U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 September 2010

CASE NO.: 2009-FRS-00011

In the Matter Of:

ANTHONY SANTIAGO,
Complainant,

v.

METRO-NORTH COMMUTER RAILROAD CO. INC.,
Respondent.

Appearances:

Charles C. Goetsch, Esq., Cahill, Goetsch & Perry, PC, New Haven, CT, for the Complainant

Margaret A. Temple, Esq. and Alison L. Bowles, Esq. United States Department of Labor, Office of the Solicitor, New York, NY for the Assistant Secretary of the Occupational Safety and Health Administration

Charles A. Deluca, Esq., Beck S. Fineman, Esq., and William N. Wright, Esq., Ryan Ryan Deluca LLP, Stamford, CT for Metro North Commuter Railroad Company Inc.

DECISION AND ORDER DISMISSING COMPLAINT

I. Introduction and Procedural History

This case arises from a complaint filed by Anthony Santiago (Complainant) under the employee protection provisions of the Federal Rail Safety Act (the "FRSA"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (the "9/11 Act"), Pub. L. 110-53, 121 Stat 266 (Aug. 3, 2007). On December 29, 2008, Complainant filed a complaint with the Department of Labor's Occupational Safety and Health Administration ("OSHA"), under the whistleblower protection provisions of the FRSA. The complaint alleged that Metro North's change in the classification of Complainant's injury from occupational to non-occupational meant Metro North would no longer pay for medical expenses associated with the work injury, and since the Complainant could not pay for his medical expenses, his medical treatment was denied, delayed or interfered with in violation of the FRSA. On June 18, 2009, OSHA, the Secretary of Labor's designee, issued findings which

determined that Metro North violated the FRSA when it reclassified Complainant's injury from occupational to non-occupational and stopped paying for the treatment, the effect of which was to deny, delay or interfere with the treatment plan of his treating physician.[1] On July 15, 2009, Metro North objected to the Secretary's Findings and requested a hearing before the Office of Administrative Law Judges. On September 30, 2009, Respondent filed a Motion for Summary Decision. Complainant's and OSHA's memorandums in opposition were filed on October 22 and 23, 2009 respectively. On November 9, 2009, I denied Respondent's motion for summary decision.

The hearing was held in New Haven, Connecticut over several days from November 17-19, 2009. The transcript of the hearing is referred to herein as ("TR"). The Complainant, Mr. Santiago's, Exhibits are referred to as (Santiago Ex) and Santiago Ex 1-41; 43-45 were admitted; OSHA's Exhibits are referred to as (OSHX) and OSHX 14, 20, 21 were admitted; Metro North's (Respondent's) Exhibits are referred to as RX and RX 1-8, 12-14, 20-28, 30-33, 36, and 38 were admitted; in addition Complainant submitted exhibits designated General Exhibits relied upon by all parties and referred to as GX and GX 1-14; 16, 17, 20-23A were admitted. TR 46-48, 221-225, 733-736, 739-751; *see also* Joint Pretrial Stipulation.

II. Findings of Fact

Metro North Commuter Railroad ("Metro North") provides commuter rail service within the states of New York, New Jersey and Connecticut. TR 582-583. Metro North Railroad is a railroad carrier within the meaning of 49 U.S.C. §§ 20109 and 20102. Metro North is a public benefit subsidiary corporation of the Metropolitan Transportation Authority ("MTA"), an entity created by New York statute and a public benefit corporation. TR 579. Metro North receives public funding in addition to revenue from passenger fares. TR 582-83.

Anthony Santiago began working for Metro North as an electrician on October 31, 2005. TR 50, 113. He was working at the Brewster, New York running repair facility. TR 55. He is a member of the International Brotherhood of Electrical Workers. TR 113.

Prior to beginning his employment with Metro North, Mr. Santiago had undergone laminectomy and microdiskectomy surgery for a herniated disc at the L5-S1 level in 2003. TR 51-52. Metro North's Occupational Health Services ("OHS") was aware of this prior surgery and, with Mr. Santiago's permission, OHS had obtained the operative report from his surgeon before hiring him. TR 52-53; Santiago Exs 7, 10. On October 18, 2005, OHS performed a pre-employment medical examination and cleared the Complainant for full duty. TR 53-54; Santiago Ex 8.

On July 25, 2008, at approximately 1:00 a.m., Mr. Santiago injured his back at Metro North's Brewster facility when he sat on a chair, which unbeknownst to him, was broken and collapsed as he attempted to sit on it, sending him to the floor. TR 57-59; Santiago Exs 2-5. Mr. Santiago's foreman Brendan Szabo witnessed the fall and asked the Complainant if he was ok. TR 120. Mr. Santiago stated that he was angry, pushed the chair out of the office, and resumed his work duties. TR 59. As the evening progressed, Mr. Santiago's pain increased and between

[1] OSHA further found that Metro North's injury index and attendance policies violated the FRSA.

2:00 - 2:30 a.m. he went to the foreman's office to report that his back hurt. TR 59, 120. Mr. Santiago declined an offer to be taken to the hospital at this point. A few hours later at approximately 4:45 a.m., Mr. Santiago reported increasing back pain shooting to his right leg and the general foreman took the Complainant to the Putnam Hospital Center Emergency Department. TR 60-62; Santiago Ex 5; RX 2. The Complainant had x-rays taken, was diagnosed with a lumbar sprain/strain, was prescribed pain medication and advised to see his orthopedic physician, and told he could work in two days. TR 62; GX 22C. The injury was reported to Metro North. TR 59-60; Santiago Exs 2-5.

Metro North requires employees injured on the job and who are unable to report to work because of the injury to report to Metro North's medical department, OHS, located at 420 Lexington Ave, 22nd Floor in New York City. TR 63; Santiago Ex 9.

OHS, operating through a contract Metro North has with Take Care Health, has two physician assistants who work under the supervision of a physician.[2] TR 187. OHS is a non-treatment medical center responsible for performing various physical examinations (Pre-employment, Periodic Medical and Return to Duty), functional capacity evaluations, examinations for sickness, job related injury and medical complaints, administering tests under the mandatory Drug/Alcohol Testing program, and implementation of back/knee and vaccination programs. TR 183, 266, 366; GX 8 at 1; GX 9 at 1-2. OHS evaluates employees injured on the job to determine whether the condition is work related and evaluates the necessity and effectiveness of medical treatment provided by an employee's physician. GX 9 at 2.

Mr. Santiago reported to OHS on the morning of July 25, 2008, after being released from the Putnam Hospital. TR 63. On his initial visit to OHS, Mr. Santiago was seen by physician assistant John Ella. TR 63-64, 266; Santiago Ex 10. Mr. Ella diagnosed the injury as a lumbosacral strain/sprain and determined that the Complainant's injury was occupational. TR 298-299, 301-302; Santiago Exs 10-12.[3] Mr. Ella testified that he uses the Office of Disability Guidelines ("ODG") and/or the American College of Occupational and Environmental Medicine ("ACOEM") guidelines to determine how long an injury is expected to take to heal and that according to those guidelines, a back sprain ought to heal after four to six weeks. TR 297-298, 312. Mr. Ella also explained that he makes a determination as to whether an employee's injury is deemed occupational or non-occupational "based on our medical knowledge and what the employee presents...." TR 271.

Although he returned to work two days after the incident with the chair, in the weeks following his work injury, Mr. Santiago's symptoms did not resolve and he continued to experience significant pain. TR 67. In late August 2008, Mr. Santiago saw Dr. Barry Krosser,

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[2] Take Care Health is a subsidiary of Walgreen's and operates medical departments for various companies. TR 182-183, 366; GX 8.

[3] Mr. Ella completed Metro North's MD- 40 Request for Occupational Medical Services form (MD-40 form) and indicated the injury was occupational. Santiago EX 12. The Metro North/OHS MD-40 form is completed by the OHS physician or physician assistant who examines the employee. TR 191-192; GX 20. The MD-40 forms indicating an injury is occupational are then sent to Metro North's claims department for payment of approved care. TR 192.

an orthopedic surgeon, who recommended non-invasive treatment. TR 67. Dr. Krosser referred the Complainant for chiropractic treatment with Dr. Thomas Drag. TR 67-68; Santiago EX 18. Mr. Ella was aware that the Complainant was treated by Dr. Krosser and he approved the chiropractic treatment with Dr. Drag. TR 67-68, 70-72, 274-275; Santiago Exs 13-15, 17, 18. Using the ODG/ACOEM guidelines, Mr. Ella approved 18 chiropractic visits (three per week) in the period August 23, 2008 to October 10, 2008, or six weeks of treatment. Santiago Exs 21, 25, 32. The Complainant continued to report ongoing symptoms of pain and numbness which radiated down his leg to OHS's Mr. Ella and to his physicians. TR 67-74, 282-284. Santiago Exs 10, 18, 22-23, 26-27.

At the end of the six weeks, Dr. Drag informed OHS that the Complainant had made "minimal improvement" and he requested an additional six weeks of chiropractic treatment. Santiago Exs 29, 34. In addition, Dr. Drag requested an MRI. *Id.* After examining Complainant on September 26, 2008, Mr. Ella noted Complainant's condition was improving and after discussing the case with OHS/Take Care Health's physical therapist, Mr. Ella authorized an additional six chiropractic visits (two weeks treatment). RX 13B. OHS/Take Care Health's nurse case manager, Eleanor Atienza, discussed Dr. Drag's request for an MRI with Mr. Ella and she approved the request on October 7, 2008. Santiago Ex 28. Dr. Drag sent periodic reports of his treatment of the Complainant to OHS, and Mr. Ella saw the Complainant several times to monitor his treatment and progress. Santiago Exs 21-22, 26-27, 34. Each time Mr. Ella saw the Complainant, including his last appointment on October 10, 2008, Mr. Ella indicated the Complainant's injury was occupational on the MD-40 form. TR 65, 70, 76, 305-306; Santiago Exs 12, 20, 33.

The MRI was performed on October 16, 2008. Santiago Ex 35. The MRI report indicated a "bulging and discogenic disease and a central subligamentous disc herniation at the L4-L5 level impressing on the thecal sac. This impresses on the exiting L5 nerve root in the lateral recesses as well. Discogenic disease, bulging and spondylosis at L5-S1 is also present." *Id.* The MRI report noted the prior right hemilaminotomy surgery and an epidural scar. The MRI report also identified "a disc herniation which is present at this level which is central and right predominant. It abuts the left S1 nerve root and impresses on the right S1 nerve root displacing slightly posteriorly in position." *Id.* OHS's Mr. Ella was made aware of the MRI report on October 27, 2008. TR 280-281; Santiago Ex 36. That same day, in a letter to Dr. Drag, Mr. Ella informed him that "Mr. Santiago's case concerning his back problem is considered resolved," and denied Dr. Drag's request for further chiropractic treatment and instructed him to submit charges for all treatment after October 10, 2008 to Mr. Santiago's company-sponsored private health insurance. TR 286; Santiago Exs 34, 37. Mr. Ella testified that he made the determination that the work injury had resolved based on the x-ray report from the emergency room which showed degenerative disc disease. TR 285-286, 313.[4] He admitted that at the time he made the decision that the injury was no longer occupational or had "resolved," he had the operative report from the 2003 back surgery indicating that there was good decompression of the L5-S1 nerve root, but he had not looked at it. TR 284-285. He also had the MRI report which identified a herniated disk at L5-S1 that was impinging on the nerve

[4] Mr. Ella conceded that he never spoke with either of the Complainant's physicians, Dr. Drag or Dr. Krosser. TR 287.

root. TR 285-286. Mr. Ella understood that the effect of his changing the injury designation from occupational to non-occupational, and his October 27, 2008 denial letter to Dr. Drag, was that Metro North was denying financial responsibility for the cost of medical treatment provided by Dr. Drag after October 10, 2008.[5] TR 276-277.

Mr. Ella agreed that typical symptoms of a low back herniated disk pressing on a nerve include pain down the legs and numbness or tingling in the leg. TR 278. At the hearing, he was initially reluctant to agree that a muscle sprain of the back normally would not cause ongoing radiation of pain or tingling down the leg, but when referred to his deposition, he agreed that such symptoms are not normally caused by muscle strain. TR 278-279. Mr. Ella acknowledged that he was not aware of any evidence indicating that the Complainant was other than asymptomatic before his work injury. TR 282. Mr. Ella admitted that during the period he saw Mr. Santiago, the OHS file has several references to constant pain, radiating down the legs. TR 282-284.

Following Mr. Ella's denial of additional chiropractic treatment and instruction to submit future bills to Complainant's private health insurance, Dr. Drag wrote a letter of medical necessity to Mr. Ella on November 10, 2008, explaining the Complainant's diagnosis, symptoms, his course of treatment and the proposed course of treatment going forward as well as Dr. Drag's opinion that the condition was due to the work injury. TR 283-284; Santiago Ex 38. On November 14, 2008, OHS's medical director, Dr. Hildebrand[6] wrote Dr. Drag stating she had reviewed the medical records as he requested and that "Mr. Santiago's case regarding his low back pain is considered resolved." Santiago Ex 39.[7] She instructed Dr. Drag to submit bills for all services performed after October 10, 2008 to Mr. Santiago's private medical insurance. *Id.* Dr. Hildebrand conceded that she approved the change in classification of the injury from occupational to non-occupational and the denial of additional treatment without examining the Complainant or speaking with either Dr. Drag or Dr. Krosser. TR 342, 354-357; Santiago Ex 39. Dr. Hildebrand confirmed that the MD-40 form she completed on November 24, 2008, was the first such Metro North MD-40 form in which Mr. Santiago's injury was classified as non-occupational. TR 357-358.[8] Dr. Hildebrand agreed that typical symptoms of a herniated disk pressing on a nerve is radiation of pain or tingling down one or both legs. TR 345-346. She also

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[5] Ella testified that by "resolved" he meant the effects of the work-related injury had cleared. TR 320. He said he did not mean that the Complainant's original July 25, 2008 back injury is then retroactively considered not a work injury or non-occupational. TR 321.

[6] Dr. Hildebrand is board certified in family medicine. TR 362-363. Dr. Hildebrand began working as the medical director of the OHS on September 2, 2008. TR 336. She is employed by Take Care Health, Metro North's contractor. TR 366. Prior to working at Metro North she was the assistant medical director of Con Edison's occupational health department for nine years. TR 364.

[7] Dr. Hildebrand testified that when Mr. Ella sent the first letter of denial to Dr. Drag on October 27, 2008, she was not consulted by Mr. Ella. TR 351.

[8] If OHS designates the injury as occupational on the MD-40 Form, Metro North's claims department pays 100 percent of the costs of medical care under the company operating procedure. TR 343, 583-587. Dr. Hildebrand stated that if OHS deems the injury non-occupational, Metro North's claims department does not cover the cost of medical care and the employee is required to submit any charges to his private health insurance carrier. TR 343.

stated that a back sprain is a muscle sprain and one would not expect that condition to result in sustained radiation of pain down the leg. TR 346-347.

Mr. Santiago's back pain persisted and he continued to see Dr. Drag regularly throughout the Fall of 2008 and into 2009, even after Metro North had decided his back injury was no longer occupational and stopped paying for the medical care. TR 144, 151, 155-160. Mr. Santiago reported that after Metro North stopped paying for his medical care, his private health insurance plan covered the chiropractic treatments except for the co-pays and deductibles until the Manipulation Under Anesthesia ("MUA") procedure in March 2009. TR 144, 155-160; Santiago Ex 43. The Complainant underwent MUA treatment over three days, a treatment Dr. Drag had recommended in his letter of medical necessity to OHS on November 10, 2008.[9] TR 84; Santiago Ex 38. The treatment was successful and Mr. Santiago said "it help[ed] a lot." TR 85. Mr. Santiago's private health insurance carrier did not approve the MUA procedure and Mr. Santiago has paid out of pocket the $15,000 cost for that treatment.[10] He has incurred a total of $16,520 in medical charges (MUA and copays) for Dr. Drag's treatment of his back condition after October 10, 2008. TR 84, 87-92; Santiago Ex 43. Because he did not have the money to cover the MUA treatment costs, Mr. Santiago took out a loan on a credit card which is interest free until March 2010, and then carries an interest rate of 22% for any missed payments. TR 95-96; Santiago Ex 45. Mr. Santiago stated that he was off work four days for the MUA treatment and he took this time as Family and Medical Leave Act leave because he did not want to have a negative attendance record with Metro North. TR 85-86, 130. He explained that he was concerned about taking time off as a sick day because it would count as an absentee....there is a rule that if you have certain absent days they start sending letters and having disciplinary action." TR 86. In reflecting on his experience, Mr. Santiago testified that "I would never report [an injury again]....You have to go through all of this procedures and ....if I know my treatment will be put in the middle of the treatment, I never go this way." TR 108.

Angela Pitaro works for Metro North and is the administrator of OHS. TR 181-183, 217, 231, 367. Her office is at the OHS location next door to Metro North's corporate offices. TR 182, 255. Ms. Pitaro agreed that OHS is not a medical treatment facility. TR 183. Ms. Pitaro explained that as the OHS administrator she "make[s] sure that what is done within the department of OHS follows the guidelines of what's expected." *Id.* Ms. Pitaro interacts with OHS staff daily and has staff meetings with them. TR 212, 255, 267-268. Ms. Pitaro described her duties as looking at the policies, the needs of the company and what has to get done and then informing the Take Care Health administrator what she needs to get done. TR 183-184, 217.

According to Ms. Pitaro, the rule is that when an employee has suffered an injury that OHS initially deems occupational and then later views as resolved, or no longer occupational, OHS reaches out to the employee's treating physician. TR 199-200. She stated that in 2008, the reaching out to the treating physician did not always happen and she considered the reach out to

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[9] The MUA treatment required Complainant to be under anesthesia and involved more aggressive chiropractic manipulation performed simultaneously by two chiropractors over a period of three days. TR 84-85, 160-161.

[10] Metro North provides private health insurance through the Empire Plan as part of the employee benefits provided to its employees. RX 20; RX 33. An employee's private health insurance plan may require deductibles, co-pays and may limit medical treatment and the employee's choice of physician to those who belong to the specific insurance plan. TR 277, 343-344, 519-521; RX 33.

have occurred if a call is placed to the physician or a letter is sent regardless of whether an actual communication between OHS and the treating physician takes place. TR 202, 264. Ms. Pitaro explained that in making the determination that an injury which was initially considered by OHS to be occupational has resolved, meaning it is no longer considered occupational, OHS considers the ODG and ACOEM guidelines, the individual's injury, diagnosis, co-morbidities, statements of the treating physician, the treatment provided and progress made. TR 262. She also said that prior to a physician assistant changing the classification or designation of a work injury that was initially deemed occupational to non-occupational, the physician assistant should discuss the matter with the OHS medical director. TR 204.

Ms. Pitaro recalled a meeting sometime in late 2008, where she shared with OHS staff the amendment to the FRSA which was enacted at that time. TR 213-214. Ms. Pitaro said that she did not view the newly enacted statutory provision as requiring any instruction to the staff that they were not to delay, deny or interfere with the medical treatment of an employee's treating doctor, because they don't do that. TR 213-215.

With regard to Mr. Santiago, Ms. Pitaro reviewed his file with Dr. Hildebrand on November 24, 2008, and was aware that Dr. Hildebrand continued to deny Mr. Santiago's physician's request for additional treatment. TR 207. Ms. Pitaro met with Mr. Santiago later that day and gave him a copy of Dr. Hildebrand's denial letter. TR 207-208.

Greg Bradley is the vice-president of Human Resources for Metro North. TR 504. Metro North's OHS department is one of the areas under his direct supervision. *Id.* Mr. Bradley acknowledged that Metro North operating procedures do not include any written instructions on the criteria for determining whether an employee injury is deemed occupational or non-occupational. TR 506. Mr. Bradley agreed that Metro North's OHS facility does not provide medical treatment, rather it is an assessment center. TR 506-507. Mr. Bradley stated that OHS is the Metro North department and Metro North has a vendor (Take Care Health) operate the OHS. TR 507. Under Metro North's contract with Take Care Health, Metro North retains the right to terminate the contract at any time, for any reason, or to prohibit any Take Care Health employees from working at OHS if it so desires. TR 509-510. Mr. Bradley stated that when FRSA's subsection 20109(c) became effective in October 2008, he had a meeting with OHS to inform them of the new statute. He said Metro North did not change anything it was doing after the amendment to the FRSA was enacted because "everything that we were doing was in accordance with good business practices." TR 538.

Mark Campbell is Metro North's Chief Safety and Security Officer and he reports to the president of Metro North. TR 391, 427-428. Mr. Campbell is responsible for injury reporting at Metro North including reporting work-related injuries to the United States Department of Transportation's Federal Railroad Administration (FRA). TR 394-96, 424-425, 464-65. Mr. Campbell stated that he compares lost work days year to year in assessing whether Metro North's safety program is effective. TR 481-483. He agreed that accurate reporting of all lost work days associated with an injury is likely important to the FRA because that government agency may use lost work days data in developing and/or enhancing rail safety regulations. TR 485-486. Mr. Campbell acknowledged that the FRA guide to reporting work-injuries requires the reporting of any calendar days that an employee is unable to work, including rest days or

vacation days. TR 416-417; GX 16. Mr. Campbell reported Mr. Santiago's injury to the FRA. TR 397, 436. Mr. Campbell conceded, however, that he did not report any lost work days for Mr. Santiago's injury in his report to the FRA even though the emergency room physician instructed Mr. Santiago that he could return to work in two days. TR 417-418; GX 22C. Mr. Campbell explained that when OHS completes an MD-40 form following a work injury and classifies the injury as either occupational or non-occupational, the Metro North Safety Department receives a copy of the form and retains it in the Safety Department's file on the injury. TR 391-393. If OHS has deemed an injury occupational or non-occupational as reflected on the MD-40 form OHS sends to the claims department, and then onto the safety department, the safety department does not overturn the OHS decision. TR 404-405, 443-444.[11]

Mr. Campbell explained that in terms of reporting lost work days, once OHS sends the MD-40 form reflecting OHS's decision that the injury is no longer occupational, and is now deemed non-occupational, the safety department stops counting the number of days lost for a work-related injury even if the employee is still out of work. TR 418-419, 469. Mr. Campbell noted that in Mr. Santiago's case, at the time the OHS decided that his injury was no longer occupational, that is, that the occupational aspect of the injury had resolved Mr. Santiago was not losing days from work. TR 439-441. Consequently, Mr. Campbell stated that no further report to the FRA on the number of lost work days was required at that point. TR 440-41.

Mr. Campbell also explained that OHS's changing the classification of Complainant's injury from occupational to non-occupational several weeks after the injury occurred did not mean that the original injury that he, as the Chief Safety Officer, reported to the FRA in compliance with the FRA injury reporting regulations, was not reportable. TR 432, 464-465. He stated that under the FRA regulations, if he had gone back after OHS determined the injury was no longer occupational, and changed the injury to not reportable, such action would have violated the FRA's injury reporting regulations. TR 465-466.

Mr. Campbell acknowledged that the Safety Department maintains an injury frequency index for each employee which contains a ratio of the employee's injuries to the number of years of service. TR 405. He agreed that the greater the number of injuries an employee reports, the higher the employee's injury frequency index as compared to other employees with the same years of service. *Id.* When a Metro North employee seeks a transfer or applies for a promotion, Metro North's Human Resources/Employment Department asks the Safety Department about the employee's injury history. TR 407-408. Mr. Campbell will report back to the Metro North Employment Department as to whether the specific employee's injury history is of no concern, some concern or serious concern in the promotion or transfer decision. In making his assessment, Mr. Campbell said he considers the injury frequency index and the part, if any, the employee played in the injury as reflected in the railroad's injury and investigation reports. TR 410-411. Mr. Campbell stated that the Employment Department considers the Safety

[11] Mr. Campbell agreed that as Director of the Safety Department, he has the authority to override OHS's determination that an injury is either occupational (work-related) or non-occupational (not related to the work incident). TR 403-404. Mr. Campbell was not aware of any occasion in which the Safety Department overrode a decision by OHS changing the injury classification from occupational to non-occupational. TR 404-405.

Department's assessment of the employee's injury frequency index or injury history in making transfer and promotion decisions. TR 415.[12]

Ray Burney, Senior Vice President for Administration at Metro North, is responsible for human resources, labor relations, procurement and inventory. TR 578. He explained that Metro North Railroad is not subject to workers' compensation statutes. TR 585. Rather, railroad employees injured on the job must bring an action against the railroad under the Federal Employees Liability Act (FELA), and must establish that the railroad caused the injury through negligence, in order to recover for such work injuries. TR 585; *see also,* Bradley at TR 552-553. Mr. Burney testified that since its formation in 1983, Metro North has had a policy of paying medical bills for employees injured on the job. TR 583.[13] Metro North codified this policy in its operating procedures as Operating Procedure 23-004 in 1991, stating that the purpose of the policy "is to ensure that employees injured on-the-job receive proper medical care but do not incur unnecessary out-of-pocket medical expenses arising from an on-the-job injury. In addition, the Policy is established to ensure that Metro-North does not incur excessive or inapplicable charges arising from on-the-job employee injuries." RX 23 at 1. Operating Procedure 23-004 applies to all Metro North employees and provides that "Metro North will pay one hundred percent (100%) of the reasonable and customary fees charged for pre-approved care by a private health care provider for the treatment of an on-the-job injury." TR 581-582, 586; RX 23 at 4. As a result of an arbitration proceeding which successfully challenged the "pre-approval" provision of the operating policy and procedure, Mr. Burney wrote a letter to the union's attorney, in which he laid out how Metro North would apply the arbitrator's ruling that "pre-approval" could not be required. RX 27, 28; TR 586-587, 590-592, 594.[14] His letter stated that Metro North would pay medical expenses causally related to on-the-job injuries and that "[p]ayment for medical services rendered will be denied in cases where Metro-North's medical director (or designee) is of the medical opinion that the rendered medical services were wholly unnecessary or inappropriate." RX 28. The effect of this policy was to encourage employees to voluntarily seek pre-approval from Metro North for medical services for work injuries because if the employee failed to obtain prior approval, the employee ran the risk of Metro North denying the care provided as not medically appropriate or necessary under Metro North's operating procedure. TR 604-605, 611-612.

Mr. Santiago testified that he applied for two jobs at Metro North in October and November 2008. TR 116-117. As for the position he applied for in October, Mr. Santiago described the job as "in engineering, on maintenance of equipment." TR 116.[15] Mr. Santiago understood the position was a management position. *Id.* He said that he was not interviewed for the position he applied for in October 2008 but he was interviewed for the second position. TR

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[12] Mr. Bradley admitted that some employees have been disqualified from transfers or promotions as a result of their safety records. TR 534-536.

[13] He explained that this policy was initiated because of the potential tort liability for the railroad under the FELA. TR 593.

[14] The arbitration decision upheld Metro North's operating procedure to the extent the procedure authorized the railroad to pay "reasonable and customary fees" for medical services for work injuries. RX 27.

[15] Mr. Santiago was less clear as to the exact job he applied for in November 2008. TR 117-118.

117-118. He was not selected for either position. Mr. Bradley agreed that Complainant applied for a management position twice. TR 568- 569. He explained that the Complainant did not meet minimum requirements based upon his online application and he did not advance further in the process and so the employment or human resources department would not contact the safety department to request a safety analysis of the applicant. TR 568-571. In addition, Mr. Bradley stated that Metro North has no record establishing that the Complainant was interviewed for the management position and does not believe that the Complainant was interviewed for either management position. *Id.* In April 2009, Mr. Santiago successfully applied for and obtained a CCTV position. TR 118. In this position, he installs, maintains and repairs all the CCTV equipment, cameras, recording devices, and access gates for the shops. TR 118-119. Mr. Santiago received a pay raise of $.97 an hour in the CCTV position. TR 115, 118-119.

Teri Wigger, an investigator in OSHA's whistleblower protection program, reviewed records of Metro North employee work injuries between August 1, 2007 and December 31, 2008. Ms. Wigger examined whether there had been a peer-to-peer review between the injured employees' physician and the OHS medical personnel at the time Metro North's OHS changed the injury classification from occupational to non-occupational. TR 622-625. Ms. Wigger also analyzed the records to determine whether there were additional lost work days associated with the injuries following OHS's change in injury classification from occupational to non-occupational. TR 625-627. On cross examination, Ms. Wigger acknowledged that in nine of the ten cases Metro North produced in response to OSHA's discovery request, the change in classification of the work injury from occupational to non-occupational occurred prior to the effective date of Section 20109(c) of the FRSA. TR 649-650.

Paul Bodnar prepared a report and testified by deposition. Santiago Ex 44; RX 38. Mr. Bodnar is president of PVC Consulting Group, a company he created in 2003 upon his retirement from the U.S. Department of Transportation's Federal Railroad Administration where he was an Operating Practices Inspector since 1996. Santiago Ex 44 Appdx A. In his report Mr. Bodnar indicated a change in the classification of an FRA reportable injury from occupational to non-occupational affects the number of lost work days that Metro North's Reporting Officer must report to the FRA. Santiago Ex 44 at 6.0(3).[16] Mr. Bodnar noted that Metro North's FRA Reporting Officer, Mr. Campbell, never changed the classification of Mr. Santiago's injury and he never notified the FRA regarding any basis for a change in classification. *Id.* 6.0(6). Mr. Bodnar concluded that when Metro North's OHS changed the classification of Mr. Santiago's injury from occupational to non-occupational it acted without authority from the FRA. *Id.* Mr. Bodnar holds the opinion that once a railroad has reported an injury to the FRA, under the FRA's reporting regulations, a railroad's medical department cannot later determine that the injury has resolved without running afoul of the FRA's injury reporting regulations even when there are no additional lost days associated with the injury. RX 38 at 44-58.

[16] I note Mr. Bodnar mistakenly understood that the Complainant was out of work from the date of his injury to the date OHS changed the status of his injury from occupational to non-occupational. RX 38 at 33, 52-53.

III. Issues

1. Is the instant FRSA claim precluded by the Railway Labor Act?

2. Did the alleged unlawful conduct occur prior to the effective date of Section 20109(c) of the FRSA?

3. Did Metro North Violate Sections 20109(a)(4) and 20109(c)(1) of the FRSA By Denying, Delaying or Interfering With Complainant's Medical Treatment?

4. Did Metro North Violate Section 20109(a)(4) of the FRSA By Requiring Employees Injured on the Job to Report to OHS?

5. Did Metro North Violate Section 20109(a)(4) of the FRSA In Applying the Injury Frequency Index To Promotion and Transfer Decisions?

6. If Metro North Violated the FRSA, Are Punitive Damages Warranted?

IV. Parties' Contentions

The Complainant argues Section 20109(a)(4) of the FRSA prohibits discrimination "of any kind" as a result of an employee's report of an injury sustained on the job and Section 20109(c) prohibits the denial, delay, or interference with the medical treating plan of a treating doctor. C. Br. 1-2. Asserting that the actions of Metro North's OHS department are the actions of Metro North, Complainant maintains Metro North violates Section 20109(a)(4) as it discriminates against employees who report work injuries by treating those employees differently from employees who report non-work injury related medical conditions. In this regard, Complainant states that Metro North requires employees reporting work injuries to report to OHS, subjecting them to OHS's arbitrary denial, delay or interference with the medical treatment plan of their treating doctor and Metro North considers the employee's injury frequency index in promotion and transfer decisions. C. Br. at 3-5. Complainant asserts that Metro North violated Section 20109(c) when OHS changed the classification of his injury from occupational to non-occupational. C. Br. 5-6. Complainant argues this action denied, delayed and interfered with his medical treatment and ended Metro North's payment for the treatment, causing him to incur significant expense to cover subsequent treatment costs. C. Br. 3-6. Complainant argues that the effect of Section 20109(c) is that the treating physician's opinion "trumps" that of the railroad's managers or medical department. *Id.* Complainant maintains that the fact that private health insurance may subsequently have paid for part of the medical treatment does not negate Metro North's denial of treatment and violation of Section 20109(c) of the FRSA. *Id.* Finally, Complainant contends that punitive damages are warranted in this case as Respondent's actions have resulted in underreporting lost work days to the Federal Railroad Administration, ignoring the opinion and treatment plan of the Complainant's treating physician, and disregarding the rights of employees under the FRSA. C. Br. 7-11.

OSHA argues that Section 20109(a)(4)'s language prohibiting railroads from "in any other way discriminat[ing]" encompasses Metro North's actions in changing the designation of the Complainant's injury from occupational to non-occupational as such action discourages employees from reporting work-related injuries thereby skewing injury statistics. OSHA Br. at 7-9. OSHA states that Section 20109(a)(4) protects an employee's right to report an injury in general terms and contends that Congress gave further meaning to that right in Section (c) by prohibiting railroad actions that Congress found discouraged the exercise of the right to report a work injury. *Id.* at 9. OSHA contends that Section(c)(1) prohibiting a railroad from denying, delaying or interfering with medical or first aid treatment for employees injured on the job is what Congress meant in Section 20109(a)(4) by the words "in any other way discriminate." *Id.* OSHA avers that Sections 20109(a)(4) and (c) divest a railroad of authority to reclassify an injury from occupational to non-occupational contrary to the treating physician's opinion. *Id.* at 8-12. OSHA contends that changing the injury from occupational to non-occupational without medical justification and contrary to the treating physician's opinion is a form of intimidation and harassment. OSHA Br. at 8. OSHA maintains that its interpretation of 20109(a)(4) effectuates the Congressional purpose of the amendments to the FRSA and is entitled to deference consistent with *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Id.* at 8-10. OSHA argues that reading Sections 20109(a)(4) and (c) together, section (c) protects employees from interference with medical care or the treatment plan of the treating physician during the course of treatment and recovery from a work injury.[17] *Id.* at 11-12. Thus, OSHA avers that the railroad is prohibited from interfering with an employee's medical treatment plan regardless of the cause or motive of the railroad's actions as the FRSA presumes that the treating physician's plan is correct and conclusive. *Id.* at 11-17. OSHA asserts that Respondent discriminated against the Complainant in violation of the FRSA when it changed the classification of his injury from occupational to non-occupational ending Metro North's financial obligation to pay for continued treatment. *Id.* at 8, 17-23. Like the Complainant, OSHA contends that Respondent is liable for the actions of its contractor, Take Care Health, and that punitive damages are warranted against Metro North. *Id.* at 27-33.

The Respondent contends that the Complainant and OSHA are attempting to include a requirement that Metro North pay directly for any medical treatment an employee claims is necessitated by an on-the job-injury, even though such a requirement is not apparent from the text or legislative history of the recent amendments to the FRSA at issue here. Resp. Br. at 1-3.

Respondent maintains that the Railway Labor Act ("RLA") precludes the instant claim under the FRSA as the Complainant's alleged right to payment for all medical treatment for a work injury arises under the collective bargaining agreement ("CBA") between the parties and not under Section 20109 of the FRSA. Resp. Br. at 13-17. Since Metro North views the dispute as "who has the right to determine whether ongoing medical expenses are causally related to an on-the-job injury," it argues the dispute is about the meaning of the CBA and, thus, is preempted

[17] OSHA notes that Section 20109(a)(4) is intended to ensure the accurate reporting of workplace accident and illness statistics to the government in order to promote safety on the railroads. OSHA Br. at 10-11. Subsection (c)(1) of Section 20109 prohibits a railroad from denying, delaying or interfering with the medical or first aid treatment of an employee injured during the course of employment and that subsection (c)(2) precludes a railroad from disciplining or threatening discipline to an employee for requesting medical or first aid treatment, or for following orders or treatment plan of a treating physician. OSHA Br. at 11.

by the RLA. *Id.* at 17-19. In addition, Respondent argues that the FRSA claim is also preempted by the Federal Employers Liability Act ("FELA"). Resp. Br. at 19-20. Metro North contends that if the Complainant succeeds on his FRSA claim, Respondent would be unable to determine causation vis-à-vis injuries occurring at the workplace, and its liability for claimed medical expenses would be unlimited. *Id.*

Metro North also argues that the alleged unlawful conduct occurred before the effective date of Section 20109(c) of the Act, and that the provision is not retroactive. Resp. Br. at 21-23.

As to the merits of the claim, Respondent notes that the FRSA instructs that the rules and procedure set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121, may be applied to analyzing complaints under Section 20109(a) or (c) of the FRSA, and agrees that alleged violations of Section 20109(a) are properly analyzed under an AIR 21 framework. Resp. Br. at 9. However, Respondent argues that the AIR 21 analytical framework may not be applied in evaluating alleged violations of Section 20109(c)(1) of the FRSA and suggests that the analytical framework under the Family and Medical Leave Act is more appropriate. *Id.* at 9-12.

Metro North contends further that Section 20109(c)(1) applies only to conduct immediately after an on-the-job injury and, that therefore, the railroad's actions in this case did not violate the statutory provision. *Id.* at 24-34. Even assuming Section 20109(c) applies to the claim, Metro North argues it did not deny, delay or interfere with Complainant's medical treatment. *Id.* at 35-42.

Metro North next asserts that it did not violate Section 20109(a)(4) of the FRSA because it did not discharge, demote, suspend, reprimand or in any other way discriminate against the Complainant for reporting his work injury. Resp. Br. at 45-47. Applying the AIR 21 analytical framework, Metro North contends that the Complainant cannot establish that he suffered an adverse personnel action. *Id.* at 47-51. In this regard, Respondent states that requiring employees injured on the job to report to OHS, or to attend the "early intervention class" following a work injury are not unfavorable personnel actions. Additionally, Respondent contends that the railroad's failure to promote Complainant to a management position was unrelated to any injury report from the Safety Department. *Id.* at 50-51.

Finally, Metro North maintains that it is not subject to punitive damages as it is a public benefit corporation under the laws of New York State. Resp. Br. at 51. Alternatively, Metro North argues that even if punitive damages could be awarded against it, such damages are not warranted under the facts presented. *Id.* at 51-64.

V. Discussion

A. The Complainant's FRSA Claim Is Not Precluded By The Railway Labor Act

As an initial matter, Respondent argues that the Railway Labor Act ("RLA") preempts Complainant's FRSA claim because the claim is routed in the collective bargaining agreements

between Metro North and the unions representing its employees. Resp. Br at 13-19.[18] The Railway Labor Act was enacted by Congress in response to concerns that labor disputes could bring railroad commerce to a standstill. The RLA is intended to:

> . . . (4)...provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. §§ 151a, 152 (First), 158(1) & 159 (Second). Disputes arising under the RLA are "minor" if they involve "grievances arising from the application of collective bargaining agreements to particular situations." *Union Pacific R.R. Co. v. L. L. Price* 360 U.S. 601, 609-10 (1959); *Union Pac. R.R. Co. v. Bhd of Locomotive Eng'rs & Trainmen*, 130 S.Ct. 584, 591 (2009). Such disputes are handled through the grievance procedures under collective bargaining agreements and then, if either party desires, through arbitration. 45 U.S.C. § 153 (First). Thus, the RLA requires employees alleging breach of the CBA to challenge the alleged breach using the procedures set forth in the RLA. *see Andrews v. Louisville & Nashville R.R. Co.*, 406 U.S. 320, 325 (1972) ("A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding."). Although *Andrews* dealt with an employee who was "wrongfully discharged," it was "conceded by all [parties] that the only source of [the employee's] right not to be discharged . . . [was] the collective-bargaining agreement between the employer and the union." *Andrews*, 406 U.S. at 324.

Claims that do not involve the interpretation of a CBA are not preempted by the RLA. In *Hawaiian Airlines, Inc. v. Norris*, the United States Supreme Court held that a state whistleblower provision was not preempted by the RLA. 512 U.S. 246 (1994). The Court held that a "grievance" was synonymous with a "minor dispute," both of which involve "the application or interpretation of a CBA." *Id.* at 255. The Court also noted that it has "held that the RLA's mechanism for resolving minor disputes does not preempt causes of action to enforce rights that are independent of the CBA." *Id.*

The reach of the RLA is limited to disputes involving the interpretation or application of existing labor agreements. It does not address allegations or claims that the railroad violated federal statutes prohibiting discrimination against an employee. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. The Complainant's main claim here is that the railroad unlawfully discriminated against him by denying, delaying and interfering with the medical treatment decisions of Complainant's physician and substituting the judgment of Metro North's medical staff, which caused Complainant to incur significant expense for his medical care. The source of the instant claim is Sections 20109(a)(4) and 20109(c)(1) of the FRSA, which prohibit and railroad from discriminating against an employee for reporting a work injury and prohibits a railroad from denying, delaying or interfering with the medical or first aid treatment of an employee injured during the course of employment. Resolution of the question of whether

[18] Neither the Complainant nor the Secretary addressed this issue in their briefs.

Metro North discriminated against the Complainant requires interpretation and application of the FRSA and not the CBA between the parties. The present action is not preempted by the RLA.

B. The Alleged Conduct Occurred After the Effective Date of Section 20109(c)(1)

Respondent argues that the alleged unlawful conduct occurred before the October 16, 2008 effective date of Section 20109(c) of the FRSA. Respondent states that the decision to change the status of Complainant's injury from occupational to non-occupational occurred on either September 26 or October 10, 2008.[19] Resp. Br. at 22. The Complainant maintains that the first time Metro North's OHS indicated Complainant's back condition was non-occupational was October 27, 2007, and that it issued letters of denial in October and November 2008.[20] C. Prop. Findings of Fact Nos. 22-29 at 5.

Section 20109(c) of the FRSA neither expressly nor impliedly provides for retroactive application and applying the statute retroactively would improperly impose new legal duties on past conduct. *see Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994). As noted in my Order denying summary decision, Section 20109(c)(1) is not retroactive, and therefore, the alleged unlawful conduct must have occurred after the effective date of the statutory provision to be actionable. Ord at 4.

On September 26, 2008, OHS physician assistant Ella, after consultation with the OHS physical therapist, authorized additional chiropractic treatment and indicated Complainant was to follow-up with OHS on October 10, 2008. GX 13B. As Complainant was directed to follow-up with OHS on October 10, presumably for further evaluation of his back condition, I find that Metro North did not decide on September 26 that Complainant's work injury would be deemed non-occupational or resolved as of October 10, 2008. Additionally, on September 3, 2008, Complainant's chiropractor, Dr. Drag, wrote to OHS's Take Care Health administrator, Ms. Atienza, explaining his treatment and stating that if Complainant had not improved in two weeks, an MRI would be necessary. Santiago Exs 21 and 29. On October 7, 2008, Ms. Atienza completed a notation that she had received Dr. Drag's records and dictated a note requesting an MRI of the lumbar spine as Complainant had minimal improvement in symptoms following six weeks of chiropractic treatment. Santiago Ex 28. Ms. Atienza's progress note indicated further that she had reviewed the matter with Mr. Ella and approved the MRI, sent a letter to Dr. Drag, and was "[a]waiting [sic] for MRI result." *Id.* On October 27, 2008, Ms. Atienza completed a progress note which stated OHS had received the MRI report as well as Dr. Drag's October 16 request for further treatment. Santiago Ex 36. Her note states she reviewed the records with Mr. Ella, and that a denial letter was sent to Dr. Drag informing him that Complainant's "condition was resolved after 10/10/08 and all visits and treatments" were now to be sent to private medical insurance for payment. Santiago Exs 36-37. In light of the fact that Mr. Ella and Ms. Atienza authorized the MRI performed on October 16, 2008 as part of the medical diagnosis or treatment

[19] The Secretary/OSHA did not address this issue in her brief.

[20] Complainant's reference to 2007 with regard to the period of time in which it asserts Metro North's OHS changed the classification of his injury from occupational to non-occupation appears to be a mistake. It is undisputed that Complainant's injury occurred on July 25, 2008 and that he first saw OHS for this injury on July 25, 2008. TR 60; Santiago Ex 2-5.

associated with the work injury, one would reasonably expect OHS to review and consider the MRI test results. OHS reviewed the MRI results on October 27, and I find OHS's decision that the injury was no longer occupational or the occupational aspect had resolved was ultimately made on that date, which is *after* the October 16, 2008 effective date of Section 20109(c). [21]

C. Did Metro North Violate Sections 20109(a)(4) and (c)(1) of the FRSA?

1. Overview

The United States Department of Transportation's Federal Railroad Administration (FRA) is responsible for and administers the rail safety program for the Nation's railways.[22] In enacting the recent amendments to the FRSA, Congress was concerned with the underreporting of injuries, the effect some railroad policies had on an employee's willingness to report work-related injuries and the effect such employee reluctance has on the accuracy of data the FRA uses in its efforts to improve railroad safety. *See Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearing Before the H. Comm. on Transportation and Infrastructure*, 110th Cong. 84 (2007) and (statement of Joseph H. Boardman, Administrator, Federal Railroad Administration).

In an effort to address these concerns, the anti-retaliation amendments to the FRSA were intended to encourage railroad employees to report work-related injuries by strengthening protections for employees who report such injuries both by expanding what constitutes protected activity and enhancing administrative and civil remedies for employees.[23] The amended FRSA Section 20109 shifts the responsibility for investigating and adjudicating retaliation claims to the U.S. Department of Labor. The FRSA's anti-retaliation or whistleblower protection provisions enforced by the Department of Labor provide that actions under the statute are governed by the

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[21] OSHA and Complainant argue that Metro North is liable for the actions of its contractor, OHS. In its post-hearing brief, Metro North has not argued that it is not liable for the actions of OHS. To the extent that Metro North seemed to suggest at the hearing that OHS was a separate and independent entity, Metro North now appears to have abandoned that claim. In any event, Title 49 U.S.C. 20109 applies to a "railroad carrier engaged in interstate....commerce, a contractor or a subcontractor of such railroad carrier, or an officer or employee of such railroad carrier...." The evidence in this case overwhelming established that Metro North had significant control over the operations of OHS, could terminate the contract unilaterally for any reason, and had control over the hiring and termination of personnel working at OHS under the contract. Metro North is liable for the actions of OHS.

[22] The Department of Transportation's FRA maintains responsibility for ensuring the safety of the Nations' railroads and for a railroad's compliance with the FRA's injury reporting regulations. The accurate reporting of workplace injuries is key to the FRA's ability to correctly identify and address the primary or significant hazards rail employees confront on the job. 49 C.F.R. § 225. 1; 49 C.F.R. § 225.5; 49 C.F.R. § 225.19. The FRA has issued regulations requiring railroads to report accidents, injuries and illness. 49 C.F.R. Part 225; see also 49 U.S.C. §§ 201-213. Absent accurate data on workplace injuries, the FRA's ability to successfully carry out its statutory function is compromised. Violations of those injury reporting requirements are the province and responsibility of the FRA. The FRA enforces the injury reporting requirements and regulations through the imposition of civil penalties. 49 C.F.R. § 225.29. The Department of Labor's charge is to ensure that a railroad employee who reports an injury to either the railroad or the FRA is not subject to discrimination or retaliation for having done so.

[23] The amendments to the FRSA in Section 1521 of the 9/11 Act were the result of a Conference Report H.R. Rep. 110-259 (July 25, 2007) (Conf. Rep.).

analytical framework and burdens of proof applied under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C. § 42121; 49 U.S.C. § 42121(b). 49 U.S.C. § 20109(d)(2)(A)(i).[24]

2. Statutory Provisions

The provisions of the FRSA at issue here are Sections 20109(a)(4) and (c)(1). 49 U.S.C. §§ 20109(a)(4) and (c)(1). Section 20109(a)(4) of the FRSA provides that "a railroad carrier...may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due...to the employee's... notify[ing], or attempt[ing] to notify, the railroad carrier....of a work-related personal injury or work-related illness of an employee."

FRSA Section 20109(c)(1) titled "Prompt medical attention" provides:

> (1) Prohibition – A railroad carrier....may not deny, delay or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the

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[24] To prevail in an AIR 21 case, and by extension an FRSA case, a complainant must prove by a preponderance of the evidence that he engaged in activity the statute protects, that the employer knew of such activity, that the employer subjected the complainant to an unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C.A. §§ 42121(a), 42121(b)(2)(B)(iii). If the employer has violated AIR 21 or by application the FRSA, the complainant is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. § 42121(b)(2)(B)(iv). *See, Clemmons v. Ameristar Airways, Inc., et al.*, USDOL/OALJ Reporter (PDF), ARB No. 08-067, ALJ No. 2004-AIR-00011 at 4-5 (ARB May 26, 2010) (slip op. at 4); *Peck v. Safe Air Int'l, Inc.*, ARB 02-028, ALJ No. 2001-AIR-003, slip op. at 22 (ARB Jan. 30, 2004); *see also 75 Fed. Reg. 53527, 53530 (Aug. 31, 2010), 29 C.F.R. §§ 1982.102(b), 1982.104.*

Metro North's argument that the burden shifting framework of AIR 21 can be applied to the claim that it violated Section 20109(a)(4) of the FRSA, but not to the claim that it violated section 20109(c)(1), because Section 20109(c)(1) does not require protected activity, is similar to OSHA's contention that for violations of Section 20109(c)(1) a railroad's motive is irrelevant. *see* Resp. Br. 8-12; OSHA Br. at 12. In this regard Section 20109(c)(1) is unlike whistleblower provisions in other sections of the FRSA (20109(a)) and in other established whistleblower statutes enforced by the Department of Labor, which require protected activity by the employee and a causal connection between protected activity and an adverse employment action to establish a violation of the respective anti-retaliation statute. Even though Congress explicitly directed that the burden shifting analysis and burdens of proof under the AIR were to be applied in analyzing claims under Sections (a) (b) and (c) of 20109 of the FRSA, U.S.C. §§ 20109(d)(1) and (d)(2)(A)(i), careful examination of the statute suggests that applying the AIR 21 framework to alleged violations of 20109(c)(1) of the FRSA produces an odd result, a fact OSHA appears to recognize in its recently published interim final rule, setting forth procedures for claims under the FRSA. 75 Fed. Reg. 53522 (Aug. 31, 2010). The preamble to the rules state that "Section [20109](c)(1) is not a whistleblower provision because it prohibits certain conduct by a railroad... irrespective of any protected activity by an employee. The procedures established in this interim final rule apply only to the remaining provisions of 49 U.S.C. 20109." In this case OSHA has argued that Metro North violated 20109(a)(4) by reclassifying Complainant's occupational injury as non-occupational, thereby denying, delaying or interfering with Complainant's medical treatment in violation of Section 20109(c)(1). OSH Br. 17-23, 34. Violations of Section 20109(a)(4), are evaluated under the AIR 21 analytical framework.

railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care. [25]

3. Elements of a Retaliation Claim under the FRSA

As noted, to establish a retaliation claim under the FRSA, a complainant must prove by a preponderance of the evidence that he engaged in activity the statute protects, that the employer was aware of such activity, that the employer subjected him to an unfavorable personnel action, and that the protected activity was a contributing factor in the unfavorable personnel action. 49 U.S.C.A. §§ 42121(a), 42121(b)(2)(B)(iii). If the employer has violated the FRSA, the complainant is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv).

The parties agree that the Complainant engaged in activity protected by the FRSA when he reported his work injury to his supervisor. C. Br. 1-2; OSHA Br. at 17; Resp. Br. 45-46. Metro North was aware of the injury as coworkers and supervisors observed the incident and Complainant's supervisor completed an incident investigation report. The question then becomes whether Complainant was subjected to an unfavorable personnel action. In determining whether the complained of conduct is an unfavorable personnel action, the Supreme Court's *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006) decision as to what constitutes an adverse employment action is applicable to the employee protection statutes enforced by the Department of Labor, including the AIR 21, incorporated into the FRSA. *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ NO. 2005-STA-00002 (ARB Sept. 30, 2008). The Court stated that to be an unfavorable personnel action the action must be "materially adverse" meaning that they "must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 548 U.S. at 57.

The Complainant and OSHA contend that Metro North's actions violated Section 20109(a)(4) by arbitrarily denying, delaying or interfering with the medical treatment

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[25] Paragraph (2) of Section 20109(c) provides:

> Discipline – A railroad carrier... may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following the orders or treatment plan of a treating physician, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness for duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on the employee's record.

As the Complainant was not subjected to discipline nor was he threatened with discipline for requesting medical treatment or for following the treatment plan of his physician, no violation of Section 20109(c)(2) is alleged in the instant matter.

recommended by Mr. Santiago's treating physician, in violation of Section 20109(c)(1), when it changed the status of the injury from occupational to non-occupational. C Br. at 4; OSHA Br. at 11, 16-17.[26] They maintain that the Complainant suffered an adverse employment action when Metro North's OHS medical personnel changed his injury status from occupational to non-occupational, the effect of which was to delay treatment and to end Metro North's payment of the cost of further medical treatment.

It is undisputed that Complainant received chiropractic treatment from Dr. Drag, and that Metro North's OHS approved and Metro North paid for the medical treatment Dr. Drag provided from the time Complainant sustained his work injury on July 25, 2008 and for a period of eight weeks thereafter.[27] At eight weeks, Metro North's OHS determined the work injury had resolved and changed the classification of the injury from occupational to non-occupational, denied Dr. Drag's request for authorization for additional medical treatment, and instructed Dr. Drag to submit any charges for additional treatment to Company-sponsored private health insurance for payment. The primary issue is whether this action by Metro North violated Sections 20109(a)(4) and (c)(1) of the FRSA.

Resolution of this aspect of the claim requires interpretation of Section 20109(c)(1).[28] The Complainant argues that the first sentence of Section 20109(c)(1), standing alone, is unambiguous and includes a blanket prohibition precluding railroads from denying, delaying or

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[26] OSHA's argument that 20109(c) "is a legislative finding that a railroad's reversal of a physician's treatment plan effectively denies the employee of the right to report a work-related injury (most importantly the number of lost work days or the full scope of the injury) to the Secretary of Transportation" is strained. OSHA's statement appears to confuse the injured employee's right to report an injury to the Department of Transportation's FRA without retaliation, which is protected by Section 20109(a)(4), with the railroad's separate responsibility to accurately report workplace injuries including the number of lost work days to the Department of Transportation's FRA under that agency's injury reporting regulations. Section 20109(a)(4) protects railroad employees from retaliation for notifying or attempting to notify the railroad or the Department of Transportation's FRA of a work-related personal injury. That the Department of Transportation's FRA injury reporting regulations require the railroad to report injuries including the number of lost work days, and may be violated by a railroad that does not accurately report workplace injuries or the number of lost work days, does not impede a railroad employee's right under 20109(a)(4) to report the injury to the railroad or Department of Transportation without fear of retaliation.

[27] Metro North covered the cost of treatment during the eight week period after the work injury under its policy of paying 100% of the medical expenses for an employee's work injury in an effort to address employee needs and to minimize the likelihood and cost of a FELA claim against the railroad. Complainant was seen periodically throughout this period by OHS medical personnel to evaluate his condition vis-à-vis the work incident.

[28] The parties filed simultaneous post-hearing briefs. Neither the Complainant nor OSHA addressed the construction of Section 20109(c)(1), the statutory provision at issue. Complainant and OSHA relied on the Order Denying Summary Decision (Nov. 9, 2009) in interpreting Section 20109(c)(1). In construing Sections 20109(c)(1) and (2) in the Order, I stated "read together, these provisions protect employees from interference with medical care or the treatment plan of a treating physician during the course of treatment and recovery from a work injury." Ord. at 5. Metro North's post-hearing brief renewed and expanded its argument that Section 20109(c)(1) applied only to the immediate temporal period following the work accident or injury. In order to ensure that the issue was fully briefed and considered, I held a telephone conference with the parties on June 25, 2010 in which I offered the Complainant and OSHA an opportunity to file a reply brief limited to the statutory interpretation issue. On June 30, 2010, Complainant filed a reply brief addressing this issue. OSHA informed the undersigned that it did not intend to file a reply brief on this issue. Therefore, I have reviewed both OSHA's Opposition to Summary Decision and its post-hearing brief in an effort to understand and address OSHA's interpretation of Section 20109(c)(1).

interfering with medical or first aid treatment without limitation. C. Rep. Br. at 2-4; C. Br. at 5. OSHA asserts that Sections 20109(c)(1) and (2) must be read together, contending that the reference in Sections 20109(c)(1) to "medical or first aid treatment" and in paragraph (2) to "following orders or the treatment plan of a treating physician" must be construed to extend the protections of the statute beyond immediate emergency care but also to the full and complete scope and duration of medical services necessary to resolve the employee's occupational injury. OSHA Opp. SD at 5; *see also* OSHA Br. at 11. OSHA argues that its interpretation of 20109(a)(4)'s words "in any other way discriminate" as encompassing conduct outlined in Section (c)(1) which "deny[s], delay[s] or interfere[s] with the medical or first aid treatment of and employee injured during the course of employment" is entitled to appropriate deference under *Skidmore*. OSHA Br. at 9.[29] *Skidmore* instructs that the weight accorded an agency's interpretation in a particular case depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140.; *U.S. v. Mead*, 533 U.S. 218, 234-235 (2001); *De La Mota v. U.S. Dept. of Education* , 412 F.3d 71, 78, 80 (2d Cir. 2005). [30]

In contrast to the Complainant and OSHA, Metro North contends that subsection (c)(1) of Section 20109 is limited in application to the immediate medical or first aid care following a workplace accident or injury. Resp. Br. 25-35. Therefore, Metro North maintains that because the railroad did not deny, delay or interfere with Complainant's medical care when the injury occurred and approved and paid for such care for eight weeks after the injury, it did not violate Section 20109(c)(1). *Id.*

The first step in interpreting a statute "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart v. Sigmon Coal Co., Inc.* 534 U.S. 438, 450 (2002) citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, (1997); see also, *Dodd v. U.S.*, 545 U.S. 353, 359 (2005); *U.S. v. Gonzales*, 520 U.S. 1, 4 (1997); *United States v. Kinzler*, 55 F.3d 70, 72 (2d Cir. 1995). Section 20109(c) is titled "Prompt Medical Attention." Subsection (c)(1) is comprised of two sentences. The first sentence makes it unlawful for a railroad to "deny, delay or interfere with the medical or first aid treatment of an employee who is injured during the course of employment." Neither the terms "medical or "first aid" treatment are defined in the statute. First aid treatment is commonly defined as "emergency and sometimes makeshift treatment given to someone (as a victim of an accident) requiring immediate attention where regular medical or surgical care is not available." *Webster's Third New International Dictionary*, (1981) at 857.[31] Medical treatment is generally defined as the management and care of a patient to combat disease or injury. *Dorland's*

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[29] It is unclear whether OSHA also asserts a *Skidmore* deference argument with regard to the interpretation of Section 20109(c)(1). OSHA Br. at 11-17. Nevertheless, I will construe its *Skidmore* argument as applying to the interpretation of Section 20109(c)(1).

[30] OSHA did not argue that its interpretation of the statutory provision is entitled to *Chevron* deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[31] First-aid is also defined as "emergency care and treatment of an injured....person before definitive medical or surgical management can be secured." *Dorland's Illustrated Medical Dictionary*, (28th ed. 1994) at 633.

Illustrated Medical Dictionary, (28th ed. 1994) at 999 and 1736.[32] It is understood to include more than first aid treatment and may be provided in the immediate aftermath of a work injury and over a period of time following an injury depending upon the severity of the injury. Applying these definitions to the provision, and bearing in mind the provision is titled "prompt medical attention," one might argue that the first sentence in paragraph 20109(c)(1) means the railroad cannot deny, delay or interfere with medical treatment without limitation and for the duration of the medical treatment. However, the language of this sentence can also be read as prohibiting a railroad from deny[ing], delay[ing] or interfere[ing] with medical treatment when the employee suffers a work injury, in other words, in the temporal period surrounding an injury.

The second sentence in paragraph (c)(1) requires the railroad to "promptly arrange to have the injured employee transported to the nearest hospital...." The intent of this sentence is to require the railroad, if requested by the injured employee, to take an employee to the nearest hospital for appropriate medical or first aid care following the injury. The two sentences in subsection (c)(1) read together plainly prohibit a railroad from denying, delaying or interfering with the medical or first aid treatment of an employee immediately after an injury occurs. What is less clear is whether the prohibition in Section (c)(1) extends beyond the temporal period following the workplace injury. Given the ambiguity, one may look to other aids to statutory interpretation including other provisions of the same statute, and the legislative history in an effort to give effect to the statute and to harmonize it with existing statutes.

An examination of paragraph (2) of Section 20109(c) may provide some assistance in construing paragraph (1) of the same provision. Subsection 20109(c)(2) prohibits disciplining an employee for "requesting medical or first aid treatment" or for "following orders or a treatment plan of a treating physician." An accepted principle of statutory construction is that when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart*, 534 U.S. 452 citing *Russello v. United States,* 464 U.S. 16, 23, (1983). Applying this rule here, suggests that when Congress omitted the phrase "treatment plan of a treating physician" from paragraph (c)(1) it acted purposefully, and did not intend the protections in (c)(1) to apply to ongoing treatment plans after the initial medical or first aid treatment for the work injury. In addition, statutes are not to be construed in a manner which renders parts of the statute superfluous. Congress' failure to included the phrase "treatment plan of a treating physician" in paragraph (c)(1) and its inclusion in paragraph(c)(2) suggests that the phrase "medical or first aid treatment" used in both paragraphs does not include the employee's ongoing medical treatment beyond the temporal period of the injury. If it did, then there was no need for Congress to have included the additional phrase "treatment plan of a treating physician" in paragraph (c)(2) because any such treatment plan would have been subsumed in the phrase "medical or first aid treatment." The inclusion of the phrase "treatment plan of a treating physician" in subsection (c)(2) explicitly prohibits the railroad from disciplining an employee injured on the job for requesting medical or first aid treatment when

[32] The FRA's injury reporting regulation, 49 C.F.R. § 225.5, defines medical treatment as follows: "[m]edical treatment means any medical care or treatment beyond "first aid" regardless of who provides such treatment. Medical treatment does not include diagnostic procedures, such as x-rays and drawing blood samples..." *See also* OSHA regulations 29 C.F.R. § 1904.7(b)(5)(i) and 29 C.F.R. § 1904.7(b)(5) (ii) defining medical treatment and first aid.

injured and, for the period of time thereafter during which the employee is following the treatment plan of his physician.

The legislative history is also instructive in the construction of Section 20109(c) of the FRSA. Congress adopted the House of Representatives provision titled "Prompt medical attention" into the FRSA as Section 20109(c) in 2008. Rail Safety Improvement Act of 2008, H.R. 2095, 100th Cong., (2008). In discussing the provision which eventually became Section 20109(c), the House Committee stated that the provision "requires railroads to provide rail workers with *immediate* medical attention when the workers are injured on the job..." H.R. Comm. On Transp. & Infrastructure, Subcomm. On R.R.s., Summ. of Markup of H.R. 2095, the Fed. R.R. Safety Act of 2007, at 3 (May 21, 2007). In addition, in considering Section 20109, Congress was aware of and commented favorably on two State statutes, one from Illinois and one from Minnesota, which had been enacted by those States in response to concerns that railroad employees injured on the job were not provided prompt medical treatment because of employer interference.[33] However, the Congressional Committee considering Section 20109 indicated that 20109 was similar to the statutes in Minnesota and Illinois which Congress acknowledged had been struck down, but the Committee stated that by enacting strengthened whistleblower protections for rail workers and what became 20109(c)(1), "a uniform national standard will be created for the protection of injured workers and allow them access to *immediate* medical attention free from railroad interference." Summ. Of Subj. Matter Hearing on "The Impact of Railroad Injury, Accident and Discipline Policies on the Safety of America's Railroads" at 9 (Oct. 22, 2007)(emphasis supplied). The legislative history reflects that Congress' concern was to ensure injured railroad employees were provided immediate medical attention when an on-the-job injury occurred without interference from the railroad.

In addition, interpreting paragraph (c)(1) as applying to medical or first aid care provided in the period surrounding occurrence of the injury, is consistent with and advances, Congress' goal of improving safety on the railroads by encouraging accurate injury reporting and of ensuring injured employees receive medical treatment. Congress identified the following management policies that inhibited or intimidated employees from reporting on-the-job injuries and which contributed to the underreporting of injuries: encouraging employees not to file injury reports, finding employees who reported injuries at fault and disciplining them, subjecting employees who report injuries to increased monitoring and scrutiny from supervisors which could lead to discipline and termination, supervisors attempting to influence employee medical care, and light duty work programs which have the injured employee report to work, but perform no work, to avoid having to report the injury as a lost work day to the FRA. With regard to supervisors attempting to influence medical care, the Committee cited reports of supervisors "accompany[ing] injured employees on their medical appointments to try and influence the type of treatment they receive, or...send[ing] employees to company physicians instead of [physicians of their own choosing],... accompanying injured employees into examination rooms and attempt[ing] to have private conversations with treating doctors....supervisors...deny[ing] or interfere[ing] with *initial* medical treatment for injured employees." *See Impact of Railroad*

[33] Both statutes were successfully challenged by the railroad industry as being preempted by the FRSA. *BNSF Railway Co. v. Box*, 470 F.Supp. 2d 860 (C.D. Ill. 2007); *BNSF Railway Co. v. Swanson*, 533 F.3d 618 (8th Cir. 2008).

Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearing Before the H. Comm. on Transportation and Infrastructure, 110th Cong. 84 (2007)(emphasis supplied). Resp. Br. at Ex E at 5. The Committee recognized that "[t]he type of treatment or medication the patient receives determines whether the injury becomes FRA reportable." *Id.* By prohibiting railroad employers from denying, delaying, or interfering with medical treatment when an injury occurs, Congress removed a railroad's ability to engage in practices which operated to discourage injury reporting and depress accurate injury reporting to the FRA.[34] Construing paragraph (c)(1) in this manner facilitates Congress' goals, as injured employees will receive prompt medical care without interference from the railroad, and the receipt of medical care when a work injury occurs will trigger the FRA's injury reporting regulations, thereby promoting Congress' purpose of ensuring accurate injury reporting and prohibiting railroad conduct which undermines this goal.

Interpreting 20109(c)(1) as applying to medical or first aid treatment in the period following occurrence of the work injury also preserves and gives effect to the FELA. Unlike most other industries, the railroad industry is not covered by a traditional workers' compensation scheme providing for compensation or medical care for employees injured during the course of employment. Rather, the FELA provides that railroad carriers are liable for injuries sustained by its employees if the injury is the result "in whole or in part from the negligence" of the carrier. 45 U.S.C. § 51 et seq. In order to recover under the FELA for compensation or medical care associated with a work injury, a railroad employee must bring an action in federal district court and establish that his injury was the result, in any part, from the railroad carrier's negligence. 45 U.S.C. §§ 51-54. See also *Ulfk v. Metro North Commuter R.R.*, 77 F.3d 54 (2d Cir. 1996); *Marchica v. Long Island R.R.*, 31 F.3d 1197 (2d Cir. 1994). FELA actions often involve questions of causation and appropriate damages including the reasonableness of medical expenses. Although the FELA provides that it does not limit or impair the rights of railroad employees under any other Act of Congress, nothing in the FRSA indicates that Congress, which was certainly aware of the FELA, intended to narrow the application of the FELA and negate the defenses available to a railroad under the FELA.[35] If 20109(c)(1) of the FRSA were interpreted

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[34] The FRA injury reporting regulations require the railroad to report employee injuries which require medical care beyond first aid and/or which result in lost work days. 49 C.F.R. §§ 225.5 and 225.19. The regulations also require the railroad to state the number of lost work days associated with an injury for a period of time. In the present case, Metro North reported the Complainant's injury in compliance with the injury reporting regulations, but it failed to accurately report the number of lost work days associated with the injury. To the extent Metro North violated the FRA's injury reporting regulations with regard to reporting the number of lost work days associated with Complainant's injury that is within the enforcement responsibility of the FRA. In addition, although not relevant here, Metro North's practice of not counting lost work days after OHS deems the effects of a work injury non-occupational, may violate the FRA's injury reporting requirements. One would expect that the Department of Transportation and the Department of Labor have a Memorandum of Understanding or some mechanism for the Department of Labor to share information helpful to the FRA in enforcing its injury reporting regulations.

[35] In his opposition to summary decision, Complainant argues that Section 58 of the FELA, which states that nothing in the FELA "shall be held to...impair the rights of ...employees under any other Act or Acts of Congress" means that the FELA does not limit the liability of railroads or impair the rights of employees under the FRSA. 45 U.S.C. § 58. Compl Opp to SD at 4. This argument is unpersuasive. It is one thing to acknowledge that the FELA does not infringe on the rights of employees under the FRSA, it is quite another to contend that the FRSA ought to be interpreted in a manner which effectively repeals the FELA in the absence of any express Congressional intent to do so. I note Complainant has also filed a FELA claim related to his back injury.

as applying to medical care or the treatment plan of the treating physician during the full period or course of the employee's recovery without limitation, on occasions Metro North's OHS determined that the effects of a work injury had resolved, or that the injury never related to work activity, the railroad would be precluded from disputing causation under the FELA and its liability for claimed medical expenses could be unlimited.

Upon careful consideration of the parties' arguments and the statutory scheme, OSHA's interpretation of Section 20109(c)(1) of the FRSA is not entitled to weight under *Skidmore* as OSHA's interpretation is overly broad, is not consistent with the legislative history of the FRSA and it eviscerates another federal statute, the FELA. I conclude that Section 20109(c)(1)'s mandate prohibiting railroads from "deny[ing], delay[ing] or interfere[ing] with medical or first aid treatment of an employee who is injured during employment" applies to the temporal period surrounding the injury, as that interpretation effectuates Congress purpose in improving railroad safety by promoting accurate injury reporting and ensuring injured employees receive appropriate care. Here Metro North approved the treatment Dr. Drag provided and paid for the medical treatment for a period of eight weeks after the injury occurred. In light of this, Metro North did not deny, delay, or interfere with the medical or first aid treatment provided to Mr. Santiago within the meaning of Section 20109(c)(1).[36]

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[36] Even if I had determined that Complainant and OSHA's interpretation of Section 20109(c)(1) as precluding a railroad from denying, delaying, or interfering with medical or first aid care throughout the period of treatment and recovery from a work injury was supportable, Complainant would have to show that Metro North's change in classification of the injury from occupational to non-occupational, which ended the railroad's obligation to pay for continued medical treatment, constituted a denial, delay or interference with medical treatment as contemplated by Congress in Section 20109(c)(1). Nothing in the language or legislative history of Section 20109(c)(1) requires a railroad to pay for medical treatment.

With regard to the claim that Metro North denied Dr. Drag's request for additional treatment, Dr. Drag was submitting periodic reports of his treatment of Complainant to OHS pursuant to Metro North's program of monitoring work injuries and covering 100% of the cost of treatment deemed reasonable and customary. The effect of Metro North's letter to Dr. Drag denying additional treatment and instructing him to submit charges for subsequent treatment to Complainant's Company-sponsored private health insurance was to terminate Metro North's financial obligation to cover the cost of Dr. Drag's subsequent treatment. The Complainant testified that Metro North's changing the classification of his injury from occupational to non-occupational in October 2008, did not deny him medical treatment and he acknowledged that he continued to treat with Dr. Drag throughout the period October 2008 through April 2009.

Complainant's evidence in support of his allegation that Metro North's action delayed his MUA procedure is unpersuasive. Complainant's statement that the MUA was denied by the insurance company and Metro North does not establish that Metro North's decision delayed his treatment. Under Metro North's policy of paying for the cost of medical treatment for work injuries, the railroad will not and has not covered medical expenses that are not deemed reasonable and customary by its OHS personnel. Complainant did not provide evidence demonstrating that Metro North would have approved the MUA procedure and, in the absence of such evidence, he has not shown the railroad delayed treatment as contemplated by the statute. Complainant's private insurance covered ongoing chiropractic treatments, but denied coverage of the MUA procedure. One might infer from this that the procedure may be considered experimental or, at the very least, not customary treatment.

Complainant's assertion that Metro North interfered with medical treatment because he was required to submit expenses for treatment after October 10, 2008 to his health insurance company is not convincing. Recalling that Congress' concern was with railroad actions that harassed and intimidated employees from filing injury claims by directing employees to specific doctors, or preventing employees from getting care when an injury occurred or

D. Did Metro North Violate Section 20109(a)(4) of the FRSA By Requiring Employees Injured on the Job to Report to OHS

Complainant argues that Metro North violates Section 20109(a)(4) because it treats employees who report work injuries differently than employees who call in sick for non-work injuries or illnesses. C. Br. at 4. More precisely, Complainant claims that requiring employees injured on the job to report to OHS and subject themselves to assessment by OHS medical personnel is a violation of Section 20109(a)(4). Applying the AIR 21 analysis, Complainant must demonstrate that requiring him to report to OHS for evaluation is an adverse employment action.

As noted the railroad industry is not covered by a workers' compensation system and instead railroad employees injured on the job must file an action under the FELA alleging negligence. Cognizant of its potential tort liability under the FELA, Metro North's policy is to pay 100% of the cost of medical expenses that are reasonable and customary for an employee's work injury. In carrying out this policy, Metro North, through OHS, requires employees injured on the job to appear at OHS after a work injury, OHS then examines the employee to determine whether the medical condition is causally related to the work injury and to evaluate the necessity, reasonableness and effectiveness of the medical treatment. If the injury is deemed work-related and the medical expenses are reasonable and necessary, Metro North pays all medical treatment expenses. Following this policy here, Metro North covered the costs of Complainant's medical treatment for a period of eight weeks. Employees who call in sick for a non-work related injury or illness are not required to come to OHS for examination because Metro North does not pay directly for medical treatment associated with non-work injuries or illnesses, those charges are covered by Metro North's company-sponsored private health insurance and the employees may

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influencing the type of medical care provided, it overt actions by railroad managers that Congress contemplated when it enacted Section 20109(c)(1) prohibiting interference with medical or first aid treatment . Absent some indication that in prohibiting "interference" with medical care, Congress intended to require a railroad pay for medical treatment, I am not persuaded that declining to pay for medical care under the railroad's operating procedure constituted interference within the meaning of Section 20109(c)(1).

What happened to Mr. Santiago in this case is troubling. The evidence established that Metro North's OHS personnel's decision to change the injury classification from occupational to non-occupational, that is, its decision that the work injury had resolved, was contrary to the objective diagnostic tests, the medial records, the ongoing symptoms, the treating physician's opinion, and was made without following OHS's own procedures requiring consultation with the treating physician and the approval of the OHS medical director. The OHS medical personnel knew that the decision to change the injury classification from occupational to non-occupational meant Metro North's financial obligation to pay for medical treatment ended. Mr. Santiago is left with significant expenses for medical treatment for his work injury. But his predicament is the result of the manner in which workers' compensation injuries are handled in the railroad industry. As noted, railroad employees injured on the job must file a claim under the FELA in federal district court and establish negligence before they may receive compensation and payment for medical expenses. In recognition of the operation of the FELA, Metro North's policy is to pay the cost of medical care for work injuries which OHS deems reasonable and necessary. If at some point Metro North determines that the condition is no longer related to the work injury or the medical care is not reasonable and necessary, the railroad will not authorize additional medical treatment and will stop paying for additional treatment. An employee, like Mr. Santiago, must then submit medical expenses to his company-sponsored private health insurance and seek to recover medical expenses and compensation in a FELA suit. Mr. Santiago has filed a FELA claim related to the July 25, 2008 back injury and may recover compensation and his medical expenses, should his claim succeed.

be required to pay co-pays.[37] Recognizing the operation of the railroad industry, and the FELA, regarding the handling of work-related injuries, Metro North's requiring Complainant to come to OHS for examination and evaluation was not an adverse employment action under the circumstances in this case.[38] Therefore, I find that Complainant has failed to establish a violation of Section 20109(a)(4), based upon his having to present himself to OHS for examination and follow-up assessment after the work injury.

E. Did Metro North Violate Section 20109(a)(4) of the FRSA In Applying the Injury Frequency Index To Promotion and Transfer Decisions

Complainant also alleges that Metro North violates 20109(a)(4) by creating an "injury frequency index" on each employee which is a ratio of the employee's injuries to years of service and using that index as a factor when evaluating employees for promotions or transfers. *Id.* Because employees who miss work due to illness are not subject to any of these procedures, Complainant argues that the procedures and policies discriminate against employees who report work injuries. C Br. at 4-5.[39]

The injury index is completed entirely by Metro North's Safety Department without any participation or contribution from the employee. All work injuries are included in the index even if the employee's actions in no way contributed to the injury. To the extent that an employee's report of a work injury is then included in the employee's "injury frequency index," thereby increasing the employee's index, as compared to the index for other employees competing for transfers and promotions, the employee has a significant incentive not to report the work injury. Application of the "injury index" in transfer and promotion decisions discourages employees from reporting injuries and is an adverse employment action.

In the present matter however, the evidence established that the injury index was not applied to the Complainant's application for the two positions he applied for in the Fall of 2008. Complainant's testimony with regard to his applications in October and November 2008 was confusing. Complainant stated that the position he applied for in October was a management job in engineering, on maintenance of equipment, and that he wasn't interviewed for the job. He was not clear as to the nature of the position he applied for in November, but he stated he was interviewed for this job, although he was unable to recall any of the particulars of the interview. Complainant's lack of clarity on both the nature of the November job and the interview for that job, raises doubt as to whether he was interviewed.

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[37] An employee who calls in sick for a non-work injury or illness may be required at some point to come to OHS for examination for purposes of return to work or fitness for duty evaluations..

[38] Depending upon the manner in which the policy is applied, it may be an adverse action and actionable under other circumstances. For example, if the employee is physically unable to travel to OHS due to the severity of the injury, and the employee is subject to discipline for failing to report to OHS.

[39] OSHA joins only the assertion that Respondent violated 20109(a)(4) by changing the classification of his injury from occupational to non-occupational contrary to the opinion of his treating physician. OSHA Br. at 17-23. The effect of the change in injury classification was that Respondent no longer covered the costs of medical treatment.

In contrast, Metro North's Mr. Bradley stated that because the Complainant did not meet minimum requirements for the position based on his online application, his application went no further. Bradley also said that the railroad had no record of the Complainant being interviewed for either position. I credit Mr. Bradley's testimony on this issue because it was based upon records from the Human Resources Department and is consistent with his uncontradicted testimony that if an applicant does not make it past the first level review of eligibility qualifications based upon the online application, no further action is taken on the application by the railroad. Because Complainant did not meet the eligibility requirements his application did not pass the initial screening process, meaning the Employment Department never contacted the Safety Department for information on Complainant's injury frequency index in relation to his applications for the two positions. [40] Based on the evidence, the Complainant failed to establish that the "injury frequency index" was applied to his October and November 2008 applications. Therefore, he cannot establish he suffered an unfavorable employment action. Consequently, the claim that the railroad violated Section (a)(4) by applying the injury index to Complainant's effort to obtain promotions in the Fall of 2008 fails.[41]

VI. ORDER

For the foregoing reasons, the complaint is dismissed.[42]

SO ORDERED.

Colleen A. Geraghty

COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, MA

NOTICE OF REVIEW: Review of this Decision and Order is by the Administrative Review Board pursuant to §§ 4.c.(43) of Secretary's Order 1-2002, 67 Fed. Reg.

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[40] Complainant successfully competed for and was awarded a promotion to a CCTV position in April 2009.

[41] The Complainant also complains that one of the factors considered by Metro North in annual evaluations of its managers, is a manager's "safety record." The annual evaluation looks at whether a manager met safety goals regarding the number of FRA reportable injuries and the number of lost days. Complainant argues that this practice which can affect the manager's promotion prospects gives managers an incentive to devise ways to underreport injuries suffered by employees they supervise. Compl. Br. 10. The evidence in this case however, demonstrates that Complainant's supervisors offered to take him to the hospital when he first reported back pain, and he initially refused. When Complainant reported increased pain a few hours later, his supervisor transported him to the hospital for treatment. The supervisor also completed Metro North's Initial Report of Incident form reporting Complainant's work injury. *See* Santiago Exs 2-5. The record lacks evidence demonstrating that Metro North's policy of considering safety goals regarding the number of FRA reportable injuries and lost work days in annual evaluations of supervisors, discouraged the reporting of the Complainant's work injury. In addition, it is conceivable that this policy could encourage managers to make safety a priority in the workplace, thereby reducing employee injuries.

[42] Because the claim was dismissed, it was unnecessary to address the issue of punitive damages.

64272 (Oct. 17, 2002). Pursuant to the Interim Final Rules: Procedures for Handling of Retaliation Complaints Under the National Transit Systems Security Act of 2007, Enacted as Section 1413 of the Implementing Recommendations of the 9/11 Commission Act of 2007, And The Federal Railroad Safety Act, As Amended By Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, 75 Fed. Reg. 53522, 53527, 53532 (Aug. 31, 2010), a party seeking review of this Decision and Order shall file a written Petition For Review with the Department of Labor's Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave, NW, Washington DC 20210 within 10 business days of the date of this decision. 29 C.F.R. § 1982.110(a).