



In the Matter of:

CHARLES L. DALTON,

ARB CASE NO. 01-020

COMPLAINANT,

ALJ CASE NO. 99-STA-46

v.

DATE: July 19, 2001

COPART, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Robert S. Coffey, Esq., *Tulsa, Oklahoma*

For the Respondent:

Steve Broussard, Esq., Monica Goodman, Esq., *Hall, Estill, Hardwick, Gable, Golden & Nelson, Tulsa, Oklahoma*

FINAL DECISION AND ORDER

Complainant Charles Dalton brought this action alleging that he was terminated as a truck driver for Respondent Copart, Inc. (Copart), in violation of the employee protection (whistleblower) provision of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C.A. §31105 (West 1997). The Occupational Safety and Health Administration investigated Dalton's complaint and found it to be without merit. Dalton objected to OSHA's findings and requested a hearing. Following that hearing a Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (RD&O), ruling that Dalton was terminated in violation of the STAA and ordering that he be reinstated. The case is before this Board pursuant to the automatic review provision of the STAA implementing regulations. 29 C.F.R. §1978.109(c)(1) (2000).

Before this Board Copart challenges the RD&O. By separate motion, Copart also seeks emergency relief from the ALJ's order that Copart reinstate Dalton immediately. We reverse the ALJ's decision and dismiss the case; therefore Copart's motion is moot.

BACKGROUND

I. Facts.

Copart is in the business of auctioning wrecked vehicles on behalf of insurance companies. Copart hired Complainant Charles Dalton on January 11, 1999, to work out of its Tulsa, Oklahoma, facility as a “salvage hauler,” picking up wrecked vehicles. Although Dalton had experience driving a conventional wrecker, he had no experience driving a large four-car hauler such as the one he drove for Copart. On March 4, 1999, less than two months after he was hired, Copart terminated Dalton’s employment.

A. Dalton’s Job and Truck. Dalton’s job was to drive one of Copart’s large haulers (which had the capacity to hold three wrecked vehicles on its decks while towing a fourth vehicle), load wrecked vehicles onto the hauler, return the vehicles to Copart’s facility, and unload them. In order to load a vehicle onto the hauler, the driver operates controls at the side of the truck which raise and tilt the hauler deck by means of a hydraulic ram. From this same location, the driver also operates three different hydraulically-driven winches that are used to pull the wrecked vehicles into their respective positions on the hauler deck. The winches are located at the front of the hauler, in the center of the hauler, and towards the rear of the hauler. Each winch, which is capable of pulling 4,800 pounds of weight, is attached to a cable designed to hold up to 15,000 pounds of weight. The driver attaches the cable to the vehicle he is loading; tilts the deck of the hauler using the ram; and, using the winch attached to the cable, pulls the vehicle onto the deck where it is secured with three chains.

B. The Survey. On February 4, 1999, Jim Powell, Copart’s National Fleet and Safety Manager, performed a routine inspection of Copart’s trucks in Tulsa, including the one Dalton drove. Powell, who is a civil engineer, had previously spent five years designing trucks and equipment for the fleet of a large public utility. His responsibilities at Copart included overseeing the Copart fleet, consisting of several hundred trucks and other equipment, and ensuring the safety of its 1,600 employees. Powell rated the components of the truck and made handwritten comments on a form, captioned “Copart Auto Auctions Truck Survey.” Respondent’s Exhibit (RX) 5. The rating scale applied by Powell was printed on the form:

Rating: 3 = Meets Standard in ALL Areas; 2 = Generally Good, Needs Some Improvement; 1= Not Meeting Standards, Needs Immediate Attention; N/A = Not Applicable; R = Not Rated During the Inspection.

Id.

Powell rated 21 components on Dalton’s truck as “3,” four components as “2,” and 10 components as “1.” Of significance in this case, Powell assigned a “2” rating to the item “Winch and Cables.” In the “Action Needed” column, Powell wrote, “Add T latch to hooks/#3 winch replace cable.” Dalton testified that he spoke with a member of Powell’s survey team on the day of the inspection, and was aware of the items that needed attention on his truck.

Powell testified that a “1” rating did not necessarily mean that there was a safety hazard. If an item did relate to safety, Powell testified that he would rate it a “1” indicate on the form that it should be fixed immediately, and discuss the matter with the General Manager. After the survey team rated all the vehicles at Copart’s Tulsa facility, Powell met with Tulsa Copart officials and discussed all of the surveys on Copart’s trucks.

Powell testified that although a few components on Dalton’s truck presented safety concerns – most notably the brakes^{1/} and the hazard lights (which were inoperable) – the “#3 cable” did not present a safety concern. Rather, it showed signs of wear which warranted replacing it at the next routine service. Powell also testified that he found no safety concern relative to the other two cables.

C. Work on Dalton’s Hauler. Notations on the Survey indicated that Copart attended to most of the identified deficiencies on Dalton’s truck between February 4 and March 4. Thus, the hazard light switch (given a “1” rating) was repaired February 4, and the item “Hydro Leaks” (given a “1”) was marked completed on February 24. Work on “Brakes” (also a “1,” with the notation “Driver complaint”) was noted on February 5, February 26, and March 1. However, the cable on the #3 winch was not replaced prior to Dalton’s termination.

Much of the work that was done on Dalton’s truck occurred between February 27 and March 4, and was performed by Frontier International, the repair facility which Copart used for repair work other than on cables.^{2/} On the weekend of February 27 and 28, Dalton was off duty, and work was done on the vehicle by Frontier. According to the invoice for that service call, Frontier mechanics changed the oil and lubricated the vehicle and the winches, welded safety chains, repaired the front winch cover, replaced the anti-tilt valve under the deck of the truck, welded wheel chocks to the rear sides of frames, replaced a switch, and set the governor on the vehicle at 75 mph.^{3/} RX 18A.

Copart drivers, at the conclusion of their work shift, submit a Driver’s Vehicle Inspection Report (“DVIR”) alerting the employer to problems with the vehicle, both safety related problems and non-safety related problems. Problems that the driver believes are safety related are noted by checking off a special box on the DVIR form. On March 1 Dalton indicated on his

^{1/} Dalton had complained to the survey team about the brakes on his truck, and for that reason Powell had given the brakes a “1” rating and told the Copart yard manager, Dan Cupp, that the brakes needed immediate attention. They were repaired later that day or the next morning before Dalton drove the truck again.

^{2/} Copart sent trucks needing cable work to Industrial Splicing, a company specializing in cable installation, repair, and replacement.

^{3/} Copart asserted that governors on Copart’s vehicles were set at 62-64 mph, and that Dalton was responsible for having the governor on his truck reset to 75 mph without permission. Dalton denied having the governor reset. However, Copart officials did not learn about the reset governor until after Dalton was terminated. Therefore the governor could not have had a role in Dalton’s termination.

DVIR that “breaks need adjusting - winch 1 & 3 are leaking and ram is leaking fluid also,” and checked the box on the DVIR indicating his view that the defects would be likely to affect safety. In response to Dalton’s DVIR notations Copart officials had Dalton’s vehicle returned to Frontier International that day for more work.

The Frontier invoice in the record indicates work that was requested and completed on March 1 as well as on March 3. RX 18B. The work requested on March 1 included adjustment to the brakes (Item A), replacement of the seat (Item B), and repair to the wiring for the back up lights (Item C). Evidently as a result of Dalton’s notation on his DVIR, work was also requested on the winches. Thus, Item D on the printed invoice was “front winch leaking . . .” The word “front” was crossed out by hand and “all (3)” was written in its place. Item E on the printed invoice listed “winch center of bed leaking also.” Item F on the printed invoice noted “check lift rams for leaking.”

It is not entirely clear how much of the work requested on March 1 Frontier completed that day. However, it is apparent that Frontier worked on the brakes, and Dalton indicated on his March 1 DVIR that the “brakes were repaired.” However, on March 3 Dalton again experienced problems with the hauler’s brakes, and, as is reflected on the March 1 invoice, Copart had the vehicle taken to Frontier International for additional work. Several notes on the invoice are significant. First, Frontier noted: “Pulled winch off tore down, replaced seals, and gasket put together & put back on truck. Front winch. [sic]” Second, Item D – “All (3) winch[es] leaking” – was marked “Done.” Third, Item F – “Check lift rams for leaking” – was marked “Seen no problem with rams.” Finally, a handwritten Item G – “Cut top winch cable off & reinstall/torque set” – was marked “cut cable off.”

Thus, according to the printed and handwritten notations on the March 1 Frontier invoice, on March 1 and/or March 3-4 Frontier adjusted the brakes; disassembled and replaced seals on the front winch, attended to the leaks on the other two winches as well; and evaluated the ram for leaks and determined that there was “no problem.” Indeed, Frontier’s Service Manager, Keith Williams, testified without contradiction that all three winches were taken apart and given new seals.

D. March 4.^{4/} The work Frontier began on Dalton’s hauler on March 3 had not yet been completed on the morning of March 4, as Dalton discovered when he went to Frontier at about 7:30 a.m. to pick up his truck.

^{4/} We emphasize that there is directly contradictory testimony regarding the events of March 4. In particular, Dalton testified that he told his supervisors that day that he was refusing to drive his truck because of his concerns about the safety of the cable and the hydraulic leaks. Dalton’s supervisors – Cupp and Craig Gille – on the other hand, testified that Dalton did not raise safety concerns until after he was terminated, and that Dalton in essence told them he had better things to do with his time than drive that afternoon. The ALJ largely credited Dalton’s testimony and discredited Cupp’s and Gille’s. Because, as we discuss below, we determine that Dalton did not engage in a protected refusal to drive, we need not reappraise the ALJ’s credibility determinations. Therefore, we relate the facts as the ALJ found them.

When Dalton determined that his truck was not ready, he drove to the Copart facility and shortly after 8:00 a.m. told Dan Cupp, the Yard Manager, that work on the brakes was not completed and that no work had been done on the cable (that the Copart Survey stated should be replaced) or the hydraulic leaks.^{5/} Cupp told Dalton that the cable would not be replaced that day, and that the hydraulic leaks would also not be serviced. However, Cupp assured Dalton that neither the cable nor the hydraulic fluid leaks posed a safety hazard. Dalton disagreed with that assessment. A friend of Dalton's, Larry Dean Glass, testified he overheard Dalton and Cupp's conversation and corroborated Dalton's version.

Dalton then left the Copart facility and stopped at a truck stop where he again encountered his friend Glass. Glass testified that Dalton then called Craig Gille, Copart's General Manager, and told Gille of his concerns about the cable and the hydraulic leaks. Dalton then returned to Frontier to determine the status of repairs to his truck. When work on the truck had not been completed by 10:45 a.m., Dalton went home. He then made an appointment to have someone come to his house that afternoon to repair the windshield on his personal vehicle.

Shortly after noon, Gille called Dalton at home to tell him that his truck was ready, and that he should pick it up at Frontier and begin work. According to Dalton, he asked Gille whether the cable and the hydraulic leaks had been fixed. Gille told him that those repairs had not been made, but that Dalton should pick up his truck and resume work or he would be terminated. Dalton demurred. He reiterated his concerns about the safety of the cable and hydraulic leaks and also told Gille that he had scheduled someone to come to his house to repair the windshield on his personal vehicle that afternoon. "I told Mr. Gille that **S** I believe it was Craig **S** that I had a man that was on his way, that I had done this because I had no idea when the truck was going to be ready for it to – for service." Gille confirmed that Dalton had told him "he had better things to do that afternoon." On cross examination, Dalton was asked why he had mentioned the windshield repair appointment to Gille:

Q [W]hy would you have told them anything about your windshield being repaired if the reason you weren't returning to work was because the truck was unsafe? Why did that matter?

A I don't recall. I don't know why that would matter.

Id. at 210-211.

Gille then informed Dalton that his employment was being terminated for refusing to drive his truck.

^{5/} It is uncontroverted that Frontier did not replace cables. See n.2, *supra*. Thus, the fact that Frontier had not replaced the #3 winch cable could have come as no surprise to Dalton.

II. Procedural History.

On March 8, 1999, Dalton filed his STAA complaint. Following an evidentiary hearing, the ALJ ruled in Dalton's favor. The ALJ found that Dalton had refused to drive his truck on March 4 because he had a reasonable apprehension that to do so would cause serious injury to himself or the public. The ALJ ordered Copart to reinstate Dalton and to pay him back pay with interest. Pursuant to the STAA regulations, the ALJ's reinstatement order was effective immediately upon Copart's receipt of the decision.^{6/}

STANDARD OF REVIEW

Under the regulations implementing the STAA, the Board is bound by the factual findings of the ALJ if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. §1978.109(c)(3). Substantial evidence is evidence that is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1983)). In reviewing the ALJ's conclusions of law, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision" 5 U.S.C.A. §557(b) (1996). *See also* 29 C.F.R. §1978.109(b). Therefore, the Board reviews the ALJ's conclusions of law *de novo*. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

In order to prevail in a STAA case, the complainant must prove that he engaged in protected activity, and the employer took adverse action against him because of that protected activity. *BSP Trans, Inc. v. United States Dep't Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 20 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F. 3d 1133, 1138 (6th Cir. 1994); *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). On review, Copart challenges the ALJ's finding that Dalton's refusal to drive his truck on March 4 was protected under the "work refusal" provision of the STAA, which among other things makes it unlawful for an employer to discharge an employee for refusing to operate a vehicle because "the employee has a reasonable apprehension of serious injury to the

^{6/} The STAA regulations provide:

The administrative law judge's decision and order concerning whether the reinstatement of a discharged employee is appropriate shall be effective immediately upon receipt of the decision by the named person. All other portions of the judge's order are stayed pending review by the Secretary.

29 C.F.R. §1978.109(b) (2000).

employee or the public because of the vehicle's unsafe condition.” 49 U.S.C.A. §31105(a)(1)(B)(ii).^{7/}

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 unsafe condition establishes a real danger of accident, injury, or serious impairment to health.” *Id.* at §31105(a)(2). Therefore, in order to prevail Dalton must prove not only that **he** had an apprehension of serious injury due to his truck's unsafe condition, but also that **a reasonable person** in his position would have concluded that there was a real danger to himself or the public as a result of the condition of the vehicle. Thus, the reasonable apprehension provision incorporates a requirement that the complainant establish that his or her apprehension was objectively reasonable.

The ALJ concluded that Dalton refused to drive his truck because he reasonably was apprehensive about two matters that might have caused serious injury to himself or the public: (1) leaks in the truck's hydraulic system and (2) concerns with the winch cables. As we discuss below, we conclude that there is not substantial evidence in the record to support the ALJ's conclusion with regard to either of these concerns. In so ruling, we are mindful that the substantial evidence standard of review places a heavy burden upon us. This Board is not free to engage in an independent evaluation of the facts.^{8/} “If there [is] substantial evidence [in the record] to support the ALJ's findings,” it would constitute reversible error for this Board to fail to treat them as conclusive. *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). *Accord Brink's Inc. v. Herman*, 148 F.3d 175, 178 (2d Cir. 1998). However, the substantial evidence standard does not require us to affirm the ALJ's findings of fact merely because there is evidence in the record which would justify them, without taking into account other – contrary – evidence in the record. Rather, as the Supreme Court held in *Universal Camera v. NLRB*, 340 U.S. 474, 488 (1951), “[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight.” With these principles in mind we evaluate all the evidence in the record with regard to the reasonableness of Dalton's apprehension of serious injury.

I. Hydraulic leaks.

We agree with the ALJ's finding that Dalton repeatedly complained about leaks in two hydraulically-driven systems used on the truck: the ram that raised and tilted the truck deck, and the winches that pulled wrecked vehicles onto the deck. Dalton's testimony to that effect is

^{7/} The STAA also prohibits retaliation against an employee who refuses 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). That provision is not implicated in this case.

^{8/} Although pages 5-24 of the RD&O are denominated “Findings of Fact” those pages actually contain a *summary* of the testimonial and documentary evidence in the record, not *findings*. The ALJ's findings of fact are related in the section denominated “Conclusions of Law.”

supported by his DVIRs, which reflect his reports of hydraulic leaks on February 1, 2, 3, 23, 24, 25, 26, and March 1 and 2. RX 17.

The ALJ found that Dalton had an objectively reasonable apprehension of serious injury as a result of the truck's hydraulic leaks. The ALJ found:

Complainant . . . explained that improperly maintained hydraulics are dangerous because the hydraulic lines may break and cause the lift to fall, potentially harming anyone standing nearby

* * * *

The evidence shows that, at the time Complainant refused to drive Respondent's truck, he knew that there were multiple hydraulic leaks Complainant knew that . . . these conditions [were] potentially hazardous

Complainant also knew that both Cupp and Gille told him the truck was safe, and that hydraulic leaks were not a danger However, Complainant also knew that he had asked for various repairs numerous times, and marked needed repairs on his Driver Inspection Reports, with no response from Respondent He was well aware that both Cupp and Gille determined that no other repairs, other than the brakes, would be completed before he drove the truck on March 4th Given these circumstances and personal experiences, a reasonable person could apprehend his/her safety, or that of the public, despite the reassurances of Respondent, who repeatedly refused to make reasonable, necessary repairs.

Id. at 25-26. In so ruling, the ALJ rejected or discounted the testimony of Powell, Cupp, and Keith Mitchell, the Service Manager for Frontier International.

Based on the record as a whole, we conclude that there is not substantial evidence to support the ALJ's finding that Dalton's apprehension that the leaks posed a threat of serious injury to him or the public was objectively reasonable with regard to either the lift ram^{9/} or the winches.

A. The Ram. Dalton's testimony regarding the dangers related to hydraulic leaks on the ram was very brief:

^{9/} The ALJ did not differentiate between the hydraulic leaks on the winches and the hydraulic leak on the ram, and made no specific findings about the danger associated with an hydraulic leak on the ram.

Well, as far as the hydraulic ram was concerned, when you're boomed up at the degree that you are, and you're taking a vehicle up to the top, if you have a – what happens is it – hydraulic is under heavy pressure It runs it up to raise this up two lids, two decks.

When you have a leak on a hydraulic hose, it's not like a radiator hose on a car or something. When it's a high pressure hose such as these, when the leak is there, it will – the pressure itself will keep bearing on that spot. And I've seen hydraulic hoses just bust.

JUDGE SARNO: And it would fail?

THE WITNESS: Absolutely.

JUDGE SARNO: And it could come down on you?

THE WITNESS: If it fails – yes, sir.

JUDGE SARNO: Something could –

THE WITNESS: It can fall on you.

Transcript (Tr.) 118-119. Thus, we only have Dalton's bald statement that the ram would fall, unsupported by any claim on his part to any experience or expertise regarding hydraulic failures.

On the other hand, we have the testimony of Powell, who, as we have pointed out, had extensive experience in truck design, and as Fleet and Safety Manager for Copart, was well aware of the workings of Copart's trucks. Powell specifically testified that hydraulic leaks on the ram are not dangerous because, in the event of a hydraulic failure on Chevron trucks such as the one Dalton drove, the ram would lock in place. Powell elaborated: "But you know, typically most hydraulics are designed that way. You go to Arrow . . . bucket trucks, you go to anything, and they're designed that way specifically because they know you have a potential of a human being onboard." Tr. 282.

Cupp, Copart's Yard Manager, also testified that if the hydraulic ram failed "nothing" would happen. "Everything shuts down and stops where it is There's a safety feature to where, if there is not fluid going through everything shuts down and locks up." Tr. 141. Cupp testified that the specialists on the trucks at Frontier International had explained these principles to him. Moreover, Cupp testified that he had told Dalton as early as February 1 that "a hydraulic leak in the ram was not a safety feature – was not a safety hazard." Tr. 140-141.

Additionally, we have the uncontroverted testimony of Keith Mitchell, the Service Manager at Frontier International and truck a mechanic with 22 years of experience. Mitchell testified that it was Frontier's policy that, if their mechanics observed an unsafe condition on a truck they were working on, Frontier would notify the customer, and that he would not allow a truck to leave Frontier if he felt it was unsafe. Mitchell testified that to his knowledge, Frontier did not find it necessary to call any conditions on Dalton's truck to Copart's attention on March 4 when the vehicle was in for repairs.

Given these facts, we cannot conclude that a reasonable person in Dalton's position would have rejected Copart's advice regarding the safety of the ram and would have relied instead on his or her own, apparently uninformed, judgment that the ram would fall. Therefore, there is not substantial evidence in the record as a whole to support the ALJ's finding that Dalton's apprehension about the ram was reasonable.

B. The Winches. Dalton provided even less information about the dangers associated with hydraulic leaks on the winches. Moreover, to the extent that he provided any support for his allegation that leaking winches posed a real danger of injury, he testified about leaks of "gear lube oil" not hydraulic fluid leaks. The following constitutes all of Dalton's testimony relating to the reasonableness of his apprehension of harm:

JUDGE SARNO: Is that the hydraulic oil leaks you're talking about, or is it like oil out of an oil pan dripping out under the truck too?

THE WITNESS: No, sir. It was –

JUDGE SARNO: You're talking hydraulic fluid?

THE WITNESS: I'm talking about hydraulic fluid –

JUDGE SARNO: Any other types of fluid?

THE WITNESS: Yes, sir. There is a gear lube oil that is contained inside your winches that keep the bearings that Ramsey Winch over here makes for the United States, basically. It's leaking out of there.

JUDGE SARNO: And what's the significance of that happening?

* * * *

BY MR COFFEY:

Q And if a gear box like that, if there is a leak in that, what is the danger of that one to the public or to yourself?

A Okay. All right. What can happen is a gear box, as it's turning, if you wind it, and it stops, it can snap, you can snap a cable there, you know, because of lack of maintenance, you know.

Tr. 119-120. From this testimony it is impossible to tell whether there was any danger associated with hydraulic leaks of the winches.

In fact, the evidence in the record as a whole overwhelmingly controverts Dalton's muddled and unsupported assertion of dangerous conditions that could lead to serious injury. Again, both Powell and Cupp testified that there was no danger associated with fluid leaks on the winches. Thus, on the record before us we conclude that the evidence conclusively establishes that, even if the winches were still leaking fluid on the morning of March 4, they would not have presented a safety hazard.

The far bigger problem with the ALJ's finding that Dalton's apprehension about the leaking winches on the morning of March 4 was reasonable is that, according to the uncontroverted testimony of Frontier's Mitchell, all three winches were removed, disassembled, and resealed *prior* to Dalton's refusal to drive. This testimony is supported by Frontier's invoice, which indicates that leaks on the winches were on the work order written up on March 1, and that all three winches were repaired. Because Dalton never examined the vehicle on March 4 prior to his refusal to drive and his termination – which would have enabled him to determine that the leaking winches had been repaired – his apprehension about the winches could not have been objectively reasonable on that date. Therefore, there is not substantial evidence in the record as a whole to support the ALJ's finding that Dalton's apprehension about the winches was reasonable.

II. Winch Cables.

The ALJ determined that Dalton's apprehension that the cables on his truck could cause serious injury to himself or the public was reasonable. He largely based this finding on Dalton's testimony that he previously had been endangered by a snapping cable and on the Copart corporate Survey of Dalton's vehicle:

Complainant explained that his concerns were based on ... unsafe cables To illustrate his concerns, Complainant described in depth an incident in which a cable snapped and "came whipping straight back towards" him He explained that he was frightened, and that the cable "could have taken off a limb". . . . He testified that he witnessed persons decapitated by a snapped cable

* * * *

The evidence shows that, at the time Complainant refused to drive Respondent's truck, he knew that . . . the cables needed replacement, as determined in a February 4, 1999 corporate inspection Complainant knew that each of these conditions was potentially hazardous Complainant personally experienced a recent incident in which a cable snapped while he was loading a car, which he described as "frightening" During his testimony of the incident, he appeared close to tears

Complainant also knew that both Cupp and Gille told him the truck was safe However, Complainant also knew that he had asked for various repairs numerous times, and marked needed repairs on his Driver Inspection Reports, with no response from Respondent He was well aware that both Cupp and Gille determined that no other repairs, other than the brakes, would be

completed before he drove the truck on March 4th Given these circumstances and personal experiences, a reasonable person could apprehend his/her safety, or that of the public, despite the reassurances of Respondent, who repeatedly refused to make reasonable, necessary repairs.

RD&O at 25-26.

The ALJ also based his finding of reasonable apprehension on the testimony of two Industrial Splicing employees that they replaced the cables on Dalton's truck on March 5 after Copart terminated Dalton's employment:

The testimony of Tipton and Vincent further supports Complainant's position. Vincent and Tipton completely replaced the cables on Complainant's truck on the same afternoon Complainant was terminated. Additionally, a large five to six page single-spaced typed work order of repairs was completed on the truck jointly by Frontier and Industrial Splicing both Tipton and Vincent agreed that the cables repaired on March 4 and 5, 1999 were in an unsafe condition Tipton pointed out that the cable had "bent wires, broken strands and kinked cables" Vincent stated that "several of the cables had been smashed or broken in some places, some of them had kinks, burs, broken wires, et cetera" Tipton further testified, and Vincent agreed, that if a cable breaks it could hurt, and possibly kill, a person standing nearby

Id. at 26. As discussed below, we conclude that the evidence in the record as a whole does not support that ALJ's finding that Dalton's apprehension regarding the cables on his truck was objectively reasonable.

A. The condition of the cables. Dalton repeatedly cited the fact that on the February 4 corporate Survey, Powell had given the "cables/winches" component on Dalton's truck a "2" rating – meaning "Generally Good, Needs Some Improvement," and had written "#3 winch replace cable." For example, Dalton testified regarding his first conversation with Dan Cupp on March 4:

And at that particular point, I believe that was a month from the day that the corporate offices came out and inspected this vehicle.

And of the – I don't know how many there were, but I know approximately 13 of their criteria stated needed to be repaired on that vehicle on February 4, through their own inspection.

* * * *

The 4th of March now. I was explaining to Dan, Look, this truck is unsafe. You know, the cables were written up even on – all the way back to the 2nd – I mean, the 4th of the following month, just by the –

Q Or the previous month?

A Yes. – the previous month, from corporate themselves.

* * * *

And I told him, I said, Dan, I don't think it's safe. I mean, I– this thing has been pushed to the limit, you know.

Tr. 95-96. Dalton also testified that he had discussed the items on the Survey with Cupp “at several different times. From the time corporate had done the inspection the month before, Well we’ll get to it, we’ll get to it. It never seemed to come.” Tr. at 97. Dalton returned to the topic of the Survey later in his testimony:

JUDGE SARNO: It was your understanding that they should be made when that report from corporate came out, that these things should be – these cables should be repaired? Is that what you're saying?

THE WITNESS: Not just cable. There were – like I say, there was like eleven items or something.

Tr. 129. Dalton also gave his analysis of the rating system: “A 1 meant it needed attention immediately. A 2 meant it was pretty close.” Tr. 105. However, it is abundantly clear that Dalton’s apprehension was based upon a fundamental misunderstanding of the rating system, and there is simply no competent evidence in the record to support Dalton’s conclusion that a “2” rating and the notation regarding cable #3 meant that the cables presented a safety hazard. In fact, there is overwhelming evidence to the contrary.

Powell testified that even a “1” rating on the Survey did not, in and of itself, mean that the item rated presented a safety hazard. Rather, he would specifically inform Copart officials as to which of those items presented a safety hazard – in this case brakes and hazard lights – and those items were fixed before the truck was put back in service. A “2” rating, such as Powell gave to the winches/cables item, signified that there was no current defect needing repair, but that the item should be dealt with at the next routine maintenance – which usually occurred at 8,000 mile intervals. Moreover, Powell testified that although the #3 cable showed signs of wear, there was nothing unsafe about it. He found nothing wrong at all with the other two cables.

Powell also testified regarding the strength of the cables in question. He stated that, although the winches were designed to pull a maximum load of 4,800 pounds, the cables that

were attached to those winches were designed to pull a maximum load of 15,000 pounds. Thus, absent significant failure of the cable, the winch would fail under a much lower load than would the cable.

Powell's testimony was supported by the uncontradicted testimony of Frontier's Mitchell that: 1) in order for Frontier's mechanics to reseal the winches – work which they did in early March – it was necessary to remove all of the cables; 2) it was Frontier's practice to examine those cables for unsafe conditions, and if any were found, to notify Mitchell or the customer; and 3) nothing was brought to his attention regarding the cables on Dalton's truck.

The ALJ ignored the testimony of Powell and Mitchell, and found the cables dangerous based upon his own misunderstanding of the "2" rating given the #3 cable on the Survey. Thus, the ALJ found that "[t]he evidence shows that at the time Complainant refused to drive . . . [Dalton] knew . . . that the cables needed replacement, as determined in a Feb. 4, 1999 [report]" RD&O at 26. The ALJ also relied upon the "corroborating" testimony of two Industrial Splicing employees S Tipton and Vincent – who specifically remembered replacing the cables on Dalton's truck immediately after he was terminated, and testified that the cables were frayed, worn, kinked and otherwise in bad condition. The testimony of Tipton and Vincent properly cannot be given any weight, however, because, as their testimony graphically demonstrates, neither of them could recall Dalton's truck. Both Vincent and Tipton testified that they specifically remembered replacing the cables on Dalton's truck immediately after he was terminated. Both of them testified that the cables on the truck were frayed, worn, kinked and otherwise in bad condition. However, Tipton described the truck as a "five-car hauler" with five cables, when in fact the vehicle was a four-car hauler with three cables. Tr. at 67-68 (Tipton). Vincent testified with conviction that the truck had five cables and that all were in bad shape:

JUDGE SARNO: Did you recommend that all the cables be replaced?

THE WITNESS: I believe so.

JUDGE SARNO: And how many cables does that carrier have?

THE WITNESS: I believe it was five.

Tr. 80 (Vincent). When confronted with actual configuration of the truck on cross-examination, Vincent stuck to his guns:

Q Mr. Vincent, you just stated that this had five cables. Correct?

A Yes, ma'am. I believe so.

Q If I told you this was a four-car hauler, that only had three winches and three cables, would you disagree with me?

A I probably would.

Q You probably would?

A I'm almost certain there were five, four or five.

Tr. 81. Since Tipton and Vincent could not even accurately describe the configuration of Dalton's hauler, we conclude that the ALJ erred in giving any weight to their description of the condition of the cables on the truck.

B. The Snapping Cable Incident. In finding reasonable Dalton's apprehension that the cables were dangerous the ALJ also heavily relied upon Dalton's testimony that in January he had narrowly avoided serious injury when a cable on his truck had snapped while he was loading a vehicle. Although he had not been injured, the incident had frightened him:

Q And what happened – now, what you've done is taken us back to January 20.

A January 20.

Q And you're explaining what happened on that day to these same cables?

A Yes.

Q Okay. Go ahead.

A So I expressed that the two needed to be replaced. Well, I took the truck to Industrial Splicing, as they had asked me to. I told them which cable that they directed me to have replaced. The gentleman, one of the guys, came from out of the back and said, Look, there's another cable that really needs to be replaced. It's –

* * * *

JUDGE SARNO: So at some point you determined that two cables, you said, needed to be replaced?

THE WITNESS: Right. I had told them that before I went out there. They came in, told their salesman, and the salesman called and told them the same thing.

JUDGE SARNO: How many were replaced on that day?

THE WITNESS: One.

* * * *

BY MR. COFFEY:

Q Excuse me. Now, you were dispatched to Missouri on what day?

A That same day that the one cable was replaced, which was, I believe, the 20th of January. I was picking up the very first vehicle. I was pulling it to the top, which it's under pretty intense pressure. It snapped.

JUDGE SARNO: Which one, the one that wasn't replaced?

THE WITNESS: That's correct, sir.

JUDGE SARNO: How – there's three cables on there?

THE WITNESS: On this four-car hauler. Yes, sir.

JUDGE SARNO: Okay. And one of the – the one that you were concerned about that wasn't replaced, you're saying it snapped?

THE WITNESS: Yes, sir.

JUDGE SARNO: All right.

THE WITNESS: As soon as it let go, it came whipping straight back towards me. I hit the ground. Now, once I get through that, I've got to worry about this vehicle that's at this degree, that had been pulled up here and to keep it from hitting other vehicles from it sliding down this – because you've got oil, you get grease, you know, that are leaking out of busted transmissions and other things. It's a frightening situation. Thank goodness I didn't get hurt. I could have. It could have taken off a limb. I've – I mean, I've seen it where people have lost limbs. I've seen it where people have been decapitated with a snapped cable. People act like it's no big deal.

* * * *

And I told you, you know, under the – anyway, from the 20th and the 21st of January, all the way to the 5th of March, there was not a cable replaced. And I had been telling them for – I had been telling Dan.

And here's – I told him, Look, these cables are going to snap anytime. And the – I had reached my limit. I was scared. I had already been through it.

Tr. 102-105. The ALJ found:

To illustrate his concerns, Complainant described in depth an incident in which a cable snapped and “came whipping straight back towards” him He explained that he was frightened, and that the cable “could have taken off a limb”. . . . He testified that he witnessed persons decapitated by a snapped cable

* * * *

Complainant personally experienced a recent incident in which a cable snapped while he was loading a car, which he described as “frightening” During his testimony of the incident, he appeared close to tears

RD&O at 25-26. We reject the ALJ's characterization of Dalton's description of this incident as being “in detail.” In fact, as the quoted testimony demonstrates, Dalton's testimony was conclusory, and at bottom, inherently incredible.

First, Dalton's claim to have seen "people" "decapitated" by a snapped cable must be viewed with enormous scepticism in light of Dalton's failure to provide any detail or corroboration whatsoever. Yet the ALJ cited this testimony with approval.

Second, Dalton failed to provide details that might have lent credibility to his claim. Third, Dalton's description of how the cable almost hit him as he was standing at the controls on the side of the hauler was directly contradicted by Powell. Powell testified that the alleged incident could not have happened as Dalton described it, because when a cable snaps the end attached to the winch would fly back in the direction of the winch – which would be in the direction of the cab of the truck and not to the side where Dalton claimed to have been standing. Finally, both Cupp and Gille (who would have had to authorize the replacement of the snapped cable) testified that they were completely unaware of the snapping cable incident. For all of these reasons, the ALJ erred in relying upon Dalton's account of the alleged January 20 cable incident when evaluating the evidence regarding the reasonableness of Dalton's apprehension on March 4.

We therefore conclude that Dalton's apprehension that the cables could cause serious injury to himself or the public was not reasonable within the meaning of the STAA.

III. Copart's Response to Repair Requests.

The ALJ also found that Dalton's fears were reasonable despite Copart's reassurances, because Copart made "no response" to his numerous repair requests, *i.e.*, Copart "repeatedly refused to make reasonable, necessary repairs." RD&O at 26. This finding is flatly contradicted by the evidence in the record, which shows that: 1) when Dalton indicated that hydraulic fluid leaks were a safety hazard, Cupp explained to him why they were not; 2) when Dalton complained about the brakes to the Survey team, Powell responded by rating brakes a "1," and directing Copart officials to attend to the brakes immediately, and Copart had the brakes repaired before the truck was placed back in service the next day; 3) when Dalton noted the brakes on his DVIR on March 1, the vehicle was immediately taken out of service and sent to Frontier for repairs to the breaks and to the winch leaks as well; and 4) when Dalton complained about the brakes again on March 3, the vehicle was immediately returned to Frontier. Indeed, Dalton's hauler was at Frontier for repairs and service on February 27 and 28, again on March 1, and on March 3 to 4. The fact that Copart did not have the cables replaced during that time is not evidence of a lack of responsiveness in light of the fact that the cables did not present a safety hazard and cable replacement was scheduled for March 6.^{10/} Moreover, Dalton never noted his apprehension about the cables on his DVIRs although he did cite his brakes and the fluid leaks. He could offer no explanation for this oversight. Thus, the following colloquy occurred between Copart's counsel and Dalton:

^{10/} Dalton admitted that he had been told prior to his refusal and termination that the cables were scheduled to be replaced on the sixth.

But what I am trying to get from you, Mr. Dalton, if the brakes – if you thought all this was going on, and the brakes were significant enough to put them on this driver inspection report and mark they were a safety concern, wasn't the cable just as much of a safety concern to you as these brakes were, if you were afraid it was going to snap and could kill somebody and decapitate someone?

And if so, why was it not on your driver inspection report on March 1 or 2?

A That's a good question.

Tr. 190. We fail to understand how this record can be read to support a finding that Copart was not responsive to the complaints Dalton actually made.

IV. Issues Relating to Dalton's Credibility.

It is evident that the ALJ found Dalton to be a credible witness. However, as we have indicated above, the outcome of this case does not turn on credibility, but on the normal process of assessing testimony in light of the expertise, experience, and logic of the witnesses in order to decide what happened based upon conflicting accounts. We must note, however, certain issues relating to Dalton's credibility. First, although Dalton testified that he refused to drive on the afternoon of March 4 out of a concern for the safety of his vehicle, he also admitted that after he had returned home from Frontier that morning, he made an appointment to have the windshield on his personal vehicle repaired at his home that afternoon, and that he told Gille about that appointment. Dalton was unable to explain why, if he was refusing to drive out of concern for his safety, he thought it was relevant to tell Gille of the windshield appointment.

Second, Dalton testified (in direct contradiction to Cupp) that Cupp pressured him not to report needed repairs on his DVIRs. This testimony – which the ALJ credited – is inherently implausible because: 1) Dalton did, in fact, report defects on his DVIRs, including ones that he thought affected safety; and 2) Dalton openly informed the corporate safety Survey team that he had concerns about his brakes. This is not conduct showing a reluctance to report vehicle defects.

CONCLUSION

Under *Universal Camera, supra*, it is our obligation to determine, not simply whether the evidence relied upon by the ALJ supports his findings of fact, but whether the evidence in the record as a whole does. We are constrained to conclude that, on the basis of our evaluation of the record as a whole, there is not substantial evidence to support a finding that Dalton's apprehension that there was a real danger of injury to himself or the public was objectively reasonable within the meaning of the STAA:

- Dalton's fears regarding leaks in the hydraulic system were not reasonable, and were assuaged by his supervisor.

- In any event, the winches were disassembled and resealed before Dalton's refusal to drive – a fact Dalton failed to ascertain because he refused to pick up the truck.
- Dalton's fears about the cables were based on a misreading of the Copart Survey and on an inherently improbable incident involving a snapping cable, and were not reasonable.
- Copart reasonably responded to Dalton's expressed safety concerns.

For the foregoing reasons we **DISMISS** the complaint, and we **DENY** as moot Copart's motion for emergency relief.

SO ORDERED.

PAUL GREENBERG

Chair

CYNTHIA L. ATTWOOD

Member

RICHARD BEVERLY

Alternate Member