



In the Matter of:

RICKY L. BROWN,

ARB CASE NO. 96-164

COMPLAINANT,

(ALJ CASE NO. 94-STA-54)

DATE: October 25, 1996

v.

WILSON TRUCKING CORP.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD^{1/}

FINAL DECISION AND ORDER

The Secretary remanded this case under the employee protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C. app. § 2305 (1988), to the ALJ to make a finding whether Complainant Ricky Brown had a “reasonable apprehension of serious injury to himself or the public,” 49 U.S.C. §2305(b), when he refused to transport and pump out a drum of hazardous material. The Secretary held that refusal to drive based on a reasonable apprehension that the task of pumping the hazardous material, which was one of Brown’s duties as a driver, would cause impairment to Brown’s ability safely to operate a motor vehicle was a protected activity under the STAA. The ALJ found on remand that Brown’s refusal of the assignment was not based on a reasonable apprehension of serious injury and recommended that this complaint be dismissed. Recommended Decision and Order on Remand at 11.

^{1/} On April 17, 1996, a Secretary’s Order was signed delegating jurisdiction to issue final agency decisions under this statute and the implementing regulations (29 C.F.R. part 19780 to the newly created Administrative Review Board. Secretary’s Order 2-96 (Apr.17, 1996), Fed. Reg. 19978 (May 3, 1996). Secretary’s Order 2-96 contains a comprehensive list of the statutes, executive orders, and regulations under which the Administrative Review Board now issues final agency decisions. Final Procedural revisions to the regulations (61 Fed. Reg. 19982) implementing this reorganization were also published on that date. The Board has reviewed the entire record in this case, including the Secretary’s Decision and Remand Order.

The facts in this case are set forth in the Secretary's Decision and Remand Order, and in the ALJ's first Recommended Decision at 4-14. Briefly, Brown refused an assignment to transport and pump out a drum of hazardous material on March 30, 1994 because he had suffered shortness of breath and dizziness when he partially pumped out the same drum on February 28, 1994. On that occasion, Brown had disconnected the hose from the transport drum to the base container before he had completely pumped out the hazardous material because he did not have enough nitrogen to pump out the drum completely. Brown was exposed to the fumes from a small spill of the hazardous material which flowed out of the hose. T (Transcript of hearing) 506-511.

We do not question Brown's good faith belief that he could again suffer exposure to the hazardous substance if he followed Wilson Trucking's order to transport and pump out the drum. But the STAA requires that

[t]he unsafe condition causing the employee's apprehension of injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a bona fide danger of an accident, injury, or serious impairment of health, resulting from the unsafe condition."

In other words, the employee's belief must be objectively reasonable, not simply subjectively made in good faith. *Yellow Freight Systems, Inc. v. Reich*, 38 F.3d 76, 82 (2d Cir. 1994). In addition, the Act requires that "[i]n order to qualify for protection under this subsection, the employee must have sought from his employer, and have been unable to obtain, correction of the unsafe condition."

We agree with the ALJ that Brown did not have a reasonable apprehension of serious injury when he refused his assignment. Brown asserts he should have been trained in the pumping procedure by the company shipping the hazardous material before being directed to make this delivery. For purposes of assessing the objective reasonableness of Brown's apprehension of injury, we find this irrelevant. He had been fully trained by another Wilson Trucking employee and had substantial experience with this procedure, having made over 190 deliveries of chemicals requiring pumping from the transport drum to a base unit in four years as a Wilson Trucking employee. T. 1179. Brown never had any problems with any other deliveries and pumping of hazardous material. T. 576. More significantly, Brown admitted that he caused the spill by failing to follow proper procedures. He knew there was not enough nitrogen in the tank to pump all the hazardous material out of the drum, but he started the pumping process anyway. T.506. When the nitrogen ran out, Brown called Wilson trucking and spoke to the man who had trained him in the pumping procedure, telling him he would try to find another nitrogen tank or to lift up the drum to feed the material by gravity, but he said nothing about disconnecting the hose. T. 509-510; 512. He knew there would be a spill when he disconnected the hose because there was liquid in it. T. 510. Brown admitted he caused his injury by disconnecting the hose and causing a spill, T. 514, and that if he had simply obtained another tank of nitrogen he could have completed the pumping without a spill. T. 515-16. We conclude that an employee with similar training and experience could not have

reasonably apprehended being injured by the work assigned to Brown in these circumstances.^{2/} Brown was not protected by the STAA when he refused his work assignment and Wilson Trucking did not violate the Act when it discharged him for that infraction.

Accordingly, the complaint in this case is **DISMISSED**.

SO ORDERED.

DAVID A. O'BRIEN

Chair

KARL J. SANDSTROM

Member

JOYCE D. MILLER

Alternate Member

^{2/} Because Brown did not have a reasonable apprehension of injury, it is not necessary to decide whether he met the final requirement of 49 U.S.C. § 2305(b), seeking correction of the unsafe condition, or whether Wilson Trucking fulfilled its obligation to make such a correction. We note that the terminal manager discussed the February 28 incident with Brown a few days later and told him “[the] next time, just call in and we can get you another nitrogen tank” T.733.