engaged in protected conduct, that the complainant was subject to adverse employment action, and that the employer was aware of the protected conduct when it took the adverse action; in addition, the complainant must present evidence sufficient to raise an inference that the protected conduct was the likely reason for the adverse action. R. D. & O. 2. Since there was no dispute that Stauffer was terminated, and that the termination was related to his refusal to complete his driving assignment, the ALJ focused on whether Stauffer's refusal was protected activity. In recommending summary decision for Wal-Mart, the ALJ concluded that Stauffer's refusal to finish his assignment was not protected under either STAA §405(a)(1)(B)(i) or (1)(B)(ii).[1/] R. D. & O. 6.

Stauffer's claim of protected activity under §405(a)(1)(B)(i) was based upon Wal-Mart's alleged violation of the Department of Transportation's (DOT) "fatigue rule," which protects workers who refuse to drive when their ability or alertness is or will become substantially impaired. The DOT fatigue regulation states, in relevant part:

> [N]o 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 . . . as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle. . . .

49 C.F.R. §392.3 (1999). Citing the Board's decision in *Somerson v. Yellow Freight System, Inc.*, ARB Case Nos. 99-005, 036; ALJ Case Nos. 98-STA-9, 11, ARB Final Dec. and Ord.

[1/] The employee protection provisions of STAA §405(a) provide, in relevant part:

> (a) Prohibitions–
>
> (1) A person may not discharge an employee . . . because–
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> * * *
>
> (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 or health; or
>
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.
>
> (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 confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health.

February 18, 1998, the ALJ found that Stauffer "failed to satisfy the requirement for proving a violation of [the fatigue rule] under the holding in Somerson . . . [because his] refusal to finish his delivery . . . was predicated on his apprehension concerning his possible physical fatigue at a future point." R. D. & O. 6.

Although Stauffer did not specifically claim protection under the refusal to drive protections of STAA §405(a)(1)(B)(ii), the ALJ correctly recognized that a driver's refusal to operate a motor vehicle also may be protected thereunder. As the ALJ noted, "[t]he protection under subsection (ii), which is applicable whenever there is a serious safety issue, is considerably broader and remains applicable even when the DOT safety regulations do not directly and specifically address the safety concern." R. D. & O. 4. With regard to whether Stauffer had a "reasonable apprehension of serious injury" within the meaning of §405(a)(1)(B)(ii), the ALJ found that Stauffer "failed to present evidence which would establish that [Wal-Mart's] policy [of awakening sleeping drivers to shuttle trailers] was unreasonable and thus a violation of [§405(a)(1)(B)(ii)]." R. D.& O. 6. In reaching this conclusion, the ALJ found that Wal-Mart's policy of awakening drivers was reasonable because Wal-Mart would not follow the policy were it the cause of regular accidents. The ALJ also cited Mr. Darwin, a former driver who was Stauffer's primary dispatcher on August 7-8, who found Wal-Mart's policy reasonable. Finally, the ALJ found that the probability of accident to be relatively low. R. D. & O. 6. Based on his conclusion that Wal-Mart's policies were reasonable, the ALJ held that Stauffer had failed to establish a *prima facie* case under the STAA. R. D. & O. 6.

ISSUE

Whether, under a proper construction of the applicable law, there are no genuine issues of material fact and whether Wal-Mart is entitled to summary decision?

DISCUSSION

In the first part of our discussion, we review the law applicable to summary decision and consider whether it was employed correctly in this case. We find that, evaluating the evidence in the light most favorable to Stauffer, there are genuine issues of material fact in dispute making summary decision inappropriate. The ALJ erred by evaluating the merits of the case in his R. D. & O., which is outside the scope of a summary decision analysis.

Because we remand the case for an evidentiary hearing, in the second portion of the discussion we review the legal standard for determining whether a refusal to drive might be protected activity under either the DOT's fatigue rule (as it applies under STAA §405(a)(1)(B)(i)) or the "reasonable apprehension" standard of STAA §405(a)(1)(B)(ii).

I. Application of the "Genuine Issue as to Any Material Fact" Standard for Summary Decision to This Case

Under the Rules for Practice and Procedure for Administrative Hearings, 29 C.F.R. Part 18 (1999), any party may "move with or without supporting affidavits for a summary decision on all or any part of the proceeding." 29 C.F.R. §18.40(a). A party opposing the motion may not rest on the mere allegations or denials of the motion but must "set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. §18.40(c). Department of Labor ALJs "may enter summary judgment for either party if . . . there is no genuine issue as to any material fact and [the] party is entitled to summary decision." 29 C.F.R. §18.40(d).

From its language, it appears that §18.40(d) is modeled on Federal Rule of Civil Procedure 56. In ruling on a Rule 56 motion for summary judgment, the judge does not weigh the evidence or determine the truth of the matters asserted, but only determines whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1985).

A fact is material if it tends to resolve any of the issues properly raised by the parties. 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure §2725 at 419 (1998). If the ALJ finds a fact, or facts, to be material, he or she must then determine whether there is a "genuine issue" concerning any of them. *Id.* at 423. In making this determination, the ALJ is to view all the evidence and factual inferences in the light most favorable to the non-moving party. *Adickes v. Kress & Co.,* 398 U.S. 144, 158-9 (1969). If the slightest doubt remains as to the facts, the ALJ must deny the motion for summary decision. 10A Wright, Miller and Kane §2725 at 425-428.

As previously noted, the Board's review of an ALJ's recommendation to grant summary decision is governed by the same standard applicable to the ALJ. Thus, in ruling on a motion for summary decision, we also do not weigh the evidence or determine the truth of the matters asserted, but only determine whether there is a genuine issue for trial. In making this determination, we view all the evidence and factual inferences in the light most favorable to the non-moving party. *See generally*, 10A Wright, Miller & Kane, §2716 (appellate review of a grant of summary judgment).

It is undisputed that Wal-Mart discharged Stauffer. In "refusal to drive" cases arising under the employee protection provisions of the STAA the ultimate issue is whether the employee was discharged because he or she refused to operate a vehicle based on safety concerns protected under the statute. As we discuss below in Part II, the central question in determining whether a fatigue-related "refusal to drive" is protected activity under the whistleblower provisions of the STAA – either under subsections (B)(i) and (B)(ii) of §405 – is the driver's current or anticipated level of fatigue and its implications for safety. The driver's condition (current and prospective) and his concern for safety are the key "material facts" to be decided in such a case. Thus an essential precondition for deciding this case for Wal-Mart, based upon its motion for summary decision, necessarily would be a finding that Stauffer's physical condition on the night of August 7 is not in dispute (*i.e.*, that he was not, or would not become, so fatigued that driving would be unsafe), and that Wal-Mart is entitled to decision in its favor as a matter of law.

Pertinent to a proper analysis of the subsection (B)(i) protection in the instant case is the DOT fatigue rule which provides that "[n]o driver shall operate a commercial motor vehicle . . . while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue . . . as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle." 49 C.F.R. § 393.3 (emphasis added). The other STAA employee protection provision, at subsection (B)(ii), also protects refusals to drive when an employee has a "reasonable apprehension" of serious injury to the employee or the public, including an apprehension based on present or future fatigue. *Somerson*, slip op.14 n.13.

Stauffer claims that he was discharged because he refused "to drive while his ability and alertness were impaired due to fatigue." Complainant's Pre-Hearing Statement (Pre-Hearing Statement) 3. He asserts that he was fatigued when he arrived at the Denham Springs store, and that it was likely that his alertness and ability would become too impaired, due to fatigue, to operate his vehicle safely several hours later. Pre-Hearing Statement 4; Dep. 37, 133-34.[2/] However, Stauffer's specific concern was not that he was too fatigued to safely shuttle the trailers upon his midnight arrival at the store (Dep. 65), but that he would be too fatigued to shuttle trailers when he would ultimately have been required to do so. Dep.37. Wal-Mart does not directly address the level of Stauffer's fatigue when he arrived at Denham Springs. Instead it argues that Stauffer could not prevail on his claim of STAA-protected activity, based upon his anticipated level of fatigue later that evening, because "[u]nder subsection (i) of section [405](a)(1)(B) . . . he must prove fatigue in fact."[3/] However, the plain language of the fatigue rule covers both present and anticipatory fatigue. Because Stauffer could prevail on the claim of protected activity based upon his future level of fatigue, the level of that fatigue is material. Because there is a genuine dispute regarding the future level of Stauffer's fatigue, the case is not suitable for summary disposition.

In awarding summary decision in Wal-Mart's favor, the ALJ apparently discounted Stauffer's claim that he was tired and credited the reasonableness of Wal-Mart's policies. For example, using the "apprehension of serious injury" analysis under section 405(a)(1)(B)(ii), the ALJ rejected Stauffer's claim by finding that Wal-Mart's policy of wakening drivers was

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[2/] Before the Board, Stauffer notes that "common sense and life experiences would indicate that a person awake for 17.25 continuous hours [from 8:45 a.m. on the previous day] would be impaired due to fatigue." Complainant's Brief in Opposition to Administrative Law Judge's Recommended Decision and Order 5-6. *See, e.g., Spearman v. Roadway Express, Inc.,* Case No. 92-STA-1, Sec'y Final Dec. and Ord., slip op. 8-9, June 30, 1993, *aff'd sub nom. Roadway Express, Inc. v. Reich,* 34 F.3d 1068 (Table) (6th Cir. 1994) (the 15 to 21 hours, during which Complainant remained awake awaiting dispatch and operating his vehicle, established that continued operation would have been unsafe); *Self v. Carolina Freight Carriers, Corp.,* Case No. 89-STA-9, Sec'y Final Dec. and Ord., slip op. 8, January 12, 1990, (complainant's uncontradicted testimony as to the number of hours that he had been awake and on call awaiting assignment renders credible his assertion that he was fatigued).

[3/] Respondent's Brief in Support of Its Motion for Summary Decision Brief 6; Respondent's Brief in Support of The ALJ's Recommended Decision and Order 11.

reasonable and that the probability of accident was low. But in evaluating a motion for summary decision it is not appropriate to focus on whether Wal-Mart's policy was reasonable or on the probability of accident. To do so necessarily requires a weighing of evidence that is inconsistent with a summary decision proceeding, in which the ALJ should only determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249.

Because on summary decision all facts and inferences are to be viewed in a light most favorable to the non-moving party (*i.e.*. Stauffer), the motion should have been assessed as if Stauffer's allegations and evidence were presumed to be true. The question then becomes, for purposes of summary judgment, "If we assume that Stauffer's allegations of current and future fatigue on the night of August 7 are true, and if we assume that Stauffer genuinely was apprehensive of his ability to operate his vehicle safely, would Wal-Mart still be entitled to prevail as a matter of law?" The clear answer is "No." Based on controlling case law, which we discuss below, it is clear that Stauffer has presented sufficient facts and testimonial evidence to survive a motion for summary decision.

Because there are genuine issues regarding the level of Stauffer's fatigue and Stauffer's apprehension of serious injury, summary decision is not appropriate and the case will be remanded for an evidentiary hearing.

II. Application of the STAA's Employee Protection Provisions to a Fatigue-Related Refusal to Drive

Based on our review of the ALJ's R. D. & O. and the pleadings submitted to the Board, it appears that there may be some confusion among the parties regarding the legal analysis that is applied in a refusal to drive case involving a claim of fatigue or anticipatory fatigue. Because we are remanding this case for the ALJ to hold a full evidentiary hearing, we believe that a brief explanation of STAA §405 and the DOT fatigue rule is useful.

A. Section 405(a)(1)(B)(i): Violation of a Safety Regulation

STAA §405(a)(1)(B)(i) protects a driver's refusal to operate a vehicle because "the operation violates a regulation [or] standard . . . related to commercial motor vehicle safety or health." This provision of STAA is often referred to as the "actual violation" clause because, to establish a violation of subsection (B)(i), the complainant "must show that the operation [of a motor vehicle] would have been a genuine violation of a federal safety regulation at the time he refused to drive." *Yellow Freight Systems v. Martin [Spinner]*, 983 F.2d 1195, 1199 (2d Cir. 1993). Stauffer rests his claim, under the STAA "actual violation" clause, on a violation of the DOT fatigue rule, which is a federal motor vehicle safety standard within the meaning of STAA §405(a)(1)(B)(i). *Yellow Freight System, Inc. v. Reich [Hornbuckle]*, 8 F.3d 980, 984 (4th Cir. 1993).

The ALJ found that Stauffer "failed to satisfy the requirement for proving a violation of [the fatigue rule] under the holding in *Somerson* [because his] refusal to finish his delivery . .

. was predicated on his apprehension concerning his possible physical *fatigue at a future point*." R. D. & O. 6 (citation omitted, italics added). This text suggests that the ALJ viewed *Somerson* as standing for the proposition that a refusal to drive based on future or anticipated fatigue cannot be protected activity under the STAA. This is an incorrect interpretation of the STAA and our holding in *Somerson*.

The plain language of the fatigue rule covers a driver who, while not presently fatigued, anticipates that his or her ability or alertness is "so likely to become impaired, through fatigue . . . as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle." 49 C.F.R. §392.3. Neither *Somerson*[4/] nor prior Secretary and ARB decisions[5/] should be read to exclude coverage of claims under subsection (B)(i) that are predicated on anticipatory fatigue. Instead, these cases stand for the proposition that a complainant must provide some proof that his or her ability will likely become impaired due to fatigue. As we noted in *Somerson*: "[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." *Somerson*, slip op. 13 n.11 (italics in original, emphasis added). 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.

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

4/ We ultimately dismissed Somerson's complaint because he failed to sustain his burden of proof and not because it was based upon anticipatory fatigue: "Although Complainants have raised interesting and novel theories with regard to the issue of driver fatigue, it ultimately is their failure to introduce sufficient *facts* to prove their individual claims that compels us to reject their complaints." *Somerson*, slip op. 3 (italics in original).

5/ *E.g., Byrd v. Consolidated Motor Freight,* ARB Case No. 98-064, ALJ Case No. 97-STA-9, ARB Final Dec. and Ord., May 5, 1998 (no STAA protection because complainant failed to prove that he would have been fatigued at a future time); *Cortes v. Lucky Stores, Inc.,* ARB No. 98-019, 96-STA-30, ARB Final Dec. and Ord., February 27, 1998 (no safety violation because complaint of fatigue related to a driving assignment some 15 hours later); *Brandt v. United Parcel Service,* Case No. 95-STA-26, Sec'y Final Dec. and Ord., October 26, 1995 (complainant could not prove that fatigue, expected some 24 hours later, would be an actual violation); *Smith v. Specialized Transportation Services,* Case No. 91-STA-22, Sec'y Final Dec. & Ord., April 30, 1992 (fatigue rule requires proof that employee's ability or alertness was so impaired as to make vehicle operation unsafe).

B. Section 405(a)(1)(B)(ii): Reasonable Apprehension of Serious Injury

STAA §405(a)(1)(B)(ii) protects a driver who refuses to operate a vehicle because the driver "has a reasonable apprehension of serious injury to [himself/herself] or the public because of the vehicle's unsafe condition." In *Robinson v. Duff Truck Line, Inc.,* Case No. 86-STA-3, Sec'y Final Dec. and Ord., March 6, 1987, *aff'd sub nom. Duff Truck Line, Inc. v. Brock,* 848 F.2d 189 (6th Cir. 1988) (Table), the Secretary broadly construed this provision to cover "conditions, which make operation of a commercial vehicle on the road a safety hazard." Slip op. 9. In *Robinson* the condition was hazardous weather. Elsewhere, we have noted that

> [v]iolations of the reasonable apprehension clause involve more than engine defects, failed brakes, and other problems with the mechanical parts of a motor vehicle; the clause is intended "to assure that employees are not forced . . . to commit unsafe acts."

Garcia v. AAA Cooper Transportation, ARB Case No. 98-162, ALJ Case No. 98-STA-23, Final Dec. and Ord., slip op. 4, (Dec. 3, 1998) (*quoting Bryant v. Bob Evans Transportation,* Case No. 94-STA-24, Sec'y Final Dec. and Ord., slip op. 7, April 10, 1995). *See also, Thom v. Yellow Freight System, Inc.,* Case No. 93-STA-2, Sec'y Final Dec. and Ord., slip op. 6, November 19, 1993, *aff'd sub nom. Yellow Freight System, Inc. v. Reich,* 38 F.3d 76 (2d Cir. 1994) (§405(a)(1)(B)(ii) should be construed broadly to apply to conditions rendering operation of a commercial motor vehicle hazardous).

In *Somerson* we held that the broad scope of §405(a)(1)(B)(ii), articulated in the *Robinson v. Duff Truck Line* case and its progeny, also encompassed situations where a driver's physical condition (including present or anticipated fatigue) causes an employee to have "a reasonable apprehension of serious injury to the employee or the public." *Somerson,* slip op. 14 n.13. Thus Stauffer's refusal to drive his vehicle could constitute protected activity under §405(a)(1)(B)(ii) if he had a "reasonable apprehension" of serious injury based upon the future level of his fatigue.

STAA §405(a)(2) contains the following criteria for evaluating the subsection (B)(ii) "reasonable apprehension" standard: "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." In *Somerson* we explained:

> 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.

Somerson, slip op. 15.

In the R. D. & O., the ALJ misapplied the "reasonable apprehension" standard when he found that Stauffer "failed to present evidence which would establish that [Wal-Mart's policy of awakening drivers] was unreasonable and thus a violation of [§405(a)(1)(B)]." R. D. & O. 6. It is not the reasonableness of Wal-Mart's policy that is at issue, but the reasonableness of Stauffer's apprehension that he would be too fatigued to operate his vehicle safely under the circumstances that he anticipated. While Wal-Mart may offer its past experience under its policy as evidence that Stauffer's apprehension was not reasonable,[6/] it is not Stauffer's burden to demonstrate that Wal-Mart's policy was unreasonable *per se*. Instead, Stauffer must prove that *his apprehension* on the evening of August 7 was reasonable. It is entirely possible that Wal-Mart could have a policy which appears reasonable on its face, but which may still violate the STAA based on the specific circumstance under which it is applied. *See Ass't Sec'y of Labor for Occupational Health and Anthony Ciotti v. Sysco Foods of Philadelphia*, ARB Case No. 98-103, ALJ Case No. 97-STA-30, ARB Final Dec. and Ord., July 8, 1998, *aff'd sub nom. Sysco Food Services v. Ass't Sec'y of Labor for Occupational Safety and Health,* No. 98-6265 (3d Cir. 1999); *see also Scott v. Roadway Express*, ARB Case No. 99-13, ALJ Case No. 98-STA-8, ARB Final Dec. and Ord., July 28, 1999.

Upon remand the ALJ is 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. The ALJ is to consider what a reasonable driver, in the circumstance confronting Stauffer, reasonably would have concluded regarding his current and prospective physical condition and his ability to operate his vehicle safely.

[6/] *See e.g., Robinson*, 86-STA-3, slip op. 12,"[A] determination as to whether [unsafe] conditions exist requires the exercise of subjective judgment and is ordinarily made on the basis of information available at the time, but that determination is not reserved to the driver alone."

CONCLUSION

Because there are genuine issues in dispute regarding material facts, summary decision is not appropriate. In remanding the case for hearing, we emphasize that we have reached no conclusion regarding the merits of Stauffer's complaint. We **VACATE** the Recommended Decision and Order (Granting Summary Judgment and Denying the Complaint) and **REMAND** the case to the ALJ for further proceedings in accordance with this decision.

SO ORDERED.[7/]

PAUL GREENBERG
Chair

E. COOPER BROWN
Member

7/ Board Member Cynthia L. Atwood did not participate in the consideration of this case.