U.S. Department of Labor

Occupational Safety and Health Administration
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June 18, 2009

Carol Sue Barnett, Esq.
Deputy General Counsel
Metro North Commuter Railroad Company
347 Madison Avenue, 19th Floor
New York, NY 10017-3739

Via Federal Express #8696 2181 9319

RE: Metro North Commuter Railroad Company/Santiago/2-4173-08-021

Dear Ms. Barnett:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Anthony Santiago (Complainant) against Metro North Commuter Railroad Company (Respondent) on December 29, 2008, under the employee protection provisions of the Federal Rail Safety Act (FRSA), 49 U.S.C. §20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. Law No. 110-53. In brief, After reporting an on the job injury on July 25, 2008, Complainant alleged that Respondent interfered with the treatment plan of his treating physician by considering Complainant's injury resolved on or about October 27, 2008, when in fact further treatment was required.

Following an investigation by a duly authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration, Region II, finds that there is reasonable cause to believe that Respondent violated FRSA and issues the following findings:

Secretary's Findings

On July 25, 2008, Complainant was injured on the job, notified Respondent of his injury and sought medical treatment. On or about October 27, 2008, Respondent notified Complainant through his treating physician that his injury was deemed resolved and thereby interfered with the medical treatment plan of the treating physician. On December 29, 2008, Complainant filed his FRSA complaint with the Secretary of Labor. As the complaint was filed within 180 days of the adverse action, it is deemed timely filed.

Respondent is a railroad carrier within the meaning of 49 U.S.C. § 20109 and § 20102. Respondent provides commuter rail service to locations in the states of New York, Connecticut and New Jersey.

Complainant is an employee within the meaning of 49 U.S.C. §20109.

The Metro-North Commuter Railroad Company is a suburban commuter rail service that is a subsidiary of the Metropolitan Transportation Authority (MTA), a public benefit corporation. Metro-North runs service to its northern suburbs in New York and Connecticut, as well as to other regions, including, in conjunction with New Jersey Transit, to parts of New Jersey. Respondent operates 120 stations.

Complainant began working for Respondent as an electrician on October 31, 2005. He is assigned to the Brewster, NY shop. Complainant is a member of the International Brotherhood of Electrical Workers and is covered by a collective bargaining agreement. At the time relevant to this complaint, Complainant was working as a vacation reliever. Complainant's normal rest days were Saturday and Sunday and he worked the hours of 8 AM to 4 PM. While acting as a vacation reliever Complainant's rest days and hours of work were the same as the person he was relieving.

On Thursday, July 24, 2008, Complainant was asked if he wanted to work overtime on Friday, July 25, 2008. Complainant agreed and showed up for the nightly midnight meeting at the Brewster, New York yard. According to Respondent's incident reports, Complainant entered what is referred to as the car wash lunchroom and found only one chair available and so he sat in it. The seat of the chair was broken and with management's knowledge, remained in service. When Complainant put his weight down the chair gave way and Complainant fell to the floor. Complainant initially experienced minimal pain and went to work performing his duties. As the night progressed the pain intensified. Complainant reported his condition to his General Foreman and was sent to the Putnam Hospital Emergency Room. At the ER an x-ray was taken and Complainant was diagnosed with a back strain/sprain and released. As required, Complainant went to Metro-North's Occupational Health Services (OHS) on the following Monday. OHS is operated by a contractor of Metro-North. At the time relevant to this complaint the contractor was CHD Meridian and the Medical Director was Dr. Lynne Hildebrand[1]. Complainant was seen and evaluated by John Ella, PA. PA Ella classified the injury as an occupational back sprain/strain and Complainant was deemed qualified for full duty. In addition to the information above, PA Ella's clinical notes reported that the pain was located on his lower back radiating down to the right hamstring. Complainant was instructed to take the prescribed pain medication only when not working. No follow up visit was scheduled. Complainant had the next two days off as his rest days.

On August 26, 2008, Complainant was seen at OHS in response to his request for chiropractic visits relative to his injury. PA Ella evaluated Complainant and wrote in his clinical notes that Complainant was working full duty even if he still has some pain on his lower back but that Complainant still had difficulties lifting heavy objects and asked for help if needed. Ella recorded that Complainant's pain went down the left buttock. Ella continued to classify the injury as occupational. Complainant was seen again at OHS on September 26, 2008 by PA Ella and Heather Smart, Physical Therapist (PT). Ella's clinical notes reported that Complainant continued to have lower back pain that radiated down his left buttock but not below his left knee. PT Smart reported in her clinical notes that the lower back pain was due to Complainant's July injury. The discomfort was on the left side and that Complainant was experiencing radiating discomfort and tightness into his left buttock and intermittently to his left thigh. PT Smart also noted that Complainant reported that his chiropractor, the treating physician, was suggesting a possible MRI. Smart reported that she had suggested to PA Ella that they taper the chiropractic care. Ella and Smart agreed that chiropractic care should be tapered ending October 10, 2008. On September 29, 2008, the Case Manager Eleanor Atienza, noted in Complainant's OHS file that they had received the x-ray and results from the Putnam Hospital ER. The x-ray showed that Complainant had severe degenerative disc disease L5-S1 with mild spondylosis and narrowing. According to the clinical notes PA Ella reviewed the records and would not approve future chiropractic visits due to the x-ray results.

On October 7, 2008, the chiropractor, Dr. Drag, requested approval for an MRI noting that Complainant had minimal improvement during the six weeks he had been treating him. PA Ella approved the request this same date. On October 10, 2008, Complainant had a follow-up visit with OHS and was seen by PA Ella. Complainant's injury remained classified as an occupational injury. The MRI procedure was

[1] CHD Meridian has been acquired by Take Care Employer Medical Services. Take Care maintained the same work force at OHS.

performed on October 16, 2008. On October 27, 2008 OHS received a request from Dr. Drag for additional treatments along with the results from the MRI. After reviewing the results PA Ella issued a letter to Dr. Drag advising that the condition had been resolved after October 10, 2008 and that all future claims for visits and treatments should now be forwarded to Complainant's private insurance. PA Ella reclassified the injury from occupational to non-occupational. Dr. Drag sent a letter of Medical Necessity to PA Ella in which Dr. Drag explained that due to Complainant's occupational injury sustained on July 25, 2008, Complainant required further treatment and he was recommending Manipulation Under Anesthesia (MUA). The Letter also addressed Complainant's pre-existing condition of degenerative disc disease but pointed out that Complainant was asymptomatic until July 25, 2008. The MUA was being recommended as an alternative to possible future surgical intervention. The letter was reviewed by Dr. Lynne Hildebrand, Medical Director of OHS to which she replied on November 14, 2008 and again declared Complainant's case to be resolved. All medical claims for doctor's visits, tests and/or treatments would have to be submitted to Complainant's private insurance carrier and would require out of pocket expenses. The MUA treatment is not a covered procedure under Complainant's private insurance carrier.

Respondent witnesses PA Ella and Dr. Hildebrand were interviewed and provided the following information. They asserted that Complainant was treated and diagnosed at the ER with a back sprain/strain and that the x-ray that had been taken was compared to an x-ray that had been taken one year prior and there had been no changes. Complainant had a pre-existing condition of degenerative disc disease but no breaks or fractures were observed as a result of the fall. After reviewing the information PA Ella and Dr. Hildebrand reached the professional opinion that Complainant had in fact suffered a sprain/strain which takes on average 4-8 weeks to heal. Due to Complainant's build it might take up to ten weeks and so they extended the chiropractic treatments until October 10, 2008. PA Ella approved the request for an MRI on October 7, 2008, because he didn't see any reason why he shouldn't even though as of September 29th he had decided that no further chiropractic treatments would be approved after October 10th. As of the final approved chiropractic treatment on October 10, 2008, OHS considered the acute problem resolved and attributed any persisting pain to the pre-existing condition. PA Ella concluded that Complainant had suffered only a sprain/strain and not something else because during evaluations there were no symptoms of pain or numbness below the lower back area. However, this is contradictory to PA Ella's clinical notes and PT Smart's clinical notes dating as far back as the date of injury. The notes clearly state that Complainant complained of pain in his left buttock that radiated down to his hamstring but not below the knee. They also felt that Complainant's ability to work full duty was additional evidence that the injury was acute and not severe enough to warrant further treatment.

Respondent's Operating Procedure No. 21-021B for attendance states that employees are permitted to use sick leave for personal illness or injury. The reference to injury includes work related injuries. "Employees whose use of sick leave days exceeds reasonable levels will be considered as having unsatisfactory attendance. Unsatisfactory attendance includes….[t]hree occurrences of absences within any thirty calendar day period or four occurrences of absence within any six month period, with an 'occurrence' being consecutive work days that an employee does not report for work due to illness or injury." Employees found to have unsatisfactory attendance as per the Operating Procedure are subject to progressive discipline. Unsatisfactory attendance for purposes of craft transfers disqualifies an employee for consideration. The formula used to determine if an employee is eligible allows for 15 occurrences of absence within 30 months and eight "patterns" of sick absence inclusive. Sick absences that occur immediately before or after the employee's rest days, vacation days and holidays are considered patterns. Approved FMLA and bereavement leave are the only two extenuating circumstances in which the absence would not count against an employee. Employees who wish to be considered for a promotion or craft transfer are "subjected to an internal investigation, which includes an evaluation of their safety and discipline records, their performance assessments, and of their time and attendance records". Chief Safety and Security Officer, Mark Campbell, reviews all applications for craft transfers and promotions.

Campbell considers the Injury Frequency Index No.[2], how the employee's injury record compares to his/her peers, whether the injury was preventable, the severity of the injury and the elapsed time from date of injury(s) to the date of application. Campbell is provided with a summary of the injuries as reported through the Incident Investigation Reports, IR1 and IR2, Campbell assigns each applicant to a category: good, concern and serious concern. The categories of concern and serious concern are meant to act as a red flag to the Human Resources Department when determining an applicant's eligibility and worthiness for the job they are applying to.

Dr. Hildebrand and PA Ella advised that OHS has the sole authority to decide if a condition is occupational or non-occupational. Respondent's OHS Scope of Work document details the scope of services and staffing requirements for the department including an Administrator-Occupational Health Services. This position is to be held by an employee of Metro-North. The Administrator's primary responsibilities, include but are not limited to; 1) managing the terms and conditions of the finalized contract; 2) Developing and implementing procedures, guidelines and goals for the contractor employees; 3) Acting as a liaison between the contractor employees and Metro-North; and 4) Defining the roles and decision-making parameters of the contractor employees. This document indicates that the Administrator-Occupational Health Services may also have a role in influencing the decisions of the Medical Director and Physician's Assistant, which is contrary to Dr. Hildebrand and PA Ella's statement that they are the sole decision makers in classifying an injury.

Respondent has submitted a position statement in which they assert that the FRSA protects employees who report or attempt to report an injury or illness and that although Complainant engaged in this protected activity, he did not suffer an unfavorable personnel action. Further, Respondent asserts that Complainant's protected activity was not a contributing factor in Respondent's decision to change the injury classification to non-occupational. Respondent asserts that the complaint must be dismissed because Complainant failed to make out a prima facie complaint and because the Federal Employees Liability Act (FELA) provides an injured railroad worker a cause of action in negligence to recover for on-the-job injuries and that to consider the change in classification from occupational to non-occupational intrudes upon the scheme under FELA. Respondent chose not to address or present a defense pertaining to the allegations concerning their interference with the treating physician's treatment plan.

Respondent argues that it did not retaliate against Complainant and states that such retaliation is prohibited under its Internal Control Plan (ICP), which provides for a policy against harassment and intimidation in order for there to be complete and accurate reporting of accidents, incidents, injuries, and occupational illnesses and to prevent employees from being discouraged from obtaining proper medical treatment or the reporting of an accident, incident, injury or illness. It is required by the FRA to disseminate the policy to its employees. Respondent usually distributes its General Safety Instructions during orientation. Rule 200.5 of the General Safety Instructions is the Policy Against Harassment. Unlike in the ICP, this also states that certain practices of Respondent are not violations of the policy against harassment, including taking steps to enhance a sense of personal responsibility for safe work practices, such as employee training, coaching, and counseling for those engaging in unsafe work practices or rules violations. Additionally, Respondent will hold employees accountable through a reasonable discipline program for rules violations. Complainant was required to attend an early accident intervention class to enhance a sense of personal responsibility even though Respondent has not disputed that they were fully aware that the chair was broken and should have been taken out of service.

[2] The Injury Frequency Index No. is an index developed by Metro-North that relates an employee's number of injuries to the number of years in service. The higher the index number, the greater number of injuries an employee suffered.

49 U.S.C. § 20109 (a) (1) (C) (4) protects employees who notify the railroad carrier or the Secretary of Transportation of a work-related personal injury. As recognized by the Federal Railroad Administration and the House of Representatives, railroad employees are harassed and intimidated making them reluctant to report accidents and injuries and then upon their reporting they are subject to disciplinary actions. Complainant reported the injury which was considered an occupational injury by Respondent until Complainant's physician requested coverage for a medical procedure beyond standard office visits.

Complainant engaged in FRSA protected activity when he reported his injury to the General Foreman on July 25, 2008. § 20109 (c) (1)[3] prohibits a railroad carrier or person covered under this section from delaying or interfering with the medical or first aid treatment of an employee who is injured during the course of employment. § 20109 (c) (2) prohibits a railroad carrier or person covered under this section from disciplining, or threatening discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician.

Dr. Drag's Letter of Medical Necessity expressed the need for further treatment and this was denied by OHS. Respondent does not dispute that Complainant was injured on the job on July 25th when the chair he sat in broke, nor do they deny that management was aware that the chair had been broken and yet it remained in service. Complainant has alleged that the reclassification of his injury from occupational to non-occupational is a violation of the FRSA since the change in designation interfered with the treatment plan of his treating physician.

Hildebrand and Ella claim that the medical staff responsible for the evaluations has the sole authority to determine if an injury is occupational or non-occupational. There is no dispute that Dr. Hildbebrand and PA Ella must make decisions daily based on their professional judgment, as in this case. However, their contradictory statements undermine Respondent's assertions. During interviews with Hildebrand and Ella they claimed that the back strain/sprain would heal in less than three months and therefore, after that time frame the occupational injury was to be considered resolved. They asserted that Complainant didn't present with symptoms that would indicate a problem other than a strain/sprain. However, the clinical notes are contradictory and show that from the very first visit to OHS Complainant experienced pains similar to those explained in the interviews as being attributed to more than just a sprain/strain.

The railroads do not have a traditional worker's compensation program. Instead, when an employee suffers an on the job injury or illness, the employer is responsible for full and complete payment of **all** medical expenses without any out of pocket expenses for the injured employee. Once the injury classification is changed to non-occupational, the employee is forced to process the claims through his or her private insurance carrier. In Complainant's case the procedure itself is not covered at all by his carrier and costs thousands of dollars. Complainant is thus forced to either forego the procedure because of the large expense or incur the large expense to have the procedure.

CHD Meridian (now Take Care Medical Employer Services) was awarded their contract with Respondent based, in part, on the fact that they were able to keep costs low. Respondent's Occupational Health Services is a non-treating facility. One of the ways they can lower Respondent costs would be by denying procedures and treatments that would result in a direct cost to Respondent. OHS has a clear motivation, by the terms of the contract, to interfere with treating physician's treatment plans and thus be rewarded with long term lucrative contracts. Respondent experiences significant cost savings when an injured employee submits medical claims to his or her private insurance carrier rather than directly through the

[3] Congress amended the FRSA on October 16, 2008 by the enactment of Public Law 110-432, the "Railroad Safety Enhancement Act of 2008" to include § 20109 (c). PA Ella reached the decision and communicated the decision to disallow any further medical coverage on October 27, 2008; after the amendment was enacted.

claims department at Metro-North. Thus, it appears that OHS is willing to classify injuries as occupational until a large expense may be incurred by Respondent.

The interference by Respondent with the treating physician's treatment plan is a prohibited act under the FRSA and is a recognized form of harassment and intimidation by railroad carriers to deter the reporting of accidents and injuries.

Respondent's Operating Procedure for attendance and their policy for determining whether an employee is eligible for consideration for promotion and craft transfers constitute facial violations of the FRSA and it is recognized that such practices produce a chilling effect on reporting injuries in the workplace, jeopardizing employee safety. Respondent's reckless disregard for the rights of its employees calls for punitive damages.

A preponderance of the evidence supports a finding that Respondent interfered with Complainant's medical treatment. Accordingly, OSHA finds that there is reasonable cause to believe that Respondent violated the FRSA. OSHA hereby orders the following to remedy the violation.

Order

Respondent shall amend all employee records to reflect Complainant's July 25, 2008 injury and subsequent care as an occupational injury.

Respondent shall reimburse Complainant for all medical related expenses due to the change in classification from occupational to non-occupational.

Respondent shall amend its Attendance Policy so that sick leave attributed to an occupational injury or illness shall not be considered when assessing unsatisfactory attendance, requests for craft transfers or requests for promotion.

Respondent shall amend its eligibility policy for craft transfers and promotions so that the reporting of an occupational injury or illness shall not be considered when assessing requests for craft transfers or promotions.

Respondent shall permanently post the Notice to Employees included with this Order in all of its 120 stations in areas where employee notices are customarily posted.

Respondent shall provide to all employees a copy of the FRSA Fact Sheet and the Frequently asked Questions on Employee Protections for Reporting Work-Related Injuries and Illnesses in the Railroad Industry included with the Order.

Respondent shall pay Complainant's reasonable attorney's fees.

Respondent shall pay Complainant compensatory damages in the amount of $5,000 for the inconvenience of and the mental anguish arising from Respondent's interference with Complainant's medical treatment.

Respondent shall pay Complainant Punitive damages in the amount of $75,000.

Respondent shall within 30 days inform the Regional Administrator in writing of the steps it has taken to comply with the above order.

Respondent and Complainant have 30 days from the receipt of these Findings to file objections and request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review. Objections must be filed in writing with:

Chief Administrative Law Judge
U.S. Department of Labor
Suite 400N, Techworld Building
800 K Street NW
Washington, D.C. 20001-8002
(202)693-7542, Facsimile (202)693-7365

With copies to:

Complainant

OSHA Regional Administrator
201 Varick Street, Room 670
New York, NY 10014

Department of Labor, Regional Solicitor
201 Varick Street, Room 983
New York, NY 10014

Department of Labor, Associate Solicitor
Division of Fair Labor Standards
200 Constitution Avenue, NW, N2716
Washington, D.C. 20210

In addition, please be advised that the U.S. Department of Labor generally does not represent any party in the hearing; rather, each party presents his or her own case. The hearing is an adversarial proceeding before an Administrative Law Judge (ALJ) in which the parties are allowed an opportunity to present their evidence *de novo* for the record. The ALJ who conducts the hearing will issue a decision based on the evidence, arguments, and testimony presented by the parties. Review of the ALJ's decision may be sought from the Administrative Review Board, to which the Secretary of Labor has delegated responsibility for issuing final agency decisions under the FRSA. A copy of this letter has been sent to the Chief Administrative Law Judge along with a copy of your complaint.

Complaints under Federal Rail Safety Act are handled in accordance with the rules and procedures for the handling of AIR-21 cases. These procedures can be found in Title 29, Code of Federal Regulations Part 1979, a copy of which may be obtained at http://www.osha.gov/dep/oia/whistleblower/index.html.

Sincerely,

Robert D. Kulick
Regional Administrator

cc: Charles C. Goetsch, Esq. (Via Federal Express #8696 2181 9320)
USDOL/OALJ-Chief Administrative Law Judge
USDOL/SOL-FLS
US DOL/SOL-Regional Solicitor, Region II
Federal Railroad Administration