



In the Matter of:

**LARRY E. EASH,**

**ARB CASE NO. 00-061**

**COMPLAINANT,**

**ALJ CASE NO. 98-STA-28**

**v.**

**DATE: December 31, 2002**

**ROADWAY EXPRESS, INC.,**

**RESPONDENT.**

**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., Katharine M. Thomas, Esq., *Eastman & Smith, Ltd., Toledo, Ohio*

**DECISION AND ORDER OF REMAND**

This case arises under the employee protection (whistleblower) provision of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (West 1997), and the regulations set forth at 29 C.F.R. Part 1978 (2002). Complainant Larry E. Eash, Sr., an operator of commercial motor vehicles, alleges that his employer, Respondent Roadway Express, Inc. (Roadway) retaliated against him for activity protected under the STAA when he refused work assignments because he was fatigued. The applicable Federal motor carrier safety administration regulation governing operator fatigue appears at 49 C.F.R. § 392.3 (2001). Procedural regulations involved in the case appear at 29 C.F.R. § 18.31(b) and § 18.40 (2002). In a [Recommended] Order Granting Motion for Summary Judgment (R. O.), the Administrative Law Judge (ALJ) determined that Roadway's motion for summary decision should be granted and the complaint should be dismissed. We disagree and remand the complaint for a hearing. We decline to order recusal of the ALJ as Eash has requested.

## Procedural History

Eash filed a complaint of unlawful discrimination against Roadway; the Assistant Secretary of the Occupational Safety and Health Administration investigated the complaint and found it to be without merit. Eash timely filed objections and a request for hearing. The ALJ assigned to hear the case determined that negotiations to settle the action had resulted in an enforceable settlement, namely that Eash either had accepted or had authorized acceptance of an offer to settle the complaint, that an agreement existed and that the agreement should be approved because it constituted a fair, adequate and reasonable settlement of the complaint. The ARB disagreed with the ALJ that the parties had entered into an enforceable settlement and remanded the case to the ALJ for a hearing on the merits of the complaint. On remand the ALJ granted Roadway's motion for summary decision.

## Jurisdiction and Standard of Review

This Board has jurisdiction to review the ALJ's recommended decision under 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c). See Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, *inter alia*, the STAA).

We review a grant of summary decision *de novo*, *i.e.*, under the same standard employed by ALJs. Set forth at 29 C.F.R. § 18.40(d) and derived from Rule 56 of the Federal Rules of Civil Procedure, that standard permits an ALJ to "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." "[I]n ruling on a motion for summary decision, we . . . do not weigh the evidence or determine the truth of the matters asserted . . . ." *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6-7 (ARB Nov. 30, 1999). Viewing the evidence in the light most favorable to, and drawing all inferences in favor of, the non-moving party, we must determine the existence of any genuine issues of material fact. We also must determine whether the ALJ applied the relevant law correctly. *Cf. Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith*, 475 U.S. 574 (1986); *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099 (9th Cir. 2000) (summary judgment under Rule 56, Fed. R. Civ. P.).

## Background

Eash attested to the following in an affidavit dated March 8, 2000, and filed before the ALJ in opposition to Roadway's motion for summary decision. Eash attests that he has worked for Roadway as an over-the-road operator of commercial motor vehicles since 1988. Roadway dispatches Eash to operate 80,000-pound vehicles consisting of a truck tractor, two trailers and a converter dolly. Affidavit (Aff.) at 13, paragraph (par.) 69. In late 1997 and early 1998 Eash twice refused dispatches due to fatigue and received discipline in each instance.

### *December 10, 1997 refusal*

Eash attests that he logged off-duty at 3:15 p.m. on the afternoon of December 7, 1987, at which time he became eligible for 48 hours of earned time off. He slept from 11:00 p.m. on December 7 until 7:00 a.m. on December 8 and again from 11:00 p.m. on December 8 until 7:00 a.m. on December 9. On December 9 Eash became subject to dispatch at 3:15 p.m. and indeed received a work call at 5:30 p.m. Eash reported for duty two hours later at 7:30 p.m. On December 10 Eash logged two and a half hours of rest in the cab of the truck tractor – from 1:30 a.m. until 4:00 a.m. Eash attests that this sleep was not restful but sufficed for safe completion of his return. Aff. at 6, par. 30. Eash logged off-duty on December 10 at 7:15 a.m., arrived at his residence at 8:00 a.m. and slept from 8:30 a.m. until between noon and 1:00 p.m. which constituted between three and one-half to four and one-half hours of rest. Eash attempted to sleep longer but was unsuccessful. Aff. at 9, par. 44. On the evening of December 10 Eash believed that he required sleep and planned to “slide”<sup>1</sup> when he reached the 16-hour threshold at about 11:15 p.m. but fell asleep before he could contact Roadway's dispatcher. Eash received a work call at 11:35 p.m., which he refused due to fatigue.

Eash attests that while “[s]ixteen hours of off-duty time is usually enough time for [him] to obtain adequate rest” the circumstances on December 10 constituted an exception due to the altered schedule (day *versus* night driving) and the inability of his “body clock” to adapt. Aff. at 9, par. 44. Roadway issued Eash a letter of warning for this refusal. Aff. at 9, par. 46.

Eash attests that he was fatigued, that he communicated his condition to

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<sup>1</sup> A “slide” is a local rule between the Company and the International Brotherhood of Teamsters, Local No. 24 which allows a driver to request additional time off, up to eight hours, for any reason, including fatigue. A driver's entitlement to slide is conditioned upon two factors: he must have been off-duty for at least sixteen hours and he must request to slide prior to receiving a work call. R. O. at 2.

Roadway and that he was concerned about unsafe vehicle operation. Aff. at 7-9, pars. 39, 40, 41, 42, 43, 45.

### *March 21, 1998 refusal*

Eash became eligible for 48 hours of earned time off when he logged off-duty at 1:44 a.m. on March 19, 1998. He arrived at his residence at about 3:00 a.m. and slept for six and one-half to seven hours beginning at 4:00 a.m. on March 19 until about 10:30 or 11:00 a.m. on March 19. On the evening of March 19 Eash slept about nine hours – from 10:30 or 11:00 p.m. until 9:30 or 10:00 a.m. on March 20. Eash attempted without success to sleep on the afternoon of March 20 from 3:00 to 5:00 or 5:30 p.m. He returned to bed at 9:45 p.m. and finally fell asleep at about 11:00 p.m. Eash attests that “[n]othing prevented [him] from getting sleep on March 20, 1988, except [his] own body which was not ready to go to sleep when [he] tried to get rest.” Aff. at 10, par. 52. Eash became eligible for dispatch at 1:44 a.m. on December 21 but received the work call prematurely at 1:21 a.m. After accepting the dispatch he inadvertently returned to sleep for about an hour. When he awoke he called Roadway and requested four additional hours of sleep before preparing to report for work. Roadway’s dispatcher offered only to restart the two-hour period during which Eash must have reported. Eash refused the dispatch due to fatigue. This dispatch would have required Eash to drive from Copley, Ohio, to Jamestown, New York, and return, and would have required him to commence the trip at about 4:45 a.m. with less than three and one-half hours of sleep during the previous 24 hours. Aff. at 12, par. 64. Roadway discharged Eash for this refusal, but later converted the discharge to a five-day suspension. Aff. at 12, par. 65.

Eash attests to concerns about fatigue and unsafe vehicle operation and to his communication of these concerns to Roadway. Aff. at 11-13, pars. 57, 58, 61, 64, 68, 69.

### **Positions of the Parties and ALJ’s Decision**

Eash argues that genuine issues of material fact exist with regard to (i) whether Eash’s ability or alertness was so impaired or so likely to become impaired due to fatigue æ to render it unsafe to begin or continue to operate a commercial motor vehicle, (ii) whether Eash’s refusal of dispatch assignments was based on a reasonable apprehension of serious injury to himself or the public and (iii) whether Eash deliberately made himself unavailable for work.

Roadway concedes the existence of adverse action and causation and identifies the issue as whether Eash engaged in protected activity. Roadway argues that “genuine fatigue and/or apprehension will not prevent summary decision from being granted where a driver deliberately makes himself unavailable for work.” Citing *Ass’t Sec’y of Labor and Porter v. Greyhound Bus Lines*, ARB No. 98-116, ALJ No. 96-STA-23 (ARB June

12, 1998), Roadway contends, “The Act does not protect an employee who through no fault of the employer, has made himself unavailable for work.”

Roadway argues that nothing prevented Eash from getting sufficient rest except Eash himself. Roadway pointed to the facts that Eash refused dispatches on two occasions after having been off-duty for 16 and 48 hours, concluding that Eash’s refusals were not protected because, through no fault attributable to Roadway, Eash made himself unavailable for work. Thus, Roadway argues that Roadway’s decision to discipline him did not violate the STAA.

The ALJ formulated the issue as follows: “[I]f Eash’s allegations of current and future fatigue on the two occasions are true, and if he was genuinely apprehensive of his ability to operate his vehicle safely, would [Roadway] still be entitled to prevail as a matter of law?” R. O. at 4. The ALJ answered the query in the affirmative, holding that summary dismissal was appropriate in that Eash’s “fatigue level is not a material fact at issue in this instance because [Eash] deliberately made himself unavailable for work.” Citing *Ass’t Sec’y of Labor and Porter v. Greyhound Bus Lines*, the ALJ stated: “The Board has consistently held that the STAA does not protect an employee who, through no fault of the employer, has made himself unavailable for work.” R. O. at 4. The ALJ assumed that the 16 and 48-hour off-duty periods *per se* afforded Eash the opportunity for adequate rest without considering Eash’s particular circumstances. The ALJ distinguished *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21 (ARB Nov. 30, 1999), on its facts, namely that complainant Stauffer “had worked all day and had minimal rest in the middle of the night[,] [a] material fact [being] the amount of fatigue the claimant had.” R. O. at 5.

## Issues

First, whether the ALJ in recommending that Roadway’s motion for summary judgment be granted, properly found that this case presents no issue of material fact regarding the issue whether Eash deliberately made himself unavailable for work.

Second, if remanded, whether the ARB should reassign the case to a different ALJ.

## Discussion

### ***Eash's Availability for Work***

The STAA protects an employee who refuses to operate a commercial motor 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.” 49 U.S.C.A. § 31105(a)(1)(B). Under the latter criterion, “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.A. § 31105(a)(2).

The moving party assumes both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. 10A Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 2727, at 455-516 (3d ed. 1998). To meet its burden of production to make a *prima facie* showing that it is entitled to summary judgment, the moving party must either (i) produce affirmative evidence which negates an essential element of the nonmovant’s complaint, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-158 (1970), or show (point out) that the nonmovant has no evidence to support an element of the complaint. *Celetex Corp. v. Catrett*, 477 U.S. at 325. *See id.* at 331-334 (Brennan, J., dissenting). In the event that the moving party carries its burden of production, the nonmoving party must produce evidence to support its claim. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies., Inc.*, 210 F.3d at 1103. The nonmoving party defeats the motion for summary judgment if it produces enough evidence to create a genuine issue of material fact. *Celetex Corp. v. Catrett*, 477 U.S. at 322.

Here Roadway, the party moving for summary decision without the burden of persuasion at hearing, must produce evidence negating an element of Eash’s complaint or show that Eash has no evidence to support an element of his complaint. Roadway attempted to meet this burden by showing, under *Ass’t Sec’y of Labor and Porter v. Greyhound Bus Lines*, that Eash could not prove that he engaged in protected activity under the STAA, *i.e.*, Eash could not prove that some fault of Roadway’s caused him to refuse work at the conclusions of 16- and 48-hour off-duty periods. According to Roadway STAA protection did not extend to Eash because he “made himself unavailable for work” by not using his time off to adequately rest in preparation for his next road assignment. In response, Eash produced an affidavit attesting to his activities during the relevant 16 hours and 48 hours off duty and his apprehension that accepting the dispatches would threaten his safety and the safety of the public.

Consistent with principles of summary decision, we view the evidence in the light most favorable to the non-moving party – Eash. The question accordingly becomes: If we assume that Eash’s attestations of current and prospective fatigue are true, and if we assume that Eash reasonably believed that he would be unable to operate his vehicle safely; would Roadway nonetheless prevail as a matter of law.

The ALJ’s grant of summary decision was based on a finding that there were no genuine issues of material fact as to whether Eash made himself unavailable for work and that the law requires summary judgment for Roadway. The ALJ relies on *Ass’t Sec’y of Labor and Porter v. Greyhound Bus Lines* and finds the facts in the Eash case similar and the law on point.

The Board does not agree with the ALJ’s reliance on the Porter case. In *Porter* the ARB granted summary judgment deferring to the outcome of an arbitrator’s decision issued after a full hearing on a grievance filed under a collective bargaining agreement. The arbitrator found that “Complainant was unavailable for work when called on six occasions before the final incident which led to his discharge” and “that Complainant had no reasonable basis to claim he was fatigued . . . because he had not worked for three days by dropping down to the bottom of the extra board and had ample time to be rested and available for work.” *Porter*, slip op. at 2. The complaint also failed because complainant’s “[s]imply claiming that he was ‘sleepy’ when called by Greyhound is not enough to show that Complainant reasonably believed he was too fatigued to take the assignment. [Nor was it] sufficient to show that an actual violation of the fatigue rule would have occurred if Complainant had accepted the assignment.” *Id.* at 3.

In the Eash case no hearing has been held. It may appear on the surface that Eash made himself “unavailable for work” by not getting the necessary rest to enable him to drive when called for duty, but we do not agree that there is no issue of material fact regarding the circumstances surrounding Eash’s attempts to be rested and available for work. It is possible that a hearing will provide further information on the circumstances surrounding Eash’s fatigue. Eash states that he attempted to get the necessary rest but could not sleep. We are not prepared to find, without a hearing, that Eash deliberately made himself available for work.

Furthermore, we note that the ALJ, relying on *Porter*, found, “[Eash’s fatigue is not a material issue because as stated above even if his testimony about “being tired” is taken for the truth, the STAA does not protect drivers who deliberately make themselves unavailable for work...” R. O. at 5. See also R. O. at 4. However, the ALJ’s reliance on *Porter* for this proposition is questionable because in *Porter*, the Board specifically found that the complainant failed to establish that “an actual violation of the fatigue rule would have occurred if complainant had accepted the assignment.”

Porter, slip. op. at 3. Therefore whether Eash was too fatigued to drive safely may in fact be a material issue.

We therefore remand the case for an evidentiary hearing.

### **Reassignment of ALJ**

Eash requests that on remand we order recusal of the current ALJ and reassignment to a different ALJ. Although the procedural rules provide that parties having reason to request disqualification of an ALJ file a motion to recuse with the ALJ, 29 C.F.R. § 18.31(b), parties have raised recusal on review of an ALJ decision. *E.g.*, *Spearman v. Roadway Express, Inc.*, No. 92-STA-1 (Sec'y Order Vacating Procedural Orders and Directing Reassignment Aug. 5, 1992), *aff'd sub nom. Roadway Express, Inc. v. Reich*, No. 93-3787, 1994 WL 454871 (6th Cir. Aug. 22, 1994). In *Spearman*, however, the Secretary ordered recusal for a reason, namely that the ALJ consistently engaged in procedural irregularities that inured to the benefit of the respondent, thus failing to conduct the proceedings in an appropriate manner. *See Aaacon Auto Transport, Inc. v. Interstate Commerce Comm'n*, 792 F.2d 1156, 1163 (D.C. Cir. 1986), *cert. denied*, 481 U.S. 1048 (1987). Here, the ALJ twice has recommended dispositions contrary to Eash's interests, which is insufficient to show personal bias. *E.g.*, *Roach v. National Transp. Safety Bd.*, 804 F.2d 1147, 1160 (10th Cir. 1986), *cert. denied*, 486 U.S. 1006 (1988); *City of Charlottesville, VA v. FERC*, 774 F.2d 1205, 1212 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986). We can discern no reason to depart in this instance from the Administrative Procedure Act provision that ALJ's be assigned to cases in rotation so far as practicable. 5 U.S.C.A. § 3105 (West 1996). *See Roadway Express, Inc. v. Reich*, No. 93-3787, 1994 WL 454871, \*\*3.

### **CONCLUSION**

Because this complaint presents genuine issues of material fact, summary decision is not appropriate. We reject and vacate the ALJ's [Recommended] Order Granting Motion for Summary Judgment, and remand the case to the ALJ for a hearing.

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**  
Chief Administrative Appeals Judge

**OLIVER M. TRANSUE**  
Administrative Appeals Judge