U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

LARRY E. EASH,

COMPLAINANT,

v.

ROADWAY EXPRESS, INC.,

RESPONDENT.

ARB CASE NO. 04-036

ALJ CASE NO. 1998-STA-28

DATE: September 30, 2005

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 T. Talbot, *Eastman & Smith, LTD., Toledo, Ohio*

FINAL DECISION AND ORDER

Larry E. Eash filed a complaint under the employee protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. § 31105 (West 1997), and its implementing regulations, 29 C.F.R. Part 1978 (2005), alleging that Roadway Express, Inc., violated the STAA in disciplining him because he twice refused to drive a truck due to fatigue. A United States Department of Labor (DOL) Administrative Law Judge (ALJ) found that Roadway had not violated the STAA and dismissed Eash's complaint. Eash appealed to the Administrative Review Board (ARB). We adopt the ALJ's Recommended Decision and Order (R. D. & O.) insofar as Eash failed to prove fatigue, and therefore failed to prove that he engaged in protected activity. We do not adopt or reach other portions of the R. D. & O.

BACKGROUND

Substantial evidence supports the ALJ's findings of fact regarding Roadway's operating procedures and the two incidents for which Eash was disciplined. R. D. & O. at 2, 4-8; *see* Appendices A and B. We briefly summarize those facts.

Eash started work for Roadway in 1988. In 1997-98, he was an "extra board" driver based at the Copley, Ohio terminal. According to specific work rules set by the company, Eash had no set schedule, and did not know when or where he would be driving until called by Roadway's dispatcher. Once called, he had two hours to report to work. Between tours of driving, Eash was eligible for ten hours off if his driving assignment ended at Copley. After six consecutive tours of duty, Eash could request 48 uninterrupted hours off. Also, once he had been off duty for 16 hours after a tour, he was eligible for an additional eight hours off, known as a "slide," but only if he requested such time off before the dispatcher called him with a tour.[1]

The December 10, 1997 refusal to drive

On December 7, Eash logged off-duty at 3:15 p.m. Because he had completed six tours of duty, he was eligible for, and requested, 48 hours of time off. He slept from 11:00 p.m. until 7:00 a.m. on December 7 and 8. On December 9, Eash received a work call at 5:30 p.m., reported for duty two hours later, and drove a truck to Buffalo, New York. R. D. & O. at 4.

On December 10 on his way back to Copley, Eash rested in the truck cab from 1:30 a.m. until 4:00 a.m., and logged off-duty at 7:15 a.m. He then slept from 8:30 a.m. until between noon and 1:00 p.m. Eash wanted to sleep longer but could not. Hearing transcript (TR) at 142. He was eligible for a work call at 5:15 p.m., but felt that he needed more sleep and planned to request a slide at 11:15 p.m., when he would be eligible. However, Eash fell asleep watching the news and the dispatcher called him at 11:35 p.m. for work. R. D. & O. at 5; Appendix A.

Eash did not refuse the assignment, but then called the dispatcher back and requested a slide. She refused and transferred him to a relay manager, Jeff Olszewski. Eash told the manager he was too tired to drive and wanted to slide. Olszewski informed Eash that he had failed to request a slide before he was dispatched and that if he refused to drive, he would be dropped to the bottom of the call list and would receive a warning. Eash refused the dispatch, and Roadway issued a warning that Eash formally protested. R. D. & O. at 5; JX 4.

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[1] During the hearing, the parties submitted joint exhibits (JX) numbered one through ten, which included an explanation of Roadway's operating procedures, JX 10. R. D. & O. at 2.

The March 21, 1998 refusal to drive

On March 19, 1998, Eash completed a sixth tour of duty and became eligible for 48 hours off until 1:44 a.m. on March 21. Eash slept six hours until about 11:00 a.m. on March 19, and then slept from 11:00 p.m. until 7:00 a.m. on March 20. He tried to sleep during the afternoon of March 20, but could not. From 7:00 to 9:00 p.m. he attended a party with his wife. He went to bed about 9:30 p.m., but did not fall asleep until 11:00 p.m. R. D. & O. at 6; Appendix B.

At 1:21 a.m. on March 21, Roadway's dispatcher called Eash, who accepted an assignment. He then went back to sleep but awoke an hour later to use the bathroom. When he returned to bed, his wife asked him whether he was going to work. Eash went downstairs to check his work log, and realized that Roadway had called him before his off-duty time had expired. At about 2:30 a.m., Eash called the dispatcher, who referred him to Tim Doody, Roadway's relay coordinator. Doody offered to reinstate the work call and give Eash another two hours to report for work. Eash responded that he was too tired to operate a truck safely and needed an additional four hours of rest. TR at 82-86. He refused to drive and received a five-day suspension. R. D. & O. at 7; JX 10.

The procedural history

Eash complained to DOL's Occupational Safety and Health Administration (OSHA), which found no merit to his complaint. Eash then requested a hearing, which was postponed while settlement negotiations were pending. On February 3, 1999, the ALJ found that Eash had agreed to a settlement and dismissed his claim. Eash appealed, and the ARB found that no enforceable oral settlement agreement existed between Eash and Roadway. *Eash v. Roadway Express, Inc.*, ARB No. 99-037, ALJ No. 98-STA-28, slip op. at 18 (Oct. 29, 1999). The ARB remanded Eash's complaint for a hearing on the merits.

On remand, the ALJ granted Roadway's motion for summary decision. Eash again appealed, and the ARB determined that summary decision was inappropriate. *Eash v. Roadway Express, Inc.*, ARB No. 00-061, ALJ No. 98-STA-28, slip op. at 6 (ARB Dec. 31, 2002). The ARB also declined to order the ALJ to recuse himself, as Eash had requested, on the basis that the ALJ's two dispositions contrary to Eash's interests were insufficient to show personal bias. *Id*. at 7.

Following a hearing, the ALJ determined, based on Eash's testimony that he required six hours of sleep in a 24-hour period to function adequately, that Eash had adequate sleep prior to the December 10, 1997 and March 21, 1998 work calls, and thus did not prove that he was fatigued. The ALJ concluded that operation of a motor vehicle would not have violated the specific requirements of the fatigue rule, and that therefore Eash had failed to prove a violation of 49 U.S.C.A. § 31105(a)(1)(B)(i). R. D. & O. at 8.

The ALJ also found that Eash failed to show that he had a reasonable apprehension of serious injury to himself or the public when he refused the work calls. 49 U.S.C.A. § 31105(a)(1)(B)(ii). The ALJ questioned the "legitimacy of [Eash's] fatigue" because, in both his initial contacts with Roadway's dispatcher on December 10 and March 21, he failed to claim that he was too tired to drive. Also, the ALJ found that the circumstances of the second incident highlighted Eash's "lack of veracity." R. D. & O. at 9.

Furthermore, construing *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) as providing a separate legal test, the ALJ found that Eash had deliberately made himself unavailable for work because he had ample opportunity to rest but failed to do so. The ALJ stated that Eash had a duty to act as if he were going to receive a work call at 5:15 p.m. on December 10 and 1:44 a.m. on March 21, but his actions on both days showed that he did not set aside sufficient time to rest before work. That Roadway's dispatcher called Eash 23 minutes too early on March 21 was irrelevant. Citing the *Porter* decision, the ALJ concluded, as a matter of law, that Eash was not entitled to protection under the STAA because he deliberately made himself unavailable for work by not taking advantage of his time off to become rested. R. D. & O. at 10

Finally, the ALJ ruled that Roadway did not issue a warning letter and a five-day suspension to Eash for refusing to drive because of fatigue. Rather, Roadway disciplined Eash because he did not follow company procedures that the ALJ determined to be in "full compliance with the letter and spirit of the regulations." R. D. & O. at 12-13.

ISSUES

1. Whether substantial evidence supports the ALJ's finding that Eash failed to prove he was fatigued and whether the ALJ therefore correctly concluded that Eash did not engage in protected activity when he refused work calls.

2. Whether the ALJ erred in holding as a matter of law that Eash was not entitled to protection under the STAA because he deliberately made himself unavailable for work.

JURISDICTION AND STANDARD OF REVIEW

By authority of 49 U.S.C.A. § 31105(b)(2)(C), the Secretary of Labor has delegated her jurisdiction to decide this matter to the ARB. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). *See also* 29 C.F.R. § 1978.109(c).

Under the STAA, the ARB is bound by the ALJ's factual findings if substantial evidence on the record considered as a whole supports those findings. 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.,* ARB No. 02-113, ALJ No. 01-STA-

38, slip op. at 2 (ARB Feb. 19, 2004). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 03-STA-12, slip op. at 3 (ARB Feb. 27, 2004).

We accord special weight to an ALJ's credibility findings that "rest explicitly on the evaluation of the demeanor of witnesses." *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983); *Poll v. R.J. Vyhnalek,* ARB No. 98-020, ALJ No. 96-ERA-30, slip op. at 8 (ARB June 28, 2002). This is so because the ALJ "sees the witnesses and hears them testify while . . . the reviewing court look[s] only at cold records." *Pogue v. United States Dep't of Labor,* 940 F.2d 1287, 1289 (9th Cir. 1991).

In reviewing the ALJ's conclusions of law, the ARB, as the Secretary of Labor's designee acts with "all the powers [the Secretary] would have in making the initial decision . . . ." 5 U.S.C.A. § 557(b) (West 2004). Therefore, we review the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

DISCUSSION

To prevail on a claim under the STAA, the complainant must prove by a preponderance of the evidence that he engaged in protected activity, that his employer was aware of the protected activity, that the employer discharged, disciplined, or discriminated against him, and that the protected activity was the reason for the adverse action. *BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994); *Densieski v. La Corte Farm Equip.,* ARB No. 03-145, ALJ No. 2003-STA-30, slip op. at 4 (ARB Oct. 20, 2004); *Regan v. National Welders Supply,* ARB No. 03-117, ALJ No. 03-STA-14, slip op. at 4 (ARB Sept. 30, 2004); *Schwartz v. Young's Commercial Transfer, Inc.*, ARB No. 02-122, ALJ No. 01-STA-33, slip op. at 8-9 (Oct. 31, 2003). Failure to prove any one of these elements results in dismissal of a claim.

Substantial evidence supports the ALJ's conclusion that Eash failed to establish that his refusals to drive were protected activity

The legal standard

The STAA provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activities. These include: making a complaint "related to a violation of a

commercial motor vehicle safety regulation, standard, or order," 49 U.S.C.A. § 31105(a)(1)(A); "refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health," 49 U.S.C.A. § 31105(a)(1)(B)(i); or "refus[ing] 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 unsafe condition," 49 U.S.C.A. § 31105(a)(1)(B)(ii).

The STAA protects two categories of work refusal, commonly referred to as the "actual violation" and "reasonable apprehension" subsections. *Leach v. Basin Western, Inc.,* ARB No. 02-089, ALJ No. 02-STA-5, slip op. at 3 (ARB July 31, 2003). While subsection (1)(B)(i) deals with conditions as they actually exist, section (1)(B)(ii) deals with conditions as a reasonable person would believe them to be. Whether a refusal to drive qualifies for STAA protection requires evaluation of the circumstances surrounding such refusal under the particular requirements of each of the provisions. *See Johnson v. Roadway Express Inc.*, ARB No. 99-011, ALJ No. 1999-STA-5, slip op. at 7-8 (ARB Mar. 29, 2000) (the ALJ properly considered all the circumstances of the complainant's refusal to drive, including his work record and medical excuses).

A complainant's refusal to drive may be protected activity under subsection (1)(B)(i) if his operation of a motor vehicle would have violated a Department of Transportation (DOT) regulation that states:

> No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

49 C.F.R. § 392.3 (2003). This regulation, known colloquially as the fatigue rule, plainly covers a driver who anticipates that his or her ability or alertness is so likely to become impaired that it would be unsafe to begin or continue driving. *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 00-062, ALJ No. 1999-STA-21, slip op. at 5 (ARB July 31, 2001).

However, a complainant must prove that operation of the vehicle would in fact violate the specific requirements of the fatigue rule at the time he refused to drive–a "mere good-faith belief in a violation does not suffice." *Yellow Freight Sys. v. Martin*, 983 F.2d 1195, 1199 (2d Cir. 1993); *Cortes v. Lucky Stores, Inc.*, ARB No. 98-019, ALJ No. 96-STA-30, slip op. at 4 (ARB Feb. 27, 1998). Thus, a complainant must introduce sufficient evidence to demonstrate that his driving ability is or would be so impaired that actual unsafe operation of a motor vehicle would result. *See Wrobel v. Roadway Express, Inc.*, ARB No. 01-091, ALJ No. 00-STA-48, slip op. at 6 (ARB July 31, 2003) (complainant who claimed sickness failed to produce sufficient evidence to demonstrate an actual violation of the fatigue rule).

A complainant's refusal to drive may also be protected under subsection (1)(B)(ii) if he has "a reasonable apprehension of serious injury to [himself] or the public because of the vehicle's unsafe condition." This clause covers more than just mechanical defects of a vehicle–it is also intended to ensure "that employees are not forced to commit. . . unsafe acts." *Garcia v. AAA Cooper Transp.*, ARB No. 98-162, ALJ No. 98-STA-23, slip op. at 4 (ARB Dec. 3, 1998). Thus, a driver's physical condition, including fatigue, could cause him to have a reasonable apprehension of serious injury to himself or the public if he drove in that condition. *Somerson v. Yellow Freight Sys., Inc.*, ARB Nos. 99-005, 036, ALJ Nos. 98-STA9, 11, slip op. at 14 (ARB Feb. 18, 1998). The employee's refusal to drive must be based on an objectively reasonable belief that operation of the motor vehicle would pose a risk of serious injury to the employee or the public. *Jackson v. Protein Express*, ARB No. 96-194, ALJ No. 95-STA-38, slip op. at 3 (ARB Jan. 9, 1997).

Eash's refusals to drive were not protected activity under subsection (1)(B)(i)

We first consider whether substantial evidence supports the ALJ's finding that Eash failed to prove he was too fatigued to drive, that is, his ability or alertness was so impaired, or so likely to become impaired, through fatigue as to make it unsafe for him to begin or continue to operate a commercial motor vehicle. After reviewing all the evidence, the ALJ found that Eash's ability or alertness on December 10 and March 21 was not so impaired or likely to become so impaired that it would have been unsafe for him to drive and would thus cause him to violate the fatigue rule.

Based on Eash's testimony that he needed six hours of sleep in a 24-hour period to function adequately, TR at 63-64, 125, 156, the ALJ found that Eash had had adequate sleep and was rested prior to the two work calls. R. D. & O. at 8. Eash slept about two hours while en route on December 10 and, after logging off, slept another four to five hours. TR at 37-39, 126-28. Thus, by the time the dispatcher called him at 11:35 p.m. on December 10, Eash had accumulated more than six hours of sleep in the previous 24.

Similarly, Eash slept up to six hours during the day on March 19, and eight hours at night until 7:00 a.m. on March 20. TR at 69-71, 160. During the day on March 20, he rested for two hours in the late afternoon and then fell asleep from about 11:00 p.m. until called by the dispatcher at 1:21 a.m. on March 21. He then slept for another hour. Thus, in the 24 hours prior to the work call, Eash had accumulated more than seven hours of sleep.

The ALJ concluded that Eash had failed to prove that he would have actually violated the fatigue rule by driving on either occasion. R. D. & O. at 8. Because substantial evidence supports the ALJ's findings, we affirm his conclusion that Eash failed to establish that he engaged in protected activity under subsection (1)(B)(i).

On appeal, Eash contends that the ALJ's findings are not supported by substantial evidence because the ALJ applied a simple mathematical formula, relying solely on the number of hours of sleep Eash had, without considering how and where he slept, when he would have been driving, and the length of each sleep period. Complainant's Brief at 10, 13. Eash also argues that the ALJ ignored scientific evidence he submitted showing that (1) fragmented sleep is not as restorative as continuous sleep; (2) sleep during daytime hours is not as restorative as that during the night; (3) environmental conditions affect the quality of a person's sleep; and (4) reduced alertness results when a person is awakened during his principal sleep period. *See Federal Register*, 65 F.R. 25553, 61-62, 87 (May 2, 2000).

Contrary to Eash's argument, the ALJ did consider the scientific studies Eash cited in support of his testimony that he slept better at night than during the day, TR at 15, 21-27, 182, 184, that short periods of sleep were not restful, TR at 166-67, 178, that sleeping in a cab was not quality sleeping, TR at 15-16, 32-33, and that driving at night was difficult, TR at 29-32. Eash admitted that Roadway did not violate the DOT regulations governing his hours of service when the dispatcher called him for work. TR at 156-58, 163.

The ALJ found that Roadway's work system was in full compliance with the letter and spirit of the regulations. Eash had been an interstate truck driver for many years, had worked for Roadway since 1988, knew how Roadway operated, and had had many years to adapt to its system. R. D. & O. at 12. The ALJ concluded that, despite Eash's testimony regarding his sleeping patterns and the studies' conclusions, Eash had failed to establish by a preponderance of the evidence that he was so tired that driving would actually violate the fatigue rule. Accordingly, we reject Eash's arguments.

Eash's refusals to drive were not protected activity under subsection (1)(B)(ii)

Eash asserts that the same evidence that supports a finding of protected activity under (i) also supports a similar finding under (ii) that he had a reasonable apprehension of serious injury to himself or the public had he accepted the work calls on December 10 and March 21. Complainant's Brief at 15-16. We disagree.

The STAA provides that "an employee's apprehension of serious injury is reasonable only if a reasonable [person] in the circumstances . . . confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury or serious impairment [to] health." Further, to "qualify for protection, the employee must have sought from the employer and been unable to obtain, correction of the unsafe condition." 49 U.S.C.A. § 31105(a)(2).

In *Somerson*, slip op. at 15, we explained that, to determine if a reasonable person in the circumstances would have been justified in refusing an assignment due to fatigue, the facts surrounding each incident must be examined. "A driver's claim of fatigue,

standing in isolation and without context, is insufficient for protection under the STAA." *Id.*

The ALJ found that the legitimacy of Eash's fatigue was "questionable." The ALJ determined that a reasonable person in the circumstances of the December 10 and March 21 incidents would not have had a reasonable apprehension of serious injury to himself or the public. R. D. & O. at 9.

The ALJ reasoned that (1) Eash had obtained adequate sleep on both occasions; (2) in both incidents, Eash failed to claim fatigue in his first contacts with Roadway; (3) when he woke up again on March 21, he did not call the dispatcher to claim fatigue as might be expected, but rather checked his logs to see if the initial call had been too early; (4) Doody testified that only after Eash learned that he would have just two extra hours to report to work did he claim he was too fatigued to drive; and (5) Eash rejected Doody's offer of the additional two hours to report to work. Under those circumstances, the ALJ concluded that Eash did not prove that he had a reasonable apprehension of serious injury to himself or the public and therefore failed to establish a violation under subsection (1)(B)(ii) of the STAA.

We defer, as we must, to the ALJ's credibility findings regarding Eash's "lack of veracity" in claiming fatigue. The ALJ considered all the evidence of the circumstances surrounding Eash's refusals to drive–the actual length of time Eash was off duty, the number of hours he slept or rested, his testimony detailing his actions on both dates, his initial response to the two work calls, his wife's account of what happened on both days, and the testimony of the Roadway managers. As substantial evidence supports the ALJ's factual findings, they are conclusive and we affirm them.

The *Porter v. Greyhound* decision does not establish an exception to the fatigue rule

We decline to adopt the ALJ's application of the *Porter* decision to this case. Because *Porter* has created some confusion, we review the case in some detail. In *Porter*, the issue was whether an ALJ had properly deferred to an arbitrator's decision denying Porter's grievance and upholding his discharge. The arbitrator concluded that Greyhound had not fired Porter because he was fatigued, but because he was repeatedly unavailable for work.

The STAA regulations permit an ALJ to defer to an arbitrator's decision if the arbitration dealt adequately with the factual issues, the proceedings were fair and free from procedural defect, and the outcome was not repugnant to the purposes and policy of the STAA. 29 C.F.R. § 1978.112(c). Applying that test, the ALJ issued a recommended decision deferring to the outcome of the arbitration.

The ARB adopted the ALJ's recommendation, slip op. at 3, noting: "The arbitrator held that the STAA does not protect an employee who deliberately made himself unavailable for work by not taking advantage of his time off to become rested

and available when called." Discussing the evidence in *Porter*, we said that simply claiming he was "sleepy" was insufficient to show that an employee reasonably believed he was too fatigued to take the assignment or that an actual violation of the fatigue rule would occur had he driven.

However, in concluding that "We agree with the ALJ that the STAA does not protect an employee who, through no fault of the employer, has made himself unavailable for work," slip op. at 3, the ARB did not intend to create a per se exception to the fatigue rule. An employee does not automatically lose whistleblower protection by failing in an alleged "duty" to be ready for work. Nor does an employer's adherence to its work rules relieve it of obligations that are grounded in the statute and regulations. While those factors may be considered in testing the legitimacy of an employee's claim of fatigue, they are not a talismanic test.

Evidence of deliberately being unavailable for work does not always disprove that a complainant was in fact fatigued. Such evidence may persuade the fact-finder, as it did in this case, to disbelieve the complainant's contention that he was fatigued. But whether or not a complainant makes himself available for work is only one of the factors bearing on (1) his assertion that driving would actually violate a regulation or (2) his reasonable apprehension that driving would result in serious injury to himself or the public. In determining whether a complainant's refusal to drive constitutes protected activity, the ALJ must consider all the circumstances of the incident.

Similarly, a mere finding that a respondent's operating rules and procedures comply with the regulations governing a driver's hours of service or that a respondent did not contribute to a complainant's fatigue do not necessarily remove a complainant's STAA protection. *See Ass't Sec'y of Labor & Ciotti v. Sysco Foods*, ARB No. 98-103, ALJ No. 97-030, slip op. at 7 (ARB July 8, 1998) (company's absentee policy which imposed a suspension after eight refusals to work constituted adverse action against Ciotti because driving while sick would have violated the fatigue rule).

Thus, we hold that the ALJ erred because he misapplied *Porter* in finding that Eash had a "duty" to act as if he would have received a work call at 5:15 p.m. on December 10 and 1:44 a.m. on March 21, when he became eligible, and in concluding that even if Eash were fatigued, he deliberately made himself unavailable for work and was therefore not entitled to protection under the STAA.[2] R. D. & O. at 10.

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[2] Because, as we discussed above, Eash failed to prove that he engaged in protected activity, he was unable to establish a necessary element of his claim. Thus, his claim was properly dismissed. Therefore, it was not necessary to reach, as the ALJ did, the issue of whether Eash was disciplined for a legitimate, non-discriminatory reason. R. D. & O. at 11. Accordingly, we decline to address whether Roadway disciplined Eash because of his refusals to drive.

Finally, we consider Eash's argument on appeal that the ALJ's personal bias motivated him to doubt Eash's veracity and discredit his testimony. Eash contends that the ALJ's findings on remand in defiance of the ARB's two previous decisions[3] demonstrate his bias. Complainant's Brief at 22-24. As we stated in our 2002 *Eash* decision, slip op. at 7, the ALJ's previous decisions adverse to Eash's interest are insufficient to show any bias requiring his recusal. The ALJ's view of the settlement issue and his previous finding on Eash's credibility do not, without more, establish that he was biased in assessing Eash's credibility at the hearing on the merits. Eash has provided no evidence demonstrating that the ALJ was personally biased against him, and our reading of the hearing transcript does not support any procedural irregularities. Therefore, we reject this argument.

CONCLUSION

We affirm the ALJ's findings of fact as supported by substantial evidence. We reject his application of the *Porter* case, as explained above, and decline to address whether Eash was disciplined because of his refusals to drive. We affirm the ALJ's Recommended Decision and Order dismissing Eash's complaint because he failed to prove he engaged in protected activity.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER TRANSUE
Administrative Appeals Judge

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[3] In his February 3, 1999 decision, the ALJ discredited Eash's testimony "in its entirety," and found that he had agreed to a settlement. On appeal, the ARB reversed the ALJ's finding that Eash was not credible and remanded the case, finding that, contrary to the ALJ's conclusion, no settlement agreement ever existed because Eash never accepted Roadway's offer nor authorized his acceptance. In his May 11, 2000 decision, the ALJ stated that Eash and Roadway had reached an oral settlement agreement but that Eash refused to execute it when it was reduced to writing. On appeal from the ALJ's grant of summary decision, the ARB again remanded the case. Following a hearing on the merits, the ALJ in his December 18, 2003 decision reiterated that the parties had agreed to a settlement but that Eash refused to execute it.