



**In the Matter of:**

**JOZEF WROBEL,**

**ARB CASE NO. 01-091**

**COMPLAINANT,**

**ALJ CASE NO. 2000-STA-48**

**v.**

**DATE: July 31, 2003**

**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:*

**Jerome D. Schad, Esq., Jason E. Markel, Esq., Hodgson Russ, LLP, Buffalo, New York**

### **FINAL DECISION AND ORDER OF DISMISSAL**

This case arises under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act of 1982 (STAA), as amended, 49 U.S.C. § 31105 (2000) and implementing regulations at 29 C.F.R. Part 1978 (2002). We affirm the Recommended Decision and Order (R. D. & O.) of the Administrative Law Judge (ALJ) dismissing the case. *Wrobel v. Roadway Express, Inc.*, 2000-STA-48 (ALJ Aug. 22, 2001).

### **JURISDICTION AND STANDARD OF REVIEW**

We have jurisdiction to review the R. D. & O. and to issue a final decision pursuant to 29 C. F. R. § 1978.109(c)(1) and Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002).

Under the STAA, we are bound by the factual findings of the ALJ if they are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to

support a conclusion.” *Clean Harbors Env'tl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

We review the ALJ's conclusions of law de novo. *Yellow Freight Sys., Inc. v. Reich*, 8 F.3d 980, 986 (4th Cir. 1993); *Eash v. Roadway Express, Inc.*, ARB Nos. 02-008 and 02-064, ALJ No. 2000-STA-47, slip op. at 3 (ARB June 27, 2003). In addition, we accord special weight to an ALJ's demeanor-based credibility determinations. *Becker v. West Side Transp., Inc.*, ARB No. 01-032, ALJ No. 00-STA-4, slip op. at 5 (ARB Feb. 27, 2003); *Trachman v. Orkin Exterminating Co., Inc.*, ARB No. 01-067, ALJ No. 2000-TSC-3, slip op. at 2 (ARB Apr. 25, 2003).

## ISSUES ON APPEAL

1. Whether substantial evidence supports the ALJ's factual findings that the Complainant did not prove essential elements of his discrimination claim under 49 U.S.C. § 31105(a)(1)(B)(i), prohibiting discharge or discipline of an employee “because the employee 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.”

2. Whether the ALJ's legal conclusions were correct.

We answer both questions in the affirmative except for our disagreement with the ALJ's application of a dual motive analysis to this case.

## BACKGROUND

On July 16, 1999, Complainant Jozef Wrobel filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the Respondent, Roadway Express, Inc., discriminated against him in violation of Section 31105 of the STAA by firing him on June 1, 1999, for refusing to drive his scheduled Buffalo-to-Boston run during the Memorial Day weekend. Wrobel contended that he suffered back pain which made him unable to obtain meaningful sleep, and that from May 28 to May 30, his ability and alertness were so impaired due to illness and fatigue that his operation of a commercial motor vehicle would violate 49 C.F.R. § 392.3. (the fatigue rule). An arbitration award subsequently reduced the Complainant's discharge to a 15-day unpaid suspension concluding on August 31, 1999.

On June 23, 2000, the OSHA Regional Administrator dismissed Wrobel's complaint for lack of merit. She stated, in pertinent part:

Based on the results of this investigative inquiry, there is no compelling evidence to support complainant's assertion that the disciplinary action taken against him for his May 28th, 1999, work refusal, was a discriminatory reprisal. It appears, based on the chronology of events in this case, that complainant used the allegations of job safety issues to mask personal concerns he had

for not wanting to work on 5/28/99, in his dispute with management.

*Id.* at 2. The Complainant then requested a hearing before an Administrative Law Judge, which was held on June 5 and 6, 2001.

On August 22, 2001, the ALJ issued a Recommended Decision and Order (R. D. & O.) finding that the Complainant had not engaged in protected activity under 49 U.S.C. § 31105(a)(1)(B)(i) when he refused to drive on May 28, 1999, because he had not shown that an actual violation of § 392.3 would have occurred if he had driven. The ALJ's ruling was based on the following facts: (1) the Complainant did not inform the dispatcher or anyone else at the Buffalo terminal that he was fatigued and experiencing back pain earlier in the day (Friday, May 28, 1999, the start of the Memorial Day weekend) when completing his prior run; (2) nor did he initially communicate these problems when he subsequently phoned the terminal as requested at 2 p.m. that day; (3) only after the dispatcher insisted that Wrobel to work his available hours did the Complainant say he was sick, without any further explanation of his condition; (4) the chiropractor's excuse note tendered upon the Complainant's return to work merely stated "excuse [Jozef Wrobel] from work from 5-28-99 to 5-30-99" and did not indicate the nature of Wrobel's illness or treatment; (5) the Complainant did not take a sick day for his absence, although he claimed to be sick. R. D. & O. at 8-10.<sup>1</sup> The ALJ also found that even if Wrobel had engaged in protected activity, Roadway would have discharged him anyway because of excessive absenteeism. The ALJ noted that a comparative summary of drivers of the Buffalo-to-Boston run from May 1998 to May 1999 indicated that, of the seven other drivers on the run, there were six who never had an unexcused absence, and one who had two unexcused absences, while Wrobel took twenty unapproved days off. Further, Wrobel was the only driver on the run who had a pattern of taking unexcused absences to extend his weekends. R. D. & O. at 12, citing RX 13.

### **TEXT OF THE RELEVANT STATUTE AND REGULATION**

The STAA provision relating to a protected refusal to drive in violation of federal safety or health requirements provides:

- (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because – . . .
- (B) the employee refuses to operate a vehicle because–

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<sup>1</sup> Although the ALJ did not explicitly state that he disbelieved Wrobel, he discussed a situation where a complainant feigned illness, and noted facts evidencing that Wrobel's conduct was not consistent with what would be expected had he truly experienced back pain and fatigue serious enough to prevent him from driving and bring him within the STAA's protection. R. D. & O. at 9-10. Thus, it is implicit that he did not find Wrobel's testimony credible.

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health.

49 U.S.C. § 31105(a)(1)(B)(i)(2000).

The Department of Transportation's "fatigue rule" 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 (1999).

## DISCUSSION

Under § 31105(a)(1)(B)(i) the refusal to drive is protected only if the record establishes that the employee's driving of a commercial vehicle actually would have violated a pertinent motor vehicle standard. ("To be meritorious on a claim under this provision, the driver must show that the operation would have been a genuine violation of a federal safety regulation at the time he refused to drive – a mere good-faith belief in a violation does not suffice." *Yellow Freight Systems v. Martin [Spinner]*, 983 F.2d 1195, 1199 (2d Cir. 1993)). Thus, to show that he engaged in protected activity here, Wrobel has to prove by a preponderance of the evidence that he refused to drive because his ability or alertness were in fact so impaired, or so likely to become impaired, through his illness and fatigue, as to make it unsafe for him to begin or continue to operate a commercial motor vehicle.

The facts found by the ALJ, and cited in part in the Background section of this decision, accurately reflect the record and thus are supported by substantial evidence. We therefore also agree with the ALJ's finding that the Complainant has not proved by a preponderance of the evidence that he engaged in protected activity under 49 U.S.C. § 31105(a)(1)(B)(i) since he failed to prove that the Respondent's directive that the Complainant drive on May 28 would have violated DOT's fatigue regulation or would have required Wrobel to violate that regulation. R. D. & O. at 8-11, 13.<sup>2</sup>

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<sup>2</sup> We disregard the ALJ's statement (when speaking of a prima facie case analysis) in the third paragraph of p. 8 of the R. D. & O. that "Due to the close proximity between the protected activity and the adverse action, it is likely that Wrobel's protected activity caused the adverse employment action." This statement is inconsistent with his subsequent detailed findings, on the fully submitted case, that the Complainant did not engage in protected activity. R. D. & O. at 10-11.

Additionally, even assuming, arguendo, that the Complainant's condition actually precluded him from driving without violating DOT's fatigue regulation, the Complainant's notification to the dispatcher that he was "sick," without any further elaboration, and his chiropractor's vague note which made no mention of any condition which made it unsafe for Wrobel to drive, did not communicate this information to Roadway. Accordingly, the Respondent could not have discriminated against the Complainant because it lacked knowledge of his protected activity. *BSP Trans., Inc. v. United States Dep't Labor*, 160 F.3d 38, 45 (1st Cir. 1998); *Yellow Freight Sys., Inc. v. Reich*, 27 F.3d 1133, 1138 (6th Cir. 1994), *Eash v. Roadway Express, Inc.*, slip op. at 4 (ARB Jun. 27, 2003); *Young v. Schlumberger Oil Field Servs.*, ARB No. 00-075, ALJ No. 2000-STA-28, slip op. at 4 (ARB Feb. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 00-STA-52, slip op. at 3 (ARB Dec. 13, 2002); R. D. & O. at 8; and cases cited. Moreover, in addition to lacking the requisite knowledge, Respondent had reason to suspect the veracity of Wrobel's telephoned response that he was sick because: (1) it was not given until he was told that his new driving assignment would be adjusted to comport with DOT regulations (T. 242-43, 318-19); (2) he had already engaged in a similar pattern of absences extending his weekends (T. 223,303-310); (3) his chiropractor's note did not contain any explanation about any illness or condition (T. 243-245, 249, CX6); (4) he failed to take sick leave for his absence (T. 247-249); and (5) the relay manager knew that Wrobel had lied to him in the past and had falsified his log book (T. 223,233,242-43).<sup>3</sup>

## CONCLUSION

Since the Complainant has not proved his case of discrimination under 49 U.S.C. § 31105(a)(1)(B)(i),<sup>4</sup> the R. D. & O. is **AFFIRMED** and the Complainant's case is **DISMISSED**.<sup>5</sup>

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<sup>3</sup> Since the Respondent's actions were not predicated in any part on the Complainant's purported protected activity, there was no reason for the ALJ to engage in a dual motive analysis, R. D. & O. at 11-12. Such analysis does not come into play merely because "the parties have presented both a legitimate and discriminatory reason for the discharge . . ." *Id.* at 11. Rather, a dual motive analysis is appropriate only when the complainant proves that retaliation for a protected activity was a motivating factor in the respondent's action. *Korolev v. Rocor International*, ARB No. 00-0006, ALJ No. 98-STA-27, slip op. at 4-5 (ARB Nov. 26, 2002).

<sup>4</sup> Pp. 14-15 of the Complainant's brief argue that the ALJ erred in failing to determine whether the Complainant engaged in protected activity under 49 U.S.C. § 31105(a)(1)(B)(ii), prohibiting discrimination against an employee because the employee refuses to operate a vehicle because "the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." It is dubious that the Complainant's case was brought under this provision. Complainant's OSHA complaint at 6-7; Complainant's pre-hearing statement at 2-3. However, in view of the findings of the ALJ and this Board with respect to Wrobel's contention that his refusal to drive was protected conduct under § 31105(a)(1)(B)(i), this was harmless error, if any. We note that under the "reasonable apprehension" provision, the refusal to drive is protected only if 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. See *Ass't Sec'y v. Consol. Freightways*, ARB No. 99-

Continued . . .

**SO ORDERED.**

**JUDITH S. BOGGS**  
**Administrative Appeals Judge**

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

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030, ALJ No. 98-STA-26, slip op. at 5 (ARB Apr. 22, 1999). The evidence casts significant doubt on the credibility of Wrobel's statement that he was "sick," and on the credibility of Wrobel's explanations with regard to his refusal to accept this assignment more generally. We note in particular the testimony of Tangent as to Wrobel's excessive unexcused absences and lack of credibility, including past falsification of his log book, and the testimony of Ryan as to when and how Wrobel stated that he was "sick," as well as the other circumstances the ALJ cited in finding no protected activity under the "actual violation" clause. The only independent evidence Wrobel submitted was the chiropractor's note, secured during a regularly scheduled appointment. That note provided no information as to Wrobel's condition. Thus Wrobel did not establish by a preponderance of the evidence that he held a belief that his driving would pose a risk of serious injury to himself or the public, that that belief was **objectively reasonable**, and that he based his refusal to drive on that objectively reasonable belief. Moreover, the reasonable apprehension provision also expressly requires that the employee had "sought from the employer, and been unable to obtain correction of the unsafe condition." 49 U.S.C.A. § 31105(a)(2). Thus, in order to show that he had sought and been unable to obtain correction of the unsafe condition, Wrobel would have had to provide Roadway with adequate information that it was unsafe for him to drive. The mere assertion that he was "sick," particularly under the circumstances presented, was inadequate to do so.

<sup>5</sup> In view of our affirmance of the R. D. & O., it is unnecessary for us to address Respondent's arguments that the ALJ erred by refusing to admit and defer to the Complainant's arbitration under 29 C.F.R. § 1978.112. See R. D. & O. at 2, n.1. *But cf. Germann v. Calmat Co.*, ARB No. 99-114, ALJ No. 1999-STAA-15, slip op. at 4-5 (ARB Aug. 1, 2002) with regard to deference to arbitration decisions.