

**U.S. Department of Labor**

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**Issue Date: 12 August 2016**

CASE NO.: 2014-FRS-00062

*In the Matter of:*

JOHN WEVERS,  
Complainant,

vs.

MONTANA RAIL LINK, INC.,  
Respondent.

Appearances: James T. Towe, Esq.,  
For the Complainant

Darla J. Keck, Esq.,  
For the Respondent

Before: Jennifer Gee  
Administrative Law Judge

**DECISION AND ORDER DISMISSING CLAIM**

This matter arises out of the employee-protection provisions of the Federal Rail Safety Act ("FRSA"), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-053, 121 Stat. 266, 444 (2007) and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848, 4892 (2008). 49 U.S.C. § 20109. John Wevers ("Complainant") alleges that his employer, Montana Rail Link, Inc. ("Respondent" or "MRL"), violated the whistleblower protection provisions of the FRSA by disciplining him after he suffered, reported, and was treated for a work-related injuries and by interfering with his treatment for work-related injuries. This claim was initiated with the Office of Administrative Law Judges ("OALJ") on March 11, 2014, when OALJ received Complainant's timely objections to the findings of the Regional Administrator of the Occupational Safety and Health Administration's ("OSHA"). This case is before me *de novo*.

For the reasons stated below, Complainant's FRSA complaint is DISMISSED.

### **I. Procedural History**

Complainant filed his complaint with OSHA on October 22, 2013, alleging that Respondent interfered with his medical care for a work-related injury and disciplined him in retaliation for reporting that injury and making safety complaints.<sup>1</sup> (Administrative Law Judge Exhibit ("ALJX") 1, pp. 1-5.)<sup>2</sup> On February 6, 2013, the Regional Administration of OSHA, acting on behalf of the Secretary of Labor, issued findings determining that there was no reasonable cause to believe that Respondent had violated the FRSA. (ALJX 2, p. 1.) OSHA found, in particular, that though Complainant had engaged in protected activities and suffered adverse action, his protected activity was not a contributing factor in the adverse action. (*Id.* at 3.) Complainant sent his objections to OSHA's determination with a timely request for a hearing to OALJ on March 6, 2014, which was received on March 11, 2014. (ALJX 3, p. 1.)

This case was assigned to me on March 27, 2014, and on April 1, 2014, I issued a notice of hearing setting this case for September 9-10, 2014, in Missoula, Montana. On April 3, 2014, Respondent filed its answer to Complainant's objections. I held a pre-hearing conference telephonically on August 29, 2014, which was summarized in a September 2, 2014 order.

The hearing was held on September 9-10, 2014, in Missoula. Complainant, Complainant's counsel, and Respondent's counsel all appeared and were given a full and fair opportunity to present evidence and argument. At the hearing I marked and admitted Complainant's complaint to OSHA, OSHA's determination letter, and Complainant's request for a hearing as ALJX 1-3, respectively. (Hearing Transcript ("HT"), p. 6.) I marked Complainant's Exhibits ("CX") 1-58, but Respondent objected to CX 50 and CX 58. (*Id.* at 6-7.) Complainant withdrew CX 50 and I reserved ruling on the objection to CX 58. (*Id.* at 8-11.) I then admitted CX 1-49 and CX 51-57.<sup>3</sup> (*Id.* at 11.) Respondent's Exhibits ("RX") A through SS were marked, but Complainant objected to RX E-H. (*Id.* at 11-12, 16.) After hearing argument, I reserved ruling on RX E-H and admitted RX A-D and I-SS.<sup>4</sup> (*Id.* at 11-23.) On September 9<sup>th</sup>, I heard testimony from Complainant, Daniel Johnson, and Mark Vanek. Jacqueline Duhamel, Tiffany Wolstad (nee Grob), Randall Gustin, and Complainant (in rebuttal) testified on September 10<sup>th</sup>. CX 58 pages 1-5 were admitted on September 9<sup>th</sup> and pages 8-9 were admitted on September 10<sup>th</sup>. (*Id.* at 89, 572.) On the second day of the hearing, Respondent withdrew RX E-G and I

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<sup>1</sup> Complainant no longer alleges retaliation for safety related complaints.

<sup>2</sup> Page references to the ALJ exhibits are to internal pagination.

<sup>3</sup> Complainant's exhibits have been marked with pagination internal to each exhibit. I reference these numbers rather than any of the original pagination in the documents.

<sup>4</sup> Respondent's exhibits are usually stamped with numbers usually in the form of 'D####', though given the arrangement of the exhibits, these numbers are not sequential as between exhibits. Some are prefaced by 'P'. They are generally sequential within each exhibit and when referring to pagination I refer to these numbers rather than any internal pagination peculiar to the exhibit. RX V is not stamped and I refer to page numbers as if it were sequentially stamped beginning with page 1, rather than internal numbers in the exhibit. RX Z-1 to RX Z-5, RX NN-4, and RX OO-2 to RX OO-5 are stamped with pagination internal to each exhibit, but not in the fashion as the other exhibits. For these, I refer to the internal pagination inserted by Respondent. RX NN-2, RX NN-3, and RX OO-1 are not stamped or otherwise paginated, but each are composed of just one page.

admitted RX H. (*Id.* at 571.) On September 10<sup>th</sup> I also marked and admitted CX 59.<sup>5</sup> (*Id.* at 416.) The record, then, consists of the case file, the hearing transcript, CX 1-49, CX 51-57, CX 58 pp. 1-5 and 8-9, CX 59, RX A-D, RX H-SS, and ALJX 1-3.

On September 11, 2014, I issued an order memorializing the agreement reached at the conclusion of the hearing setting December 5, 2014, as the due date for the closing briefs and December 23, 2014, as the due date for reply briefs. (*See also id.* at 574-76.) The parties filed a joint motion for an extension of the date for filing the closing briefs on October 30, 2014. This motion was granted telephonically such that closing briefs were now due on January 9, 2015, with reply briefs due on January 30, 2015.<sup>6</sup> On January 8, 2015 the parties agreed to, and I permitted, an extension of the briefs to a dispatch date of January 12, 2015. Respondent's Closing Brief ("RCB") was received on January 14, 2015. Complainant's Post-Hearing Brief ("CPB") was received on January 20, 2015. Reply briefs were filed by both Complainant ("CRB") and Respondent ("RRB") on January 30, 2015. No further filings have been received.

## **II. Issues**

The issues to be decided are:

1. Did the Respondent retaliate against the Complainant for filing injury reports on December 5, 2012, and October 22, 2013?
2. If Respondent did retaliate against the Complainant, what damages is he entitled to?
3. Is Respondent's control of the Complainant's medical care an adverse action?

(HT, pp. 4-5.) Complainant's counsel also clarified that Complainant was alleging violations of 49 U.S.C. § 20109(c), including interference with and control of Complainant's medical care by Respondent. (*Id.* at 5.)

## **III. Stipulations**

Prior to the hearing the parties stipulated to the following, as reflected in Respondent's Pre-Hearing Statement:

1. John Wevers is a 48 year old Communication Technician employed with Montana Rail Link, Inc.
2. Mr. Wevers began his employment with Montana Rail Link, Inc. on December 3, 2007.

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<sup>5</sup> CX 59 contains excerpts from the records of Stevenson Consulting, in particular the notes generated by Ms. Grob. All of these records are also contained in RX NN or RX OO. CX 59 is paginated with numbers 'SCS ###' and I refer to these numbers. Because the exhibit is excerpts, however, many of the pages are not included, so the pagination is not sequential. When referring to a range of pages, I refer to the actual range provided in the exhibit, not the range in the larger collection from which the exhibit was culled.

<sup>6</sup> Per my order, and OALJ rules (*see* 29 C.F.R. § 18.30(b)(2)), these dates were dates of receipt. But on January 15, 2015, I received a January 6, 2015, letter between the parties treating these as dates of dispatch.

3. There are five (5) Communication Technicians employed by Montana Rail Link. They are Robert Blohm, Mark Vanek, Nathan Gonzalez, Don Gies and John Wevers.
4. Mr. Wevers filed a personal injury report on December 5, 2012, indicating he “slipped on top step of tamper and right foot impacted ground jarring R hip & R lower back.”
5. Mr. Wevers filed a personal injury report on October 22, 2013, indicating he “stepped down off fuel trailer, left foot landing, jarring left back area, heard two pops in lower spine area. Immediate pain & stiffness. Left leg nerve pain, pins & needles, knumbness [sic].”
6. On April 24, 2013, Mr. Wevers was issued, and acknowledged, a censure for violation of Montana Rail Link, Inc. General Code of Operating Rule 1.4 for failure to inform supervisor prior to being absent from a scheduled appointment.
7. On September 27, 2013, a notice of fact-finding was issued.
8. On October 18, 2013, Mr. Wevers signed an Acknowledgement and Waiver.
9. On October 22, 2013, John Wevers filed a complaint with OSHA, Cause No. 8-0100-14-001.

During the August 29, 2014, telephonic pre-hearing conference, the parties agreed to the following additional stipulations:

1. Montana Rail Link, Inc. is a railroad carrier engaged in interstate commerce and is a railroad carrier under the definition of 49 U.S.C. § 20109 and 49 U.S.C. § 20102.
2. John Wevers is an employee within the definition of 49 U.S.C. § 20109.
3. The Complainant’s complaint was timely filed as to the censure letters that were issued.

#### **IV. Factual Background**

##### ***A. Complainant’s Background and Employment with Respondent***

At the time of the hearing Complainant was 48 years old and lived in Missoula. He grew up in Missoula, but after working as a mechanic for a year after high school, moved to Phoenix for training in electronics and telecommunications. After earning a degree, he joined the Air Force and served for 8 years, working in electronics and telecommunications. (*Id.* at 62.) He received an honorable discharge and then worked for MCI and USAN for several years in telecommunications in Atlanta, Georgia and Sacramento, California. Complainant then moved back to Missoula when a cell company started up and hired him and Nathan Gonzalez to work on their network and infrastructure. (HT, pp. 61-62.)

MRL was in formed in 1987 and took over railroad track in Montana and Idaho that belonged to BNSF. (HT, p. 507.) As a railroad, MRL is heavily regulated by the Federal Railroad Administration. (*Id.* at 509-10.) It must, for example, keep records and report all injuries that require anything beyond simple first aid treatment. (*Id.* at 532-33.) BNSF retained ownership of the communications system along the track until MRL purchased it from them in

2006 or 2007. After MRL purchased the communications system it needed to hire communications technicians to maintain the various sites and equipment used to communicate throughout the railroad. (*Id.* at 507-08.)

Complainant began working for MRL in December 2007 as a communications technician. (*Id.*) Soon thereafter, he injured his shoulder while training with test equipment. (*Id.* at 62-63.) He reported the injury to MRL but did not see a doctor. (*Id.* at 63.) He received no discipline related to this injury and, in fact, received no discipline from Respondent at all before the events that led to this case. (*Id.* at 63, 558.) MRL records date Complainant's shoulder injury to May 6, 2008, and detail the care given and thorough investigation of the incident. (RX S, pp. D1241-52.) Before the events relevant to this case, Complainant also received one efficiency test failure for not knowing the tracking time limits when they were working on the track. (HT, p. 246.) But his supervisor, Dan Johnson, didn't have any complaints about Complainant's work. (*Id.* at 273-74.)

Mr. Johnson is the supervisor in the communications department and supervises five communications technicians: Don Gies, Mike Bloom, Mark Vanek, Mr. Gonzalez, and Complainant. He reports to Gary Loeffler who reports to Randy Gustin. (HT, p. 202.) Mr. Loeffler is the director of signals and communications. (*Id.* at 238-39.) Mr. Gustin is the chief engineer at MRL. (*Id.* at 500.) MRL's track is split into five territories, one for each communications technician. (*Id.* at 203-05; RX SS-1.) Part of their jobs is to maintain the microwave sites that are used for communications on the railroad. These sites each have towers and a building that contains the equipment, generators, and the fuel for the generators. (HT, pp. 203-05.) Complainant is responsible for the western-most territory of the railroad, with one site in Missoula and a number of sites in western Montana and Idaho. (RX SS-1.) Mr. Gonzalez's territory is also around Missoula. Mr. Vanek's territory stretches from Missoula eastwards to Helena, Montana. (*Id.*) Mr. Gies and Mr. Bloom cover territory further to the east. (*Id.*)

Employees at MRL report their time using a computerized system. Supervisors then approve the hours twice a month, after verifying that the hours correctly represent their understanding of the time worked. (HT, pp. 210-11.) For the communications technicians, the job sites of the supervisor and employee might be far apart and also vary from day to day. Complainant recognized that a great deal of trust was required and that from time to time it would be important for his supervisors to check on him and his performance. (*Id.* at 149-50.) He also knew that if he wasn't feeling well or needed to miss work, he should contact Mr. Johnson and let him know. Mr. Johnson was "very good" about allowing employees to take time off when they weren't feeling well. (*Id.* at 151.)

### ***B. Respondent's Wellness Program***<sup>7</sup>

MRL's Wellness Plan provides medical and wage continuation benefits to employees injured on duty. (RX W, p. D2783; *see also id.* at D2769-80 (resolutions adopting plan and amendments); RX X, pp. D2748-62 (description of plan for employees).) The medical portion of the plan is governed by ERISA and the plan provides benefits as required by the Railway Labor

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<sup>7</sup> This summary is primarily based on the plan documents. The plan is described more generally in various plan brochures at RX W, pp. D2838-66 and RX X, pp. D2748-62. During the hearing, Ms. Duhamel, the current administrator of the Wellness Plan, explained some of the relevant documents at HT, pp. 311-24.

Act and the various collective bargaining agreements with MRL. (RX W, p. D2784.) To receive benefits, an employee injured on duty must notify a supervisor and properly report the injury, accept alternative work prescribed by a treating physician, submit to independent medical examinations, provide information about eligibility to the administrator, and execute a written authorization and release of medical records. (*Id.* at D2785-86.) The plan administrator is an ERISA fiduciary and is vested with discretionary powers in the administration of the plan, including determinations as to eligibility and entitlement to benefits. (*Id.* at D2786, D2788-89.) Benefits under the plan continue up to three years after the covered injury. (*Id.* at D2842, D2779.) Participation is voluntary, but if an employee elects not to participate, he or she forfeits entitlement to short-term disability. (RX Z-5, pp. 6-7.)

The medical component covers emergency treatment and treatment that is pre-authorized, recommended by a physician, medically necessary, and not subject to a specific exclusion. (RX W, pp. D2797-99.) The plan administrator makes the determination as to whether treatment is medically necessary, considering whether it is consistent with the diagnosis and prescribed course of care, accepted by the medical community as safe, appropriate, and effective, and required for reasons other than convenience. (*Id.* at D2798.) Generally, the plan administrator must pre-authorize treatment. (*Id.* at D2798-99.) The plan provides a detailed procedure for appealing claims. (*Id.* at D2800-08; *see also id.* at D2862-66; RX Y, pp. D2763-67.) The medical benefits are meant to be equivalent to those available to employees via their employer-sponsored health insurance program. (RX Z-5, p. 6.) Though federal requirements create the need for MRL to have its employees medically examined and certified on a regular basis, MRL does not employ any doctors. (HT, pp. 305-07.) Instead it works with clinics throughout the state on a fee-for-service basis, often using occupational health clinics. (*Id.* at 307-08.)

The wage continuation component of the Wellness Plan provides for payment (after a 7-day waiting period) of 80% of an employee's base regular pay when the employee performs no work for MRL. When the injured employee works on light or modified duty, he or she is entitled to the difference between 100% of his or her regular base pay and compensation earned in light or modified duty. These benefits continue for up to 25 full weeks after a covered injury, extendable at the discretion of the plan administrator. (RX W, pp. D2816, D2825-26, D2780; RX X, p. 2751.) Payment continues until the maximum benefit is paid, the plan administrator determines that the employee can return to regular work, the employee ceases to be eligible for the plan, the employee qualifies for long-term disability benefits under the MRL's plan, the employee dies or retires, or the employee fails to undergo independent examination at the direction of the plan administrator. (RX W, pp. D2816-17.) As with the medical component, there is a detailed appeal procedure. (*Id.* at D2817-22; *see also id.* at D2862-66; RX Y, pp. D2763-67.) Benefits are paid by a trust funded by MRL. (RX W, pp. D2828-34.)

When employees are hired, they are presented with information during orientation about their benefits, including the Wellness Plan, and are given brochures on the various benefits programs. The summary plan is also distributed to employees periodically and whenever an amendment is made.<sup>8</sup> After MRL learns of an on-duty injury, the injured employee is provided with a packet of information about the Wellness Program. (HT, pp. 318-21.) Injured employees are provided with a release to sign that authorizes MRL to view medical records, but they do not

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<sup>8</sup> The larger plan documented is only provided if an employee asks for it. (HT, p. 346.)

have to sign that release in order to receive the medical benefits in the Wellness Plan. The wage continuation benefits, however, are contingent on executing the release. (*Id.* at 324-26, 343-44.) Nurse case management is offered as a benefit to employees in the Wellness Program and through MRL's insurance for off-duty injuries or illnesses, but use of a nurse case manager is not required. (*Id.* at 329-30.) MRL does not employ any nurse case managers and so refers cases to outside providers. (*Id.* at 331.) They have regularly worked with Stevenson Consulting for these management services. (*Id.* at 362.) The function of the nurse case manager is to coordinate care as part of a treatment plan. (*Id.* at 330.) Complainant received information about the Wellness Program and knew that it was for work-related injuries, but did not know that it was voluntary. (HT, pp. 123-24.) He has also received care through insurance for non-work-related injuries and none of that care had to be approved by the claims department or be managed by Stevenson Consulting Services. (*Id.* at 124-25.)

Jacquie Duhamel, the administrator of the Wellness Plan, testified that it is her role to administer the plan by its terms. She makes no treatment recommendations. Her job is to review the billing authorizations and requests from the providers to ensure that the plan is being followed and there is enough information provided for the plan to pay the bill. MRL relies on treating physicians to make treatment recommendations, make referrals, and provide MRL with an employee's work status and restrictions. (*Id.* at 336-37.) But as plan administrator, she has to make the final determination as to whether to authorize care with a particular physician or a particular course of treatment. (*Id.* at 348-49.) This is done in reliance on the treatment plan determined by the treating providers. Generally requests from treating providers are simply reviewed and approved. (*Id.* at 349.) Per the collective bargaining agreement, employees cannot be forced to treat with a doctor designated by the company. (*Id.* at 351-52.) The Wellness Plan differs from the general medical insurance plan in that MRL administers the Wellness Plan but the regular insurance plan is administered by a third-party, Allegiance. (*Id.* at 356.)

### ***C. Respondent's Rules and Disciplinary Process***

When employees are hired by MRL, they undergo orientation sessions and are provided with all of MRL's rules and regulations as well as the collective bargaining agreement between the various unions and MRL. (HT, p. 509.) Complainant would have received all of these rules, received training, and have been required to pass examinations. (*Id.* at 511-12.) Employees are also subject to operations or efficiency testing to ensure they are complying with the rules. Testing occurs in a variety of manners, including a number of covert testing practices. (*Id.* at 513-14.) Consequences for violations range from a simple undocumented verbal correction, to more formal verbal warnings, to written warnings or censures, to a formal discipline process that involves the union and could result in termination. (*Id.* at 515.) The collective bargaining agreement relevant to Complainant provides that MRL may require periodic medical and rules examinations. (RX Z-3, p. 4.)

MRL categorizes its rules into minor, major, and serious. (RX V, p. 1.) "Discipline is assessed considering the rule level, employee compliance history and whether the violation is inadvertent or intentional." (*Id.*) Formal discipline ranges from censure to termination, and multiple violations in one category of discipline can progress an employee into the next category of discipline. (*Id.*) Minor rule violations have little potential for significant injury or damage, major rule violations have a potential of serious injury and damage, and serious rule violations

have that potential plus violation of state or federal regulations. (*Id.*) Each rule category provides for a progressing range of punishments. A leniency policy provides for deferring action or time suspended for first and second violations. (*Id.* at 1-2.) Discipline at MRL is progressive and increases over time if behavior is not corrected. (HT, p. 519.)

Several rules are relevant in this case. General Code of Operating Rules (“GCOR”) 1.4 concerns “Carrying Out Rules and Reporting Violations” and is classified by MRL as a minor rule. (RX V, p. 3.) It provides that “[e]mployees must cooperate and assist in carrying out the rules and instructions. They must promptly report any violations to the supervisor. They must also report any condition or practice that may threaten the safety of trains, passengers, or employees, and any misconduct or negligence that may affect the interest of the railroad.”<sup>9</sup> GCOR 1.6 is for “Conduct (1-6)” violations and is deemed a serious rule by MRL. (RX V, p. 3.) It provides that “[e]mployees must not be: 1) Careless of the safety of themselves or others; 2) Negligent; 3) Insubordinate; 4) Dishonest; 5) Immoral; 6) Quarrelsome; or 7) Discourteous.” GCOR 1.15 addresses “Duty—Reporting or Absence” and is classified by MRL as a major rule. (RX V, p. 3.) It specifies that “[e]mployees must report for duty at the designated time and place with the necessary equipment to perform their duties. They must spend their time on duty working only for the railroad. Employees must not leave their assignment, exchange duties, or allow others to fill their assignment without proper authority.”

Based on the disciplinary file, MRL rules also require that “[a]ny act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty of [sic] to the performance of duty will not be tolerated.” (*See* RX B, p. D1022.) Complainant was also charged with violating General Safety Rule G-1 1(f). (*Id.* at D1021.) Though the spreadsheets submitted by Respondent contain the General Safety Rules, no rule with that number is included. (RX V, p. 9.) No text of the rule has been submitted into evidence and it is not generally available. It does not appear to have played a significant role in the case and I do not consider it or any alleged violation of it here as an explanation for the discipline assessed.

Mr. Gustin explained that at MRL rules dealing with honesty and “stealing time” are generally categorized as serious and are subject to the heaviest discipline. (HT, p. 520.) MRL has terminated employees and been upheld in arbitrations for stealing as little as 15 minutes or less of time from the company when that was all the time they could prove with “rock solid” evidence that was misappropriated and not subject to any excuse. (*Id.* at 552-56.)

MRL policy provides for a grievance procedure, which includes controversies involving discipline, that allows employees to escalate complaints beginning with their immediate supervisors and then continuing to human resources and ultimately the vice president of operations.<sup>10</sup> (RX O, pp. 2730-31.) The collective bargaining agreement also provides for a grievance procedure. (RX Z-1, pp. 4-5.) The agreement deals with discipline in detail. An employee has a right to a fair and impartial fact-finding session before discipline is assessed,

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<sup>9</sup> Neither Complainant nor Respondent submitted the text of the rules into evidence. The alleged misconduct becomes clear in the record, but the only evidence of the exact content of the rules is a set of spreadsheets that give a general description of the rule and then categorize its severity. Nonetheless, GCOR is a standardly used, widely available manual throughout the railroad industry, and so I simply include the text of the rules here.

<sup>10</sup> Complaints involving discrimination proceed directly with human resources. (RX P, pp. 2732-33.)

unless he or she accepts the discipline in writing and waives the fact-finding. (RX Z-2, p. 4.) Seven days' notice must be provided before a fact-finding and it must be held within 10 days of notice, unless extended by mutual consent. (*Id.* at 5.) MRL may propose and an employee may accept discipline without fact-finding, and if he or she does so, a stipulation is added to remove the discipline from the employee's record within 24 months unless there is additional discipline for a similar incident. (*Id.*) Fact-finding is conducted by a company supervisor. (*Id.* at 6.) Appeals proceed internally, with an option to eventually appeal "to a tribunal having jurisdiction to dispose of the matter pursuant to the Railway Labor Act." (*Id.* at 6-7.)

In the course of his employment, Complainant has signed acknowledgments of receipt of the union contract and MRL's Timetables, On-Track Safety Rules and Procedures, Vehicle Usage and Operation Policy, training on workplace behavior, Employee Discrimination Complaint Policy, Violence in the Workplace policy, Alcohol and Drug Testing Policy, General Code of Operating Rules, General Safety Rules for Mechanical Engineering and Administrative Employees, Maintenance of Way Circular, Hazardous Materials Instructions, and Emergency Response Guidebook. (RX I, pp. D1058-68; *see also* HT, pp. 154-57.) He testified that he had received information on the collective bargaining agreement, but wasn't familiar with all of the details on the disciplinary process. He has a union representative who acts as a go-between and advocate with MRL. (HT, pp. 134-36.)

#### ***D. Complainant's First Injury and Treatment***<sup>11</sup>

The first injury relevant to this case occurred on December 5, 2012. (HT, p. 68.) Complainant was in Clark Fork, Idaho, working on and exchanging communications equipment because the FCC had required a bandwidth change for MRL's radio frequency. (HT, p. 64.) It was a rainy day. After he finished exchanging the equipment on a tamper machine he slipped climbing down. His right foot slipped, turned, and then struck the ground. His right knee locked and "it jammed everything up into my right hip area, right spine area." (*Id.*; *see also* CX 3, pp. 1-3 (pictures of tamper machine).)

Complainant immediately believed that something wasn't right, but after stretching he just started driving back to Missoula. When he arrived, his back was stiff and tight and he was in "quite a bit of pain." (HT, p. 66.) He called his supervisor, Mr. Johnson, and informed him of the injury. (*Id.*) Mr. Johnson informed the Train Rules & Safety ("TRS") office at MRL of the injury. TRS sent several employees to "debrief" the scene the next day. No discipline was issued to Complainant or any other employee because the de-briefers determined that the hand and foot rails on the tamper machine were in good condition with the footing covered with

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<sup>11</sup> RX NN contains well over a thousand pages of records related to this course of treatment collected by Ms. Grob. The first 658 pages (with D0### pagination) contains what seems to be the primary collection of records, roughly in reverse chronological order, though there are many redundancies in these records as they reflect not only the reports entering Stevenson Consulting's file but also outgoing correspondence relaying the reports to others. In this section, I cite to this portion of records more heavily, sometimes citing to multiple versions of the same report. The remainder of RX NN (with D3### pagination) contains what appears to be more specialized sections of correspondence, medical records, and other documentation. I have reviewed all of these records and they are almost entirely redundant with records contained earlier in the file, except that Ms. Grob has sorted them in a way helpful to her. Rather than further clog the text of the decision with redundant citations, I cite to these parts of RX NN sparingly, only when they add information not already found in other records or presented in a clearer manner than the other records.

diamond plate and Complainant had just suffered an accidental injury. (*Id.* at 206-07; RX NN, p. D0718; *see also* RX NN, pp. D0675-706, D0745-46 (debriefing information).)

Complainant attempted to self-treat overnight, but this was ineffective and so he called Mr. Johnson again on the morning of the 6<sup>th</sup> and asked to be taken to the emergency room. (HT, p. 66.) Mr. Johnson took Complainant to the emergency room that he requested and waited with him, but had no role in his care. (*Id.* at 207-08.) As Complainant recalled, the doctors eventually diagnosed him with a fractured transverse processor, gave him some pain-killers and muscle relaxers, and then sent him home with instructions to rest. (*Id.* at 66-67.) The emergency room at St. Patrick Hospital recorded that he was in moderate distress and anxious, with back pain and tenderness. (CX 4, p. 1; RX NN, pp. D0619-28; RX NN-2.) X-rays were taken showing no evidence of an acute fracture and minimal intervertebral disc height loss. (CX 4, p. 5; RX NN, pp. D0458, D0618.) The clinical impression was acute low back pain. (CX 4, p. 4.)

After leaving the emergency room, Mr. Johnson took Complainant to MRL's TRS office so they could fill out a formal injury report. When he filled out the report he had taken 3 or 4 painkillers and was nauseous from the medication. (HT, pp. 67-68.) The briefing could have been delayed, but Complainant told Mr. Johnson that he was able to proceed. (*Id.* at 208.) The report was filed on December 6, 2013, and indicated that he had "[s]lipped on top step of tamper and right foot impacted ground jarring R hip & R lower back." (CX 47, p. 1; RX LL, p. D1135; RX NN, pp. D0685-86, D0695.) Mr. Johnson filed a formal report of the injury to TRS on the same day. (CX 48, p. 1; RX NN, p. D0696; *see also* RX NN, pp. D0673-74 (MRL report to the Federal Railroad Administration).)

Over the next several days Complainant tried to take care of himself and sought physical therapy on his own from Tara Mahoney, a friend from the gym. (HT, pp. 69-70.) On December 12<sup>th</sup>, Mr. Gustin called to check on him. Complainant assumed that MRL would take care of everything related to his injury, but no one explained the process to him. (*Id.* at 70-71.) He did get a letter from the claims department with information and later signed a release. (*Id.* at 71-72.) He signed the release after being told it was necessary so that Respondent could pay the medical bills. (*Id.* at 73.) Ms. Duhamé sent this letter on December 13, 2012, informing him that the Wellness Program provided medical and wage continuation benefits for on-duty injuries as part of the collective bargaining agreement. The letter had several attachments with information about the program and benefits. Ms. Duhamé requested that he sign a release so that they could comply with HIPAA and proceed with the Wellness Program. (CX 51, p. 1; RX AA, p. D0672; *see also* HT, pp. 138-42.) Complainant signed the release on December 15, 2012. (RX CC, pp. D0670-71.)

On December 14, 2012, Ms. Duhamé informed Mr. Gustin that she didn't yet know Complainant's duty status and he requested that they set up a follow-up appointment for Complainant the next week so they could develop return to duty plans. (CX 58, p. 8.) On December 14<sup>th</sup>, Complainant was contacted by Debbie Marshall, an employee in the claims department, who informed him of an appointment MRL had arranged. He did not choose the doctor. (HT, p. 73.) Ms. Duhamé explained that she made the initial appointment with St. Patrick's occupational health clinic, PMG MT Occupational Health, where Dr. Dana Headapohl practices, because she was told by Mr. Gustin that Complainant had been injured at work, was still in pain and off of work, and hadn't been evaluated or given medical restrictions or work

status information beyond his treatment at the emergency room. (*Id.* at 380.) This initiated Complainant's medical care and treatment plan under the Wellness Plan, but Complainant was not involved in these discussions. (*Id.* at 381-82.) Ms. Marshall also informed Mr. Johnson that they had arranged an appointment for Complainant and Mr. Johnson passed the information on to Mr. Gustin and Mr. Loeffler. (CX 58, p. 9.) Later, Complainant was told by Ms. Duhamé that MRL didn't manage the care of injured employees but instead contracted with Stevenson Consulting, who would be contacting him. (HT, pp. 73-74.)

At the hearing Ms. Duhamé explained that medical management through a nurse case manager is used to develop and implement a treatment plan, including the referrals that are made. But use of a nurse case manager is optional. The Wellness Program initiates the process by telling the nurse case manager to contact the injured employee, but the injured employee can refuse the offered medical services. Generally Ms. Duhamé will talk with the injured employee to offer the services. (*Id.* at 370-71, 375.) The Wellness Program, however, does not inform employees that if they have a nurse case manager, then he or she will be reporting information back to MRL. (*Id.* at 372-73.) The letter does state how to submit claims, but it does not explain the claims procedure or who makes the ultimate determinations. (*Id.* at 373.) The authorization that injured employees are given by the nurse case manager, however, states that the nurse case manager will be permitted to discuss their case and release information to MRL. (*Id.* at 383-85.)

Complainant recalled that after the injury, MRL arranged for treatment with Dr. Headapohl, though he estimated that 90% of the time he was seen by Dr. Headapohl's physician's assistant, Paula Colledge. (*Id.* at 78-79.) He first saw Dr. Headapohl on December 14, 2012, at which time he reported that he was down to 3/10 pain with his therapy. The impression was sacrolilitis from a fall at work and he was advised to continue with the physical therapy and follow-up with the clinic. (CX 5, pp. 1-2.) Later low back pain and lower lumbar facet disease were added to his diagnostic continuum. (CX 6, p. 1.) Ms. Colledge released Complainant to modified duty on December 17, 2012, and also referred him for physical therapy evaluation and treatment. (RX NN, pp. D0639-42, D0648, D0651.) He was sent for additional physical therapy with Ms. Mahoney at Grizzly Physical Therapy/Hamilton Physical Therapy & Sports Rehabilitation, was evaluated by them on December 17, 2012, and continued treating with them regularly in December. (RX NN, pp. D0630-33, D0635-38, D0649-50; *see also* HT, pp. 76-78.) This continued physical therapy with was approved. (RX NN, p. D0629.) Grizzly Physical Therapy was the local site in Missoula where Ms. Mahoney worked with Complainant, but her affiliation and billing was with Hamilton Physical Therapy & Sports Rehabilitation in Hamilton, Montana. (*See* CX 59, p. SCS 377.) For the purposes of this case, however, they refer to the same course of treatment with Ms. Mahoney.

Complainant returned to work on modified duty on December 18, 2012. (RX NN, p. D0634.) He testified that he continued on modified duty during his treatment, though he wanted to just stay at home. (HT, p. 82.) Modified duty involved him working in the office, sitting around and doing what he could remotely. He couldn't drive with his back pain, so when something needed to be done in his territory someone else, usually Mr. Gonzalez, would have to go do the work. (*Id.* at 82-83.) MRL did not hire anyone to cover his territory and the burden fell to his co-workers. Mr. Gonzalez was unhappy about this and gave him a hard time about his injury. (*Id.* at 83.) Complainant complained to people at MRL and the union about this, but he didn't think that anything was ever done to Mr. Gonzalez. (*Id.*) Mr. Gonzalez would become

upset when he was assigned a task in Complainant's territory and storm into Complainant's office. He would say things like "Man up and quit being a wuss" or "I'm tired of covering your territory." (*Id.* at 84-85.) Mr. Vanek testified that Mr. Gonzalez complained about Complainant's inability to work and had done so to him about every couple of weeks. (*Id.* at 295-96.) Complainant admitted that he and Mr. Gonzalez had a personal problem that pre-dated the injury. He used to have to "hand-hold" Mr. Gonzalez and had talked to Mr. Johnson about that. The injury exacerbated the conflict and Mr. Gonzalez started complaining to him and others a lot. Complainant mentioned this at several points to Mr. Johnson, and Mr. Johnson told him that "He'll get over." (*Id.* at 171-72.)

Complainant recalled receiving a packet from Stevenson Consulting in the mail at some point after his injury and was contacted by Tiffani Grob, a nurse case manager at Stevenson Consulting, via telephone. (*Id.* at 74.) Her records show that she made first direct contact with him via telephone on December 19, 2012. (RX NN, p. D0634.) She also sent him a letter on December 19<sup>th</sup>, informing him that Stevenson would be managing his case and that she would follow the case with him and his physicians and work to coordinate his medical care. She identified the objectives of her services as including assuring quality medical care and returning him to modified and then full duty as soon as it was medically appropriate. The letter informed Complainant that his responsibilities included actively participating in care with the goal of returning to work, cooperating with Ms. Grob, and seeking pre-authorization from Ms. Grob for physician referrals or "unusual or extensive testing or treatment." She requested that he complete and return a medical records release. (RX EE, pp. D3504-05; *see also* HT, pp. 144-46.) The release authorizes the nurse case manager to speak with and procure information from the providers and to keep the employer updated on the course of treatment. (HT, pp. 389-91.) He signed this release on February 12, 2013. (RX FF, p. D3383.)

According to Complainant, Ms. Grob would call him to check on him, schedule and coordinate his appointments, and usually go into the room with him at the appointments for the examination and discussions with the doctors. (HT, pp. 74-75.) He did not think that Ms. Grob was reporting to MRL's claims department. (*Id.* at 75.) But he testified that Dr. Headapohl later told him in confidence—after asking Ms. Grob to leave the room—that Ms. Grob had a "direct line" to MRL. (*Id.* at 78.) As Ms. Grob explained her role, she was to submit all of the recommendations to Ms. Duhamel at MRL for approval and authorization. (HT, pp. 407-08.) She also made appointments for Complainant, though when she received the case, he was already seeing Dr. Headapohl. Ms. Grob didn't know who made those first appointments. (*Id.* at 417-18.) All of the recommendations for treatment had to ultimately be approved by MRL, since it was the payor, and the recommendations had to be made by one of the treating providers. (*Id.* at 423-25.) When a treating physician or provider made a referral or requested treatment, Ms. Grob would facilitate the necessary authorization by MRL. (*Id.* at 460-62.)

On January 2, 2013, Complainant visited Ms. Colledge, reported a recent flare-up in symptoms, and received the first of three trigger point injections. He continued on modified duty. (RX NN, pp. D0576, D0605-17.) Another x-ray of his lumbar spine was also conducted on January 3, 2013. Mild degenerative changes were noted at L6-S1 and alignment was stable. (*Id.* at D0590-92.) Complainant returned to Ms. Colledge to review the x-ray on January 4, 2013. He reported relief from the injection. Ms. Colledge opined that they should continue with conservative management and consider facet injections as a possibility for the future. (*Id.* at

D3639-43.) Ms. Grob, on behalf of Ms. Duhamel, authorized 4-6 weeks of 3 weekly physical therapy sessions with Ms. Mahoney on January 8, 2013. (*Id.* at D0604.)

Ms. Colledge examined Complainant again on January 23, 2013, gave him the second in a series of three trigger point injections, and continued him on modified duty. The trigger point injections showed good results, though she opined that he may need facet injections. Continued physical therapy at Grizzly/Hamilton was approved thereafter. (*Id.* at D0550-65.) Throughout January 2013 Complainant was receiving physical therapy from Ms. Mahoney as prescribed by Dr. Headapohl and Ms. Colledge. (*Id.* at D0567-72, D077-89, D0593-603.)

In February of 2013 MRL procured a new chair specially designed for Complainant. It arrived at the end of the month and they adjusted it for him. This created difficulties with the desk so MRL adjusted his desk and got him a new docking station. (CX 15, pp. 1-3; RX J, pp. D2967-68; *see also* CX 14, p. 1; CX 54, pp. 2-3; RX K, pp. D2977-95.) The chair, on discount, cost \$1,229.00. (RX K, p. D2991; RX R, p. D2090.) MRL also procured a new monitor and keyboard for Complainant. (*E.g.* RX L, p. D5359.) In addition, Complainant suffered pain while driving in his work truck. He reported that his personal truck felt better, so MRL asked him to provide the model of the seat in his personal truck so they could duplicate it in his work truck. He replied by stating that this wouldn't work and he needed to be moved from a Chevy to a Dodge or Ford instead. (CX 15, p. 1; RX J, p. D2969; RX K, p. D2992-94)

On February 12, 2013, Complainant received a third trigger point injection from Ms. Colledge. After examination and discussion, they decided to continue one more week of therapy with Ms. Mahoney and then transfer to Timothy Cordial. Ms. Grob reviewed the plan. (CX 6, p. 1; RX NN, pp. D0525-30) Complainant, accompanied by Ms. Grob, followed-up with Ms. Colledge and Dr. Headapohl on February 20, 2013. He reported that the work hardening program had worked well and led to pain free days, though he expressed concern about re-injury at work. He was working on light duty "which has been very helpful for him." They decided to hold off on a new physical therapist and anticipated maximum medical improvement ("MMI") in the near future, though also that Complainant would need to undergo some job-specific physical therapy before returning to full duty. (CX 7, pp. 1-3; RX NN, pp. D0506-16.) During February he continued to receive physical therapy at Grizzly/Hamilton. (RX NN, pp. D0353-65, D0491-94; D0517-19, D0521-24, D0531-43, D0545-49.) On February 21, 2013, Ms. Mahoney requested 6 weeks of physical therapy, but only 1 week was authorized based on the recommendations of February 20, 2013.<sup>12</sup> (CX 8, p. 1; RX NN, p. D0498.)

Eventually Complainant complained to MRL that Ms. Grob was contacting him too much—at first he found it "kind of nice" but eventually thought she was calling too much and that he was being "mother-hen'd." (HT, pp. 75-76.) He e-mailed Ms. Duhamel on February 25, 2013, complaining that Ms. Grob was too involved and he was stressed with her amount of contact and his current physical therapy. He added, "I am unsure why I am seeing the doctor once a week. I feel like I am being pressured into healing." (CX 9, p. 1.)

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<sup>12</sup> A "slim line McKenzie roll" that was requested was approved. (RX NN, p. D0495.)

As Complainant recalled, after a period of receiving physical therapy from Ms. Mahoney, Dr. Headapohl decided to refer him instead to Mr. Cordial because he was a more specialized physical therapist. (HT, p. 79.) Ms. Mahoney had been doing a lot of work hardening, but Complainant was having flare-ups. When he was switched to Mr. Cordial, he recalled that he was told he was “full of inflammation” and they worked on reducing that. (*Id.* at 81-82.) Complainant also remembered that Ms. Mahoney complained to him that his caregivers were pushing him back to work and not giving him enough time. (*Id.* at 87.) In general, he recalled that Dr. Headapohl and Ms. Colledge pushed him to be active, exercise, and engage in recreational activities, but he sometimes didn’t think he was ready. (*Id.* at 87-88.)

On February 25, 2013, Ms. Wilson at Grizzly Physical Therapy reported to Ms. Colledge that Complainant’s pain was varying and sought authorization for additional physical therapy. Ms. Colledge, however, responded and discontinued further therapy.<sup>13</sup> (CX 10, p. 1; RX NN, p. D0434.) When Complainant returned to PMG MT Occupational Health on February 27<sup>th</sup>, Ms. Colledge referred him to Dr. Christopher Caldwell at the PMG MT Spine and Pain Center for interventional therapy involving facet and joint injections. They planned to continue physical therapy and work-hardening with Mr. Cordial when appropriate. (CX 11, p. 1; RX NN, pp. D0355-59; D0400, D0431-33; *see also* RX NN, p. D3477 (initial referral form annotated with approval from Ms. Grob and MRL billing information).) The L6-S1 facet injections were authorized on March 6, 2013. (CX 13, p. 1; RX NN, p. D0461.)

Complainant started physical therapy with Mr. Cordial on March 4, 2013, and was scheduled for three weekly sessions with home exercises in between. Mr. Cordial stopped the work hardening and lifting in order, as Complainant understood it, to get his muscular system “straightened out.” (CX 14, p. 1; RX NN, pp. D0360-61.) Complainant also saw Ms. Colledge on March 4, 2013, and received a renewed prescription for Norco. (RX NN, pp. D0351-54, D0464-68, D0470-88.) In a March 5<sup>th</sup> e-mail to Mr. Johnson, Complainant stated that he was having good days and bad days and that the painkillers were tough on his stomach. (*Id.*; CX 54, p.1.) Physician’s assistant Kevin Scott at the Spine and Pain Center conducted a comprehensive spin evaluation of Complainant on March 7, 2013. Treatment via injections was planned. (RX NN, pp. D0426-30.) In a March 11, 2013, letter to Ms. Colledge, Mr. Cordial reported improvement, in particular that Complainant was sleeping better and his pain had decreased. (RX NN, p. D3719.) Complainant saw Ms. Colledge on March 12, 2013, and remained on modified duty with MMI expected in roughly a month. (RX NN, pp. D0435-55.) On March 15, 2013, Complainant received bilateral L6-S1 intra-articular facet injections and a left sacroiliac joint injection from Dr. Caldwell. (RX NN, pp. D0422-25.) Physical therapy continued with Mr. Cordial through March and April. (CX 21, p. 1; RX NN, pp. D0288-90, D0293, D0295-98, D0350, D0362, D0380.) On April 1, 2013, Mr. Cordial reported that progress was being made, but Complainant still had some pain, which Mr. Cordial attributed to prolonged sitting in his truck. More therapy was planned and Complainant would “also be scheduled for chiropractic eval and adjustment if needed from Dr. Casey Cordial.” (CX 16, p. 1; RX NN, p. D0416.)

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<sup>13</sup> Ms. Grob, on behalf of Ms. Duhamel, also later declined authorization for a \$50.00 “ElastoGel hot/cold pack” requested by Hamilton Physical Therapy & Sports Rehabilitation on February 21, 2013, on the grounds that the plan was to wean him from this treatment and so it was not needed. (RX NN, p. D0469.)

Dr. Headapohl examined Complainant on April 2, 2013. Ms. Grob accompanied him. He complained of pain when working in tight space and difficulty getting comfortable in his company truck. But he also reported that “the injections were very helpful and have increased his mobility” and that he felt that he was “making tremendous headway with physical therapy.” (CX 17, p. 1; RX NN, pp. D0402-10; D0417-20) At an April 16, 2013, appointment with Dr. Headapohl, Complainant reported that the new company truck was better, but he had issues with vibration. Complainant was still improving, but Dr. Headapohl noted they hadn’t received an accurate job description from MRL.<sup>14</sup> (CX 18, p. 1; RX NN, pp. D0271-72, D0338-49, D0369-78.) In an April 16<sup>th</sup> report to Ms. Colledge, Mr. Cordial stated that Complainant had been improving and his pain was between 2-4/10 and his “dysfunction improves with exercise.” Mr. Cordial also noted that Complainant’s new truck was better, but had some vibration problems. Mr. Cordial recommended two to three more weeks of therapy after which Complainant would be at MMI and could return to work full duty.<sup>15</sup> (CX 19, p. 1; RX NN, p. D0294.)

Complainant kept Mr. Johnson informed about his treatment because he was Complainant’s supervisor. (HT, p. 85; *see also* RX Q, pp. P0112-14; P0118-19.) Mr. Johnson kept Mr. Loeffler, his supervisor, apprised of Complainant’s recovery and status via phone calls or e-mails at least once a week. (HT, pp. 239-40.) He also kept Mr. Gustin informed as to Complainant’s recovery and status at their weekly meetings. (*Id.* at 259.) Information about Complainant’s status was also forwarded to Ms. Duhamé. (*E.g.* RX NN, pp. D0652-57.) Some of this correspondence is in the record. On February 5, 2013, Mr. Johnson forwarded Complainant’s physical therapy schedule to Mr. Loeffler, who replied, “WOW...I need a schedule like that!” Mr. Johnson then asked, “That is what I am thinking. Do we just say okay since it is an on the job injury?” Mr. Loeffler replied, “[u]nfortunately yes, whatever it takes to make him whole again.” Mr. Johnson then wrote “[w]ell hopefully he gets better pretty soon and he can go back to working his normal beat for us soon.” Mr. Loeffler added, “I hope so too, I can’t believe having his hip go ‘out of Place’ [sic] caused so much trauma??? My back goes out more than I do!” Mr. Johnson replied, “LOL.” (CX 58, pp. 1-2.)

Mr. Johnson sent Mr. Loeffler another update on February 13, 2013. Mr. Loeffler wrote back, “Wow [sic] He is going to be the 6 million dollar man [sic]” Mr. Johnson commented “[i]t’s looking that way. According to the sheet he just gave me it will be another 1 or 2 months before he is back to full service.” (*Id.* at 4.) They exchanged e-mails again on March 4, 2013, Mr. Loeffler remarking that “I wish I had a schedule like this!” and Mr. Johnson replying, “[i]t would be nice.” (*Id.* at 5.) Complainant found these comments “disturbing.” (HT, p. 85.)

Complainant was expected to keep Mr. Johnson informed of his schedule and MRL paid him for all of the time he was visiting doctors or in therapy as work time. (*Id.* at 212.) Mr. Johnson testified that Mr. Loeffler was always genuinely concerned about Complainant’s health and recovery, though he admitted that Mr. Loeffler liked to use comedy sometimes. (*Id.* at 240, 283.) He added that they wanted Complainant back at work and in his regular job, but that they were also doing alright without him and covering his territory. (*Id.* at 241.) Asked about these

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<sup>14</sup> RX NN, pp. D0385-97 contains several copies of a job description sent by Ms. Duhamé to Ms. Grob on March 1, 2013, but the issue appears to have been that the description MRL had on file was no longer accurate according to Complainant. (*See also* HT, pp. 432-35, 495-96.)

<sup>15</sup> The record contains reference to a May 1, 2013, return to full duty, but Complainant speculated that this was something discussed between Ms. Grob and Mr. Cordial and hadn’t been approved by the doctors. (CX 20, p. 1.)

e-mails, Mr. Gustin expressed that aside from the little quip by Mr. Loeffler that was made privately between two supervisors, he was proud of the way that his supervisors had handled the injury and the whole process. He believed that Mr. Johnson in particular had treated Complainant with a great deal of respect. (*Id.* at 556-58.) At the hearing Complainant agreed that Mr. Johnson treated him with respect and continued to rely on him. (*Id.* at 153.)

In general, between his injury and April 2013 Complainant was seeing the doctor about once a week and going to physical therapy for an hour or more about three times a week. He would do physical therapy during his work hours, and was paid for the time in treatment. (HT, pp. 90-91.) He would also sometimes use flex-time when his back was hurting. (*Id.* at 91.) On April 11, 2013, he sent an e-mail to his supervisors and others at MRL about a truck he had picked up that had a much better cab for him, but had some problems with vibration and lumbar support. He reported that his office desk set-up was now much better with no further issues. (CX 45, p. 1; RX J, p. D2972.) Mr. Gustin replied with a supportive e-mail with plans to talk soon about next steps. (CX 45, p. 1; RX J, p. D2972.) Complainant responded, stating that “[t]hings are going very well for me. I am gaining more range of motion and less guarding every day. I can see the light.” He added that he was still trying to figure out how to travel in the truck without suffering pain and spasms. Mr. Gustin forwarded this message to Ms. Duhamé, adding only a smiley face. (RX NN, p. D0652.) Complainant continued to look for trucks that would better accommodate him. (RX J, p. D2973.)

#### ***E. Missed Appointment and Censure Letter***

On April 19, 2013, Complainant had a 2:00 physical therapy appointment with Mr. Cordial. He testified that he worked sedentary duty and then went home for lunch around 1:00. He would generally eat lunch, take his pain pills and muscle relaxers, and switch to his personal vehicle before going to physical therapy. He stated that on that day he took his pills, sat down in his recliner, and fell asleep. He testified that he missed the physical therapy appointment but did not call their office. (HT, pp. 92-95.) He later told Mr. Cordial that he had slept through the appointment, but had no contact with anyone at the office until the next week. (*Id.* at 98-99.)

Mr. Johnson recalled that he had been wondering if Complainant was where he said he was due to some comments he had received from Complainant’s co-workers to the effect that Complainant had mentioned ways of wasting time. So he decided to check on him. He drove to Complainant’s house around 2:30 and found both of his cars present. (*Id.* at 212-13.) Complainant’s house is quite close to work, and Mr. Johnson had checked on him in the past at several points with no issues. (*Id.* at 249-50.) Mr. Johnson had also checked on two other employees, Mr. Gonzalez and Kevin Thomas, to see if they were at home during working hours. (*Id.* at 288-89.) By this point, Mr. Gonzalez had complained to Mr. Johnson about Complainant “very many times.” (*Id.* at 251.) Mr. Gonzalez believed that Complainant had been injured at work, but didn’t believe that he was as injured as badly as he claimed to be. (*Id.* at 284.)

After returning to MRL, Mr. Johnson talked with Mr. Gustin, and they decided to pull Complainant’s physical therapy records to check his attendance. (*Id.* at 212-13, 256-58, 548-49.) They received a document from Ms. Duhamé reflecting that Complainant had told the office that

he would be “unable to attend due to work schedule per clt.”<sup>16</sup> (*Id.* at 213; RX II, p. D0337) Mr. Gustin then decided to discipline Complainant with a letter of censure because he had been excused from work with pay to attend the appointment, but hadn’t gone to the appointment. This discipline involved no loss of time or pay. (HT, pp. 214, 518-19, 521.) They decided to not charge him with stealing time because they didn’t want to “really hammer him.” They just wanted to correct the behavior. (*Id.* at 521.) So instead they cited him for the lesser violation of failure to comply with instructions, which would result only with a censure. (*Id.*) Other employees at MRL have been disciplined for reporting being at work but not being where they were supposed to be. (*Id.* at 216.) Mr. Johnson stated that they did not treat Complainant any differently because he had filed an injury report in December. (*Id.*)

At his appointment with Mr. Cordial the next Monday, the 22<sup>nd</sup>, Complainant learned that MRL had requested his attendance records from physical therapy. (HT, p. 95.) He contacted Mr. Johnson that afternoon, but at that point Mr. Johnson didn’t know what was going on. The next day, however, Complainant was called into Mr. Johnson’s office about the missed appointment. According to Complainant, Mr. Johnson asked him why he missed the appointment and what was going on, but he just replied that “I’ll get back to you” because he wanted to talk to his union. Mr. Johnson probed further, saying that he didn’t think it was like Complainant to be missing things like this and asking what was really going on. Complainant told him that he was tired and on pain pills and muscle relaxers. Mr. Johnson then told him that he would be receiving a letter of censure for missing the appointment on company time. He also told Complainant that “You’re either with us or you’re not.” (*Id.* at 95-97.) Mr. Johnson, however, recalled that in the conversation Complainant told him that he had no excuse for not being at the appointment. (*Id.* at 215.) Complainant denied using those words, but agreed to the discipline because he had missed the appointment. (*Id.* at 152-53.)

As Complainant remembered, on April 23, Mr. Johnson gave him the discipline letter and they both just moved on. (*Id.* at 98, 152-53) The letter is dated April 24, 2013, and is signed by Mr. Gustin. It informs Complainant that the following would be entered into his personal record: “April 24, 2013: Censured for violation of [MRL GCOR] 1.4, which governs [MRL] employees per items 8, 9 and 13 in the All Subdivision Special Instructions of Timetable #17, when on Friday, April 19, 2013, you failed to inform your supervisor prior to being absent from a scheduled appointment.” (RX A, p. D1019.) The letter provided that the note would be removed after two years if in that period Complainant had no more discipline for a similar incident. (*Id.*) Complainant was informed of his option of contesting the discipline. (*Id.*) He signed the letter acknowledging the discipline on April 25, 2013, and his union representative, Dale Doyle, did the same on April 29, 2013. (*Id.* at D1019-20; *see also* HT, pp. 521-22.)

#### ***F. Continued Treatment to September 2013***

On April 25, 2013, Complainant attempted to see Dr. Headapohl but didn’t have an appointment and so he went to see Mr. Cordial. He reported to Mr. Cordial that he had a flare-up after riding in his truck, with pain primarily on the left with radiculopathy. Mr. Cordial recommended an MRI. (CX 21, p. 1; CX 22, p. 1; *see also* RX NN, pp. D0321-22.)

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<sup>16</sup> The records showed that Complainant had attended his other appointments, except for one that was “cancelled per Joey @ PT office.” (RX II, p. D0337.)

Complainant was able to see Ms. Colledge later on April 25<sup>th</sup> about his renewed and lower back pain and radiculopathy. Ms. Colledge noted that they had “maximize[d] conservative efforts with [Complainant], unfortunately he has continued to have recalcitrant low back pain.” (CX 23, p. 1; RX NN, pp. D0268-70, D0303-12, D0323-29.) An MRI was requested, approved the same day, and scheduled for the next morning. (CX 23, p. 1; CX 24, p. 1; RX Q, pp. D5923-24 (Ms. Duhamé upon receipt of request: “Call her and have her get it scheduled ASAP”); RX NN, pp. D3440-41; *see also* RX NN-1, pp. D5923-23; RX NN-3.) An MRI of the lumbar spine was conducted on April 26, 2013, and read to show vertebral body higher and alignment within normal limits, some areas of increased T1 and T2 signal, some disc desiccation, and multilevel degenerative changes. (CX 25, p. 1; RX NN, pp. D0134-36; D0330-33.)

In an April 29, 2013, e-mail to Mr. Johnson, Complainant complained that he was “not feeling good at all...it’s like I lost 3-4 months of therapy.” (CX 26, p. 1.) He left work early, reporting to both Mr. Johnson and Ms. Grob. (*See* RX NN, p. D0299.) On May 1, 2013, Complainant was examined by Ms. Colledge, who noted a recent flare up during a drive and opined that the treatment program needed to be expanded to include more injections and pain management in a “biopsychosocial model” for treating pain. (RX NN, pp. D0260-67; D0274-87.) Physical therapy and the injections continued, with Complainant remaining on light duty into May. (CX 26, p. 1; *see also* RX NN, pp. D0206-07, D0220, D0232-33, D0288-89 (physical therapy records).)

Complainant saw Dr. Caldwell on May 16, 2013, where they reviewed the recent MRI. Dr. Caldwell noted “evidence of left greater than right lumbar facet arthropathy with trace in joint effusion. There is also what appears to be either a small synovial cyst or connective tissue sleeve extending off the anterior aspect of the L5-S1 facet and narrowing the subarticular recess for the descending left S1 nerve root.” Additional injections were planned. Dr. Caldwell also spent 15 minutes coordinating care with Ms. Grob. (CX 27, p. 1; RX NN, pp. D0234-36, D0248-51; RX NN-4, pp. 1-3)

Complainant returned to Dr. Headapohl and Ms. Colledge on May 20, 2013, and was continued on modified duty. He reported general improvement, but a recent flare-up. Flare-ups were caused by sitting in a vehicle. (RX NN, pp. D0210, D0222-23, D0225-29.) More injections with Dr. Caldwell were authorized on May 21, 2013. (CX 28, p. 1; CX 29, p. 1; RX NN, p. D0214.) On May 21, 2013, Ms. Grob also authorized requests on behalf of Ms. Duhamé from the Montana Spine and Pain Center for 11 sessions of “pain school” and a psychological evaluation with Dr. Patrick Davis. (CX 30, p. 1; CX 31, p.1; RX NN, pp. D0213, D0215; *see also* RX NN, pp. D0242-43, D0245-46 (referrals from Dr. Caldwell for pain school and psychological examination).) In a May 30, 2013, letter to Ms. Colledge, Mr. Cordial reported that Complainant was making steady improvement and that his exercise tolerance was increasing. (RX NN, p. D3804.) On May 30, 2013, Complainant saw Dr. Headapohl and reported progress with the injections and physical therapy. (RX NN, p. D0205.) Complainant received transforaminal epidural steroid and intra-articular facet injections from Dr. Caldwell on May 31, 2013. (RX NN, pp. D0199-0202.)

Ms. Colledge examined Complainant on June 3, 2013, and noted that he continued to get injections with Dr. Caldwell, was going to pain school, continued in physical therapy, and was doing well on modified duty. (RX NN, pp. D0146-48, *see also id.* at D0177-98.) He attended

pain school with Dr. Davis, though he did not participate verbally, on June 11 and 18, 2013. (RX NN, pp. D0161; D0175.) Dr. Caldwell gave Complainant a left piriformis trigger point injection on June 13, 2013. (RX NN, pp. D0171-73.) On June 14, 2013, Complainant dropped from three to two physical therapy sessions per week with Mr. Cordial. (CX 32, p. 1; RX NN, p. D0174.) On June 24, 2013, Ms. Colledge opined that Complainant was not yet at MMI and should remain on modified duty. Continued physical therapy, work hardening, and an ergonomic evaluation of his work duties and truck were planned. She estimated he might reach MMI and return to full duty in 3 weeks. (CX 33, p. 1; CX 34, p. 1; RX NN, pp. D0122, D0149-51, D0153-60.)

Complainant sent a blank e-mail to Mr. Johnson on June 27, 2013, with the subject, "I am going to head home, my back is killing me." (RX Q, p. P0129.) Dr. Davis met with Complainant for a behavioral health assessment on June 28, 2013. Complainant expressed anger with MRL for his injury and perceived non-accommodation in purchasing the vehicle he wanted. He stated that he had improved greatly, only experiencing flares of pain when in the truck for too long. Managing the pain interfered with sleep, work, and life activities. They discussed the possibility that anxiety was playing a role in his pain symptoms surrounding riding in the company vehicle. Dr. Davis recommended continuation of pain school and 6 sessions of individual therapy. (RX NN, pp. D0137-42, D0162-66.) On July 3, 2013, 6 sessions with Dr. Davis were authorized. (RX NN, pp. D0132-33.)

By this point in his treatment, Complainant recalled that he had received trigger point injections from Ms. Colledge and facet and spinal injections from Dr. Caldwell. He received between 25 and 30 of these and Dr. Caldwell has told him that he will probably need them roughly every 6 months. (HT, pp. 100-01.) The injections didn't help at first, but some of them did start to work and by some point in April to June he started to feel a little bit better. (*Id.* at 101.) He stated that he returned to regular duty sometime in July 2013. (*Id.* at 102.)

On July 11, 2013, Dr. Headapohl determined that Complainant had reached MMI and released him to full duty, with instructions to continue his home exercise program and care. (CX 36, p. 1; RX NN, p. D0130.) Complainant testified that he did not agree with the determination that he had reached MMI because he didn't think he was 100% and that the shots were just masking his pain. He understood, however, that MMI didn't mean that he was 100% but just that he was medically stable. (HT, pp. 102-03.) Complainant explained that when he returned to work in July 2013 he was on his feet but still had some restrictions and things that would bug him. In particular, driving in the company vehicles was a "big problem." (*Id.* at 102-03.) He continued to receive physical therapy from Mr. Cordial until he was discharged into a home exercise program on July 12, 2013. At discharge, Mr. Cordial believed that Complainant "is fit to return to work without restrictions." (RX NN, pp. D0120-21, D0123-26; *see also id.* at D3690 (July 10, 2013 letter to Dr. Headapohl).)

Complainant also saw Dr. Davis on July 11, 2013, and reported that he had been declared MMI, that MRL had procured the vehicle he had wanted, and that he was told to engage in activity as tolerated. (RX NN, pp. 0127-29.) Complainant saw Dr. Davis for another individual session on July 25, 2013. They discussed his recent return to work and Complainant's "more laid-back attitude about his work." Complainant had also recently purchased a boat. (*Id.* at D0114-16.) On July 25<sup>th</sup>, Complainant also e-mailed James Crawford, the Vehicle Fleet

Manager at MRL, saying that the seat in his Ford work truck was better but that it still had inadequate support. Complainant had determined that installing the proper support would cost \$300.00. Mr. Crawford approved the expenditure the same day. (CX 39, p. 1.)

On August 1 and 8, 2013, Complainant attended sessions of pain school with Jeffrey L. Schroeder, PhD. (*Id.* at D0111-12.) Dr. Davis saw Complainant individually on August 15, 2013. Complainant reported that his return to full duty had gone well, MRL had provided him with the vehicle he had been seeking, and that he was able to tolerate riding in the company vehicle, though he had cut back on some of his recreational activities. (RX NN, pp. D3671-73.) Complainant continued to attend pain school group sessions with Dr. Davis on August 22, 2013, August 29, 2013, September 5, 2013, and September 19, 2013. (*Id.* at D0104, D0107-08, D0110.) During the last two sessions he only stayed for half of the session and “did not participate verbally to any significant degree.” (*Id.* at D0104, D0107.) Complainant testified that he continued to report back and leg problems into September 2013. (HT, p. 107.)

### ***G. Performance Review and Discipline***

In September 2013 Mr. Johnson became concerned that Complainant wasn't performing his duties because he received complaints from both Mr. Gonzalez and Mr. Vanek. All of the communications sites are connected to one “trap server,” which records various alarms, including alarms whenever someone enters or leaves the building. Mr. Johnson received complaints that the trap server records showed that Complainant would drive to a site but then enter and exit in a short time when no work could have been completed and wasn't triggering the other alarms that normally would go off when work was being done. His co-workers were worried that Complainant wasn't keeping his section of the railway in order, which could create problems across the system. (*Id.* at 218-21; *see also id.* at 261-64; RX JJ, pp. D1031-53 (trap server reports from May 23, 2013 to October 10, 2013 for Plains, one of Complainant's sites (*see* RX SS-1)); HT, pp. 560-62 (Complainant's explanation of the trap servers and records).) Mr. Johnson estimated that at a minimum, checking on a site would take half an hour to an hour. (*Id.* at 264.) There might be an occasion on which an employee would only go in to a site to get something, but only “[o]nce in a great while.” (*Id.* at 265.) Complainant claimed that he was in and out of the buildings in short periods of time in some cases because his back was hurting and that in general he keeps spare equipment and tools at some of the sites because it doesn't fit in his truck. (*Id.* at 562-64.)

Mr. Vanek testified that he reported concerns to Mr. Johnson about Complainant's work performance when he noticed short-term entry alarms at some of the communications sites, which made him believe that Complainant wasn't doing his job. (*Id.* at 291.) He explained that work is necessary at the sites and he learned that Complainant wasn't triggering alarms associated with actually doing work beyond the entry alarms. He noticed this because he checks the server about twice a day since what is happening in one part of the system can have effects throughout. (*Id.* at 291-92.) His main complaint to Mr. Johnson involved the short term entry alarms of only a few minutes. He noticed many of these after Complainant had returned to full duty. (*Id.* at 292-93.) Mr. Vanek thought Complainant returned to full duty in July and he made the complaints 3-5 times during the summer and fall during his weekly conversations with Mr. Johnson about what he had been working on that week. (*Id.* at 293-94.) Mr. Vanek recalled that

Mr. Johnson didn't respond directly to his complaints and didn't provide any more information about Complainant's condition beyond that he had hurt his back. (*Id.* at 294-95.)

Mr. Johnson was also concerned because when he called each of his employees at the start of the week to learn their plans, Complainant would report the same thing over a series of weeks. When he talked to his employees at the end of the week to get reports on what they had done and any overtime, Complainant would report only work that should have taken a short amount of time. (*Id.* at 221-22.) Further, Mr. Johnson noticed that sometimes he knew Complainant was supposed to be working in Missoula, but his truck wouldn't be at the shop or in the yard at the worksite. (*Id.* at 222.) Mr. Johnson informed Mr. Gustin of his concerns and the complaints of Mr. Gonzalez and Mr. Vanek and asked how they should be handled. Mr. Gustin decided that they needed to be verified one way or another and recommended that Mr. Johnson conduct operations testing. (*Id.* at 522-23, 542-46.)

Stan Boaz, another supervisor, and Mr. Johnson then agreed to conduct an unobserved operations test on Complainant as well as some other employees of Mr. Boaz. (*Id.* at 222-23, 226.) Mr. Johnson explained that there are two ways to conduct operation testing or efficiency testing, go out and work with the employee and observe his or her work or observe the employee covertly, which gives them a better idea of the employee's actual work habits. They are required to conduct such testing and it is standard practice at MRL. (HT, pp. 216-17; *see also id.* at 157-163.) They rented a car to observe him, which is also standard practice at MRL, though Mr. Johnson allowed that he had never previously observed Complainant in this manner. (*Id.* at 246-47.) Nor has he observed Complainant in this matter since. (*Id.* at 255-56.)

Mr. Johnson talked with Complainant on September 25, 2013, and was told that he would be working on "northwestern Energy circuit and fuel trailer." Mr. Boaz and Mr. Johnson observed him at his house just before 10:30 but then could not locate him at the office or any work areas for the next hour. Complainant returned to his house for 30 minutes at 11:30 and then drove on what seemed to be random roads. At 1:00 they located him back at his shop. They then conducted observation of one of Mr. Boaz's employees. On the 26<sup>th</sup> they observed Complainant getting ready at 7:30 and then driving to Avon, Montana with a trailer. He arrived at the Avon café at 10:00 and stayed there for lunch until 10:50, spending most of the time inside. He then drove back to Missoula without the trailer, taking frontage roads for part of the trip. He arrived at his home at 12:30, stayed 15 minutes, and then went to Les Schwab, Gull Boats and RV, and Blue Ribbon. He then went to his shop before going to Modern Machinery to remove radios from retired vehicles. (HT, pp. 225-29; CX 49, p. 1; RX B, pp. D1029-30.)

Mr. Johnson explained that it was odd that they lost Complainant in town because there were only a few places he should have been going for work, and they could not locate him in those places. (HT, p. 225.) They had trouble figuring out what he was doing because sometimes it just seemed like he was driving around. (*Id.* at 226.) The trip to Avon was work-related, except for the long lunch and inexplicable use of backroads to return to Missoula. (*Id.* at 227-28.) They did not have a direct view of the café and so couldn't be sure as to the exact time spent inside. (*Id.* at 252.) At Les Schwab Complainant talked to someone by a boat and then left with some papers. MRL doesn't have a boat Complainant would use. Neither does MRL do any business with Les Schwab. They get their tires from Whalen. (*Id.* at 274.) MRL also doesn't have any business with Gull Boat. MRL does do business with Blue Ribbon, but Complainant

was there for an hour and 15 minutes and nothing MRL had going on could have taken that long. The last activity they observed, at Modern, was work-related. (*Id.* at 228-29.) Complainant submitted time entries to the effect that he had worked complete days on both days. (RX B, pp. D1027-28.)

Complainant did not know that supervisors were following him. (HT, p. 107.) He explained that on September 26, 2013, he had volunteered to transport the trailer they use to haul the 100 gallon fuel tank needed to refill the fuel at some of their facilities to Avon, where it would be transferred to Mr. Vanek. They met, had lunch at the café, transferred the trailer, and then talked a little about the new topper and shelving on Complainant's truck. Complainant then drove back to Missoula, taking the back roads for part of the way. (*Id.* at 108-09.) He explained that he wanted to see how the truck would run on the back roads and that it did not create a significant time difference. (*Id.* at 109.) He admitted that he visited Blue Ribbon, Gull Boats, Les Schwab, and Modern Machinery, but claimed it was all on work business. He went to Blue Ribbon about the topper for his truck, Gull Boats about getting a safer sled trailer he had been working on for several years, Les Schwab to ask about the rear suspension on the truck, and Modern about snowmobiles for work. (*Id.* at 109-10.)

Mr. Johnson reported his findings to Mr. Gustin, who handles the discipline in the engineering department. An efficiency failure was issued<sup>17</sup> and Mr. Gustin decided to discipline Complainant. (HT, pp. 229-30, 232.) Mr. Johnson testified that he did not decide on discipline and that he was not consulted on ultimate discipline decisions in general. (*Id.* at 254.) Mr. Gustin recalled that in their discussion it was decided that the observed conduct was quite serious and a fact-finding needed to be called. (*Id.* at 523-24.) On September 27, 2013, Mr. Gustin called Complainant and told him that they need to see him in person at the office. When they met that afternoon Mr. Gustin explained that they had discovered he had been misusing company time and they couldn't permit him to get away with that. He then gave Complainant a discipline letter. Complainant testified that he tried to explain, but Mr. Gustin directed him to his union representative, Dale Doyle. (HT, pp. 112-13.)

Complainant went directly to Mr. Johnson's office and testified that Mr. Johnson was uncomfortable and asked if Complainant was mad at him. According to Complainant, when he tried to explain what happened, Mr. Johnson said, "Well, you're either with us or you're not. I'm not sure what's wrong with you. You know, you're not the same guy." Complainant stated that he replied, "Dan, I'm hurting, I'm hurting and I am trying to do what I can do but I'm hurt." Mr. Johnson then replied, "Well, maybe railroading isn't something that is for you. And maybe you should think about going down another path." (HT, p. 114.) They just let it go and didn't talk any more about it. (*Id.*) According to Mr. Johnson, Complainant admitted the Les Schwab was personal but when asked about the others just said, "I don't know yet." (*Id.* at 233-24.) At the hearing, Complainant denied admitting that Les Schwab was personal business. (*Id.* at 568.) He explained that he was at Les Schwab to talk to the suspension guys he knew at the shop about how problems on his work truck might be fixed and left with a pamphlet, not a receipt. He thought Les Schwab did business with MRL because he had purchased supplies for MRL at a

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<sup>17</sup> At the hearing, however, Complainant mistakenly claimed that he had not been issued a failure on any efficiency test for September 25 or 26, 2013. (HT, pp. 192-93, 198.)

Les Schwab in a different city. (*Id.* at 564-66.) Mr. Vanek was not being efficiency tested that day and did not receive any formal discipline. (*Id.* at 253.)

Later on September 27<sup>th</sup> Complainant e-mailed Mr. Johnson saying that he was going to Blue Ribbon about a back door leaking on his truck. (CX 37, p. 1.) On September 30<sup>th</sup> he sent Mr. Johnson an e-mail about looking at trailers at Gull. (CX 38, p. 1.) He also sent an e-mail to Mr. Crawford following up on an exchange from July, saying that he had been to Blue Ribbon and Les Schwab about other problems he was having with the truck, mentioning as well that he had taken it on the backroads to see who the transmission and turbo worked together. (CX 39, p. 1; RX J, pp. 2975-76.) Mr. Crawford replied on October 2, 2013, simply stating that Modern could do the additional work. (RX J, p. D2975.) Complainant placed a call to Ms. Grob on September 30, 2013, saying that he may have hurt himself at work on September 26<sup>th</sup> and had been in pain over the weekend but was starting to feel better that day. (RX NN, p. D3844.)

In another e-mail to Mr. Johnson on September 30<sup>th</sup>, Complainant reported that his “back has been something else since last week” and that he had experienced pain and stiffness with weather changes, lying on the ground, and with driving. He was hearing occasional pops in his back. (CX 40, p. 1; *see also* CX 35, pp. 2-3.) He also e-mailed “Scott” at Polaris, copying Mr. Johnson, about sled trailers. (CX 41, p. 1; *see also* RX T, pp. D2638-40.) Mr. Johnson testified that they had been interested in trailers for work at one point, but that was back in 2011. (HT, pp. 234-35.) In fact, on December 28, 2011, Complainant had e-mailed Mr. Johnson about a used sled trailer for snowmobiles that had a safer platform. (CX 1, p. 1; *see also* CX 2, pp. 1-3 (pictures of trailer).) Complainant had also proposed the sled trailer to the “Senior Safety Fund” in October 2012. (RX T, pp. D2635-37.) Complainant e-mailed Mr. Loeffler on September 30, 2013, in response to an earlier solicitation of items for the senior safety council fund, renewing his proposal of a dual sled trailer.<sup>18</sup> (RX KK, p. D4878.) The items mentioned in the various e-mails were not items that Mr. Johnson had discussed with Complainant any time before the efficiency testing. (HT, p. 235.)

MRL records show that on September 27, 2013, Complainant was issued a notice of fact-finding for October 7, 2013, which was later delayed.<sup>19</sup> It was alleged that on both September 25 and 26, 2013, he had conducted personal business while working, in particular that on the 26<sup>th</sup> he had taken a 50 minute lunch and conducted personal errands, but had submitted time records reflecting he was on company time throughout the day. He was informed that past discipline would be taken into account. (RX B, p. D1021, D1024-26) Mr. Gustin explained that, as is typical in discipline hearings, the matter was delayed while Complainant informed and consulted with his union representative, Douglas Maines on this occasion. Mr. Maines and Mr. Gustin then talked about what discipline would be imposed if Complainant waived his fact-finding. (HT, pp. 524-26.)

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<sup>18</sup> This proposal was placed on the “follow-up” list so that more information could be gathered about the request. (RX T, pp. D3938-42; *see also* RX T, p. D2634 (audio of committee deliberations).)

<sup>19</sup> Respondent has included some telephone conversations related to the process between Complainant and Tiffany Crawford as RX U.

On October 18, 2013 Complainant signed this statement:

I admit that I violated [MRL GCOR] 1.15, 1.6 (4&5) and paragraph ‘Any act of hostility, misconduct, or willful disregard or negligence affection the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty of to the performance of duty will not be tolerated.’ and [GSR] G-1 1(f)...when I conducted personal business on September 25, 2013, including visits to my residence without permission from a supervisor and submitted time to the payroll system which did not accurately reflect actual time spent in the service of [MRL]...as well as on September 26, 2013, when I took approximately fifty (50) minutes for a meal period rather than the allotted thirty (30) minutes; which was not reflected on the time I submitted...

(RX B, p. D1022 (emphasis removed).)

He waived the fact-finding session and agreed to a 10 day suspension that was waived so long as no other violations occurred in the next 18 months. (*Id.*) A note reflecting the violation and discipline was also entered into his personal record. That note would be removed if no further discipline was assessed in the next three years. (*Id.*) Douglas Maines also signed the letter on October 18, 2013. (*Id.* at D1023.) Complainant admitted that he signed the second discipline letter. (HT, p. 125, 167-70.) He didn’t think Mr. Vanek had been disciplined. (*Id.* at 126.) Mr. Gustin explained that the discipline that was assessed was the lowest that their policy would allow for a serious rules infraction and that they also waived that discipline and made it a record suspension based on leniency so that Complainant wouldn’t have to lose any time or earnings. (*Id.* at 526.) Mr. Gustin testified that Complainant’s injury report had no bearing at all on his decisions to discipline Complainant for the April 2013 or the September 2013 incident. (*Id.* at 527-28.) According to Complainant, after the discipline he “[m]oved forward” and continued to do his job. He did not feel intimidated by his treatment by Mr. Johnson and believed that Mr. Johnson continued to trust him and he was able to effectively perform his job. (*Id.* at 170-71.)

#### ***H. Second Injury and Subsequent Events to the Hearing***

On October 22, 2013, Complainant suffered a second injury. He was getting fuel to take to a microwave site and his back felt “pretty messed up.” When a stepped down from the trailer at the gas station he heard two pops and then felt quite a bit of pain. He went to the microwave site, unhooked the trailer, and did some stretching. He was still feeling pain, so he called Mr. Johnson and told him that he had aggravated his back and would need to be taken to the emergency room when he got back to Missoula. He then returned to Missoula, went home to get his pain pills, and then went to the ER. (HT, pp. 116-18.) Mr. Johnson drove Complainant to the ER, but otherwise was not involved. (*Id.* at 209-10.) The ER doctor, Dr. Gary Muskett, prescribed pain medicine and muscle relaxants. An x-ray of the lumbar spine should mild multilevel degenerative disc disease, but no fracture, subluxation, or dislocation. Dr. Muskett instructed Complainant to “Followup [sic] with your regular provider or Dr. Sherry Reed to discuss symptoms.” (CX 42, pp. 1-3; RX OO, p. D3243; *see also* RX OO, pp. D3232-41.)

Complainant filed an injury report with MRL on October 23, 2013, describing the injury as “stepped down/off fuel trailer, left foot landing, jarring left back area, hard two pops in lower spine area. Immediate pain & stiffness. Left leg nerve pain, pins & needles, knumbness [sic].” (CX 46, p. 1; RX MM, p. D1199; RX OO, p. D0009.) On the same day, Mr. Johnson filed a formal report notifying TRS and MRL debriefed the incident. (See RX OO, pp. D0014-46.) Ms. Duhamé sent Complainant a letter on October 23<sup>rd</sup> about the wellness program, requesting that he sign a release. (RX BB, p. D004; see also HT, pp. 142-44.) Complainant signed this release on December 15, 2013. (RX DD, pp. D3244-45.) Ms. Duhamé also referred the injury to Stevenson Consulting for management on October 23, 2013. (RX OO-1.) Ms. Grob sent Complainant a letter on October 31, 2013, informing him that, as before, Stevenson Consulting Services would be managing his care and asking that he complete and return a release. (RX GG, pp. D3070-71; RX OO, pp. D3070-71; see also HT, pp. 146-48.) Complainant signed this release on November 19, 2013. (RX HH, p. D3141.)

On October 28, 2013, Complainant e-mailed Mr. Johnson about upcoming appointments and noted that he had been trying to get more shots, but there had been delays getting approval. (CX 25, p. 1.) He was also seeking to see Dr. Sherry Reed. (*Id.* at 2.) Complainant did see Ms. Colledge on October 28, 2013. She gave him some trigger point injections, referred him to Dr. Caldwell at the pain clinic, referred him to Mr. Cordial for physical therapy beginning on October 31, 2013, and took him off of work for a week to rest. (RX OO, pp. D0002-08, D0067-70, D0073-77, D0082-92, D3167-69, D3229-31.) On October 30, 2013, Dr. Caldwell examined Complainant and discussed the injury with both Complainant and Ms. Grob. Dr. Caldwell recommended additional facet and transforaminal epidural steroid injections as well as a left lower extremity EMG test. (RX OO, pp. D0054-57; see also *id.* at D0059-64, D3087-88, D3226-27.) Ms. Grob authorized, on behalf of Ms. Duhamé, further treatment by Dr. Caldwell and a left lower extremity EMG that day. (RX OO, pp. D0049-50.) On October 31, 2013, Complainant began physical therapy with Mr. Cordial, which continued through March 28, 2014. (RX OO, pp. D1892-94, D1906-17, D3932.)

Complainant followed-up with Ms. Colledge on November 4, 2013. She prescribed muscle relaxants and planned physical therapy and further injections. She returned Complainant to modified duty. (RX OO, pp. D0079-80, D3165-66, D3213-14, D3217-22.) Dr. Karen Nelson conducted neuro-electrophysiologic testing on Complainant on November 4, 2013. The testing showed “the absence of frank denervation in the left lower limb. There are no findings to support a left mid to lower lumbar or upper sacral radiculopathy.” (RX OO-2, pp. 1-2; see also RX OO, pp. D3084-86, D3223-25..) Complainant was told that these were good results showing normal function. (HT, p. 180.) Complainant e-mailed Mr. Johnson several times in the first half of November, keeping Mr. Johnson up to date about his treatment schedule and condition. (RX OO, pp. D3142-43.) On November 8, 2013, Dr. Caldwell gave Complainant bilateral L5-S1 transforaminal steroid injections and bilateral L5-S1 intra-articular facet injections. (RX OO, pp. D3209-12.)

Ms. Colledge saw Complainant again on November 19, 2013. He reported continued pain that had been aggravated with working light duty. MRL had recommended going off-duty for two weeks so he could rest and do physical therapy. They discussed his prognosis for recovery, and Ms. Colledge opined that he would eventually be able to return to his job of injury. She recommended a one-time psychological evaluation with Dr. Terri Reid and placed him off-

duty. (RX OO, pp. D3162-64, D3175-76, D3204-06.) Dr. Caldwell examined Complainant on November 21, 2013, following up on recent bilateral L5-S1 intra-articular facet and transforaminal epidural steroid injections. Complainant reported 30% initial relief and gradual improvement since then. Dr. Caldwell also reviewed a recent EMG, which had come back normal, indicating “that though the nerve is irritated at times because of some mild compression in certain positions, you’re not in danger as you continue to return to full activities without restriction.” Dr. Caldwell supported continued physical therapy with Mr. Cordial and opined that future injections would be appropriate during flare-ups, so long as he received only 3 in each 12 month period. (CX 43, pp. 1-2; RX OO, pp. 3197-201.)

Dr. Headapohl examined Complainant on December 3, 2013, and recorded that he had been taken off of work by his supervisor after his symptoms were being aggravated by multiple workplace activities. She concurred with Ms. Colledge’s recommendation for an evaluation by a psychologist to explore barriers to recovery. They discussed the progression of his symptoms and his ability to do his job. He reported increased “nerve pain” and groin pain, as well as some numbness and pins and needles sensation. Dr. Headapohl noted that the EMGs were negative for radiculopathy, but Complainant was nonetheless requesting referral to a neurosurgeon. Dr. Headapohl continued him on off-duty status. (RX OO, pp. D3161-62, D3173-74, D3195-96, D3360-63.) Complainant reported some relief to Ms. Colledge on December 10, 2013, but continued to experience left groin pain and pain with working activities. He was continued off-duty. (RX OO, pp. D3159-60, D3171-72, D3182-90, D3192-94, D3345-58.) On December 17, 2013, Complainant returned to Ms. Colledge. He continued in off-duty status and she recommended a neuropsychological evaluation with Dr. Terri Reed. She also planned to request that Dr. Nelson take over primary treatment and accept Complainant into “their multidisciplinary pain clinic.” (RX OO, pp. D3146-49, D3255, D3335-39.)

On January 7, 2015, Ms. Colledge saw Complainant and released him to possible modified duty, though he remained off work. She recommended a follow-up with Dr. Nelson for the purposes of a second opinion about the EMG testing as well as with psychologist Dr. Terri Reed. Complainant reported “nerve pain” and was transitioning from hydrocodone to Lyrica. Ms. Colledge again expressed interest in transferring management of the case to one of the doctors at the pain clinic so he could receive “a consistent multidisciplinary approach to pain relief.” (RX OO, pp. D3327-32.) According to Complainant, however, Dr. Caldwell didn’t want to be Complainant’s treating physician and preferred that Dr. Headapohl remain the point person for workers’ compensation purposes. (HT, pp. 100-01.) According to Ms. Grob’s notes, referral to a neurologist or neurosurgeon was discussed but Ms. Colledge explained that she “would not recommend a neuro eval as they would have nothing to offer and does not recommend neurosx consult as that would not be a good option for [Complainant].” (CX 59, pp. SCS 468-69.) Complainant followed-up with Dr. Nelson on January 22, 2014. She went over the EMG test with him because he had been seeking a second opinion about the test. She explained the results, but deferred other questions and recommendations to his treating physicians because she and Dr. Caldwell were in the same practice and Dr. Caldwell was better able to address his care. (RX OO, pp. 3322-26.) Complainant testified that he had been seeking to see a neurologist, but was sent to Dr. Nelson, who didn’t really know why he was there. (HT, p. 188.)

Theresa Reed, Ph.D., PC evaluated Complainant on February 13, 2014. The evaluation included an interview, psychological testing, and record review. Complainant expressed frustration because he thought he had been returned to full-duty work too soon in July 2013 and this had led to the later aggravation that currently had him off of work. He continued to experience pain, though he reported improvement and expressed that he might be able to return to work in six weeks, though he was also anxious to do so and to resume active recreational activities. (RX OO, pp. D3262-63; *see also id.* at D3311-16.) Dr. Terri Reed opined that Complainant had many psychological strengths but also some “risk factors” that might lead to non-compliance and complicate his recovery. She opined that he may have a personality disorder that would interfere with treatment in that he may tend to be “domineering and overbearing” and “get into power struggles with providers.” Complainant had some narcissistic tendencies, might be uncomfortable as a patient, might “have an unusually strong need to be in control of medical decision making,” and “[t]rust is a significant issue with him.” (*Id.* at D3266.) Though Complainant was anxious to return to work, he was also worried about re-injuring himself and so was delaying. She opined that this was not for secondary gain, but due to the “personality features” she identified. (*Id.* at D3267.)

Dr. Headapohl and Ms. Colledge examined Complainant on February 24, 2014, as part of a case review. Complainant had been off of work for three months. He reported several trips to Helena for treatment by the VA, where he had received an MRI with no new significant structural findings. His pain was much improved, triggered only by activities in physical therapy. Dr. Headapohl determined that he had reached MMI, approved of four more weeks of physical therapy with Mr. Cordial, and opined that before he could return to work he needed to have a functional capacity evaluation (“FCE”). Referral to a neurologist or neurosurgeon was again discussed, but Complainant was told that it was not indicated. (CX 59, p. SCS 476; RX OO, pp. D1895-905; *see also* RX OO, pp. D3269-91, D3297-310; HT, pp. 452-54.) Complainant followed-up with Ms. Colledge on March 18, 2014, reporting that he felt groin pain when on his back, but was “the best he’s felt in over a year.” Complainant requested a referral to neurology and/or neurosurgery but Ms. Colledge opined that this was inappropriate given Complainant’s condition. She requested a functional capacity evaluation, which was approved. (RX OO, pp. D1888-91; D3292-93)

Mr. Cordial wrote a letter to Ms. Colledge on March 28, 2014, detailing his course of treatment for Complainant’s second injury—52 physical therapy treatments since October 31, 2013. He reported that Complainant was “fully rehabilitated and...fit to return to work without restrictions.” Complainant had been instructed on home exercises. Mr. Cordial noted that Complainant’s “symptoms have improved, but he still has occasional complaints of low back pain, left greater than right, bilateral SI pain, left glute medius pain, as well as radicular pain...” (RX OO-3, pp. 1-2.)

On March 31 and April 1, 2014, Complainant underwent an FCE conducted by Richard Smith at Missoula Physical Therapy. Complainant was cooperative throughout and provided consistent performance with no pain behavior. The FCE showed no significant deficiencies and Mr. Smith determined that Complainant could perform his job as a communications technician without restriction. (RX OO-4, pp. 1, 3-4; *see also* RX OO, pp. D1860-86, D3366-78.)

Complainant was examined by Ms. Colledge on April 9, 2014, who deemed his recovery over the last few months “excellent.” He reported no pain during the day and 2/10 pain at night in his left lower back and believed that he was ready to return to full time work without restrictions. After reviewing the case with Dr. Headapohl and examining Complainant, Ms. Colledge determined that he had reached MMI with no permanent disability or impairment and released him to work without restrictions, with instructions to follow-up as necessary. She anticipated that future therapy with Mr. Cordial or injections with Dr. Caldwell might be necessary at some point, but that “[t]here is no need for referral to neurology or neurosurgery and I concur with the VA on this.” (RX OO-5, pp. 1-2; *see also* RX OO, pp. D1845-58, D3380-81.)

Through February 2014, for Complainant’s December 5, 2012, injury, MRL paid medical benefits for a total of \$39,091.96 and \$19,978.00 in wage continuation benefits. (CX 55, pp. 1-3 RX C, pp. D1102-05.) For Complainant’s October 22, 2013, injury, through May 2014, the Wellness Program paid \$25,968.05 in medical benefits and \$32,499.29 in wage continuation benefits. (RX D, pp. D1106-08.) Ms. Duhamé was not aware of any outstanding bills on either of Complainant’s claims under the Wellness Plan and that Complainant had reported none to her. (HT, p. 329.) Complainant had filed no appeals as allowed by the Wellness Plan contesting his care. (*Id.* at 330.) She testified that she administered his claims in the same manner as she did for all other employees of MRL. (*Id.*)

On June 16, 2014, Complainant hit a deer on the interstate, causing \$3,574.51 in damage. (RX S, pp. D1969-75.) Complainant e-mailed Mr. Johnson, copying Ms. Duhamé, on June 26, 2014, with an update on his status. He reported that he had felt great when he returned to work, but was having problems with the new truck he had been assigned after he hit the deer and damaged the truck he was using. (RX OO, p. D2722.) Mr. Johnson replied on July 1, 2014, copying Ms. Duhamé, thanking Complainant for the update but stating that his “understanding is that your current status is unrestricted medically, including with regard to vehicles. If there are any changes in your status or your doctor’s recommendations, please let me know and, as always, I’ll work with you to try to find a reasonable accommodation.” (*Id.* at D2723.) Complainant doesn’t believe that MRL took his complaints about pain while driving the work truck seriously. (HT, p. 197.) He complained at the hearing that his current vehicle was maxed out weight-wise with all of the material he carries and “it rides like a dolphin, a porpoise all of the time.” The seat was too low and hurt his legs. (*Id.* at 105-06.) He allowed, however, that MRL had provided a number of different vehicles to him to increase his comfort driving and had adjusted his workstation so that he now has “minimal pain” when working there. (*Id.* at 186-87.)

Mr. Johnson has conducted efficiency tests on Complainant since his failure in September 2013 and resulting discipline, but hasn’t failed Complainant on anything. (HT, p. 263.) Records generated by Respondent of the efficiency tests conducted by Mr. Johnson on Complainant show efficiency tests of 173 rules on 78 different occasions between January 22, 2008, and May 28, 2014.<sup>20</sup> (*Id.* at 276; RX PP-1, pp. D3933-36.) There are only three failures: 1) a test of NG1.1.2 on June 12, 2009, that resulted in an informal verbal warning; 2) the missed appointment on April 19, 2013 that resulted in a written letter of censure; and 3) the misuse of

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<sup>20</sup> Since Mr. Johnson did not personally generate this summary, he couldn’t be sure that it referenced every efficiency test he had conducted on Complainant. (HT, p. 276.) Mr. Gustin, however, was familiar with how the document was generated and testified that it catalogued all operations tests of Complainant in that time period. (*Id.* at 517.)

company time on September 26, 2013 that resulted in the initiation of formal discipline. (HT, pp. 277-80; RX PP-1, pp. D3933-35.) Sixty-six of the efficiency tests precede Complainants first injury and 12 follow it. (RX PP-1, pp. D2933-36.)

Complainant testified that he has not gone to see the neurologist Dr. Sherry Reed because MRL hasn't approved it, despite his requests. His injury is "coded" workers' compensation, so he cannot see Dr. Reed without MRL approving it. He didn't understand what was happening, but just knew that he wasn't being allowed to see a neurologist or a neurosurgeon. (HT, pp. 119-20.) Ms. Duhamé allowed that she had seen a reference to Dr. Sherry Reed in one of the reports/bills submitted to and paid by the Wellness Plan, but explained that she has never been asked to approve of a referral to Dr. Reed. (*Id.* at 364-65.) The emergency room instruction was to follow-up with his regular physician or Dr. Reed, and Complainant followed-up with his regular provider. (*Id.* at 366.) Ms. Duhamé explained, "I don't make medical recommendations or referrals. If there is a recommendation from the treating medical provider for a referral, that's something Mr. Wevers could pursue under the Wellness Program and we'd evaluate the request when it came in just like we do every other benefit." (*Id.* at 367.) The same held for treatment by a neurosurgeon—if a medical provider made the recommendation for such a referral she would evaluate it like any other recommendation. (*Id.* at 368-69.) At this point, Complainant is at MMI and has no further treatment recommendations. If he wishes to receive more medical treatment he needs to coordinate with his case manager or ask Ms. Duhamé. (*Id.* at 382.)

Ms. Grob explained that treatment by a neurosurgeon would be indicated by findings on an EMG, but in this case the EMG conducted by Dr. Nelson did not produce such findings, which is why Dr. Nelson did not refer Complainant to a neurosurgeon. (*Id.* at 404-06.) Dr. Caldwell did not refer Complainant to a neurosurgeon either. (*Id.* at 407.) Complainant stated that Dr. Caldwell told him he did not want to do referring and that Dr. Headapohl should do that. (*Id.* at 181.) Ms. Grob stated Complainant had asked to see Dr. Sherry Reed or another neurologist several times in the course of his treatment with other doctors, but that the only provider to reference Dr. Reed as part of a referral came from the ER where Complainant was instructed to follow-up with his treating physician or Dr. Reed. (*Id.* at 425-26.) Though the referral was discussed over months, the treating physicians never recommended it, so Ms. Grob never set an appointment up. (*Id.* at 426-28, 442-47.)

When Ms. Grob received the referral note from the ER she didn't ask Complainant if he wanted to see Dr. Reed since he already had scheduled appointments with Dr. Headapohl/Ms. Colledge as well as with Dr. Caldwell. (*Id.* at 439-40.) Whenever a treating physician made a referral or recommendation for further treatment, Ms. Grob would facilitate approval and authorization from MRL. In addition to the care with his treating physicians, MRL authorized physical therapy, care with Dr. Caldwell, appointments with Dr. Nelson, psychological evaluation and treatment with Dr. Davis, pain school, as well as psychological evaluation by Dr. Reed. Ms. Grob testified that never did MRL refuse to authorize any of the treatment recommendations and referrals that she forwarded. (*Id.* at 407-10, 462-70.) But referrals had to come from treating physician; Complainant couldn't just refer himself for a particular course of treatment or to see a particular specialist. (*Id.* at 492.)

Ms. Grob didn't recall that Complainant ever complained to her about her involvement in managing his case. Per her normal protocol, when she is at an appointment she asks the client if they would like to see the provider privately or with her present. She will also sometimes talk to the providers at the end of the appointment to discuss the treatment plan. She followed this protocol with Complainant. (*Id.* at 400-01.) Complainant didn't specifically ask Ms. Grob to attend appointments with him and didn't know that Stevenson Consulting worked with MRL regularly. (*Id.* at 189-90.) Complainant admitted that he signed the various releases in this case for participation in the Wellness Program and to have a Nurse Case Manager that informed him that they were optional. But he claimed to have never read the details and thought he had to have a nurse case manager. He never revoked any of his authorizations and he has never filed an appeal of his benefits under the program. He never told Ms. Grob he didn't want a nurse case manager and found her services "somewhat" useful. (*Id.* at 140-49.)

Since his second injury Complainant has continued to see Dr. Headapohl and Ms. Colledge and has continued to receive physical therapy and shots, which have all been approved. (*Id.* at 120-21.) He testified that his MRI's were explained to him by Ms. Colledge, which he didn't like because she is a physician's assistant. He has asked for referrals to a back specialist but has been told that they are either awaiting approval or he doesn't need to see such a specialist. (*Id.* at 106-07.) His concern with his treatment is that he remains symptomatic and "I don't want a PA, with all due respect, telling me that I have to—it's something I have to live with. I want a neurosurgeon to tell me that, to look at my MRIs and to tell me if there is more, other than facet injections, maybe some more (inaudible) stuff, or any other procedure that would alleviate a lot of this nerve stuff that's going on." (*Id.* at 121.) He has also sought some care through the VA, but does not have access to a neurologist or neurosurgeon. (*Id.* at 122-23.) To Ms. Grob's knowledge, the VA had conducted an MRI and had not referred him to a neurologist or neurosurgeon. (*Id.* at 410, 482.)

Over time, Complainant developed the sense that people at MRL and the doctors were communicating about him and his injury behind his back. (*Id.* at 86.) He didn't like suggestions that he see a mental health professional when they wouldn't send him to a neurosurgeon. (*Id.*) He explained that he had heard about treatment options that might minimize or eliminate his pain and that "I would like to see a neurosurgeon to look at the nerve root, back, spine area who has expertise in that to tell me whether, at my age, whether surgery or living with it are my options. I don't want a PA or general doctor telling me that. I want a specialist to tell me that." (*Id.* at 196.) He admitted, however, that he didn't know what criteria neurosurgeons use to determine whether to see a patient and that he had tried to set up an appointment with a neurosurgeon but was unable to procure one. (*Id.* at 198-99.) Complainant opined that his time with MRL would be short because of "everything that has gone on. I think—I mean, you can see it in my supervisors' e-mails. They're ridiculing me and making fun of me. The harassment with [Mr. Gonzalez] continues. It's a hostile work environment." (*Id.* at 126)

## **V. Credibility Determinations**

In arriving at a decision, the finder of fact is entitled to determine the credibility of witnesses, to weigh evidence, to draw her own inferences from evidence, and is not bound to accept the opinion or theory of any particular witness. *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968), *reh'g denied*, 391 U.S. 929 (1968); *Atlantic Marine, Inc. v. Bruce*,

661 F.2d 898, 900 (5<sup>th</sup> Cir. 1981); *Duhagon v. Metro. Stevedore Co.*, 31 BRBS 98, 101 (1997), *aff'd*, 169 F.3d 615 (9<sup>th</sup> Cir. 1999). An ALJ is not bound to believe or disbelieve the entirety of a witness' testimony, but may choose to believe only certain portions of it. *Altemose Constr. Co. v. Nat'l Labor Relations Bd.*, 514 F.2d 8, 16 n.5 (3<sup>d</sup> Cir. 1975).

The ARB has stated its preference that ALJs “delineate the specific credibility determinations for each witness,” though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). In weighing the testimony of witnesses, the ALJ as fact finder may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony, and the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006).

Having heard the witnesses' testimony, I have been able to observe their behavior, bearing, manner and appearance. The Ninth Circuit has explained that credibility “involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.” *Carbo v. U.S.*, 314 F.2d 718, 749 (9<sup>th</sup> Cir. 1963); *see also Indiana Metal Prods. v. Nat'l Labor Relations Bd.*, 442 F.2d 46, 52 (7<sup>th</sup> Cir. 1971). I have based my credibility findings on a review of the entire testimonial record and exhibits, according due regard to the demeanor of witnesses who testified before me, the logic of probability, and “the test of plausibility,” in light of all circumstances apparent to me from the record. *Indiana Metal*, 442 F.2d at 52.

#### ***A. Complainant's Credibility***

Though I find that Complainant was generally honest in his testimony, for several reasons I find him only moderately credible. First, Complainant's explanation of what happened when he missed the April 19, 2013, physical therapy session is not believable. He testified that on that afternoon he went home with the intention of making the appointment, took his pills, sat in his recliner, and then fell asleep, thereafter missing the appointment. (HT, pp. 92-95.) He testified that he had no contact with Mr. Cordial's office about the appointment until the next week. (*Id.* at 98-99.) On the attendance register procured by MRL after the missed appointment, however, Mr. Cordial's office had a note next to the April 19<sup>th</sup> appointment to the effect that Complainant had told the office that he would be unable to attend the appointment because of his work schedule. (HT, p. 213; RX II, p. D0337.)

One of these accounts must be incorrect. There is no evident reason that Mr. Cordial's office would lie about Complainant calling them, and Complainant has suggested none beyond stating that the note is incorrect. Complainant, on the other hand, had plentiful reasons to offer an alternative explanation for what happened that day. On either account, he had just been caught “red-handed,” telling MRL that he would be missing work, while on the clock, to attend an appointment that for whatever reason he did not attend. This could well result in serious discipline and would confirm the reports MRL had received that Complainant was wasting company time, (HT, pp. 212-13)—here exploiting Mr. Johnson's trust in order to go home and take a nap, using the work-related injury and treatment for it as a cover. Clearly in trouble,

Complainant had manifest reasons to try to put the best spin possible on missing the appointment, here by saying that he had planned to go to the appointment but simply fell asleep and missed it. While this would still be malfeasance, it would be considerably less serious and likely result in minimal discipline. The note in the medical records contradicts this account, and it is more credible than Complainant's self-serving attempt to mitigate the potential damage.

Relatedly, I find that Complainant's behavior subsequent to the September 2013 performance review was also dishonest and an attempt to mitigate the potentially quite serious discipline that he was facing by manufacturing evidence explaining his activities. On September 25, 2013, Mr. Boaz and Mr. Johnson observed Complainant seemingly just driving around at random. On the 26<sup>th</sup> they observed him take an over-long lunch, inexplicably take back roads on the return to Missoula, and then make stops at Les Schwab, Gull Boat, and Blue Ribbon. (HT, pp. 225-29; CX 49, p. 1; RX B, pp. D1029-30.) Each of these created potential grave problems for Complainant's future at MRL.

After being informed of the impending fact-finding, which could potentially lead to termination, Complainant started sending e-mails. To explain his use of backroads he e-mailed Mr. Crawford, responding to an e-mail from months earlier, conveniently mentioning that he had recently taken the backroads to test the truck. (CX 39, p. 1; RX J, pp. D2975-76.) He testified he was doing the same at the hearing. (HT, p. 109.) As for the visit to Les Schwab, Complainant mentioned going there in his e-mail to Mr. Crawford to take care of some problems on his truck. (CX 39, p. 1; RX J, pp. D2975-76.) Mr. Crawford simply told him that Modern would do any required work. (RX J, p. D2975.) Mr. Johnson explained that MRL doesn't even do business with Les Schwab. (HT, p. 274.) After hearing this damaging testimony, Complainant had an explanation for that to, adding at the hearing that he thought they did and that he wanted to talk to their suspension guys about the truck. (HT, 564-66.)

To address the trip to Blue Ribbon, Complainant e-mailed Mr. Johnson on September 27<sup>th</sup>, saying he was going back to the store to talk about a back door leak on his truck. (CX 37, p. 1.) He included a mention of Blue Ribbon in his e-mail to Mr. Crawford as well. (CX 39, p. 1; RX J, pp. D2975-76.) Even these e-mails would not explain why he spent an hour and fifteen minutes at the store, an amount of time Mr. Johnson testified was inordinate to any possible work-related business with the shop. (HT, pp. 228-29.) As for the trip to Gull, Complainant sent an e-mail on September 30<sup>th</sup> to Mr. Johnson about looking at snowmobile trailers at the shop. (CX 38, p. 1.) He added to this by e-mailing Polaris, conveniently copying Mr. Johnson, about the same product. (CX 41, p. 1.) But as Mr. Johnson explained, this revived a discussion from all the way back in 2011, not something that was ongoing. (HT, pp. 234-35; *see also* CX 1, p.1.) Complainant further revived this old issue by e-mailing Mr. Loeffler on September 30<sup>th</sup> to propose purchase of a sled trailer as a potential use of a senior safety council fund. (RX T, pp. D2635-37.)

For good measure, Complainant sent another e-mail to Mr. Johnson on the 30<sup>th</sup> complaining about his back being injured. (CX 40, p. 1.) He placed a call to Ms. Grob on the 30<sup>th</sup> as well, stating that he now thought he had been re-injured on the 26<sup>th</sup>, but was now feeling better. (RX NN, p.3844.) It is not clear why, if Complainant had been reinjured, he did not contact Ms. Grob earlier or seek out any treatment from his various providers. Nor is it clear why he would call Ms. Grob at all just to say that he had been injured but was now feeling better.

In short, the evidence shows that Complainant learned of the serious charges on Friday the 27<sup>th</sup> and sent some e-mails that day. After returning to work after the having weekend to consider his position, he sent a flurry of e-mails, conveniently addressing his behavior on the 26<sup>th</sup>. He also suddenly had a flare-up of his injury, dated to the 26<sup>th</sup>, the date subject to discipline, but not reported to anyone until the 30<sup>th</sup>. This is simply all too convenient to be believable. Perhaps covering his tracks in this way might prevail in a disciplinary hearing because it would eliminate the “smoking-gun” nature of the evidence against him, but in assessing Complainant’s credibility here, these actions are not impressive. Most of his explanations come out of nowhere. Mr. Johnson credibly testified that none had been discussed before the efficiency testing. (HT, p. 235.) The sled trailers proposal went nowhere because Complainant didn’t give any detail to the proposal, resurrected from years earlier. (RX T, pp. D2634, D3938-42.) If Complainant was having trouble with his truck he knew what to do—talk to Mr. Johnson or Mr. Crawford. MRL had been extraordinarily accommodating in this regard. It is inexplicable that Complainant would out of the blue spend an afternoon shopping around asking about his truck without having first talked to Mr. Johnson or Mr. Crawford.

The natural explanation of these e-mails and calls is that Complainant was crafting his defense to his impending discipline that could well have resulted in his termination. He did so by creating doubt as to whether his various activities could be deemed work-related. And he upped the ante by reporting, five days after the fact, that he had been subject to a flare-up of his work-related injury on the date for which he was under investigation. The merits of the charges against him, and related question about whether the various activities were work-related, are not the subject of this matter. But I find Complainant’s behavior in manufacturing his defense to those charges dishonest and thus find him less credible generally.

Complainant also was somewhat deceptive about his treatment at the VA. This could potentially be a very important piece of evidence: Complainant argues that he is being thwarted in seeing a neurologist or neurosurgeon by MRL, but as a veteran has an alternative source of medical care available to him that is entirely outside of any influence by MRL. So if he were to go to the VA and be referred to the neurologist or neurosurgeon, and perhaps even receive recommendations from such practitioners for further care, that would be very good evidence that his care by Dr. Headapohl and the others was deficient and suggestive evidence that MRL was somehow interfering with his care. No such evidence has been submitted. In fact, even at the VA Complainant did not see a neurologist or neurosurgeon. At the hearing, Complainant was much too cagey about what happened, stating only that “I don’t have any access to” a neurologist or neurosurgeon at the VA. (HT, p. 123.) Though the form of this answer was partially due to objections from Respondent’s counsel, Complainant could have said that he was not referred to a neurologist or neurosurgeon by the VA. He could also have said that the VA doesn’t have a neurologist or neurosurgeon. Instead, he left it uncertain. While it could well be that Complainant would have to wait a long time to see a neurologist or neurosurgeon at the VA, it would be incredible if none were available to him if a primary care physician at the hospital deemed it appropriate.

Complainant’s testimony as to his appointment with Dr. Nelson is also questionable. In his telling, he wanted to see a neurologist but was sent to Dr. Nelson again in January 2014. He testified that Dr. Nelson “didn’t know why I was there.” (HT, p. 188.) The medical records do not bear this out. Dr. Nelson does not appear confused—Complainant was there to get an

explanation of the EMG studies from Dr. Nelson and that was what Dr. Nelson did, deferring further queries not to Dr. Headapohl or Ms. Colledge, but to Dr. Caldwell, since she shared a practice with Dr. Nelson. (RX OO, 3322-25.) I credit that Complainant was frustrated and somewhat confused, but I do not credit his attempt to insinuate that his other providers beyond Ms. Colledge and Dr. Headapohl were frustrated or confused with the course of treatment.

Finally, I do not find Complainant's account of his frustration with his medical care and attempts to see a neurologist or neurosurgeon wholly credible. While I credit that he wishes to see one of these specialists, or both, he doesn't seem to have put a great deal of effort into trying to make this happen. He presents himself as caught in a bind, unable to procure a referral from Dr. Headapohl and his other providers but unable to see a neurologist or neurosurgeon on his own because his injury is "coded" as workers' compensation. (CPB, p. 14.) As he admitted, however, he only tried to procure such appointments once and did not know what criteria these specialists use to determine whether to see a patient. (HT, pp. 198-99.) One such criterion is almost certainly a referral from another physician. So if Complainant wants to see a neurologist or neurosurgeon, he needs to find a treating physician to refer him to one.

Complainant argues that Dr. Headapohl will not do so, leaving him in this bind. But there are some problems in this account. First, Ms. Colledge and Dr. Headapohl showed interest in ceasing to be Complainant's treating providers, instead passing off care to Dr. Caldwell or Dr. Nelson. (E.g. RX OO, pp. 3327-32.) I find it highly unlikely that Dr. Headapohl and Ms. Colledge are scheming on behalf of MRL to prevent Complainant from seeing a neurologist and neurosurgeon when at the same time they are trying to transfer his care elsewhere.

More importantly, despite professing to be dissatisfied with his treatment and needing a referral that Dr. Headapohl and Ms. Colledge will not provide, the record is devoid of evidence suggesting that Complainant has sought to change treating physicians at *any* point in the history of the case. If he needs a referral and his treating physician won't give him one, the obvious next step is to seek out a different treating physician. Nothing binds him to Dr. Headapohl, and at the least, seeking to change physicians would put the onus on MRL to either let him to procure care elsewhere or risk liability under the FRSA by interfering with his care. Instead of seeking different care, however, Complainant has filed a complaint alleging interference while completely acquiescing in the course of what he claims to be deficient care. This is very puzzling behavior. As such, I treat Complainant's claims and testimony as to his dissatisfaction with his treating physician and efforts to receive alternative care critically and skeptically. His behavior does not match his claims, and hence his claims must be treated with a critical eye.

I do not find that Complainant's testimony was fundamentally dishonest or that he was lying generally. At the hearing, he appeared for the most part honest and gave testimony that was not wholly favorable to his position, such as the testimony that Mr. Johnson never made him feel intimidated and they had been to just move on and work together after the discipline. (HT, pp. 170-71.) Hence, where it otherwise accords with the record, I credit Complainant's testimony. In the various instances mentioned above, however, I place much less weight on Complainant's accounts and treat his claims much more critically. In addition, where there are conflicts as to the exact wording of what was said on a particular occasion, I place less weight on Complainant's account, in part for the reasons stated above and in part because Complainant admitted, when explaining why he was using notes to testify, that he has a poor memory because

of the medications he is on. (HT, pp. 111-12.) If this is so, it is unlikely that Complainant could accurately recall the course of particular conversations years earlier. Such discrepancies, however, are not critical to this case. Moreover, though I find Complainant only moderately credible, the resolution of the complaints here does not turn primarily on this determination.

### ***B. Daniel Johnson's Credibility***

Daniel Johnson is Complainant's direct supervisor in the communications department. (HT, p. 202.) I find Mr. Johnson's testimony credible. In addition, do not find any animosity towards or bias against Complainant or his protected activity. Though Complainant alleges that MRL has violated the FRSA, he has not claimed any such bias—quite the opposite, he testified that Mr. Johnson treated him with respect and relied on him and that he never felt intimidated and has continued to be able to work well under Mr. Johnson since they both simply moved on after the discipline at issue here. (*Id.* at 153, 170-71.)

There is no evidence that shows antipathy to injuries or injury reports by Mr. Johnson. After both injuries at issue he prompted Complainant to report the injury and immediately initiated the reporting and investigation at MRL. In both cases he took Complainant to the hospital when requested and did nothing more except wait for him to be seen. Neither is there any circumstantial evidence of bias or animosity—there is no indication that MRL presents any incentives to Mr. Johnson that would lead him to retaliate against protected activity. If any of his performance standards relate at all to the number of reported injuries or employees on light duty, it is not reflected in the record. On the record before me, the objective incentives MRL gives to Mr. Johnson leave him indifferent to protected activity.

The evidence in this case suggests the opposite conclusion: whenever Complainant needed to miss work, all he had to do was let Mr. Johnson know. (*Id.* at 151.) If he felt pain and needed to go home, he only needed to e-mail Mr. Johnson. (*E.g.* RX Q, p. P0129; RX NN, p. D0299.) In fact, Mr. Johnson appears to be quite liberal in his supervision, placing great trust in his employees—trust that survived the discipline in this case—and giving them latitude in their work, only expecting that they keep him informed and be honest. (HT, pp. 149-50, 210-11.)

Complainant has stressed the e-mail exchanges between Mr. Johnson and Mr. Loeffler as evidence of animosity. Even assuming that the comments in the e-mails suggest animosity, they are uniformly made by Mr. Loeffler, not Mr. Johnson. At most, Mr. Johnson concurs with the statements of *his* supervisor. The exchanges show that when Complainant first presented Mr. Johnson with a schedule involving a great deal of work time at physical therapy, he wasn't sure what to do and sought guidance from Mr. Loeffler. Mr. Loeffler told him that they should just accept whatever Complainant presented since it was a work-related injury. (CX 58, pp. 1-2.) The evidence reflects that Mr. Johnson did just that throughout the course of Complainant's treatment—I find no instance where Mr. Johnson resisted, in the least, any of the medical requests of Complainant for time off. Moreover, when Complainant went off of work for an extended period of time to recover after his second injury, it was Mr. Johnson who suggested the time off to get well, with pay via the Wellness Program. (*E.g.* RX OO, pp. D3162-64.)

The last e-mail exchange between Complainant and Mr. Johnson in evidence suggests some chilling of the relationship. After an accident with a deer put his truck out of service, Complainant complained about the new truck he had been assigned. (RX OO, p. D2722.) In the past, Mr. Johnson, and indeed MRL generally, had gone to great lengths to accommodate Complainant after his injury, whether or not he had a doctor's note, by altering his work station in various ways, procuring him different trucks, allowing him to upgrade his truck in various ways, and even seeking to procure the exact seat model as his personal truck so that he would be more comfortable. On this occasion, however, Mr. Johnson replied some days later and simply stated that MRL would work with him to accommodate any restrictions, but at present it was not aware of any regarding the sort of vehicle he could drive. (*Id.* at D2723.)

This was certainly a more formal, and perhaps chillier, response. But it was reasonable in context. MRL expended a good deal of money attempting to make Complainant comfortable in his truck, and at this point it was manifestly reasonable to make the process more formal and linked to a medical opinion. Moreover, by this point Complainant was involved in extended litigation against MRL. That should not have been, and does not appear to have been, a reason to retaliate in any way against Complainant, but it is a good explanation of why handling requests related to his injuries and the treatment of them would be treated in a much more formal way than in the past. Mr. Johnson was extraordinarily supportive and accommodating of Complainant's recovery. That eventually this support took on a more formal tone does not evidence any animosity against the protected activity of Complainant.

Mr. Gustin expressed admiration for the way Mr. Johnson handled himself in the events surrounding this case. (HT, pp. 557-58.) I agree. The record shows that he behaved professionally throughout and was genuinely concerned for Complainant's well-being. In addition, his testimony was quite clear and Mr. Johnson was very good at sticking to just the facts that were within his personal knowledge. For these reasons, I find Mr. Johnson credible and give his testimony weight.

### ***C. Mark Vanek's Credibility***

Mark Vanek is a communications technician with MRL who operates out of Helena, Montana. He is a co-worker of Complainant and is also supervised by Mr. Johnson. (HT, pp. 290-91.) I find Mr. Vanek to be credible. He quite clearly and matter of factly explained why he was concerned about Complainant's performance, why this was relevant to him, and how he came to develop his concerns. In his normal course of duties he noticed something that legitimately caused him to worry about the maintenance of the communications system. He did not go out of his way to make complaints, instead relaying his concerns in his normal weekly reports to Mr. Johnson. (*Id.* at 291-93.) I detected no animus toward Complainant or his protected activity, there is no reason that Mr. Vanek would have such animus, and Complainant has not alleged any animus. The scope of Mr. Vanek's testimony was limited, but within that scope I credit his testimony.

#### ***D. Jacqueline Duhamé's Credibility***

Jacqueline Duhamé is the director of claims management at MRL. (HT, p. 303.) She joined MRL in 1989 as a clerk in the operating department and advanced through several positions to her current role in 1996. (*Id.* at 304.) Her job involves overseeing “the administration of all medical processes for [MRL] employees,” which includes administering the Wellness Program. (*Id.* at 304-05.) She is also the “Privacy Official” at MRL. (*Id.* at 341.)

I find Ms. Duhamé only moderately credible. Though her testimony appeared honest, she was at times quite evasive. For example, establishing that her letter to Complainant did not explain that the nurse case manager would be reporting back to MRL and that it did not explain that Ms. Duhamé would ultimately be making determinations as to whether to authorize care took an inordinate amount of time at the hearing. (*See* HT, pp. 371-77.) During this exchange I had to intervene to instruct Ms. Duhamé that the questions being posed required simple yes or no answers about whether the referenced material was in the letter, not narrative responses describing other aspects of the letter. (*Id.* at 372.) Even after this instruction Ms. Duhamé persisted in evading simple questions, and I had to intervene again in an attempt to get a clear, straight answer. (*Id.* at 376.) This too was relatively unsuccessful, with Ms. Duhamé eventually claiming that she was confused as to why a question asking whether or not she made the authorization determinations wasn't a question about how claims are submitted for authorization and thus would require her to expound on the references to how claims are submitted instead of simply replying that the letter doesn't flat out say that she makes the final determination on whether care will be authorized. (*Id.* at 377.) Counsel thereafter gave up, wisely, and let the letter speak for itself. (*Id.*) The ultimate issue is relatively unimportant and has no bearing on my decision below. As such, I do not understand why Ms. Duhamé was being so evasive on this point, as if tactically attempting to resist giving *any* straight answers to the questions posed.

In addition, on the simple question of whether or not Complainant could be authorized to see a neurologist or neurosurgeon, Ms. Duhamé was surprisingly slippery. (*See* HT, pp. 364-69.) The point she made was simply that she hadn't received a definite referral to a neurologist or neurosurgeon, so hadn't had the occasion to approve or deny the request. Pressed as to whether such a request would be approved, Ms. Duhamé would only say that she would review it if it came in, but it hadn't so she could give no answer. The more obvious response would have been that given the criteria for approval, if such a request came in from a treating provider, then it would likely be approved whereas if Complainant put in the authorization request himself, it would not. Ms. Duhamé wouldn't even go this far, unreasonably refusing to consider the hypothetical other than saying that it would be evaluated. It is her job to evaluate such requests, and she should have been able to explain *how* they are evaluated and how a request to see a neurologist or neurosurgeon would be treated. Ms. Duhamé's evasiveness suggests that there may be something more than the ordinary processing of claims under the plan and some intent by MRL to prevent Complainant to see a neurologist or neurosurgeon because it won't even hypothetically commit to approving such a request. Why else would Ms. Duhamé be so reluctant to answer straightforward questions? I do not reach that conclusion at present regarding MRL's intentions. But I do find that this exchange is an indication that Ms. Duhamé's testimony must be treated with care.

Furthermore, I find that Ms. Duhamé's claims that her role was simply to implement the terms of the plan was disingenuous. At times she described her role as essentially mechanical, simply reviewing the imputed recommendations and other information, applying the rules of the plan, and reporting what the plan determined. (*E.g.* HT, pp. 336-37, 348-49.) The terms of the plan, however, are anything but mechanical, giving the plan administrator a great deal of discretion in determining whether the requested treatment is medically necessary, consistent with the diagnosis and course of treatment, generally accepted in the medical community as safe, appropriate, and effective, and required for reasons other than convenience. (RX W, p. D2798.) Ms. Duhamé may, in a particular case, outsource these determinations to particular physicians and simply authorize whatever they recommend. But that is a choice she is making in her role as plan administrator. Ultimately, she is the "decider" as to whether the plan will cover proposed care. In so doing, she is in a sense just implementing the terms of the plan, but the plan itself requires her to play an active role exercising a great deal of power and judgment.

To her credit, when pressed Ms. Duhamé allowed that she is making the determinations. (*See*, HT, p. 349.) But as a whole, I find that she attempted to minimize her discretionary role in order to obscure the involvement of MRL in the treatment process. As with almost any medical program, the treatment recommendations are developed by the physicians and then submitted to the insurer or the insurer's administrator for a determination of whether or not to cover the proposed treatment. *Someone* has to make that determination—especially as here where the plan provides only very general guidelines as to what is and is not covered. In the Wellness Program, MRL has decided to self-administer the plan, and that someone who must ultimately make determinations about covered treatments is Ms. Duhamé. This should not have been a difficult, time-consuming point to establish at the hearing, since it is obvious from the face of the plan documents. Nonetheless, Ms. Duhamé resisted stating the plain facts, attempting instead to present herself as a mere cog in the mechanical application of the plan language.

Hence, I credit Ms. Duhamé's testimony but treat it with care due to her evasiveness during the hearing. I do not find that she was lying or that her evidence cannot be trusted. Rather, as with Complainant, I credit but critically evaluate her statements against the record.

#### ***E. Tiffany Wolstad's (nee Grob) Credibility***

Tiffany Wolstad (nee Grob)<sup>21</sup> was Complainant's nurse case manager for both injuries relevant to this case. She has been a nurse for 8 years and a case manager for 6 years. (HT, pp. 386-87.) Beyond being credentialed as an RN, she also has earned a certification as a nurse case manager. (*Id.* at 393-94.) She manages between 25 and 40 cases at a given time. (*Id.* at 394.) In this matter, Ms. Grob's role was to submit all of the recommendations to Ms. Duhamé at MRL for authorization, to make appointments for Complainant, and to coordinate care. (*E.g. id.* at 407-08, 417-18, 423-25, 460-62.)

Ms. Grob was contracted by MRL to provide nurse case management services to Complainant, but Complainant was her client. Her role is to coordinate care and help patients navigate the process with different providers. (HT, pp. 387-88.) Throughout the medical records

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<sup>21</sup> Ms. Wolstad married after the events relevant to this case but before the hearing. (*See* HT, p. 361, 386.) Her maiden name was Tiffany Grob, and I have referred to her as Ms. Grob in this decision since at the time of the events discussed that was her name and all of the patient records in this case refer to her as such.

in evidence, Ms. Grob functions as a conduit of information between doctors and between doctors and Ms. Duhamé at MRL, both keeping Ms. Duhamé apprised of everything that was going on and expeditiously getting recommended care approved. For example, Ms. Grob collected the records from the various providers to keep a complete file. (*E.g. id.* at D3387-91.) She created summary sheets cataloguing Complainant's history of appointments and current status. (*See, e.g., id.* at D3797-811.) She also kept a detailed ledger of all of her involvements in the case with updates on Complainant's condition and status as well as who she was talking to and what records she reviewed. (*See id.* at D3814-46; RX OO, pp. D3104-07, CX 59, pp. SCS 377-477; *see also* HT, pp. 421-54 (discussion of these records).) In general the ledger simply records contacts and information given and provided, but it also shows that Ms. Grob worked to get information from the providers about the Complainant's exact work restrictions and anticipated date of MMI. (*E.g.* RX NN, p. D3818.)

Ms. Grob forwarded updates to Ms. Duhamé, including a summary of Complainant's status and the medical treatment. (*E.g. id.* at D0456; D3847-61.) She explained that she doesn't provide the entire file to employers unless they request it, but will regularly send them updated work status reports and some of the records. (HT, p. 412.) She made recommendations on whether claims should be paid, (*e.g.* RX NN, pp. D3385-85), and on other occasions authorized care on behalf of MRL. (*E.g. id.* at D0461.) Ms. Grob also informed Ms. Duhamé of conversations with Complainant, (*e.g. id.* at D3384), and reported conversations with providers, for example when Complainant had called to cancel or reschedule an appointment. (*E.g. id.* at D3393, D3399.) Ms. Grob arranged for Complainant's appointments with providers. (*E.g.* RX OO, p. D3107.) She prepared the providers for appointments by sending relevant medical records that might be needed. (*E.g.* RX NN, p. D3432.) She facilitated approval of treatment by relaying the recommendations to Ms. Duhamé for prompt approval and then getting the authorizations to the providers. (*E.g. id.* at D2294-95.) One of Ms. Grob's primary functions was procuring medical and work status forms from the providers of care and then providing them to MRL. (*See, e.g.,* RX NN, pp. D3748-65, D3770-73, D3778-95.)

Though Complainant has some legitimate concerns about the role that Ms. Grob played in his care, these concerns pertain to the role of a nurse case manager, *not* the manner in which Ms. Grob executed that role. Her job was to get care authorized and coordinate that care. In a workers' compensation claim, or a claim with *any* insurance, the payor or its administrator is involved in authorizing care. That is simply a fact about our healthcare system. A nurse case manager facilitates that process by collecting and providing the necessary information to the decision-makers so that the proper determinations can be made and care can get authorized, or denied. This can be a very complicated and time-consuming process, a procedural maze that befuddles most patients. Ms. Grob handled it expertly, as is evidenced by the fact that no care requested by a treating physician was denied.

I am particularly impressed by the circumstances surrounding Complainant's MRI on April 26, 2013. Ms. Colledge determined that this would be necessary on April 25<sup>th</sup> and Ms. Grob was able to facilitate processing the request, getting it authorized, and scheduling the test with a provider that afternoon so that the MRI took place the next morning, less than 24 hours after it was first requested. (CX 23, p. 1; CX 24, p. 1; RX Q, pp. D5923-24; RX NN, pp. D3440-41.) This is phenomenal turn around and an example of how MRL's use of a nurse case manager *expedited* care. Use of a nurse case manager does have drawbacks for an injured worker in that

the employer is likely much better informed about the course of care, for better or worse. But it has clear benefits for a patient as well. Ms. Grob may have been an agent of sorts for MRL, but she was certainly not *just* an agent of MRL whose sole function was to keep MRL informed.

I find the testimony of Ms. Grob credible. While her role has been challenged, her credibility has not. Her testimony was very straightforward and did not attempt to obscure or spin the role of a nurse case manager in providing information to the employer. She was also very knowledgeable about the course of medical treatment since she has been involved since almost the beginning of treatment. Importantly, since none of the actual providers testified, the only testimony explaining the course of treatment from a trained professional came from Ms. Grob. Her testimony hence adds important information to the record, and since I find her credible and obviously quite skilled at her job, I give her testimony weight in this decision.

#### ***F. Randall Gustin's Credibility***

Randy Gustin is the chief engineer at MRL. (HT, p. 500.) He holds a B.S. in engineering from Gonzaga but started working for MRL in the summer of 1989, while in college. At the time he was a track laborer and union member. After college he worked for a time at a geotechnical engineering firm in Spokane before returning to MRL in 1994 as an assistant road master. (*Id.* at 500-02.) He held that position for about two years, then was a road master for two years, and then transferred into the engineering staff as the assistant chief engineer. He became chief engineer in about 2010 when his boss retired. (*Id.* at 504-06.)

I detected no animus from Mr. Gustin towards Complainant or his protected activity either in his testimony or in any of the documentary evidence. He was clearly concerned about Complainant's health and hoped for a positive recovery. (*E.g.* RX NN, p. D0652; HT, p. 70.) Nor has the evidence suggested any possible reason for bias—as with Mr. Johnson, no evidence indicates that Mr. Gustin was or even could be personally or professionally negatively impacted by any of the protected activity in this case. No evidence indicates that MRL provides him with any incentives that might lead him to suppress any of the protected activity.

Mr. Gustin's testimony was professional and matter of the fact. In his disciplinary decisions he appears quite fair-minded and lenient, working to reach resolutions that would have minimal impact on Complainant while also protecting MRL's interest in compliance. He was successful in doing so, as Complainant never lost time or pay. The stated goal was behavior correction, and the record indicates this was successful—Complainant wasn't disciplined again and so the impact of the incidents on his career was minimized. (*See* HT, pp. 518-21, 524-26.)

At one point Mr. Gustin appeared to be somewhat hostile to Complainant in that after giving him the charging letter he declined to hear Complainant's explanations. (*Id.* at 112-13.) In context, however, this apparent rebuff was an effort to aid Complainant. The decision had already been made to call a fact-finding. At that point, anything Complainant stated could only hurt him going forward. Indeed, his subsequent statements to Mr. Johnson could well have hurt his disciplinary case. Rather than let Complainant try to explain himself and dig himself a hole, Mr. Gustin directed him to his union representative. In context, this was highly beneficial to Complainant and so should not be mistaken for animus or bias.

Therefore, as with Mr. Johnson, I find that Mr. Gustin had no bias against or animosity toward Complainant or protected activity and I that that Mr. Gustin’s testimony was generally credible. I hence give it weight in my determinations below.

## **VI. Legal Analysis and Findings**

The FRSA contains three separate provisions under which a complainant may seek relief against a covered employer. 49 U.S.C. § 20109(a) provides a general anti-retaliation provision protecting complaints about violation of federal law or safety, participation in investigations, and, as relevant here, reports of work-related injuries. 49 U.S.C. § 20109(b) contains an anti-retaliation provision specifically addressed to hazardous safety or security conditions, protecting reports of such conditions, refusal to work in such conditions, or refusal to use equipment that creates such conditions. Finally, 49 U.S.C. § 20109(c) contains two provisions, one forbidding railroad interference in medical care, § 20109(c)(1), and another forbidding retaliation for requesting care, seeking care, or complying with medical instructions, § 20109(c)(2).

This case concerns two distinct complaints, one under 49 U.S.C. § 20109(a) and 49 U.S.C. § 20109(c)(2) alleging retaliation for reporting and being treated for a work-related injury (the retaliation complaint) and another under 49 U.S.C. § 20109(c)(1) alleging prohibited interference with medical care (the interference complaint). Though the ARB has constructed the relevant analysis of 49 U.S.C. § 20109(c)(1) as a retaliation claim, *see Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB Case No. 10-147 (ARB July 25, 2012) (“*Santiago I*”), that analysis is considerably different than the analysis of an “ordinary” retaliation claim and thus the two sorts of complaint at issue here must be considered separately. I begin the retaliation complaint and then address the interference complaint.

### **A. Retaliation Complaint**

The FRSA provides that railroad carriers “may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part” to any protected activities. 49 U.S.C. § 20109(a). Actions brought under the FRSA are governed by the burdens of proof set forth in the employee protection provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (“AIR 21”). *See* 49 U.S.C. § 20109(d)(2)(A)(i). In order to prevail, a complainant must demonstrate that: (1) he engaged in protected activity (protected activity); (2) the employer knew that he engaged in protected activity (knowledge); (3) he suffered an unfavorable personnel action (adverse action); and (4) the protected activity was a contributing factor in the unfavorable personnel action (contribution). 49 U.S.C. § 42121(b); *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 157 (3d Cir. 2013); *see also Kuduk v. BNSF Ry. Co.*, 768 F. 3d 786, 789 (8<sup>th</sup> Cir. 2014). The complaining employee bears the initial burden, and must show “by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.” 29 C.F.R. § 1982.109(a).

The burden then shifts to the respondent employer, which in order to avoid liability must demonstrate “by clear and convincing evidence, that [it] would have taken the same [adverse] action in the absence of that [protected] behavior.” 49 U.S.C. § 42121(b)(2)(B); 29 C.F.R. § 1982.109(b); *Araujo*, 708 F.3d at 157; *Beatty v. Inman Trucking Mgmt., Inc.*, ARB No. 13-039;

ALJ Nos. 2008-STA-020, 2008-STA-020, slip op. at 7-11 (ARB May 13, 2014); *see also Addis v. Dep't of Labor*, 575 F.3d 688, 691 (7<sup>th</sup> Cir. 2009) (noting that AIR-21 language overrules traditional case law and allows an employee to shift the burden to the employer with a “lesser showing”); *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11<sup>th</sup> Cir. 1997) (“For employers, this is a tough standard, and not by accident”). Clear and convincing evidence is evidence that shows “that the thing to be proved is highly probable or reasonably certain.” *DeFrancesco v. Union R.R. Co.*, ARB No. 13-057, ALJ No. 2009-FRS-009, slip op. at 8 (ARB Sept. 30, 2015) (“*DeFrancesco II*”) (citing *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 5 (ARB Jan. 31, 2011)); *see also Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 6 (ARB Apr. 25, 2014); *Brune v. Horizon Air Indus., Inc.*, ARB Case No. 04-037, ALJ No. 2002-AIR-008, slip op. at 14 (ARB Jan. 31, 2006).

### 1. *Complainant's Case For Retaliation*

#### a. Did Complainant Engage in Protected Activity?

To establish a case for retaliation, a complainant must first show that he or she engaged in some protected activity. *Araujo*, 708 F.3d at 157. The FRSA contains three sets of employee protections. Section 20109(a) of the FRSA identifies a variety of general protected activities including providing information or assisting in an investigation regarding potential violations of law, refusing to violate the law, filing a complaint applicable to railroad safety or security, notifying the railroad carrier of an injury, cooperating with a federal safety or security investigation, furnishing information to a governing body, or accurately reporting hours. 49 U.S.C. §§ 20109(a)(1)-(7). Section 20109(b) lays out additional protected activities, including reporting a hazardous safety condition, refusing to work under hazardous conditions, or refusing to authorize the use of hazardous or unsafe equipment. 49 U.S.C. §§ 20109(b)(1)-(3). Finally, Section 20109(c)(2) protects employees who seek medical treatment or follow the treatment instructions for a work-related injury. 49 U.S.C. § 20109(c)(2).

Complainant's central protected activities are his reports of work-related injuries. (CPB, pp. 2, 15-16; *see also* HT, pp. 4-5.) The FRSA provides that a covered employer “may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith act done, or perceived by the employer to have been done or about to be done...” 49 U.S.C. § 20109(a). One of the enumerated protected activities is “...to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or a work-related illness of an employee.” 49 U.S.C. § 20109(a)(4). To be protected, the report of injury must be made in good faith. *See, e.g., Ray v. Union Pac. R.R. Co.* 971 F. Supp. 2d 869 (S.D. Iowa 2013); *Davis v. Union Pac. R.R. Co.*, 2014 U.S. Dist. LEXIS 101708 (W.D. La. July 14, 2014).

Complainant has reported three work-related injuries. First, he reported a shoulder injury he suffered on May 6, 2008. (HT, p. 63; RX S, pp. D1241-52.) This report is not relevant to the analysis of this complaint. Second, he suffered a right hip and back injury on December 5, 2012, which he reported to his supervisor that day and formally on December 6, 2012. (HT, pp. 66-68; CX 47, p. 1; RX LL, p. D1135.) Finally, on October 22, 2013, Complainant re-injured his back. (HT, pp. 116-18.) He reported this injury to Mr. Johnson that day and submitted a formal injury

report on October 23, 2013. (*Id.*; CX 46, p. 1; RX MM, p. D1199.) Respondent acknowledges that these reports are protected activities. (RPB, pp. 7-8, 10, 50-51.) Given the timing of most of the alleged adverse actions, the report of the December 2012 injury is the most relevant protected activity at issue.

Complainant has also alleged protected activity of “obtaining medical treatment for his work injury.” (CPB, p. 2; *see also* HT, pp. 4-5; ALJX 1, p. 4; ALJX 3, pp. 12-13.) 49 U.S.C. § 20109(c)(2) provides that a “railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician.”<sup>22</sup> “Discipline” in this context means “to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee’s record.” *Id.* These protections apply only to treatment for work-related injuries. *See Port Auth. Trans-Hudson Corp. v. Sec’y United States DOL*, 776 F.3d 157 (3d Cir. 2014) (“*Bala*”).

Here complainant sought treatment through the Wellness Program for his work-related injury and followed the recommendations of his treating providers in attending appointments, staying off duty during certain periods, and working light-duty in other periods. Since these involved being treated for a work-related injury or following the orders of his treating physician for such an injury, they are all protected activities. Respondent does not directly address this point, though it clearly does not contend that Complainant was not seeking treatment for a work-related injury or that his off-duty and light-duty status did not stem from instructions from a physician treating a work-related injury. The fact that the injuries at issue were work-related is not contested and the course of treatment and duty status is well-documented in the records. Hence, per § 20109(c)(2), adherence to that course of treatment is protected.

b. Did Respondent Know About Complainant’s Protected Activity?

A complainant must also show that the respondent knew about his protected activity. *See Araujo*, 708 F.3d at 157. It is not enough for a complainant to show that his employer, as an entity, was aware of his protected activity. Rather, the complainant must establish that the decision-makers who subjected him to the alleged adverse actions were aware of his protected activity. *See Conrad v. CSX Transp.*, -- F.3d --, 2016 U.S. App. LEXIS 9670, \*9; 2016 WL 3006097, \*3 (4<sup>th</sup> Cir. May 25, 2016); *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-38 (ARB Jan 31, 2006); *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004). Case law differs on whether this factor is a required independent showing or if it is subsumed in the causal showing that a complainant must make. *See Coates v. Grand Trunk Western R.R. Co.*, ARB No. 14-019, ALJ No. 2013-FRS-003, slip op. at 2 n.5 (ARB July 17, 2015) (citing *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op at 13 (ARB June 24, 2011) (“*Bobreski I*”); *Moon v. Trasp. Drivers, Inc.*, 836 F.2d 226, 229 (6<sup>th</sup> Cir. 1987)); *see also Folger v. SimplexGrinnell, LLC*, ARB No. 15-021, ALJ No. 2013-SOX-42 (ARB Feb. 18, 2016) (knowledge not a distinct element in a complainant’s required showing under Sarbanes-Oxley); *DeFrancesco II*, ARB No. 13-057 at 5 (knowledge omitted as separate element in FRSA claim). But whether analyzed independently or not, some knowledge of the protected activity must be shown—it is hard to imagine that the

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<sup>22</sup> The provision makes an exception involving refusals to permit a return to work that is not relevant to this case.

protected activity could contribute to the adverse action unless someone involved in the decision making process knows about it in some way.

Whether or not knowledge is a distinct element of a complainant's required showing or a part of the required showing of contribution is not material to this case, and I discuss the element separately only to accord with some of the case law and the formulations of the parties in this case. Here, there would seem to be no question that Complainant has demonstrated Respondent's knowledge of the protected activity. All of the decision makers in the process knew about the injury report and the course of treatment that he was undergoing, either because of the reports of Ms. Grob or Complainant's e-mails to Mr. Johnson and others.

Perplexingly, Respondent contests this point. It proclaims that Complainant "has not proffered any evidence that any [MRL] employee involved in the alleged adverse action had actual or constructive knowledge of his protected activity." (RPB, p. 52; *see also* RRB, p. 20.) The decision-makers as to any discipline assessed were Mr. Johnson and Mr. Gustin. Both quite clearly knew about Complainant's injury reports and his course of treatment. Complainant kept Mr. Johnson informed of his treatment and Mr. Johnson kept Mr. Gustin informed. (*See, e.g.*, HT, pp. 85, 259.) Both knew that an injury had been reported—for one, Complainant reported the injuries to Mr. Johnson and Mr. Johnson took Complainant to make formal injury reports. (HT, pp. 66-68, 116-18, 209-10.) Respondent's argument is not well thought-out and defies good sense. Respondent cites to several cases, but all these citations establish is that, in fact, an FRSA claim can fail when the decision-makers lacked knowledge of the protected activity. That much is surely correct, but the crux is showing that *this* case is relevantly similar to those cases. The rest of Respondent's argument, however, is only a simple proclamation that the same holds here since Complainant hasn't introduced evidence to the point. I do not follow this reasoning, as it is contrary to the whole record in this case that evidences Mr. Johnson's and Mr. Gustin's knowledge that Claimant reported an injury and sought and received medical care.

Hence, I find that Complainant has established the knowledge of his protected activity by the relevant decision-makers of Respondent.

c. Did Respondent Take Adverse Action Against Complainant?

Third, a complainant must show by a preponderance of the evidence that the respondent took some adverse action against him or her. *Araujo*, 708 F.3d at 157. The FRSA specifies that a railroad carrier may not "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee" on the basis of protected activity. 49 U.S.C. § 20109(a); *see also* 49 C.F.R. § 1982.102(b)(1) (railroad "may not discharge, demote, suspend, reprimand, or in any other way discriminate against, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining an employee").

The ARB has made clear that whistleblower standards are meant to be interpreted expansively, as they have "consistently been recognized as remedial statutes warranting broad interpretation and application." *Menendez v. Halliburton*, ARB Nos. 09-002 and 09-003, ALJ No. 2007-SOX-2005, slip op. at 15 (ARB Sept. 13, 2011). Cautioning against applying the more stringent standards of Title VII cases, the ARB has stressed the safety issues present in "hazard-laden, regulated industries" and in particular the FRSA's extensive legislative history citing the

rampant practices of abuse and intimidation inflicted on railroad workers who reported work-related injuries. *Williams v. American Airlines*, ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 12 (ARB Dec. 29, 2010); *Vernace v. Port Auth. Trans-Hudson Corp.*, ARB No. 12-003, ALJ No. 2010-FRS-018, slip op. at 3 (Arb Dec. 21, 2012); *Santiago I*, ARB No. 10-137 at 8-10; see also *Blackorby v. BNSF Ry. Co.*, 2015 U.S. Dist. LEXIS 266, \*8 (W.D. Mo. Jan. 5, 2015).

In *Burlington Northern & Santa Fe Ry. v. White*, the Supreme Court held that an adverse action in the Title VII context need only be “harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination.” 548 U.S. 53, 68 (2006). Drawing on this rule, the ARB has held that in whistleblower claims, the *starting point* for an adverse action is any action that “would dissuade a reasonable employee from engaging in protected activity.” *Menendez*, ARB Nos. 09-002 and 09-003 at 20. Employer actions must be considered in the aggregate to determine if together they rise to the level of an actionable adverse action. *Id.* at 20-21. Based on the similar language in the statutes, the ARB has applied the same broad definition of an adverse action under the FRSA as it previously articulated under AIR-21 and Sarbanes-Oxley: a railroad engages in adverse action if it engages in “unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.” *Fricka v. Nat’l R.R. Passenger Corp.*, ARB No. 14-047, ALJ No. 2013-FRS-035, slip op. at 7 (ARB Nov. 24, 2015) (quoting *Williams*, ARB No. 09-018 at 7).

Hence, under the FRSA, there is an extraordinarily broad range of potentially adverse actions. The quintessential example of an adverse action is a tangible employment action such as the termination of the employment relationship. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998); *Crady v. Liberty Nat. Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993). But the ARB has also held that a charging letter qualifies as an adverse action under the FRSA, and that a written warning is presumptively adverse, not only when it is considered discipline in and of itself, but also where it is routinely used as the first step in a progressive discipline policy or implicitly or expressly references potential discipline. The ARB has held that “unfavorable personnel actions” include reprimands, written warnings, and counseling sessions where (a) it is considered discipline by policy or practice, (b) it is routinely used as the first step in a progressive discipline policy, or (c) it implicitly or expressly references potential discipline. *Williams*, ARB No. 09-018 at 15; see also *Vernace*; ARB No. 12-003.

Complainant alleges two particular adverse actions: his censure letter derivative from the April 2013 discipline and the October 2013 censure letter and record suspension. (CPB, pp. 18-19.) He also alleges a “pattern of conduct” involving “[i]ntimidation and threatening actions.” (*Id.* at 19-20.) I treat it as a claim that he has been subject to a hostile work environment.

Respondent argues that the discipline assessed in this case is not adverse actions under the FRSA.<sup>23</sup> It contends that after each protected activity it offered immediate medical treatment and took no direct disciplinary actions. (RPB, pp. 7-12.) Complainant does not contend otherwise and admitted that no discipline had directly followed from his injuries or the events

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<sup>23</sup> Respondent also briefly argues in its Post-Hearing Brief that Complainant’s complaint was untimely as to the first censure letter. (RPB, pp. 49-50.) Respondent stipulated otherwise at the pre-hearing conference and so I do not consider this argument.

leading to them. (HT, p. 133.) Respondent admits that it did discipline Complainant in April 2013 and October 2013, but argues that these are not adverse actions because they are not “materially adverse” actions: Complainant was issued only warning/censure letters and he never lost any pay or time as a result. (RPB, pp. 53-54; *see also* RRB, pp. 20-21.)

In making this argument Respondent relies on the Supreme Court’s holding in *Burlington Northern*, federal court decisions in the employment discrimination context, and several older ARB decisions. *Id.* Even assuming that Respondent is correct in its arguments about the significance of these letters, it has imposed an incorrect standard onto adverse actions under the FRSA. To be adverse the action does not have to be “materially diverse” or even “dissuade a reasonable worker from engaging in protected activity.” It only has to be more than trivial. Any formal discipline subsequent to an investigation and charge is more than trivial.

Furthermore, even if Respondent’s standard were proper, as a matter of fact the censure letters would dissuade a reasonable worker from engaging in protected activity and thus would qualify as adverse actions under *Burlington Northern*. 548 U.S. at 68. Respondent betrays its argument on adverse action with a quite good argument it makes later in its brief. Explaining why Complainant was subjected to more serious discipline than Mr. Vanek after they took an over-long lunch, Respondent’s point out that it does, and in fact must, consider the disciplinary record for the prior three years in assessing appropriate discipline. (RPB, p. 68.) This is quite right—but it also means that any discipline, even a censure letter, will result in more serious, and perhaps much more serious, future discipline in the event of future misconduct. Per Respondent’s account, in this instance the prior censure letter was part of the reason Complainant faced a fact-finding with the potential for termination while Mr. Vanek received a verbal reprimand. But then the letter could not be something merely trivial.

In effect, these supposedly trivial censure letters put an employee on very thin ice for the future and set the stage for the imposition of quite serious discipline for perhaps even minor offenses. As such, they are far from trivial. This is especially so in a company that constantly, and often covertly, inspects and investigates its employee’s compliance with its myriad rules, going so far in the case of one supervisor to hike up a mountain before daybreak in order to spy employees with a spotting scope. (*See* HT, p. 514.) Such an approach to discipline creates a climate of fear, which it is within the discretion of MRL to do—courts do not sit as a sort of “super-personnel department” evaluating the wisdom of business decisions. *See Scaria v. Rubin*, 117 F.3d 652, 655 (2d Cir. 1997). Whatever its effect on employee relations and morale, it may well increase compliance with the rules. But in such an environment, *no* past discipline can be deemed trivial when it could always amplify the consequences of a future mistake.

Censure letters in both April and October 2013 as well as the record suspension in October 2013 are “more than trivial” and hence are adverse actions under the FRSA. Complainant has thus satisfied his burden as to this element.

There remains Complainant’s hostile work environment claim. In *Meritor Sav. Bank, FSB v. Vinson* the Supreme Court recognized that a claim based on a hostile or abusive work environment was actionable under Title VII. 477 U.S. 57, 64 (1986). To be actionable, the environment must reasonably, and actually, be perceived as hostile, which requires that the harassment that is sufficiently severe or pervasive to alter the conditions of the victim’s

employment and create an abusive working environment. *Id.* at 67; *Harris v. Forklift Sys.*, 510 U.S. 17, 21-22 (1993). Whether an environment descends to this level can be determined only by examining all of the circumstances. *Harris*, 510 U.S. at 23. The ARB has adopted this standard and analysis for whistleblower claims alleging a hostile working environment. *See Williams v. Nat'l R.R. Passenger Corp.*, ARB No. 12-068, ALJ No. 2012-FRS-016, slip op. at 6-7 (ARB Dec. 19, 2013); *Knox v. Nat'l Park Serv.*, ARB No. 10-105, ALJ No. 2010-CAA-002, slip op. at 3-4 (ARB Apr. 30, 2012); *Overall v. Tenn. Valley Auth.*, ARB Case No. 04-073, 99-ERA-25, slip op. at 15 (ARB July 16, 2007) (reissued as corrected); *Erickson v. U.S. Evtl. Prot. Agency, Region 4*, ARB Nos. 03-002, 03-003, 03-004, 03-064; ALJ Nos. 1999-CAA-2, 2001-CAA-8, 2001-CAA-13, 2002-CAA-3, 2002-CAA-18; slip op. at 18-19 (ARB May 31, 2006).

Whether, and when, an employer is liable based on such harassment depends on who is doing the harassing. If it is a co-worker, then the employer must have been negligent in controlling working conditions to be liable. If it is a supervisor and the harassment has resulted in a tangible employment action, then the employer is strictly liable. If the harasser is a supervisor but the harassment did not result in such action, then the employer may defend against liability by showing that it exercised reasonable care to prevent and correct any harassment and that the victim unreasonably failed to take advantage of opportunities to prevent and correct that the employer provided. *Vance v. Ball State Univ.*, 133 S.Ct. 2434, 2439 (2013) (citing *Ellerth*, 425 U.S. at 765; *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998)). An individual is a supervisor under Title VII if he or she is empowered to take tangible employment actions against the victim. *Vance*, 133 S. Ct. at 2454.

Complainant argues that he has been subject to a pattern of harassment and mistreatment. He references the harassment by Mr. Gonzalez, the investigations into his activities, and the internal e-mails of his supervisors. (CRB, pp. 7-8.) He can rely as well on the somewhat chilly response to his complaints about his truck in 2014.

On review, however, the only evidence that could potentially support a hostile work environment claim is the harassment from Mr. Gonzalez. The e-mails that between Mr. Johnson and Mr. Loeffler were private and not in any way directed to the attention of Complainant. He produces no evidence of comments by either to him or in his presence that could be interpreted as hostile. Even presuming that those comments were anything more than attempts at humor by Mr. Loeffler, Complainant was only aware of them due to litigation. As such, they could not have previously created a hostile work environment. The chilly reception of his complaints about the truck was not hostile either—as discussed above it was reasonable in context and merely a reflection of more formal handling of the issue given the ongoing litigation (§ V.B). Nor is the fact of investigation hostile. Investigation of compliance with rules is standard practice and required. Complainant acknowledged as much. (*See* HT, pp. 149-50, 513-14.) On both instances, the investigations were premised on reports of potential misconduct. While the discipline that resulted is clearly adverse action, the simple fact that MRL checked on his compliance with rules does not support a hostile work environment claim.

This leaves the harassment of Mr. Gonzalez. The testimony on this point, however, is insufficient to establish a hostile work environment. Insufficient specificity has been provided as to exactly what was said or done, exactly when it was said or done, and exactly how often such things have occurred. (*See* HT, pp. 84-85.) Moreover, Mr. Gonzalez is a co-worker, so MRL

will be liable only if it was negligent. Complainant has not produced specific evidence as to what he did to alert MRL to the problem and what MRL did or did not do in response. Complainant's testimony on this point was much too general, stating only that he reported it but nothing was done. (*See id.* at 83, 171-72.) Such a bare statement absent any specificity does not establish negligence by MRL.

Ultimately Complainant's case on this point came down to a general assertion that MRL is a hostile work environment and that he didn't think he would last long at the railroad. (*See id.* at 126.) These statements were not explained in detail, and so I cannot make out even a subjective aspect of the necessary claim, let alone support such beliefs with the evidence necessary to establish an objectively hostile environment. Complainant has shown neither that the harassment from Mr. Gonzalez rises to the level necessary to create a hostile work environment nor that MRL was negligent as to the work environment. Therefore, I find that Complainant has failed to show a hostile work environment.

d. Was Complainant's Protective Activity a Contributing Factor in Respondent's Adverse Action?

i. Legal Framework

The final element in a complainant's case for retaliation is a showing, by the preponderance of the evidence, that the protected activity was a contributing factor in the adverse action. *Araujo*, 708 F.3d at 157. There are two adverse actions and two sorts of protected activity. The question now is whether the December 2012 injury report contributed to either the April 2013 or October 2013 discipline or whether the adherence to his course of treatment, including working light duty, contributed to either the April 2013 or October 2013 discipline.<sup>24</sup>

The question is whether the Complainant has shown by a preponderance of the evidence that the protected activity played some role in the decision to take the adverse action. This is not meant to be a difficult or arduous showing. *E.g. Ledure v. BNSF Ry. Co.*, ARB No. 13-044, ALJ No. 2012-FRS-020, slip op. at 8 (ARB June 2, 2015); *Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ Case No. 2010-FRS-020, slip op. at 7 (ARB May 31, 2013); *Rookaird v. BNSF Ry. Co.*, 2016 U.S. Dist. LEXIS 147950, \*16 (W.D. Wash. Oct. 29, 2015). A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Araujo*, 708 F.3d at 158 (quoting *Ameristar Airways Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 563, 567 (5<sup>th</sup> Cir. 2011)); *see also Addis v. Dep't of Labor*, 575 F.3d 688, 691 (7<sup>th</sup> Cir. 2009); *Marano v. Dep't of Justice*, 2 F.3d 1137, 1150 (Fed. Cir. 1993); *Williams*, ARB No. 09-092 at 5.

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<sup>24</sup> 49 U.S.C. § 20109(c)(2) differs from §§ 20109(a)-(b) in that it provides that a respondent "may not discipline, or threaten discipline to, an employee for" engaging in the protected activity. This considerably narrows the range of actionable adverse actions under the provision, since it importantly leaves out the phrase "or in any other way discriminate against." For instance, *if* Complainant had established a hostile work environment that MRL could be held liable for, then that would only have been an adverse action as to the injury reports, not the adherence to his treatment program. Since, however, the adverse actions at issue involve discipline, this wrinkle in the statute is not relevant to the analysis in this case.

The contributing factor element of a complaint may be established by direct evidence or indirectly by circumstantial evidence. *See, e.g., Bechtel v. Competitive Techs., Inc.*, ARB No. 09-052, ALJ No. 2005-SOX-033, slip op. at 13 (ARB Sept. 30, 2011) (citing *Sylvester v. Paraxel Int'l, LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042, slip op. at 27 (ARB May 25, 2011)). It is not necessary for a complainant to establish any retaliatory motive in order to show the contributory factor element. *See Marano*, 2 F.3d at 1141; *see also Coppinger-Martin v. Solis*, 627 F. 3d 745, 750 (9<sup>th</sup> Cir. 2010). Nor is it necessary to show any animus. *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012) (“*DeFrancesco I*”) Contribution might be shown simply by the presence of a protected activity in a chain of causation leading to the adverse action, even when there is no evidence of retaliatory animus or motive. *E.g. Hutton*, ARB No. 11-091 at 6-7. “Quite simply, ‘any weight given to the protected [activity], either alone or even in combination with other factors, can satisfy the ‘contributing factor’ test.’” *Powers v. Union Pac. R.R. Co.*, ARB Case No. 13-034, ALJ Case No. 2010-FRS-030, slip op. at 11 (ARB Apr. 21, 2015) (reissue with full dissent) (vacated on other grounds) (quoting *Marano*, 2 F.3d at 1140).

The contributing factor inquiry is a different from ordinary causal inquiries, where the aim is to discern *the* cause or the substantial cause or motivating cause etc., and is importantly different from the causal inquiries that courts engage in when deciding Title VII and related discrimination/retaliation claims. Rather, the question is only whether a particular factor played *any* role at all in bringing about the adverse outcome. The ARB, however, has been in considerable discord as to just how the contributing factor inquiry is to proceed, and in particular what evidence is to be considered in discerning whether a complainant has shown contribution. *See, e.g., Powers*, ARB No. 13-034.

In *Bobreski v. J. Givoo Consultants, Inc*, an ARB panel articulated a fairly clear structure:

...the ALJ must consider “all” the evidence “as a whole” to determine if the protected activity did or did not “contribute.” By “all” of the evidence, we mean all the evidence that is relevant to the question of causation. This requires collecting the complainant’s evidence on causation, assessing the weight of each piece, and then determining its collective weight. The same must be done with all of the employer’s evidence offered to rebut the complainant’s claim of contributory factor. For the complainant to prove contributory factor before the ALJ, all of his circumstantial evidence weighted together against the defendant’s countervailing evidence must not only permit the conclusion, but also convince the ALJ, that his protected activity did in fact contribute to the unfavorable personnel action.

ARB No. 13-001, ALJ No. 2008-ERA-003, slip op at 17 (ARB Aug. 29, 2014) (“*Bobreski II*”).

A little over a month later in *Fordham v. Fannie Mae*, however, the ARB sketched a very different sort of contribution inquiry. ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB Oct. 9, 2014). There the ARB held that it was reversible error to weigh evidence offered in support of a non-discriminatory basis for the adverse action against the complainant’s evidence of contribution. That evidence goes to a respondent’s affirmative defense and is evaluated later in the analysis and under a different burden of proof that is imposed on the respondent. *Id.* at 2.

Consequently, a respondent's evidence of a legitimate, non-retaliatory reason or basis for its decision or action is not weighed against a complainant's causation evidence in the determination of whether a SOX complainant<sup>25</sup> has met his or her burden of proving 'contributing factor' causation. The determination whether a complainant has met his or her initial burden of proving that protected activity was a contributing factor in the adverse personnel action at issue is required to be made based on the evidence submitted by the complainant, in disregard of any evidence submitted by the respondent in support of its affirmative defense...

*Id.* at 3; *see also id.* 16-17, 20-37. Though the *Fordham* ARB panel two-judge majority acknowledged *Bobreski* and a number of other cases addressing the issue in different ways, it stated simply that "[g]iven the inconclusiveness of the case law on this subject, we treat this issue as a matter of first impression."<sup>26</sup> *Id.* at 20-21. *Fordham*, however, has not resolved the question of how to analyze a complainant's case for contribution.

*Powers*, in which the ARB sat *en banc*, offered the potential for a resolution of this tension with the statement, endorsed by the majority and dissent, that "there is no inherent limitation on specific admissible evidence that can be evaluated for determining contributing factor *as long as the evidence is relevant to that element of proof.*" ARB 13-034 at 21 (emphasis in original); *id.* at 32 (Corchado, J. dissenting). Based on the differing arguments in the majority and dissent as well as the subsequent application by the ARB, there is little agreement, however, on what this means. Moreover, on March 11, 2016, the ARB issued "Order to Hold the Case in Abeyance and Inviting Responses" in *Powers* citing an *ex parte* communication by one of the judges in the majority.<sup>27</sup> *Powers v. Union Pac. R.R. Co.*; ARB No. 13-034, ALJ Case No. 2010-FRS-030 (ARB Mar. 11, 2016). Then, on May 23, 2016, the ARB issued an order vacating its decision in *Powers* due to the *ex parte* communication. *Powers v. Union Pac. R.R. Co.*, ARB No. 13-034, ALJ No. 2010-FRS-030 (ARB May 23, 2016). The ARB is in the process of reviewing the question *en banc*, *see Palmer v. Canadian Nat'l Ry.*, ARB No. 16-035, ALJ No. 2014-FRS-154 (ARB June 17, 2016), but at present there is no clear appellate guidance.

Post-*Powers* decisions have not clearly decided the issue. The *DeFrancesco II* ARB held that "an employer's affirmative defense evidence...is, with rare exception, not to be considered at the initial causation stage..." ARB Case No. 13-057 at 6. Yet the *Ledure* ARB, writing between *Powers* and *DeFrancesco II*, affirmed a finding of no showing of contribution that was premised on a run of the mill consideration of evidence favoring contribution and evidence favoring non-discriminatory reasons to determine if contribution was shown—a model of the inquiry that would make evidence favoring the respondent's reasoning relevant in most, if not every case—and certainly not rarely. ARB No. 13-044 at 8-9. In one of its latest decisions touching on the issue, the ARB has candidly recognized that it is deeply split. *Dietz v. Cypress Semiconductor Corp.*, ARB No. 15-017, ALJ No. 2014-SOX-002, slip op. at 20 (ARB Mar. 30, 2016.)

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<sup>25</sup> Sarbanes-Oxley incorporates the same AIR-21 framework used in FRSA cases. *See* 18 U.S.C. § 1514A(b)(2)(C).

<sup>26</sup> Administrative Appeals Judge Joanne Royce was in the majority on both panels.

<sup>27</sup> In a subsequent case directly touching on the question in *Powers*, no reference was made to *Powers* and instead the ARB looked back to *Fordham* for the point. *See Dietz*, ARB No. 15-017 at 20-21.

No doubt, over time the tension will be resolved and the ARB will articulate a more easily understood and applied framework for the consideration of contribution. In the meantime, however, I must arrive at a way to consider the question of contribution in this case.

It is difficult to make sense of a *per se* rule that would forbid consideration of any of a “respondent’s evidence” at this stage of the inquiry. Evidence is simply evidence. Different parties offer different evidence, but the decision is on the record as a whole (which could include joint evidence that cannot be “assigned” to one party or the other). Evidence of one party may in fact favor the other party or, as is quite often the case, tend to indicate some conclusions favorable to a party but others not favorable to that party. The categorical rule could mean that at this stage one is simply to consider the evidence that favors a complainant. But such a rule would be perplexing insofar as it would dispense with any fact-finding—if only evidence favoring one conclusion may be considered in “finding” a fact, the “showing” will have been made so long as *any* evidence is produced. Judge Corchado, dissenting in *Fordham*, made a similar point as a *reductio ad absurdum* of what he took to be the rule of the majority: so long as there was some temporal proximity, properly ordered, then contribution would *always* be shown, even when the evidence as a whole decisively showed no contribution, for instance by showing financial collapse led to the termination of *all* employees. See *Fordham*, ARB No, 12-061 at 43 (Corchado, J. dissenting). The *Fordham* majority didn’t engage the example, to either embrace it or explain it away. But it is not necessary to read *Fordham* to adopt such a blind rule about evidence. Rather, *Fordham* stands for the proposition that the contribution inquiry “does not involve the weighing of the respondent’s evidence of lawful, non-retaliatory reasons for its action against the complainant’s evidence of causation under the ‘preponderance of evidence’ test.” *Id.* at 21. This is an injunction against weighing evidence to decide the question of causation, *not* an injunction against what evidence *could* become relevant in a properly conducted contribution inquiry.

This would not matter, of course, if the ARB had clearly stated otherwise—the ARB is the reviewing court, and the role of the ALJ is simply to apply. The ARB, however, has not been clear on the rule here. The best explanation for the current state of the law is that evidence favoring a respondent’s explanation may be considered, but it can only be considered when it is relevant, or to address particular points. Evidence may often speak to multiple conclusions, respond to many different questions. The issue, then, may not be so much as to whether or not evidence may be considered at all, but to *how* it may be considered at this stage of the analysis.

In the AIR-21 framework there are two inquiries into causation: whether the protected activity was a contributing factor in the adverse action, where the complainant has the burden of proof by a preponderance of the evidence, and whether the respondent would have taken the same adverse action even absent the protected activity, where the respondent has the burden of clear and convincing evidence. These inquiries are in ways quite similar. The AIR-21 framework is difficult to apply precisely because these are naturally overlapping inquiries that must be treated as separate and distinct. If this is not done properly, critical examination of whether a complainant has shown contribution becomes an inquiry into whether the respondent would have acted the same despite the protected activity, and along with this transformation, respondents improperly benefit from a reduced, and flipped, burden of proof.

A contributing factor is one of the actual motives of an action, though it need not be necessary or sufficient. But it is more than a reason for an action in the abstract. The fact that it is sunny today could be a reason for my going for a walk. But it may not be a contributing factor in my decision to go for a walk: I may not know it is sunny, I may be indifferent to the sunny weather, etc. It may even tend the other way for me—perhaps contrary to most, I happen to dislike walking in the sun. Absent some evidence, even if just unrefuted common sense, that the weather relates to my decision in any way at all and does so in the way suggested, there is no reason to believe that it is a contributing factor. The same holds for a variety of other potential reasons or explanations. I may go for a walk because it is exercise, it allows me to take in the fresh air, it is energizing, or even if I saw a public service advertisement encouraging taking a walk. All of these could be among the contributing factors in my decision to go for a walk. But a contributing factor is more than a reason—it is a reason that played some role, even if an unimportant or trivial role, in my action.

As a matter of simple logic, if the sunny weather was not a contributing factor in my decision to go for a walk, then I would have gone for a walk even if the weather wasn't sunny. But, the converse does not hold. Though I would have gone for a walk even if it hadn't been sunny, it does not follow that the fact that it was sunny was not a contributing factor in my decision. My decision to go for a walk may have been overdetermined: I may have had reasons that were unnecessary to motivate the action. The crucial factor may be that I want exercise. Whether sunny or not, this was going to get me out on a walk. But if it is sunny and that is a reason for me to walk, then that fact it is sunny is still a contributing factor in my decision.

A contributing factor doesn't need to be a necessary condition for an action or a sufficient condition for an action. In the anti-retaliation context, it may be that other reasons are sufficient for the adverse action, even though the protected activity was, in fact, another reason on the heap of reasons in play. In that case, the protected activity is a contributing factor and the complainant has the burden of showing as much by a preponderance of the evidence. But then the respondent will escape liability if it can show, by clear and convincing evidence, that the protected activity, despite being an actual contributing factor, was not a *necessary* factor in that other, non-discriminatory factors were *sufficient* to cause that exact adverse action.

In the abstract this isn't so confusing, but things become difficult where, as here, and in the typical litigated whistleblower case, there are non-discriminatory reasons for the adverse action and the case for contribution is circumstantial. In a more obvious case, the shifting inquiry may be easy: if an employee engages in protected activity and a decision maker credibly tells her that adverse action will be taken because of the protected activity, then the protected activity is a contributing factor. But a respondent could still escape liability if other, unconnected misconduct by the employee (perhaps related to the manner in which the activity was engaged in or unrelated but roughly contemporaneous) were going to produce that adverse action regardless of the protected activity and the attitude of the one supervisor. If the employee complained about safety with great vulgarity and then punched out her boss, it is rather easy to imagine that protected activity contributed to the termination likely to follow, but also that the employer would have terminated the employee absent the protected activity—employees who use vulgarity and punch out their bosses are generally terminated, regardless of whether or not they make any complaints related to safety.

On the opposite end of the spectrum are cases with protected activity, adverse action, and an absence of any good, plausible reasons for the adverse action. Here contribution could follow quite easily as well: adverse actions aren't taken absent any reason, and a particular absence of non-discriminatory rationale is good evidence that discriminatory rationale played some role. In such a case, however, the complainant's case for contribution will turn on deficiencies in the respondent's explanation of the action, so the evidence to be considered will overlap in the two inquiries. To know whether contribution follows because of a deficiency in the explanation otherwise, one must examine the evidence for the explanation, even though this examination is different in kind than the similar evaluation in the first case above in which the question is whether the respondent's reasons are such that they would have motivated the action absent the protected activity. In the inquiry now imagined, the question is only whether there is a particular deficiency in the explanation that shows contribution by the protected activity of some sort, even if in the final analysis the respondent still would have taken the same adverse action.

So although the contributing factor inquiry and subjunctive affirmative defense inquiry are distinct, they overlap in important ways and the same sorts of evidence *could* become relevant. Yet the *questions* being posed are quite different. Weighing reasons belongs only to the second question—whether the protected activity was a necessary condition of the adverse action or if the adverse action would have followed absent the protected activity. In the first inquiry the issue is not *comparative* weight but whether the protected activity is a reason with *any* actual weight. Insofar as the non-discriminatory rationale is weighed at this step, it is only in order to determine whether or not its insufficiency, lack of credibility, or inextricable connection to the protected activity is such that the complainant has shown that the protected activity did contribute in some part. A respondent's argument and favorable evidence can go to defeat a showing of contribution by undermining the circumstantial evidence favoring contribution, but no such evidence could dispose of the contribution inquiry.

Return to the simple example from above. If the question is whether the weather or the public service announcement was a contributing factor in my decision to go for a walk, then the point that I would have gone for a walk absent either does not establish a negative answer. That evidence taken as evidence of the necessary and sufficient reasons for, or motivating factors in my action does not bear on the question of contribution. But, if one trying to show contribution argues for it by claiming that there is something deficient, shifting, or questionable about the proffered reason of needing the exercise, then that same evidence becomes relevant to that particular mode of showing contribution. One person says I went walking because I needed the exercise and that this reason was independently sufficient for my action. Another person says that the fact that it was sunny and that I saw the advertisement were contributing factors in my going for a walk. There is no conflict here—both could be right, and both could produce great evidence for their claims that have no tendency to refute the other. But if a person argues for contribution by reference to the absence, insufficiency, or questionability of alternative explanations, then to determine whether such an argument establishes contribution one must also consider evidence on offer about those other explanations. If the claim is that the advertisement contributed to my going for a walk because otherwise I wouldn't have gone for the walk, evidence normally irrelevant to contribution to the effect that I would have gone for a walk with or without the advertisement becomes relevant to the *showing* of contribution.

The following is a bad argument:

*Premise:* R would have taken the adverse action even if C didn't engage in the protected activity  
*Conclusion:* C's protected activity was not a contributory factor in R's adverse action.

This is a bad argument because of the logic of a contributory, as opposed to motivating, factor. So a respondent can show that premise with some evidence and it would be a mistake to reach the conclusion. Moreover, the same will hold for a whole group of premises: R had sufficient non-discriminatory reasons for its adverse action, R had no bias or animus against C or C's protected activity, R has offered consistent explanations for its adverse action, R standardly takes the same adverse action in circumstances of this sort absent the protected activity, R conducted an objective investigation, the proximate causes were non-discriminatory, a reasonable employer would have taken the same action, and a whole host of others. Moreover, even all of these together do not establish that there was no contribution. Contribution is a minimal showing, and so evidence favoring other explanations just isn't going to establish no contribution.

But, of course, a respondent does not bear the burden of showing no contribution. Rather, the complainant bears the burden of showing contribution by a preponderance of the evidence. It is hence incumbent on a complainant to make some showing. What is to be established is a minimal causal role, but it must be established by a preponderance of the evidence.<sup>28</sup> Consider the following argument, somewhat similar to that above.

*Premise 1:* C argues that C's protected activity contributed to R's adverse action because R's adverse action lacks sufficient explanation otherwise.

*Premise 2:* R would have taken the adverse action even if C didn't engage in the protected activity.

*Conclusion:* C's argument that C's protected activity contributed to R's adverse action because R's adverse action lacks sufficient explanation otherwise fails.

In contrast to the above, this is a good argument, and if the respondent can point to evidence establishing premise 2 while premise 1 is true in virtue of the complainant's proffered case for contribution, then the respondent will have a good argument not against contribution, but against the complainant's proffered *showing* of contribution. The same will hold for the whole host of other alternatives for premise 2 where a respondent might point to evidence: bias animus, shifting explanations, inconsistent action, etc.

Since AIR-21 places the burden on a complainant to show contribution, arguments of the second form are quite appropriate to consider in the contribution phase. Arguments of the first form are not. The difficulty is that evidence that would establish the second premise in the second argument (as well as the substitutes) is the same as the evidence that would establish the premise in the first argument (as well as the substitutes) because those two premises are

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<sup>28</sup> It is easy to conflate a showing of contribution by a preponderance of the evidence with a showing of motivation by minimal evidence. They are not the same. Consider: evidence from a complainant that his supervisor said she was going to punish him for his protected activity that is controverted and not credible is minimal evidence of motivation, but it is also minimal evidence of contribution. Lowering the amount of causation to be shown does not make all previously inadequate evidence adequate. In the same way, very good evidence of contribution, for instance evidence that one of a group of decision makers was biased against the protected activity, is not necessarily even minimal evidence of motivation—the motivation may still be conclusively non-discriminatory and the evidence of bias by one decision-making has no tendency that the motivation as a whole was otherwise.

identical. So that evidence can be relevant to the contribution inquiry, but only if and when it is considered as part of a rebuttal to an argument or claim made by (on imagined on behalf of) the complainant to establish contribution. The error to be avoided is transitioning from the cabined inquiry into evidence favoring a respondent's explanation *solely* as it would undermine an argument of the complainant to a broader inquiry into contribution generally. If that is done, one is drawn into arguments of the first, unacceptable form and inappropriate weighing of reasons. That is the danger the ARB guards against, not the consideration of evidence favoring a respondent's explanation when that evidence is relevant to whether a complainant has shown contribution in a particular way. The *Fordham* majority recognized as much, holding that it would be permissible to examine an employer's reasons for actions when the complainant's circumstantial case for contribution turns on a claim that those reasons are pretext. But it warned against the error of taking this point to mean that the inquiry was defined by a weighing of competing causal stories or a requirement that pretext be shown, features appropriate in the Title VII context but not in the distinct AIR-21 framework. ARB No. 12-061 at 25-26.

When contribution is shown by direct evidence, the inquiry is simple: one considers that evidence and if credible, contribution is shown. In determining the credibility of the evidence, it may be necessary to weigh competing evidence, but only in determining the value of the evidence, not the ultimate issue of causation. The task is more difficult when contribution is shown, as it almost always will be in a litigated whistleblower case, by circumstantial evidence. Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, work pressures, relationships among the parties, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation of the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. See *DeFrancesco I*, ARB No. 10-114 at 6-7; *Bobreski II*, ARB No. 13-001 at 17; *Bechtel*, ARB No. 09-052 at 13; *Bobreski I*, ARB No. 09-057 at 13. In some of these inquiries it will be necessary to consider a respondent's stated rationale for the adverse action in order to determine if some shortcoming in or surrounding it makes out a case for contribution by the protected activity. E.g. *Ledure*, ARB Case No. 13-044. It may be necessary in such a case to look at why the employer said it did what it did and examine whether such action conforms to that of a prudent, rational supervisor or whether it leaves something wanting. *Id.* at 8-9.

For example, a complainant might show contribution via circumstantial evidence including temporal proximity, evidence of pretext, inconsistent application of policy, and inconsistent personal actions. See *Dietz*, ARB No. 15-017 at 19. In so doing, it is necessary to consider a respondent's stated reasons and evidence for those reasons. But such inquiry will *not* involve weighing a respondent's reasons against those offered by the complainant and thus a respondent's evidence favoring a non-discriminatory motivation is not relevant and should not be considered as part of a general determination of whether contribution has been shown. See *Fordham* ARB No. 12-061. Such evidence may become secondarily relevant insofar as the case for contribution leads into a consideration of those reasons—but the error is confusing this sort of derivative relevance as the essence of the inquiry.

Noting its recent disagreement as to what evidence is relevant in examination of contribution, the ARB added that “we all agree that ALJS are not precluded from considering evidence of pretext, inconsistent application of an employer's policies, and inconsistent

explanations for the adverse personnel actions to support a finding that a complainant has met his burden to show that his protected activity was a contributing factor.” *Dietz*, ARB No. 15-017 at 20-21. It would appear to follow as a matter of course that evidence undermining those showings and others can be relevant as well, insofar as in the particular factual situation and the arguments being advanced by the complainant the case for contribution turns on one of those factors that pertains to a respondent’s rationale. Again, the error is to transform one of many possible inquiries into an argument for contribution into a legal rule for all showings of contribution because it is that transformation that would turn an examination of contribution into a weighing of alternative reasons for the adverse action.

Nor will a complainant be required to show *any* of the particular circumstances individually—in a contribution factor inquiry there is no decisive examination of pretext, animus, sufficiency, etc. that drives the analysis because the burden on the complainant, albeit a burden by a preponderance of the evidence, is only to show contribution. So it is error to focus the contribution inquiry on a particular aspect or on respondent’s articulated reasons because those reasons could well be true or the animus, retaliatory motive, or pretext could well be absent, but *at the same time* the protected activity also contributed. Instead, insofar as a complainant’s argument for contribution is premised on one or more of the circumstances that involves a respondent’s reasons, those reasons and evidence favoring them become relevant to the contribution inquiry since those reasons and evidence are relevant to the circumstantial case for contribution. *Fordham* ARB No. 12-061 at 23; *see also Zurcher v. Southern Air, Inc.*, ARB No. 11-002, ALJ No. 2009-AIR-007 (ARB June 27, 2012); *Franchini v. Argonne Nat’l Lab*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 10 (ARB Sept. 26, 2012).

To evaluate a complainant’s case for contribution, the ALJ must thus look at a variety of different ways in which contribution might be shown and the evidence for each. Furthermore, an ALJ must consider the circumstantial evidence *as a whole* and not in discrete pieces when asking whether the evidence establishes contribution. *Bobreski II*, ARB No. 13-001 at 17-18. Evidence that individually might be insufficient can together make a very strong case—for instance where there is temporal proximity, evidence of animus by some decision-makers, evidence of pretext, significant inconsistencies in a respondent’s evidence, shifting explanations and policies, etc. *Id.* at 19-22. Individually none of these points may be convincing, but together they can make out a clear case of contribution, especially when a respondent’s evidence that would undermine each of these points is unconvincing. *Id.* at 30. Consideration of the strength of a respondent’s evidence for its proffered reasons for an adverse action will be rare because “the complainant need establish only that the protected activity affected *in any way* the adverse action taken, notwithstanding other factors an employer cites in defense of its action.” *DeFrancesco II*, ARB Case No. 13-057 at 6 (emphasis in original). A court may not simply weigh evidence in favor of one reason or another, because “[u]nder the contributing factor causation standard, protected activity and non-retaliatory reasons can coexist; therefore, [a complainant] is not required to prove the [respondent’s] reasons are pretext.” *Coates*, ARB Case No. 14-019 at 3-4.

Where the content of a report or disclosure (the filing of which constitutes the protected activity) gives an employer the reasons for personnel action against a complainant, the protected activity is inextricably intertwined with the adverse action. *E.g. Hutton*, ARB No. 11-091 at 6-7; *Tablas v. Dunkin Donuts Mid-Atlantic*, ARB No. 11-050, ALJ No. 2010-STA-024 (ARB Apr. 25, 2013); *Henderson v. Wheeling & Lake Erie Railway*, ARB No. 11-013, ALJ No. 2010-FRS-

012, slip op. at 12 (ARB Oct. 26, 2012) (citing *Smith v. Duke Energy Carolinas, LLC*, ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012)). For example, if a protected report of an injury triggers a record review or an investigation and this leads to disciplinary action, the protected activity and investigation are inextricably intertwined, even when the employer asserts a non-discriminatory basis for the adverse action, and contributing factor follows as a matter of law. *DeFrancesco I*, ARB No. 10-114 at 7-8. In such a case, the consideration and weighing of the respondent's non-discriminatory rationale occurs in the context of its affirmative defense to liability. *Id.* at 8. It is at that stage that it is proper to weigh the strength of the non-discriminatory rationale articulated by a respondent as against the complainant's evidence of contribution, and to do so in an inquiry in which the respondent has a clear and convincing evidence burden rather than the complainant possessing a preponderance of the evidence burden. Explaining the point recently, the ARB found that a complainant's showing of contribution can be accomplished simply via the presence of protected activity in a causal chain leading to the adverse action. So long as that protected activity is "inextricably intertwined," contribution follows as a matter of course and a respondent may only prevail in the later analysis of its affirmative defense. See *Rudolph v. Nat'l R.R. Passenger Corp. (Amtrak)*, ARB Nos. 14-053 and 14-056, ALJ No. 2009-FRS-015, slip op. at 10 (ARB Apr. 5, 2016) ("*Rudolph II*"). When there are intervening events that might explain the adverse action, "the only question" at this stage of the analysis "is whether the intervening events...negate a find that [the complainant's] protected activity was a contributing factor in [the respondent's] adverse action." *Rudolph v. Nat'l R.R. Passenger Corp. (Amtrak)*, ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 21 (ARB Mar. 29, 2013) ("*Rudolph I*"); see also *Carter v. BNSF Ry. Co.*, ARB Nos. 14-089, 15-016, 15-022; ALJ No. 2013-FRS-082; slip op. at 4 n.20 (ARB June 21, 2016) (not all connection via a chain of events establishes contribution).

Temporal proximity is one form of acceptable circumstantial evidence in the contributing factor analysis. *Bobreski I*, ARB No. 09-057 at 13; *Bechtel*, ARB No. 09-052 at 13 & n.69; *Zinn v. American Commercial Lines*, ALJ No. 2009-SOX-025, slip op. at 19 (ALJ Nov. 19, 2012) In some instances temporal proximity alone can suffice to show contribution. See *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1003 (9<sup>th</sup> Cir. 2009); *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1136 (7<sup>th</sup> Cir. 2013); *Dietz*, ARB No. 15-017 at 20. In evaluating the importance of temporal proximity, however, a court must consider the overall circumstances and the nexus between the protected activity and the chain of events leading to the adverse action. Compare *Kuduk*, 768 F.3d at 792 with *Mosby v. Kan. City S. Ry.*, 2015 U.S. Dist. LEXIS 93869, \*19-20 (E.D. Okla. July 20, 2015). So a finding of no contribution may be sustained despite temporal proximity when there countervailing evidence against contribution, including evidence of compelling non-discriminatory rationale for the adverse action, a larger timeline disfavoring contribution, and the existence of a plausible non-retaliatory intervening cause. *Folger*, ARB No. 15-021 at 3-6.

A complainant may also show contribution a cat's paw theory, which is applicable in cases under the FRSA. See *Kuduk*, 768 F.3d at 790-91. This theory of liability applies when the impermissible consideration, here the protected activity, has no bearing on the decision-maker, suggesting no discrimination, but does bear on the actions of a lower-level (or just other) supervisor who in turns acts to bring about the ultimate adverse action in some way. See *Staub v. Proctor Hosp.*, 562 U.S. 411, 422-23 (2011). If the impermissible factor contributed to actions of one supervisor, and those actions contributed to the ultimate decision resulting in the adverse

action, then the impermissible factor was a contributing factor in the adverse action. The complainant need only show that one individual among multiple decision makers influenced the final decision and acted, in part, because of the protected activity. *Rudolph I*, ARB No. 11-037 at 16-17 (citing *Bobreski I*, ARB No. 09-057 at 13-14).

This discussion has been long, reflecting the current uncertainty as to what the proper contribution inquiry is supposed to look like. In light of that uncertainty, I have attempted here to explicate the way in which evidence favoring a respondent's non-retaliatory rationale can be both relevant and irrelevant to the analysis of contribution. I conclude that the proper mode of analyzing contribution is to look at all of a complainant's arguments, actual and those he could have made based on the record, and then to examine whether those arguments sustain, individually or together, the complainant's burden. This may include consideration of temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation of the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity, and anything else a complainant produces as an indication of contribution. One does not weigh conflicting evidence of non-retaliatory explanations since that evidence is not relevant to the question of contribution. But, depending on the context of the case, that same evidence may become relevant to a complainant's *showing* of contribution. When this occurs, it is proper to consider that evidence, but only in the context of evaluating whether a complainant has met his burden in the particular way suggested. Such evidence could be decisive only in undermining all of a complainant's arguments for contribution, thereby resulting in a failure by the complainant to carry his burden of proof.

## ii. Application

### (1) Did Complainant's December 2012 injury report contribute to Respondent's April 2013 discipline?

There are two sorts of protected activities and two adverse actions to consider. I begin with the protected activity of filing an injury report in December 2012.<sup>29</sup> The first question is whether this protected activity contributed to the April 2013 discipline. Complainant argues that his protected activity contributed to this adverse action on the basis of temporal proximity, Mr. Gonzalez's complaints occasioning the investigation, disproportionate discipline, the fact that he came to work early, and the fact that he also used flex-time to attend these appointments. (CPB, p. 18.) MRL points out that Complainant has not presented any direct evidence of contribution and argues that circumstantial evidence does not support contribution either since there was a lack of temporal proximity, that Complainant was treated similarly to others with similar violations, and that there is no evidence of antagonism or hostility towards Complainant's protected activities. (RPB, pp. 65-71.)

Complainant's basis for his claim is circumstantial. Respondent is correct that there are no indications of bias or animosity from the decision-makers directed at this protected activity. This point was discussed above with reference to the credibility of Mr. Johnson and Mr. Gustin

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<sup>29</sup> The October 2013 injury report comes after the adverse actions at issue, so is not relevant to the analysis.

(§§ V.B, V.F). Indeed, not even a circumstantial case for animosity—a showing that either one might have a reason to be hostile to this sort of protected activity—has been presented. If anything, the evidence shows that the decision-makers encouraged the protected activity in question. Complainant has used the e-mails between Mr. Loeffler and Mr. Johnson to ground a claim of animosity. (*See* CX 58, pp. 1-5.) Yet insofar as they are antagonistic, it is Mr. Loeffler who is the source of the offending comments, and no evidence suggests he played any role in the discipline. The comments also have absolutely no connection to the injury report, instead relating to the therapy schedule. Finally, these e-mails in context do not show hostility. They read more as poor attempts at humor, especially when put in the context of the two of them agreeing to accommodate Complainant's every request and the absence of contextual evidence that would prompt reading more into these e-mails than kindly joking.

The protected activity doesn't figure into the reason for the investigation either. Mr. Johnson had been told that Complainant had talked about ways of wasting time and so took a rather minimal step of driving by his nearby house to see if he was home when he was supposed to be at physical therapy. (HT, pp. 212-13.) Given such a report, this minimal investigation was rational, indeed Mr. Johnson would have likely have been derelict in his duties if he didn't do something to investigate the reports. Moreover, focusing on the protected activity in question, no evidence has even suggested that the injury report had anything to do with the decision to check on Complainant's adherence to his treatment schedule. Complainant has presented evidence of Mr. Gonzalez's hostility, (HT, pp. 82-85, 295-96), but this was not, even on Complainant's telling, hostility to the protected activity of filing an injury report. Mr. Gonzalez was upset that Complainant was not working as in the past, not that he had reported an injury. No evidence even suggests that Mr. Gonzalez was aware of any report. Nor can I imagine how the report could serve contribute to Mr. Gonzalez's antagonism.

In addition, I agree with Respondent that the fact that Complainant sometimes arrived at work early or used flex-time to attend appointments is irrelevant. (RRB, p. 22.) Complainant's argument on this point is that though he violated a rule, the fact that he was disciplined is evidence of impermissible contribution because MRL should have simply excused his malfeasance. As Respondent points out, this is hard to countenance. Respondent's rationale for disciplining Complainant was that he took paid-time away from work to attend a physical therapy appointment. Complainant may have arrived at work early and used flex-time on other occasions, but he has not explained how that could possibly entitle him to skip appointments that he had told his superiors he would be attending during working hours. Perhaps Complainant may have been able to use the fact that he showed up for work early as a reason to be granted time off on other occasions, but this would have involved discussion with his supervisors. Here, Complainant had told Mr. Johnson he would be at physical therapy and then was not there.

The point about showing up early on other occasions leads into another argument Complainant makes: that the discipline was disproportionate to the infraction. This can be a powerful indication of contribution—a respondent intent on retaliation may know better than to just suddenly discipline the employee or invent charges out of thin air. But such an employer might increase investigations of an employee and/or use a legitimate infraction as an excuse to punish the protected activity by an unreasonably harsh sanction. I discussed the first point above, finding that the investigation at issue is not suspect. The question next is whether the punishment fits the crime, so to speak.

To begin with, the rules involved are highly ambiguous. MRL categorizes rules differently, but those relevant to this case overlap considerably and are not particular as to what they cover. This is to be expected of a rules manual developed for use in the industry generally. But it raises the possibility that supervisors could manipulate the rulebook to retaliate against employees in terms of what charges they bring and how they pursue them. This is a legitimate worry, but it does not apply convincingly in this instance. MRL may well have used the flexibility of its rules to tailor its discipline of Complainant, but it did so in order to be as lenient as possible while still instituting some discipline. MRL chose to charge him with the less serious violation of GCOR 1.4. (RX A, p. D1019; *see also* RX V, p. 3.) Mr. Gustin credibly testified that they did not want to punish him severely, just correct the behavior. (HT, p. 521.) Most importantly, Complainant received only a censure letter, losing no pay or time. (*Id.* at 214, 518-21; RX A, p. D1019.) This is adverse action, but very mild adverse action.

Part of Complainant's argument on this point is that his misconduct was less serious than it may appear—he didn't call to cancel the appointment, he merely took his pills and fell asleep, thereby missing the appointment. As discussed with reference to Complainant's credibility (§ V.A), I do not credit his version of events. But even on Complainant's version of events, the discipline assessed was warranted and entirely reasonable. He was punished for saying he was going to be at an appointment on company time and then failing to be at the appointment, instead being at home. He did this regardless of whether he just fell asleep or called to cancel. The discipline assessed, though an adverse action, was lenient. MRL discovered potentially serious misconduct and had to do something, opting for minimal discipline.

Consistent with the above framework, I do not conclude that there was no contribution based on this evaluation of Respondent's rationale for discipline and the type of discipline imposed. Rather, I conclude only that Complainant's proffered showing of contribution via insufficiently explained or disproportionate discipline is not successful.

Respondent argues that Complainant has not shown a nexus between this letter of censure and any protected activity. It also argues that Complainant signed a document admitting the infraction, demonstrating that there was no contribution. (RRB, pp. 26-27.) The second point is irrelevant. Acceptance of the discipline does not establish that it was proper and fair, let alone that the injury report did not contribute to the discipline in any way. The first point, however, has some merit. This is decidedly not a case wherein the report of an injury prompts an investigation, which then leads to discipline. Those cases are difficult because there is a clear nexus between the injury report and the adverse action—they are inextricably intertwined, and generally that establishes contribution. *See, e.g., DeFrancesco I*, ARB 10-114 at 7-8. Here, however, the injury report itself presents as a causal dead end in the record. Complainant reported an injury to Mr. Johnson. MRL investigated the injury per its standard procedure. Mr. Johnson took Complainant to the emergency room and prompted him to file an injury report. MRL instigated the Wellness Plan to get Complainant treatment, provide him with wage continuation benefits if needed, and develop back to work-plans. And then, so far as the injury report went, the story comes to an end. It plays no further part in the events of this case until it becomes a basis for an OSHA complaint. The injury report and April 2013 discipline are causally related in some sense in that both relate to the injury itself, but there is no direct line of causation running from one to the other that can be made out in the record.

Complainant's last stated grounds for contribution is temporal proximity. About four months separate the injury report and the April discipline. This is not so temporally distant that contribution becomes unlikely, but not so temporally close that contribution follows as a matter of course. As discussed above, temporal proximity must be considered in terms of the particular circumstances of the case. *See, e.g., Folger*, ARB No. 15-021 at 3-6. An argument for contribution based on temporal proximity will be most convincing when nothing has occurred in the intervening period, however long or short, that would explain the discipline. That just isn't the case here. It is undisputed that Complainant did in fact miss his physical therapy appointment after he had told Mr. Johnson that he would be attending it during work hours. Mr. Johnson also had independent cause to check on Complainant. So there is nothing inherently suspect about the temporal proximity in this case. Again, I do not conclude that there was no contribution based on this point—rather I only conclude that temporal proximity does not establish contribution on the facts of this case.

In addition to the various arguments and possible indications of contribution considered above, the ARB has directed consideration of indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, and a change in the employer's attitude toward the complainant after he or she engages in protected activity. *See, e.g., DeFrancesco I*, ARB 10-114 at 6-7. None of these circumstantial indications of contribution are present here. There isn't evidence of pretext. Insofar as the record makes clear how MRL treats these sorts of infractions, if there is inconsistency it is that Complainant was treated more leniently than others. MRL has been consistent in its explanation—Complainant said he was going to be at the appointment but was not. Nor do I see any evidence that MRL's attitude toward Complainant changed at all. They were incredibly supportive of Complainant and accommodating as to his work space and truck. Even through the events that led to the discipline is there no alteration in MRL's attitude—Complainant testified that they just moved on immediately and continued as before. (HT, pp. 98, 152-53.)

Neither has Complainant shown contribution in reference to all of these considerations put together. Rather, neutral, even-friendly decision makers instituted reasonable, lenient discipline for clear misconduct. In the circumstances they might have been harsher, especially given his representation that he had just fallen asleep when the medical records demonstrated that he called beforehand. The investigation was minor and reasonable in the circumstances. Any complaints that prompted it would not have been the result in any way in animosity at the protected activity of filing the report. The report is relatively distant from the discipline, the evidence of record shows that the report itself was irrelevant to all subsequent events, and the intervening period of time contains events that fully explain Respondent's actions.

No direct evidence that the December 2012 injury report contribute to the April 2013 discipline has been offered. I have examined all of the circumstantial evidence and Complainant's arguments for contribution—considering Respondent's evidence as it became relevant—but have not found any indications that the protected activity contributed in any way to the adverse action. Therefore, I find that Complainant has failed to show that the protected activity of filing an injury report in December 2012 was a contributing factor in Respondent's April 2013 discipline of him.

(2) Did Complainant's December 2012 injury report contribute to his October 2013 discipline?

Similar considerations apply to the next question, whether the December 2012 injury report contributed to the October 2013 discipline. Complainant's argument for contribution is two-fold: the investigation was instigated by complaints from his co-workers and Respondent had an inadequate case for discipline. (CPB, p. 19.) Respondent's argument on this point is identical: there is no direct evidence of contribution and the circumstantial evidence favors a conclusion of no contribution. (RPB, pp. 65-71.)

Though Complainant is correct that the investigation that led to the October 2013 discipline was partially initiated by his co-workers, this does not show that his injury report of December 2012 contributed to his discipline. The complaints, at least from Mr. Vanek, were well-founded and based on worries that Complainant was not doing his job, putting the entire system at risk. Mr. Gonzalez was hostile to Complainant, but no evidence that the injury report contributed to this hostility. Those complaints, then, cannot serve to show contribution by the December 2012 injury report.

As in the previous section, I find no evidence of bias, animosity or hostility directed at the protected activity in question in the timeframe leading up to the October discipline. And as above, this investigation was well-founded. Complainant may be bothered that he was covertly surveilled, but the record shows nothing out of the ordinary in the behavior of the MRL supervisors. Mr. Johnson credibly explained his reasons for conducting a covert efficiency test of Complainant. He had complaints from several of Complainant's co-workers, Complainant had previously been disciplined for mis-use of company time, Complainant didn't seem to be accomplishing anything from week to week, Complainant wasn't around the shop when he should have been in Missoula, and Complainant's reports of what he had done suggested he wasn't doing his work. (HT, pp. 218-22, 261-65.) This evidence does not establish there was no contribution. But I do conclude from it that the efficiency testing was more than adequately explained by factors not including the protected activity, and so the fact of investigation itself, in these circumstances, does not in and of itself show contribution.

Complainant's argument for contribution turns on disproportionate punishment and/or the inability of MRL to prove its disciplinary charge. Ultimately MRL primarily charged Complainant with only an over-long lunch, yet the supervisors could not be exactly certain as to how over-long the lunch was. Moreover, Mr. Vanek was not subjected to the same sort of discipline, though he also took an overlong lunch. (CPB, p. 19.)

At first glance, this appears to make out a good circumstantial case for contribution. But on further analysis, the argument doesn't hold up. In the first place, the issue before me is not whether MRL or Complainant would prevail in a fact-finding. Complainant had his chance to make that challenge and decided not to do so. The concern here is whether the charges and discipline stemmed, in any way, from the protected activity. Even if MRL could not have prevailed in a disciplinary hearing, if its reasons for acting did not include the protected activity, there is no liability under the FRSA. To put the point otherwise, the FRSA is not an avenue for a disgruntled employee to re-litigate discipline on the merits. It responds to different concerns: discipline that was properly instituted might be a violation of the FRSA while discipline that was

wrongfully institute may not. Under the FRSA, it is the rationale for the discipline, not its merits, that matters.<sup>30</sup>

Once that point is taken, the focus on the over-long lunch misses the point. Though that is the charge that MRL decided to formalize in the letter Complainant signed, the rationale for the discipline was Complainant's course of conduct over the two days of observation. Contributing to this was his past discipline, likely the complaints of others, and Mr. Johnson's independent worries that Complainant was not doing his job. Mr. Gustin's explanation of why they charged him as they did establishes as much—MRL crafts its charges to what it believes the arbitrators would ultimately uphold, not including all of the rationale that stands behind the decision to charge. (HT, pp. 552-53.) So while it may seem suspicious to level serious disciplinary charges against an employee who took 15-20 too long for lunch, that isn't why MRL was leveling the charge. That was all that was included in the charge, because in the context of railroad arbitration hearings, railroads are seemingly upheld when they can nail down misuse of any period of company time for which the employee can find no excuse. (*Id.*)

There is more, then, to the October 2013 discipline than the over-long lunch. But that "more" does not seem to include the December 2012 injury report. Once the larger circumstances are considered, there is nothing suspect about the charges that were pursued in this instance. Complainant references Mr. Vanek's lack of discipline, but as Respondent argues, Mr. Vanek was not in the same situation as Complainant. (RRB, pp. 23-27.) He was not being efficiency tested, he did not have recent discipline for misuse of time, he did not make a host of seemingly personal errands on company time, he was not inexplicably taking backroads, and he was not making reports to Mr. Johnson that suggested he was not completing any work. They were differently situated, and so were treated differently.

In the October 2013 discipline, MRL charged Complainant with the violation of two more serious rules, GCOR 1.5 and 1.6. (RX B, p. 1022.) Given the ambiguity and malleability of MRL's rules, this could suggest contribution. Yet, Complainant's total behavior was quite troubling, as were his attempts to cover his tracks in the subsequent flurry of e-mails. Because communications technicians operated independently, the position required a great deal of trust between Mr. Johnson and his subordinates. The totality of the evidence raised serious questions about whether Complainant could be expected to live up to that trust and MRL pursued correspondingly serious charges, at least as a warning to him so that he would be more diligent.

Ultimately, however, the case for contribution based on disproportionate discipline falters because, again, Complainant was subjected to very mild discipline—a censure letter, record suspension, and notations in his personal file that would disappear if he had no further problems. (RX B, p. 1022.) He again lost no time and earnings and was given the most lenient discipline that Mr. Gustin could give, consistent with alleging a serious infraction. (HT, p. 526.) The discipline is more than adequately explained by non-retaliatory factors, and so Complainant's argument for the contribution of his December 2012 injury report on his October 2013 discipline on the grounds of the defectiveness of Respondent's explanation of that discipline fails.

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<sup>30</sup> So for example, an employee terminated solely because a supervisor harbored a personal animus against her might have a good case appealing the termination under the collective bargaining agreement, but would have no FRSA claim at all, unless that animus was founded, in part, on protected activity.

The other considerations relevant to contribution are the same here as in the last section. There is no evidence of pretext or animus and no shifting explanations. As above, it is relevant that as far as the record goes, the December 2012 discipline report is a causal dead end: leading nowhere and playing no further role at all in the story. I find no changes in attitude and, like before, if there is inconsistency in MRL's treatment of Complainant, it would seem to suggest that he was treated quite leniently given the scope of potential malfeasance. The temporal proximity here is weaker, just over 9 months between protected activity and the investigation that would lead to the adverse action. And as above, even if this weak temporal proximity could be suggestive, there is nothing suspicious about *this* temporal proximity in context

Considering all the various possible indications of contribution together, I am not convinced that Complainant has shown that his December 2012 injury report contributed, in any way, to his discipline in October 2013. Complainant's circumstantial case turns mostly on assailing Respondent's charges, but in the fuller context these arguments are not convincing. I therefore find that Complainant has failed to show that his December 2012 protected activity contributed to his October 2013 discipline.

(3) Did Complainant's adherence to a course of treatment contribute to the April 2012 discipline?

The parties have focused mostly on the protected activity of reporting an injury, as protected by 49 U.S.C. § 20109(a) of the FRSA, but in the context of this case the more difficult question concerns the activity protected by 49 U.S.C. § 20109(c)(2), which encompasses adherence to a treatment plan for a work-related injury and so covers Complainant's attendance of appointments during work, his work of light duty, and any other compliance with recommendations of his treating physician. If any of these activities contributed to the April 2013 discipline, then Complainant has made out his case for retaliation under the FRSA.

There is some evidence of record of negative attitudes toward Complainant, his missing work for medical appointments, and his work on light duty status in the months between his injury and the April 2013 discipline. I have determined that neither Mr. Johnson nor Mr. Gerson had animosity against Complainant's adherence to a course of treatment (§§ V.B, V.F), though the e-mails from Mr. Loeffler might suggest some animosity on his part. As discussed above, the best reading of these e-mails does not impute such bias to Mr. Loeffler, instead treating the comments as a private attempt at humor (§ VI.A.1.d.ii.(1)). Moreover, Mr. Loeffler played no role in the decision-making process.

The animosity of Mr. Gonzalez is more relevant. Though above I dismissed this as not related to the protected activity at issue (§§ VI.A.1.d.ii.(1)-(2)), Mr. Gonzalez's animosity quite clearly related to the fact that Complainant was missing work and/or was on light duty. (*See* HT, pp. 82-85, 251, 283, 295-96.) This animosity pre-dated any of the protected activity in this case, but Complainant credibly testified that his reduced work-status heightened the conflict. (*Id.* at 171-72.) The investigation of Complainant in April 2013 was prompted by reports/complaints to Mr. Johnson that Complainant was wasting time. (*Id.* at 212.) Respondent points out that nothing definitively linked the complaints to Mr. Gonzalez. (RRB, pp. 21-22.) The best reading of the record, however, is that Mr. Gonzalez was the source of the complaints. Though Mr. Johnson did not explicitly link the report to Mr. Gonzalez, he testified that by April Mr.

Gonzalez had complained a great deal. (HT, p. 251.) The only other person known to complain about Complainant is Mr. Vanek, but these complaints did not come until much later, after Complainant returned to full duty. (*Id.* at 291-95.)

Mr. Gonzalez, of course, had nothing to do with the decision to discipline Complainant and Complainant was disciplined only after Mr. Johnson independently determined that he did in fact miss an appointment. Nonetheless, Complainant can rely on a “cat’s paw” theory to show that Mr. Gonzalez’s reports, grounded in part in animosity at Complainant’s protected activity of attending appointments and working light duty as ordered by his physicians, contributed to his discipline. (*See* CPB, pp. 17-19.) Mr. Gonzalez, however, is Complainant’s co-worker, not his supervisor, which makes this different from an “ordinary” cat’s paw case where the retaliatory animus of one supervisor is passed on to another, unknowing supervisor. The cat’s paw theory requires that the actor with unlawful motivation be acting within the scope of his or agency from the employer an agent of the employer, which will generally mean a supervisor. *See Staub*, 562 U.S. at 418-21. *Staub*, however, left open the question as to whether or not a co-worker could be the source of cat’s paw liability. *Id.* at 422 n.4.

Most courts have limited the theory to supervisors, *e.g. Abdelhadit v. New York*, 2011 WL 3422832 (E.D.N.Y. Aug. 4, 2011); *Reynolds v. Fed Ex. Corp.*, 2012 WL 1107834 (W.D. Tenn. Mar. 31, 2012), though some have held that cat’s paw liability can stem from animus from co-workers. *See Johnson v. Kappers, Inc.*, 2012 WL 1906448 (N.D. Ill. May 25, 2012). The ARB has countenanced cat’s paw liability in whistleblower cases, but it has not squarely addressed whether the discriminatory intent of a co-worker can sustain a showing of contribution. *See e.g. Rudolph I*, ARB Case No. 11-037 at 16-17; *Bobreski I*, ARB No. 09-057 at 13-14; *Chen v. Dana-Farber Cancer Inst.*, ARB No. 09-058, ALJ No. 2006-ERA-009, slip op. at 17-20 (ARB Mar. 1, 2011) (Royce, J., dissenting).

*Staub* was based on an application of general agency principles, extending liability based on bias of a supervisor when he was acting in the course of his employment, *e.g.* by making personnel evaluations and recommendations. As one court has recently explained, an extension of cat’s paw liability generally must thus derive from agency principles, whether the biased individual be a supervisor or a co-worker. *Vasquez v. Empress Ambulance Serv., Inc.*, 2015 WL 5037055, \*5-6; 2015 U.S. Dist. LEXIS 113284, \*15-18 (S.D.N.Y. Aug. 25, 2015); *see also Kregler v. City of N.Y.*, 987 F. Supp. 2d 357, 368 (S.D.N.Y. 2013), *aff’d*, 604 F. App’x 44 (2d Cir. 2015). Hence, for a co-worker to be the font of cat’s paw liability, that co-worker must be acting within the scope of his employment, as an agent of the employer, and must play a meaningful role in the events, not merely acting as a source of information akin to a witness being asked questions. *Id.* (citing *Staub*, 562 U.S. at 421-22; *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 450 (2d Cir. 1999); *Kregler*, 987 F. Supp. 2d at 268.)

What it means to play a meaningful role is just a role sufficient to implicate contribution under the FRSA. Here, Mr. Gonzalez was not a mere idle informant reporting when asked or “analogous to a witness at a bench trial.” Instead, he is an “actor in the events that are subject to the trial.” *Staub*, 562 U.S. at 421-22. The evidence is that the investigation was prompted by information provided in a complaint/report. Mr. Gonzalez was constantly complaining about Complainant. So if in making his report/complainant he was acting within his scope of employment, then he can be a source of cat’s paw liability here and a basis for contribution.

Ordinarily there would be a clear negative answer: co-workers are not enlisted to make investigations or to make reports to prompt investigations as part of their duties and hence within their scope of agency at the employer. MRL, however, has instituted rules to the contrary. As cited in Complainant's disciplinary letter, "[a]ny act of hostility, misconduct, or willful disregard or negligence affecting the interest of the company or its employees is cause for dismissal and must be reported. Indifference to duty of [sic] to the performance of duty will not be tolerated." (RX B, p. D1022.)

These are not idle words. Read straightforwardly, they require every MRL employee, as part of his or her employment, to inform MRL whenever misconduct by another employee is witnessed. That would certainly include reporting to supervisors suspicions that a co-worker is stealing company time, using appointments as an excuse to leave during work hours but not going to those appointments, something MRL considers very serious. If one fails to do so, one may be disciplined. So, contrary to what may seem ordinary, MRL *does* enlist its employees as agents for the purpose of making these sorts of reports and complaints. Since it has done so, Mr. Gonzalez was acting within the scope of his employment agency with MRL when he made his reports and cat's paw liability can extend on the basis of those reports. Since Complainant's protected activity contributed to, and perhaps motivated, Mr. Gonzalez's internal reports, those reports were within the scope of Mr. Gonzalez's employment, and they contributed to the adverse action taken, Complainant's protected activity of adherence to his course of treatment contributed, in some way, to the adverse action taken in April 2013.

There is no evidence of contribution in the conduct of the investigation itself. Mr. Johnson was presented with reports that Complainant was exaggerating the time needed for treatment or not attending his treatment. He responded by undertaking a minimal investigation in a manner he had done with other employees. The communications department operates on trust, and Mr. Johnson gave his employees wide-latitude in taking time off for appointments so long as they informed him of where they would be. He was charged with verifying the hours of his employees, so if he was informed by a subordinate that a co-worker had bragged about betraying this trust, he had to do something. He discovered that Complainant was not where he said he was going to be during work hours. Further, as found above (§ VI.A.1.d.ii.(1)), there was sufficient basis for discipline and it was not disproportionate.

*Staub* held that "if the employer's investigation results in an adverse action for reasons unrelated to the [agent's] original biased action...then the employer will not liable." 562 U.S. at 421. But the Court stressed that an independent investigation alone would not absolve an employer of liability—it would depend on the causal role played by the biased agent's action. *Id.* Moreover, *Staub* located the sort of proximate cause inquiry in the required showing of the employer, not the employee. *Id.* *Staub* was a case under the Uniformed Arms Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301, *et seq.*, and was analyzed in a "motivating factor" framework. The FRSA employs the more complainant-friendly "contributing factor" framework and, accordingly, in cat's paw liability a complainant only needs to show a chain of contribution. *See Rudolph I*, ARB No. 11-037 at 17-18; *see also Bobreski I*, ARB No. 09-057 at 13-14. Contribution is not meant to be a difficult showing. *E.g. Ledure*, ARB No. 13-044 at 8. Hence, consideration of whether the investigation uncovered reasons for the discipline unrelated to the original biased action and hence breaks the causal link necessary to impose liability belongs properly to the consideration of the employer's affirmative

defense. There the question will be whether the reasons for the discipline, even if in actuality unearthed due, in part, to the biased agent's actions, were independently sufficient to prompt the discipline. That, however, is not a question to be considered in the contribution inquiry and to do so would improperly impose the incorrect burden of proof on the showing. For the moment, then, I conclude that given Mr. Gonzalez's express duty to make such reports and his active role in generating the investigation that produced the adverse action, Complainant has shown contribution, in some way, via the hostile attitude of Mr. Gonzalez to his protected activity.

Other circumstantial evidence indicates contribution in this case as well, in particular temporal proximity. With the injury report over four months had passed between the protected activity and the adverse action. This was not very suggestive of contribution. Here, however, little time passed between the protected activity and the adverse action—in fact, *no* time really passed since Complainant was continuously engaged in protected activity by remaining on light duty and attending his appointments throughout the time relevant to this adverse action.

Ultimately, the fact that the protected activity and adverse action are inextricably intertwined is the most convincing evidence of contribution. When the protected activity itself triggers the adverse action or investigation that leads to it, the protected activity is inextricably intertwined with the adverse action. *DeFrancesco I*, ARB No. 10-114 at 7-8. The simple presence of the protected activity in a causal chain leading to the adverse action can also make the two inextricably intertwined. *Rudolph II*, ARB Nos. 14-053 and 14-056 at 10; *see also Hutton*, ARB No. 11-091 at 6-7. As discussed in both *DeFrancesco I* and *Rudolph II*, the relevant inquiry is into the actual causal story and the role played by the protected activity in the Respondent's adverse action. If it is intertwined in actuality, then contribution follows. Consideration of whether that actually intertwined role was *necessary*, or whether absent the protected activity the other factors about the situation would have been *sufficient* to produce the *same* discipline belongs to the respondent's affirmative defense, not a discussion of contribution. Again, contribution is not meant to be a difficult showing. *Ledure*, ARB No. 13-044 at 8.

With Complainant's protected injury report I found a causal dead end. This is not so for the protected activity involving adhering to a course of treatment. The course of treatment drives the rest of the events in the history of this case and Complainant's activities at work during this period. Complainant was working light duty and taking paid time away from work to attend appointments. The entire investigation was an examination of how he was engaging in this protected activity and whether he was fully adhering to his course of treatment and appointment schedule. As such, I find that the course of treatment and the April 2013 discipline are inextricably intertwined in this case. In actuality, the investigation and discipline revolves around activity that was protected. With the injury reports the actual facts of this case showed an absence of causal role and disappearance from the history of the case. With the course of treatment, it is impossible to understand the history of the case as it actually unfolded absent consideration of the protected activity. This is enough for contribution, and the respondent's rationale for discipline free from the protected nature of the activity is properly considered in the last step of the inquiry, not here. Therefore, Complainant has made the minimal showing that his protected activity of following a course of treatment contributed, in some way, to Respondent's adverse action of the April 2013 discipline.

(4) Did Complainant's adherence to a course of treatment contribute to his October 2013 discipline?

The last question to consider is whether any activity protected by 49 U.S.C. § 20109(c)(2) contributed to Respondent's October 2013 discipline of Complainant. Most of the relevant considerations have been discussed at length in reference to the prior questions. Complainant's arguments for contribution are unconvincing insofar as they target the conduct of the investigation, the charges that were made, or the discipline that he ultimately agreed to. In addition, Complainant stopped working light-duty in July 2013, (HT, pp. 102-03), so the protected activity ceased, in some respects, then and was not as intertwined with subsequent events. On the other hand, Complainant continued to receive treatment for his work-related injury, and so the protected activity, in some respects, continued through the October 2013 discipline. If Complainant can show contribution, it will be in one of the three ways discussed in the last sub-section.

First, Mr. Gonzalez's reports and complaints did play a role in prompting the efficiency testing. These complaints were part of the reason that Mr. Johnson approached Mr. Gustin, and why the two of them decided to conduct the testing. (*Id.* at 218-21, 522-23, 542-46.) I have found that Mr. Gonzalez's complaints were in part based on animosity directed at Complainant's missing work and working light duty, which left Mr. Gonzalez with a heavier workload. As before, since MRL has rules that require co-workers to make complaints of the sort at issue here, in making those complaints Mr. Gonzalez acted in the scope of his employment, and so can be a source of contribution. Respondent may argue that in this case at least there were many other reasons for the investigation that did not involve impermissible motives or bias. That argument misses the point—the evidence is to be considered with Respondent's affirmative defense, not as part of the contribution inquiry. At present I do not weigh the reasons for investigation or explore the permissible rationale for it. Rather, it is enough that Mr. Gonzalez's animus to the protected activity contributed, in some way, to the investigation and ultimate discipline.

There is close temporal proximity between Complainant's ongoing protected activities and the adverse action. The protected activity had lessened since Complainant had returned to full duty and wasn't receiving as many treatments. But even so, the close proximity of the adherence to a course of treatment and the investigation, charge, and discipline in October 2013 supports an inference for contribution, even if it alone does not license such an inference.

Finally, though less intertwined, I find that the October 2013 discipline is also inextricably intertwined with the protected activity of adhering to a treatment program. In particular, the investigation was about evaluating whether or not Complainant had properly returned to duty after his injury and treatment for it, including his ongoing treatment. The discipline was, from one perspective, for failure to fully re-engage after a period in which he was, by doctor's orders, not fully working and not engaging in the sorts of activities he was expected to do on September 25 and 26. As the actual history of the case and events leading into the investigation, charge, and subsequent discipline played out, the protected activity of adhering to a course of treatment and physician's recommendations played an inextricably intertwined role with the adverse action, setting up the events and reasons for discipline. Whether that role was necessary or if the discipline would have occurred given the same conduct but absent the protected activity is a question to be considered in the last step of the AIR-21 inquiry, not as part

of the contribution inquiry. Here I simply conclude that the causal connection between the protected activity and adverse action, then, is rather intertwined enough to make the minimal showing of contribution and thereby shift the burden of proof onto Respondent.

2. *Has Respondent Shown by Clear and Convincing Evidence that it Would Have Taken the Same Adverse Action Absent the Protected Activity?*

In the previous section I found that Complainant engaged in protected activity by reporting injuries in December 2012 and October 2013 and by adhering to the course of treatment, to include working light duty, prescribed by his physicians. I found that Respondent had knowledge of this activity. Further, Complainant suffered adverse action under the meaning of the FRSA in his April 2013 censure letter and his October 2013 censure letter and record suspension. Finally, I determined that Complainant failed to show that his injury reports contributed to either adverse action but had shown that his adherence to a course of treatment prescribed by his physicians did contribute to both adverse actions in some way, primarily because the ongoing protected activity was inextricably intertwined with the adverse action. Complainant has thus made out his case for retaliation and shifted the burden to Respondent. Now I must determine if Respondent has made out their “affirmative defense” and so avoid liability for retaliation under the FRSA.

a. Legal Framework

Under § 1982.109 (b), relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. 29 C.F.R. § 1982.109(b); *see also Dietz*, ARB No. 15-017 at 6-7. In other words, even where a complainant has proven retaliation by a preponderance of the evidence, liability does not attach if the employer can demonstrate clearly and convincingly that it would have taken the same adverse action in any event. *Williams*, ARB No. 09-092 at 6. Clear and convincing evidence is “evidence indicating that the thing to be proved is highly probable or reasonably certain.” *Id.* (citing *Brune*, ARB No. 04-037 at 14). It is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. *See* 5 C.F.R. § 1209.4(d).

To prevail under this standard, the respondent must show that its factual contentions are highly probable—clear and convincing evidence is the burden of proof in between “preponderance of the evidence” and “proof beyond a reasonable doubt.” *See Araujo*, 708 F.3d at 159 (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *Addington v. Texas*, 441 U.S. 418, 525 (1979)). Thus, the burden of proof under the clear-and-convincing standard is more rigorous than the preponderance-of-the-evidence standard. *DeFrancesco I*, ARB No. 10-11. Evidence is clear when the employer has presented an unambiguous explanation for the adverse action. It is convincing when based on the evidence the proffered conclusion is highly probable. *DeFrancesco II*, ARB No. 13-057 at 7-8 (citing *Speegle, Inc.*, ARB No. 13-074 at 6; *Williams*, ARB 09-092 at 5). This is a difficult standard for employers, signaling Congressional concern with past industry practice and the importance of the interests at stake. *See Araujo*, 708 F.3d at 159 (citing *Herman*, 115 F.3d at 1572); *see also DeFrancesco II*, ARB No. 13-057 at 8.

The inquiry requires weighing the employer's reasons to ascertain whether there is a rational, non-discriminatory basis for that action, such as rules and policies, that powerfully compels a conclusion that the action would have taken place apart from the protected activity while also considering evidence favoring a complainant's rationale or evidence of disparate treatment in the application of those rules. *DeFrancesco II*, ARB No. 13-057 at 9-10. The analysis is essentially subjunctive, asking whether "the employer has presented evidence that clearly and convincingly establishes that it would have taken the same personnel action against" an employee who engaged in the same conduct absent the protected activity. *Id.* at 10. In *DeFrancesco II* the ARB offered a series of questions to consider. Does the employer routinely monitor or investigate compliance with the rules absent protected activity? Does the employer consistently impose equivalent discipline to employees who violate the rule but engage in no protected activity? Are the rules charged routinely applied? Are those rules vague and subject to manipulation? Does the evidence show that the investigation was designed to further the purpose of the rule rather than as a way to punish the employee? *Id.* at 11-12. To prevail, an employer must show more than that a rule was violated, that it had a legitimate motive for the adverse action, and that it imposes discipline generally whenever it determines a rule has been broken. Instead, it is necessary to establish the more particular point that the rule is applied consistently such that employees who engage in substantial similar conduct absent the protected activity are also investigated and punished in the same manner. *Id.* at 13-14.

As opposed to the inquiry into contribution, the inquiry here is counterfactual, not actual. So the fact that the protected activity did play some causal role in the adverse action as events developed, and so is inextricably intertwined with it, does not automatically impose liability on a respondent. Rather, an ALJ must factor the protected activity out of the situation and ask whether with everything else remaining the same, the exact adverse action would still have been taken.<sup>31</sup> Counterfactuals are difficult to evaluate since there are many scenarios that can be imagined in which there is no protected activity and it is not immediately obvious which one is the proper counterfactual situation to consider. An example, however, can help frame the inquiry. If an injury report prompts an investigation and the investigation reveals serious misconduct by the complainant (e.g. embezzlement of company funds, behavior causing grave safety and/or security risks to the employee and others), the employee will be able to show contribution because of the inextricable actual role of the report, which is protected. But it would be absurd to find that just because the investigation might not have actually happened except for the report that the employer has automatically violated the FRSA. Such a rule would allow an employee to protect himself from discipline for misconduct by engaging in a protected activity that would alert the employer of that misconduct—because the impetus to eventual discovery was protected, the employer's hands would be tied in punishing the misconduct. It would be different, of course, if the investigation of that sort isn't normal in such circumstances, i.e. when the employer learns of an injury, whether or not there was the protected report. If the railroad only investigates because of the protected activity (or to put it otherwise, investigates for the reason that the activity is protected), then liability may follow. But if such investigations are normal, independently and objectively conducted, and lead to discipline that is independent of the protected activity, then liability will not follow because in those circumstances absent the protected activity, the railroad would have done the same.

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<sup>31</sup> It is important, of course, to ask if the *same* adverse action would have been taken, not just whether *any* adverse action would have been taken.

The AIR-21 framework requires the respondent to show, by clear and convincing evidence, that it “would have taken the same [adverse action] in the absence of that [protected activity].” 49 U.S.C. § 42121(b)(2)(B)(ii). To evaluate the respondent’s affirmative defense, then, an ALJ must first construct the counterfactual scenario in which the protected activity is absent, but all else remains the same. Then, it is necessary to ask whether the evidence of record is such that it is “highly probable or reasonable certain” that the respondent would have acted in the same way in that imagine scenario as it did in the actual course of events.

b. Application

Respondent argues that the same discipline would have been imposed absent the protected activity on the grounds that the violations were very serious and have been accompanied by serious discipline in the past and that in Complainant’s case the imposed discipline was extraordinarily light. (RPB, pp. 72-73; *see also* RRB, pp. 28-29.) Complainant contends that Respondent cannot establish its affirmative defense because its explanation for the discipline was inadequate and it could show no comparable discipline. (CPB, pp. 20-21.) More directly, in his Reply Brief, Complainant argues that since MRL hasn’t proven the disciplinary charges and hasn’t produced employees who committed the exact infractions who were also disciplined, MRL cannot establish its defense. (CRB, p. 9.) Respondent replies that the submitted disciplinary records demonstrate a pattern of discipline showing no connection between injuries and discipline as well as a pattern of serious discipline for misconduct involving dishonesty. (RRB, p. 28.)

Respondent has submitted a ledger of 2940 instances of employee injury or discipline assessed between January 5, 2004, and May 22, 2014. (RX H, pp. D7285-D7391; *see also* HT, pp. 533-38) Most discipline consists of verbal reprimands, though there are instances of more serious discipline involving written reprimand, censure, record and actual suspension, and termination. (*Id.*) Though injuries are included in the ledger, discipline was assessed in only 10 out of 150 recorded injuries in the period. (*Id.*) The chart does not record, however, whether or not an employee who was injured was later subjected to discipline for a different incident. (HT, p. 539.) Hence this evidence is relatively useless if offered to show that MRL does not discipline injured employees—it can show only that MRL doesn’t regularly discipline injured employees directly for their injury.

The chart can, however, provide some sense of the seriousness with which MRL treats the sorts of infractions Complainant was charged with and can thus provide a helpful backdrop to the evaluation of Respondent’s affirmative defense. Complainant was accused of violating GCOR 1.4, 1.15, and 1.6(4&5) as well as General Safety Rule G-1 1(f). I focus on the GCOR violations, as these are represented in the chart and I am able to tell what the rules and violations were. The chart provided in RX H is over 100 pages long but for the most part just catalogues test failures that result in minor discipline rather than a violation of a rule. Of the rules relevant here, GCOR 1.15 shows up by far the most often and generally involves some sort of failure to report. It results in discipline ranging from censure, (*e.g. id.* at D7286, D7295, D7299), to dismissal, (*e.g. id.* at D7297, D7211-12), with a variety of suspensions, usually waived at least in part, in between. (*E.g. id.* at D7285, D7297, D7299, D7300-01, D7311-13, D7315.) Violations involving GCOR 1.4 and 1.6 result in similar discipline, with violations of GCOR 1.6 tending to be treated more seriously. These violations, however, are fewer in number.

Some instances superficially resemble Complainant's conduct. In December 2005 an employee was dismissed for violation GCOR 1.15 and 1.6 (among others) after he claimed false time on payroll. (*Id.* at D7300.) During August 2006 an employee who failed to report and then falsified payroll time was charged with violating both GCOR 1.15 and 1.6 and was given a 20 working day suspension with 5 days served and 15 days waived. (*Id.* at D7313.) In November of 2006 an employee who violated GCOR 1.4 for leaving work without permission was given a waived 5 day suspension. An employee who failed to report and failed to get permission to leave, violating GCOR 1.15 and 1.6(4), was assessed a 15 day waived suspension. Another employee charged with the same conduct was given a 20 day suspension, which was also waived. (*Id.* at D7316.) An employee who left work without permission in violation of GCOR 1.15 was given a 10 day suspension with 5 days served. (*Id.* at D7325.) Another employee who left work without permission but also lied and failed to report an injury was dismissed. (*Id.* at D7329.) An employee charged with violation of GCOR 1.15 and 1.6(4) for not reporting for duty and having his wife lie for him was assessed a 30 day suspension with 10 days served. (*Id.* at D7330.)

In November 2008 an employee who left work without permission and falsified his or her timecard was charged with violation of GCOR 1.15 and 1.6(4) and given a 10 working day suspension. (*Id.* at D7338.) In December 2008 another employee who left work without permission, falsified a time card, and conducted personal business on company time was dismissed. (*Id.* at D7339.) An employee who used his company vehicle for personal business and lied to his supervisor violated GCOR 1.15 and 1.6(4) was given a 30 calendar day suspension in August 2009. (*Id.* at D7346.) Another employee was dismissed in October 2010 for violation of GCOR 1.6 after the employee lied to supervisors and submitted payroll that did not reflect the actual hours worked. (*Id.* at D7361.) In May 2011, two employees who violated GCOR 1.15 for taking too long a lunch break were given 5 working day suspensions with 3 days waived. (*Id.* at D7364-65.) Employees who misused company time and property in violation of GCOR 1.15 and 1.6(4) in November 2012 were given 10 day suspensions. (*Id.* at D7379.) Lastly, in October 2013, three employees who were playing cards at work and submitted incorrect payroll time were charged with violating GCOR 1.6(4). One was censured and the other two received 5 day suspensions, which were waived. (*Id.* at D7386.)

Reviewing this information, I agree with Complainant that it does not establish that MRL would have instituted the same adverse action absent the protected activity. First, the catalogue does not allow me to determine when protected activity may also have been involved in the discipline that was assessed. Second, since the rules involved are very general and malleable, any comparison involving violations of the same rules will be rough and imperfect. Lastly, importantly, there is far too little detail to make a confident judgment about how MRL would treat a substantially similar case absent the protected activity. The discipline MRL assesses varies considerably even when the rules involved are the same. This does not establish inconsistency—rather it shows that the details of a particular violation, which would include past disciplinary history, matter a great deal in the type of discipline that is meted out.

So I cannot draw a favorable inference for Respondent based on this exhibit alone. I do conclude from this evidence that MRL generally treats violations involving dishonesty and not reporting for or being on duty when an employee is supposed to report for or be on duty quite seriously and that such misconduct quite often results in serious discipline, not only including the

censure letters and short record suspensions involved here, but also more serious consequences up to termination. This confirms the testimony of Mr. Gustin to the effect that MRL generally treats violations of this sort as serious misconduct that results in discipline including and beyond that instituted in the present case. (*See, e.g.*, HT, p. 520.) This testimony, well corroborated by the record, is evidence in favor of MRL's affirmative defense, showing, at the least, that the discipline given to Complainant is well within the ordinary course of MRL discipline. But to determine if Respondent has met its burden of proof, a more particular examination of the exact facts of this case must be made.

There are two adverse actions to consider. For ease of exposition, I begin with the October 2013 discipline and then discuss the April 2013 discipline.

- i. Would Respondent have disciplined Complainant in the same way in October 2013 even if he had not engaged in protected activity?

Complainant's October 2013 discipline was a censure letter with a 10-day waived suspension. Respondent's rationale for the discipline was that during an efficiency test Complainant had taken an overlong lunch and also appeared to be wasting time on his way back to Missoula and conducted a number of personal errands on company time. Above, however, I found that Complainant had shown contribution in the complaints of Mr. Gonzalez (§ VI.A.1.d.ii.(2)), who was motivated in part by animus towards the protected activity involved in adhering to his course of treatment and in the fact that the protected activity and adverse action were intertwined. The question now is whether Respondent's have shown by clear and convincing evidence that the same discipline would have followed even if Complainant had not been adhering to a protected course of treatment.

Most of the required analysis was conducted above in the discussion of whether the protected injury report contributed to this adverse action (§ VI.A.1.d.ii.(1)). There the case for contribution turned on alleged inadequacies in Respondent's explanation, which required that I consider Respondent's evidence supporting its explanation. That discussion is incorporated here. I found that Respondent's discipline was in fact driven by non-discriminatory considerations, predominately the facts constituting Complainant's misconduct and that the investigation, charges, and ultimate discipline were amply explained by the reasons offered by Respondent.

Given that conclusion, the narrower question now is whether the same would have resulted factoring out the protected course of treatment. So I am to imagine an employee who is not receiving treatment for a work-related injury but who nonetheless is acting otherwise in the same way. Would MRL still have investigated such an employee? I find that it is highly probable that they would have. Mr. Gonzalez's complaints were driven, in part, by the protected activity, but they were a very small part of the reasons for the investigation. I found the testimony of Mr. Vanek and Mr. Johnson credible on this point: there were clear indications that Complainant was not doing his job. This required some investigation, especially in a job that operated largely independent from day to day supervision and required a great deal of trust. Moreover, Mr. Gonzalez would have almost certainly made complaints even if Complainant was not adhering to a course of treatment for a work-related injury. The animosity pre-dated all of the events in this case and insofar as it was driven by events relevant to this case, was driven by

the fact that Complainant wasn't able to work as hard or often as in the past, not because he was following a course of treatment for a work-related injury.

Furthermore, I am convinced that in the hypothetical scenario in which the intertwined protected activity is factored out, MRL would have instituted the same charges and discipline for the malfeasance. I did not find Complainant's collateral attack on the disciplinary charges at all convincing. An investigation that would have been conducted in a similar scenario absent the protected activity revealed potentially very serious misconduct and dereliction of duty. Complainant's actions at work were not related to his ongoing, or prior, protected activity. His behavior was not derivative, in any way, from a treatment plan or course of treatment recommended by his physicians.<sup>32</sup> Complainant received a relative slap on the wrist—a censure and record suspension. I have credited that testimony of MRL employees, corroborated by disciplinary records, that this discipline was light and not at all out of the ordinary considering just the malfeasant behavior.

Therefore, I am entirely convinced that if an employee had engaged in the same course of conduct but absent ongoing adherence to a physician-instituted treatment plan for a work-related injury, MRL would have acted in the same way and taken the same adverse action. The fact that the protected activity was intertwined with the adverse action as this case actually played out is completely accidental. Hence, Respondent has made out its affirmative defense by clear and convincing evidence and is not liable for any retaliation for the October 2013 discipline.

- ii. Would Respondent have disciplined Complainant in the same way in April 2013 even if he had not engaged in protected activity?

The April 2013 discipline is a slightly more difficult case in that the protected activity and adverse action are more tightly intertwined. Mr. Gonzalez's complaints, bothered in part by Complainant's light duty work, led to an investigation that queried Complainant's compliance with his treatment program and so was intimately connected to his protected activity. Nonetheless, I find that Respondent has presented clear and convincing evidence that it would have instituted the same discipline in an otherwise similar situation but absent the protected activity of adhering to a physician-instituted treatment plan for a work-related injury.

As in the last section, the starting point is the discussion above in relation to whether or not the December 2012 injury report contributed to the April 2013 adverse action (§ VI.A.1.d.ii.(2)). Since Complainant's case for contribution on that point turned primarily on alleged deficiencies in MRL's explanation and rationale for its discipline, there I discussed MRL's explanation and found it satisfying and consistent. That discussion is incorporated here. What remains is to consider, with more particularity, the hypothetical situation in which the protected activity is entirely factored out, but otherwise Complainant behaves in the same manner.

Would Mr. Gonzalez still have made his complaints? If Complainant hadn't been working light duty and attending appointments, then there would have been no occasion for Mr. Gonzalez to complain, or at least to complain that Complainant had mentioned ways of wasting

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<sup>32</sup> To be protected, the treatment plan must be one instituted by a physician. See 49 U.S.C. § 20109(c)(2). Complainant's independent judgment as to his medical needs and restrictions does not suffice to protect the activity.

time. But the fact that Complainant was adhering to a treatment plan *for a work-related injury* was not a rationale for the complaints. Mr. Gonzalez was bothered that he was taking on more of the workload because Complainant was on light duty and missing work for appointments. The fact that this related to a work-related injury was irrelevant to Mr. Gonzalez. Under 49 U.S.C. § 20109(c)(2), only treatment for a work-related injury is covered. *Bala*, 776 F.3d 157. So in the hypothetical scenario in which Complainant were injured off-duty but still needed to be accommodated in the same way or where for other reasons could not work in the same manner as in the past, Mr. Gonzalez would still have been chagrined at his increased work-load and would still have made the relevant complaints, prompting the investigation. Though Complainant's course of conduct happened to involve protected activity, on the record before me I conclude that Mr. Gonzalez was completely indifferent to the protected aspect of that course of conduct. He would have behaved the same way in a scenario in which Complainant's conduct was the same except that it was not protected by the FRSA.

In the alternative, the facts here fit exactly into the safe-harbor from cat's paw liability that the Supreme Court described in *Staub*. Though the Court rejected the proposition that conducting an independent investigation alone could protect an employer from liability when a biased agent initiated or contributed to a process that led to adverse action, it held that "if the employer's investigation results in an adverse action for reasons unrelated to the [agent's] original biased action...then the employer will not liable." 562 U.S. at 421. So merely the fact that a complaint from a biased agent prompted investigation is not enough to make an employer liable. Rather, that contribution must remain necessary to the final adverse action. So if a biased supervisor makes complaints that prompt an otherwise independent investigation, the employer can be liable if the adverse action that resulted relied, in part, on the content of the original complaint. But if that investigation uncovers information and that information alone, entirely absent the negative information from the biased supervisor, results in the adverse action, liability will not follow.

The sort of causal showing and burdens of proof are different in the FRSA, but the basic agency principles that apply to cat's paw liability are the same. Here, the biased complaints of Mr. Gonzalez, made in the scope of his employment agency due to MRL rules, prompted Mr. Johnson to investigate. But the investigation itself was free from any discriminatory intent or bias—Mr. Johnson acted as he would have had he received a report that any employee was stealing company time by taking very small steps to verify the complaint, here taking a slight detour past Complainant's house when he should have been at an appointment. That independent investigation uncovered information—that Complainant was at home when he said he was missing work for a medical appointment that led to discipline. The discipline that was given in no way depended on Mr. Gonzalez's complaints—neither Mr. Johnson nor Mr. Gustin relied on those complainants as *reasons* in deciding whether and how to discipline Complainant. Rather they wholly relied on the information provided by the independent investigation. Therefore, Mr. Gonzalez's complaints do not result in cat's paw liability, even presuming he would not have made them except for the protected activity. Since those complaints only occasioned an investigation, and were not a reason for the discipline, Respondent would have acted the same way as to Complainant when presented with the same situation, absent Mr. Gonzalez's complaints.

As above, the fact that the protected activity was intertwined with the adverse action is accidental in this instance. Respondent's disciplined Complainant because he said he was going to be somewhere during work hours and then didn't follow through, instead going home and taking a nap. Based on the disciplinary history, the testimony of Mr. Gustin and Mr. Johnson, as well as common sense, I am completely convinced that if Complainant, or any employee, had done the same for a medical appointment involving a non-work-related injury or any other activity that provided an excuse from presence at work during work-hours, MRL would have disciplined that employee with, at the least, a censure letter as a way to correct the behavior. The fact that the malfeasance touched on protected activity because it concerned treatment for a work-related injury, was accidental and non-determinative of the adverse action that was taken.

This conclusion is reinforced here by a very awkward fact for Complainant in this case: though the protected activity was intertwined with the adverse action, the proximate cause of the adverse action in this case was not engaging in protected activity—it was his *failure* to engage in protected activity. Attending the appointment with Mr. Cordial would have been protected activity. Going home to take a nap was not. MRL disciplined Complainant because he didn't engage in the protected activity he said he was going to engage in. Had he engaged in the particular protected activity most relevant to the discipline, there would have been no discipline at all. It is highly implausible, then, that MRL was behaving differently because of the protected activity surrounding the malfeasant failure to engage in protected activity. The record as a whole reflects a great deal of support of Complainant's recovery and course of treatment as well as ready accommodation of his needs and requests. His supervisors encouraged him to be treated for his work-related injury. His slight discipline in April 2013 reflected his failure to do so coupled with telling Mr. Johnson he would be somewhere during work hours but then failing to follow through.

For all of these reasons, I find it highly probably or reasonably certain that had Complainant not been generally adhering to a course of treatment for a work-related injury but had otherwise acted in the same manner as to the events of April 19, 2013, MRL would have taken the same adverse action against him in the subsequent April 2013 discipline. Therefore, MRL has made out its required showing by clear and convincing evidence and is not liable for retaliation under the FRSA for the April 2013 discipline of Complainant.

## ***B. Interference Complaint***

### *1. Legal Framework*

49 U.S.C. § 20109(c)(1) provides that:

A railroad carrier or person covered under this section 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 railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

Complaint alleges that Respondent has denied, delayed, or interfered with his treatment, in particular by impeding examination by a neurologist and/or neurosurgeon. (CPB, pp. 11-15.)

By its plain language, this is not a whistleblower protection. Congress labeled it a “prohibition.” It does not specify particular protected activities that implicate the prohibitory language like a whistleblower provision would do, instead stating an unqualified prohibition on certain conduct. The ARB has held that this provision “bars a railroad from denying, delaying, or interfering with an employee’s medical treatment throughout the period of treatment and recovery from a work injury,” not just the temporal period immediately following such an injury. *Santiago I*, ARB No. 10-147 at 12. Work-related injuries include both injuries that occur at work and pre-existing conditions that manifest while at work. See *Jones v. Ill. Cent. R.R. Co.*, 2015 U.S. Dist. LEXIS 137586 (E.D. LA Oct. 8, 2015). 49 U.S.C. § 20109(c)(1) is not merely a prohibition—it vests an employee with actionable rights. See *Santiago I*, ARB No. 10-147; *Delgado v. Union Pac. R.R. Co.*, 2012 U.S. Dist. LEXIS 146706 (N.D. Ill. Oct. 11, 2012). To evaluate allegations of denial, delay, or interference, the ARB has constructed the analysis of a claim under § 20109(c)(1) through the AIR-21 framework made applicable to FRSA claims by 49 U.S.C. § 20109(d)(2)(A)(i). *Santiago I*, ARB No. 10-147 at 16-18.<sup>33</sup>

Explaining the requirements of § 20109(c)(1) in more detail, the ARB noted that

[t]he only affirmative duty created in section 20109(c) is for the railroad carrier to take the employee to the nearest hospital after a work injury if such a request is made. Section 20109(c) does not require the railroad carrier to affirmatively provide medical insurance, but, if it does, it must not interfere with the insurer’s decisions. Likewise section 20109(c) does not require [the railroad] to create an occupational health services department, but, if it does, it must not interfere with that department’s decision-making. Again, the employee must prove that the railroad carrier interfered. In the end, other than taking the employee to a hospital, the whistleblower statute expects the railroad carrier to stay out of the way of the medical providers.

*Id.* at 16. Moreover, the prohibition means just what it says: it is a violation to deny, delay, or interfere in any manner with an injured employee’s medical care for a work-related injury. *Id.* at 15-16. The FRSA

contemplates that the railroad carrier will stay completely out of the way of medical treatment, and if it does exactly that, it will not be liable...if the independent medical treatment providers conclude that no more care is needed. However, the instant that the railroad carrier directly or indirectly inserts itself into that proves and causes a denial, delay, or interference with the medical treatment, the protected activity necessarily becomes a presumptive reason.

*Id.* at 16.

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<sup>33</sup> *Santiago I*, ARB No. 10-147 at 12-15 examines the legislative history, explaining how a straightforward prohibitory clause became part of a whistleblower protection.

Analogizing an interference claim to a retaliation claim, the protected activity is the request for medical care. The adverse action is the denial, delay, or interference with that care. Based on this understanding, the protected activity and adverse action are “necessarily connected” and “[c]ausation is assumed by virtue of the fact that the railroad carrier inserted itself into the medical treatment.” *Id.* To prevail on an interference claim, a complainant must show “that (1) the [respondent] inserted itself into the medical treatment and (2) such act caused a denial, delay, or interference with medical treatment. Both of these are factual questions.” *Id.* Therefore, in a complainant’s case for interference, the element at issue will be the “adverse action” which requires showing both a general involvement by the respondent in medical treatment and concrete instances of delay, denial, or interference with that course of treatment.

This is not the end of the analysis. If the complainant makes those showings, the burden shifts to respondent to make out its affirmative defense. Noting the difficulty of simply applying the AIR-21 language to a claim under § 20109(c)(1), the ARB explained that to avoid liability the respondent must show “by clear and convincing evidence that the result would have been the same with or without the railroad carrier’s interference.” *Id.* at 18. What does this mean? It will likely depend on the facts, but it could entail showing that any reasonable doctor would have acted in the same manner by denying, delaying, or interfering with care in those circumstances. A complainant might also offer a variety of evidence tending to show that but for the interference the result would have been different, perhaps by showing non-medical motives of the carrier. *Id.* at 18. To evaluate this affirmative defense, the ALJ does not necessarily need to weigh medical evidence, but “must look at all the direct and circumstantial evidence, as a whole.” *Id.* at 16-18.

Clarifying the inquiry in a subsequent review, the ARB explained that the required showing is “that it was highly probable that a reasonable doctor acting independently, without [the respondent’s] involvement, would have” reached the same conclusion. *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 13-0062, ALJ No. 2009-FRS-011, slip op. at 3-4 (ARB June 12, 2015) (“*Santiago II*”). Evidence of medical reasonableness is circumstantial evidence that could support this conclusion, but the railroad must do more than show that there is reasonable debate about a procedure or course of treatment—it must make the stronger showing that *any* reasonable doctor would have reached the same conclusion as to the procedure or course of treatment. *Id.* The ARB recognized that this is a quite extraordinary showing, but pointed out that it does not entail that the railroad must pay for all medical treatment requested by a treating provider, let alone by the employee. Rather, it is free to make determinations of medical reasonableness via an outside agent or even an internal department so long as the decision maker is “truly acting independently” of the railroad.<sup>34</sup> The demanding sort of proof is only triggered

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<sup>34</sup> In *Santiago* the decision-maker was the Occupational Health Services Department *of the railroad*. The ARB clearly imagined that it would be possible to have such an internal department that was actually sufficiently independent of the railroad itself. *See, e.g., Santiago II*, ARB No. 13-0062 at 5. This is initially puzzling. If the department is part of the railroad, its decisions are decisions and actions are decisions and actions of the railroad, which would appear to trigger the sort of heightened scrutiny of § 20109(c)(1). Things would be quite different if the railroad had a third party administrator, in which case the query would be whether the railroad was sufficiently influential in the decisions of the third-party administrator. In *Santiago* the crux seems to be that though the Occupational Health Services Department was internal to the railroad, the railroad contracted out to a third-party to run that department. *See Santiago I*, ARB 10-147 at 2. This created a sort of quasi-third party administrator relationship. Heightened scrutiny over its decisions was triggered because the railroad was quite involved in the actual administration of the department, despite nominally outsourcing the task.

when the railroad inserts itself into the decision-making process and engages in action that in some way denies, delays, or interferes with the provision of medical care. *Id.* at 4-5.

## 2. Application

Both parties have framed this claim in terms of the ARB's decision in *Santiago I*. Complainant refers to the decision as "seminal" and insinuates, at times, that it makes MRL liable under the FRSA solely due to its involvement in Complainant's medical care and treatment, as if the FRSA vests control over which medical care to authorize and pay for in the injured employee alone. (CPB, pp. 11-15; CRB, pp. 2-7.) He goes so far as to suggest that the existence of MRL's Wellness Program is a violation of § 20109(c)(1) and that MRL needed to amend it in order to comply with the FRSA. (CRB, p. 7.) Respondent spends a great deal of time discussing the factual differences between *Santiago I* and the instant case, arguing that *Santiago I* does not control the result here. (RPB, pp. 59-63; RRB, pp. 2-9.)

Both parties are partially correct and partially incorrect. Complainant is correct that *Santiago I* provides the analytical framework for assessing a complaint under 49 U.S.C. § 20109(c)(1). But he is incorrect in the supposition that the Wellness Program is itself a violation due to MRL's involvement or that MRL needed to alter its plan to comply with the FRSA. Per *Santiago I*, the details matter, and in particular not just the general involvement of a railroad in the medical treatment of an injured employee but whether or not that involvement is used to concretely delay, deny, or interfere with care. Moreover, an affirmative defense is available. MRL's Wellness Program may put it at great risk of violating § 20109(c)(1), but it is not itself a violation. Respondent is correct that the facts here are very different from those in *Santiago I*, but incorrect in concluding that the factual differences clearly lead to a different result. Again, the details matter. *Santiago I* provides the framework for the analysis, but it is necessary to apply the facts here to that analysis to ascertain the merit of Complainant's interference complaint.

### a. Did Respondent Insert Itself into Complainant's Medical Treatment?

Complainant contends that MRL inserted itself into his medical care through its claims department as well as agents of MRL. (CPB, p. 13.) MRL argues that it has not inserted itself because the role of the claims department is merely administrative—it makes no determinations as to the appropriateness of care, only mechanically applying the Wellness Plan to determine if a treatment is covered. (RPB, pp. 55-56.) MRL has no doctors, makes no determinations of appropriateness, and exercises no control over care. (RRB, pp.17-18.)

The first question is who is an agent of MRL. Quite clearly, Complainant's supervisors, Mr. Johnson, Mr. Loeffler, and Mr. Gustin are agents of MRL. Ms. Duhamé is also obviously an agent of MRL. At times, however, Complainant appears to suggest that nearly all of his providers are somehow agents of MRL and thus any treatment decisions in which he is not the sole decision-maker constitute unlawful interference. This would be fantastic. The FRSA forbids MRL from interfering, but it does not mean that all medical providers ultimately being paid by the railroad are also forbidden from directing medical care, let alone create a requirement that after an employee suffers a workplace injury MRL must pay for and provide whatever care that the employee, absent agreement of *any* doctor, requests.

The more narrow questions concern Stevenson Consulting/Ms. Grob and Dr. Headapohl/Ms. Colledge. Complainant contends that both are effectively agents of MRL, though this is mostly implicit—Complainant refers to Ms. Grob as “MRL’s nurse case manager” and Dr. Headapohl as “MRL’s doctor” (*e.g.* CPB, pp. 4, 14) and throughout speaks of decisions and actions of both as decisions and actions of MRL. This is not, however, an obvious implication of the evidence and Complainant’s presumption that any involvement of either simply *is* involvement of MRL is a serious blind spot in his argument.

I begin with Ms. Grob. She has been Complainant’s nurse case manager and works for Stevenson Consulting, not MRL. MRL contracts with Stevenson Consulting for nurse case management services. Respondent argues that since “Stevenson Consulting is a completely independent service” the actions of Ms. Grob do not manifest its involvement in Complainant’s course of care. (RPB, pp. 62-63.) It adds that Ms. Grob has only worked for MRL a handful of times. (RRB, p. 7.) Neither point is persuasive. The issue is whether Ms. Grob is operating as an agent of MRL, and it is perfectly possible that MRL contracts for services but retains the control necessary to operate through the providers of those services. The number of times that Ms. Grob has worked for MRL is not relevant, since the question before me can be answered without recourse to insinuations about secret sympathies or a compromised provider.

The issue was discussed in reference to Ms. Grob’s credibility (§ V.E). On the facts of this case, I find that the involvement of Ms. Grob is involvement of MRL. Though I found Ms. Grob credible and personally independent, her particular role in this case was not a decision-making role in which she exercised independent judgment. She was a coordinator and conduit, passing information among providers and between providers and MRL. Moreover, though she approved care, she did so as an agent of MRL, taking instructions from MRL. A refrain throughout the records is “authorized by Tiffani Grob RN on behalf of Jacquie Duhamel with MRL,” or some close variant. (*E.g.* RX NN, p. D0604.) Ms. Grob sought instructions from MRL about authorizing care and acted on those instructions. Insofar as she acted independently, it was based on authority delegated by MRL and that she exercised on its behalf. Again, this conclusion does not impugn the integrity of Ms. Grob or Stevenson Consulting—Ms. Grob performed her job (and based on the record, she was quite effective in so doing), but her job essentially involved taking directions from and submitting information to the MRL claims department. As such, the involvement of Ms. Grob is also effectively the involvement of MRL.

The more important question is whether Dr. Headapohl and Ms. Colledge are agents of MRL. In direct contrast to Ms. Grob, they were not reporting to MRL and they were not taking directions from MRL. There is hence no straightforward, and benign, case for agency. Complainant’s contention, however, is that Dr. Headapohl in particular (and by implication Ms. Colledge as Dr. Headapohl’s physician assistant) is effectively MRL’s doctor and hence when she (or Ms. Colledge) make a decision regarding the appropriate course of treatment, MRL is secretly interfering with his care.

Dr. Headapohl is board certified in occupational medicine and specializes in treating occupational injuries, helping people get back to work. (HT, p. 402.) According to Complainant, Dr. Headapohl has the reputation with his colleagues as an MRL doctor. (*Id.* at 195.) When a worker is hired or before an injured worker returns MRL requires a physical. Mr. Johnson testified that Dr. Headapohl is one of the doctors who conduct such exams. (*Id.* at 242.)

Ms. Duhamé admitted that MRL has “used Dr. Headapohl for a number of different services over the years.” (*Id.* at 378.) They regularly use occupational health clinics in different cities, which includes Dr. Headapohl’s clinic in Missoula. (*Id.* at 379.) Ms. Grob testified that she had worked with Dr. Headapohl and Ms. Colledge on at least a “handful” of cases involving MRL employees in her 6 years as a nurse case manager. (*Id.* at 419.) In addition, Dr. Headapohl and Ms. Colledge’s exam notes also sometimes include a series of MRL forms for physical exams, review of history, a return to work health history, and physician recommendations.<sup>35</sup> (*E.g.* RX NN, pp. D0261-67.)

This is all circumstantial evidence tying Dr. Headapohl to MRL in some way. Respondent contends that it simply works with occupational health clinics throughout the state on a fee-for-service basis and that it has no doctors in its control. (RPB, p. 62; RRB, pp. 6-7.) Considering the record as a whole, I find that Dr. Headapohl and Ms. Colledge are independent medical providers, not agents of MRL and hence their involvement in this case does not automatically implicate involvement of MRL. I reach this conclusion for several reasons.

In the analytical framework, Complainant bears that burden of proof by a preponderance of evidence in showing that these providers are agents of MRL. This issue arises as part of the alleged “adverse action” under § 20109(c)(1), and this is part of a complainant’s case for an FRSA violation. Here, the evidence is much too weak to support an inference. At best Complainant has shown a professional relationship in which MRL often sends employees to Dr. Headapohl. This does not automatically compromise her. To make that last leap Complainant relies mostly on insinuation and the bare claim that she is MRL’s doctor. I find this insufficient.

There is nothing *per se* untoward about the fact that many MRL employees are sent to Dr. Headapohl’s clinic. MRL has an operation in Missoula and needs to either have doctors on staff or refer employees to doctors for required examinations. An occupational health clinic is an obvious place to refer employees. Dr. Headapohl has such a clinic in Missoula. The record does not reflect whether there are alternative clinics, but it is entirely natural that a business in need of occupational health services would regularly use a local occupational health clinic. Such a regular relationship *could* produce some control by MRL over Dr. Headapohl, but that is an additional showing, not something that automatically follows just because a local occupational health doctor sees a lot of employees in need of occupational health services and treatment. The regularity also explains why the office would decide to use MRL forms for an MRL employee.

Moreover, if Ms. Colledge and Dr. Headapohl are agents of MRL, they are both very good at hiding it and poorly serve MRL’s interests. A great deal of care was recommended in this case and MRL spent a great deal of money on medical treatment because of the recommendations of Ms. Colledge and Dr. Headapohl. (*See* RX C, pp. D1102-05; RX D, pp. 1106-08.) Complainant’s date of MMI and return to full duty was delayed and after his second injury he spent a great deal of time off of work. Insofar as MRL pressured them as to Complainant’s care and return to work, it was only by queries as to when this might occur. If these were meant as pressure, they were not effective, since Ms. Colledge and Dr. Headapohl certainly appeared to be making independent judgments and keeping Complainant off of full

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<sup>35</sup> Ms. Grob was the only witness who addressed this and didn’t know where the MRL forms originated. Stevenson Consulting uses its own work status forms, not forms that would reference MRL. (HT, pp. 420-21.)

duty until they believed he was ready. Complainant would like to cast this case as binary—there are *his* views on what care should be provided and everything else is an MRL imposition. The record is more nuanced, reflecting that the medical professionals involved had independent views about the course of treatment. Just because Complainant now disagrees with some of them does not entail that they must be the product of MRL interference.

Further, Complainant's own testimony contradicts the allegation that Dr. Headapohl is an agent of MRL. He stated that at one appointment with Dr. Headapohl she asked Ms. Grob to leave the room and then informed him in confidence that Ms. Grob had a direct line to MRL. (HT, p. 78.) This is a plausible claim and consists simply of Dr. Headapohl explaining to Complainant the role of a nurse case manager in a case like this, a role he did not fully appreciate. But if his testimony is correct, it is highly unlikely that Dr. Headapohl is in fact an agent of MRL as well or somehow under their mysterious control. Informing on Ms. Grob would be inconsistent with such a role, and Complainant never reconciled why Dr. Headapohl would tell him this while at the same time operating as a secret agent of MRL.

Finally, Complainant's present contentions that Dr. Headapohl and Ms. Colledge are mere stand-ins for MRL and the source of MRL interference are simply not credible in light of the treatment history. This is a litigation position, not one he appears to have taken during the course of treatment. The important point was discussed above as to Complainant's credibility (§ V.A): there is simply no evidence that Complainant ever really sought to change treating providers, even in the time up to the hearing. If he came to believe that they were both MRL agents, this is bizarre. Simply put, his behavior is inconsistent with the contention that Ms. Colledge and Dr. Headapohl are agents of MRL. I credit Complainant's behavior, not his claim in the course of litigation.

For all these reasons, I find that neither Dr. Headapohl nor Ms. Colledge are agents of MRL. Therefore, for the purposes of involvement with Complainant's medical care, I find that Complainant's supervisors, Ms. Duhamel, and Ms. Grob function as agents of MRL but that neither Dr. Headapohl nor Ms. Colledge, nor any of the other providers so function. The next question, then, is whether any of these agents were involved in Complainant's medical treatment.

No evidence suggests that any of Complainant's supervisors had anything to do with Complainant's medical treatment beyond taking him to the hospital when he requested (as required by the FRSA) and summarily approving whatever schedules he forwarded involving medical appointments. Hence, Complainant has not shown any involvement on their part.

Quite obviously, however, both Ms. Duhamel and Ms. Grob were involved in Complainant's medical care. Ms. Grob made few if any independent determinations about what would be authorized, but functioned as a conduit or intermediary, giving MRL information about the course of treatment and making authorizations on MRL's behalf. One of Ms. Duhamel's functions at MRL is to be involved in the medical care of injured employees—MRL has structured their Wellness Program to involve authorization of care and payment of claims by Ms. Duhamel. Necessarily this requires her involvement in the course of treatment. She portrayed this as merely mechanical application of the plan rules, but as discussed in reference to her credibility I do not find this credible. The decision about whether a request for care would be authorized had to be made by someone. In the structure of the Wellness Program, that someone

is Ms. Duhamé, even if in making those decisions she decided to simply accept the recommendations of others.

This alone is not a violation of 49 U.S.C. § 20109(c)(1). As the ARB made clear in *Santiago I*, nothing forbids a railroad's involvement in medical care—rather, if there is involvement, then the inquiry proceeds to discern if there is any delay, denial, or interference with care. *Santiago I*, ARB No. 10-147 at 16. That is the next step in the inquiry.

b. Did Respondent's Role in Complainant's Medical Treatment Cause a Denial, Delay, or Interference with Medical Treatment?

To make out his interference allegation Complainant must show not just involvement, but actual, concrete denial of, delay of, or interference with his course of treatment. *Santiago I*, ARB No. 10-147 at 16. Complainant alleges that MRL interfered with his medical treatment by denying six requests: 1) referral from the ER to a neurologist; 2) referral to chiropractic treatment; 3) Complainant's request to see a neurosurgeon or back specialist; 4) Ms. Mahoney's request for additional physical therapy; 5) requests for injections that Ms. Grob was waiting for Ms. Duhamé to approve; and 6) unspecified requests for additional treatment after he reached MMI. He also contends the MRL delayed unspecified injections that were requested as well as other unspecified treatment "on several occasions." Generally, he contends that "[t]aken as a whole, MRL controlled and interfered with Wevers [sic] medical care for now over two years since he reported a work-related back injury." (CPB, pp. 13-14.) Respondent argues that it has never interfered, denied and delayed medical treatment because it has never denied a request for treatment submitted by a treating physician. It points to a large number of treatment requests that it approved and the absence of any rejection of recommended treatment by Ms. Duhamé or Ms. Grob. (RPB, pp. 56-57)

To begin with, in the last section I determined that Dr. Headapohl/Ms. Colledge are not agents of Respondent. This does not foreclose the possibility that they were influenced by MRL in their decisions. But it does shape the inquiry here in that the mere fact that Complainant in retrospect thinks that his course of treatment should have differed from that prescribed by those providers does not *automatically* mean that MRL has interfered with treatment. If a recommendation or request was made but determined to be medically unnecessary by Dr. Headapohl/Ms. Colledge, that is not necessarily an instance of interference. It could be, but Complainant must make an additional showing on that point.

With that in mind, I begin with Complainant's specific allegations of interference before considering his more general arguments. He first contends that MRL denied a referral from the ER doctor to a neurologist. (CPB, p. 13.) On this point, Respondent points out that the ER referral was in the disjunctive, and since Complainant was already scheduled to see his regular providers no further action was appropriate. (RPB, pp. 57-58.) Further, MRL contends it was never involved in any of the decisions on who Complainant should see. (RRB, p. 11.) In this case, the referral from the ER quite clearly was disjunctive: "Followup [sic] with your regular provider or Dr. Sherry Reed to discuss symptoms." (CX 42, pp. 1-3; RX OO p. D3243.) A disjunctive instruction is followed when one, the other, or both options are adhered to. Complainant was scheduled to see his regular providers and did so. They declined to refer him

further. (See HT, pp. 426-28.) Since Complainant did follow-up “with [his] regular provider” and MRL approved and paid for all of that care, no referral was denied.<sup>36</sup>

Next Complainant contends that MRL interfered by denying referrals for chiropractic treatment. (CPB, p. 13.) According to Complainant, a later additional referral to chiropractor Dr. Casey Cordial was denied because Dr. Headapohl wouldn’t accept Tim Cordial’s recommendations. (HT, p. 80.) Ms. Grob explained that though that had been mentioned by Mr. Cordial, none of the treating physicians had recommended the care and so it was never submitted for approval. (*Id.* at 422-23.) Complainant thought there was a “disconnect” between the doctors and physical therapists about diagnosis and the doctor’s commitment to western medicine. (*Id.* at 80-81.) Respondent argues that there the only discussion of chiropractic treatment came from Mr. Cordial, a physical therapist, and even there it was only a note saying that such treatment would be scheduled if it was needed. (RRB, pp. 10-11.)

I find no interference by MRL on this point. It never denied a referral. At the most, the treating providers decided not to make a referral that had been discussed by a physical therapist. Since no referral was made, there was nothing for MRL to deny. Moreover, even presuming that Mr. Cordial’s records could be treated as a request for the authorization of treatment, the treatment note makes no such request. In Mr. Cordial’s April 1, 2013, letter to Dr. Headapohl (not Ms. Grob or MRL), he writes, “My plan is to focus on his thoracic and lumbar myofascial spasms with manual therapy, modalities, and therapeutic exercises. John will also be scheduled for chiropractic eval and adjustment if needed from Dr. Casey Cordial.” (CX 16, p. 1; RX NN, p. D0416.) The record does not reflect any attempt to schedule such treatment. A plan to provide chiropractic treatment “if needed” is not a plan to provide chiropractic treatment and it is not a request for care that MRL (or Dr. Headapohl for that matter) even *could* have denied.

Complainant’s foremost complaint as to his medical care is that MRL has not allowed him to be seen by a neurologist, neurosurgeon, or back specialist of his choosing. (CPB, p. 13-14.) He contends he is in a Catch-22 since MRL won’t approve treatment by Dr. Sherry Reed but he cannot see Dr. Reed using his medical insurance since his injury is coded as workers’ compensation. (*Id.* at 14.) Respondent points out that it has never denied a request for treatment via a treating physician and that all of the physicians in this case have determined that no referral is appropriate. Those decisions were made by the physicians, not MRL. (RFB, pp. 57-59.)

Complainant’s allegation on this point fails because he has never presented MRL with a claim or request for authorization for such care that could be denied. Complainant clearly would like to see a specialist—though whether it be a neurologist, neurosurgeon, or “back specialist” is unclear—and has relayed his desire to his treating providers and agents of MRL. But for MRL to be liable for a denial of requested medical treatment, there has to be a formal request for it to

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<sup>36</sup> In his brief, (CPB, p. 13), and through incorrect statements by counsel during the hearing, (HT, pp. 31-32, 365, 450), Complainant has misrepresented the content of the referral—proclaiming that it was a referral to Dr. Sherry Reed rather than a referral to his regular treating physicians *or* to Dr. Reed. The expectation appears to be that I will ignore the evidence and acquiesce in the misrepresentation if it is repeated often enough. The text of the referral is dispositive of this allegation: it made a disjunctive recommendation, and Complainant kept his appointments with his treating providers, as recommended by the referral. Nothing more was recommended. It is somewhat troubling that counsel would misrepresent the evidence to both the court and to witnesses testifying, at one point attempting to have Ms. Duhamel not review the record by incorrectly representing the text of the referral to her. (See *id.* at 365.)

deny. The onus is on Complainant to procure a referral to a specialist or a request by a specialist for the requested care. If he does so, and MRL denies it, then he has made out his case for a violation of § 20109(c)(1). But merely expressing a desire for such care, even to agents of MRL, does not give MRL anything to act on. Indeed, if MRL were to take his general desire and go around the medical professionals in the case in an attempt to arrange for different care on Complainant's behalf, *that* would be a potential violation of § 20109(c)(1) because it would be interference with the course of treatment as determined by Complainant and the medical professionals treating him.

Here, Complainant's treating providers have considered and discussed his desire and have determined it is not appropriate treatment for his injury. No referral has been made and no care has been requested. Complainant disagrees, but his dispute is with the medical professionals who are treating him, not MRL. If he wishes to have different providers, he needs to seek them out and submit, or have them submit, claims to MRL. Complainant's way around this missing component in this complaint has been to assert that his providers are really agents of MRL, co-opted in a scheme to prevent him from seeing a neurologist or neurosurgeon. I rejected this contention in the last section, and it is belied by the fact that Complainant has not sought alternative primary providers so that he might be referred to a neurologist or neurosurgeon.

Complainant argues that the evasiveness of Ms. Duhamé at the hearing about whether a referral to a neurologist or neurosurgeon would be approved supports his complaint. (CPB, p. 14.) I agree that Ms. Duhamé was evasive on this point, and it was a factor in my discussion of her credibility above (§ V.D). Nonetheless, it is not a violation of the FRSA to be evasive about whether a prospective request for care would be approved or denied or even to say that a prospective request for care will likely be denied. To be actionable, the railroad must have denied, delayed, or interfered with treatment in some way. As to treatment by a neurosurgeon, neurologist, or back specialist, Complainant has yet to put MRL to the test, so to speak. Since he has not given MRL the occasion on which it could deny authorization of or payment for such treatment, MRL has not yet violated the FRSA—even if the evasive testimony of Ms. Duhamé suggests that they may do so in the future.

Fourth, Complainant argues that MRL interfered with his treatment by denying Ms. Mahoney's requests for physical therapy. (CPB, p. 13.) Respondent replies that this non-approval came from Dr. Headapohl and occurred only because she was changing his provider to Mr. Cordial. (RRB, pp. 9-10.) Complainant's assertion here is especially cynical. He is correct, there is a record showing that MRL first approved only 1 week of therapy when 6 weeks were requested. (CX 8, p. 1; RX NN, p. D0498.) There is also a record showing Ms. Colledge discontinued the requested therapy with Ms. Mahoney. (CX 10, p. 1; RX NN, p. D0434.) In context, however, these "denials" reflected only a change in care. In actual fact, Complainant was being referred by Dr. Headapohl and Ms. Colledge to more specialized physical therapy with Mr. Cordial. (See CX 7, pp. 1-4; CX 11, p. 1; RX NN, pp. D0344-59, D0400, D0431-33, D0506-16.) At the hearing Complainant understood what happened and was admirably candid—he testified that he stopped receiving therapy from Ms. Mahoney because his treating providers decided to have him receive physical therapy from Mr. Cordial instead. (HT, p. 79.)

A determination by the treating medical professionals, in consultation with Complainant to change his physical therapist so that he would receive more specialized and appropriate treatment does not constitute delay, denial, or interference with Complainant's course of treatment, even if the process of making the changing produces forms denying requests by the prior physical therapist. Complainant knew and understood is, and it is rather duplicitous for him to suggest otherwise in his closing brief.

Complaint's fifth alleged interference by MRL is "Wevers [sic] requests for injections which Tiffany Grob told him she was waiting for [Ms.] Duhome to approve." (CPB, p. 13-14.) Complainant makes no citations to the record related to this allegation and does not date the alleged delay in approval or treatment, so I have reviewed the record to ascertain what exactly the contention is and what evidence might support it.

At the hearing Complainant testified that he wasn't seeing the doctor regularly by September 2013 but was requesting shots for his back. He said he was told by Ms. Grob that they were waiting for approval from MRL. (HT, p. 115.) Ms. Grob testified that MRL approved the injections with Dr. Caldwell every time they were requested. (*Id.* at 407, 463.) She also testified that he had previously scheduled injections with Dr. Caldwell in late October 2013, immediately after he visited the ER. (*Id.* at 439.) She was not asked about any alleged delay in approving injections in this period.

Reviewing the record as a whole, the only other evidence of a delay is an October 28, 2013, e-mail Complainant sent Mr. Johnson about upcoming appointments. He relays that Ms. Grob had told him that they had been waiting on MRL approval for more shots but that in "the last conversation I had with [Ms. Grob] she stated something about having talks with Dr. H [Headapohl] and they decided without even seeing me to wait it out." (CX 35, p. 1.) Prior e-mails in the chain indicate that on October 1, 2013, he had been in touch with Ms. Grob seeking shots but that he had been told that they would have to get it requested by a provider and hadn't heard back from Ms. Grob by the morning of October 2<sup>nd</sup>. (*Id.* at 2.) On October 21<sup>st</sup>, the day before his second injury, he e-mailed Mr. Johnson relaying that he had been in touch with Ms. Grob but nothing had been approved, though he was now scheduled to see Dr. Caldwell on October 30<sup>th</sup>. He represented that he wasn't getting treatment as quickly as he wanted because he had reached MMI, that he would be pursuing care with his own doctors, and that he was "waiting to hear back seeing [sic] a neurologists [sic] and a back bone guy." (*Id.*) Two days later, and one day after the second injury, Complainant e-mailed Mr. Johnson again, saying that he had spoken to Ms. Grob about his increasing pain and delays in getting shots. He represented that Ms. Grob told him they were waiting on approval. (*Id.*)

Though neither party questioned Ms. Grob about what was happening in this period, she kept meticulous records of all of her involvement in the case for billing purposes. On August 30, 2013, Complainant called Ms. Grob and left a message indicating that "the week has been difficult" and that he was interested in getting a shot from Dr. Caldwell. (RX NN, p. D3842.) Ms. Grob returned his call that day, leaving a message, and also contacted MRL about potential authorization of an appointment with Dr. Caldwell or Dr. Headapohl. (*Id.*) Complainant returned her call and they spoke for over 20 minutes. He reported increasing pain and interest in injections from Dr. Caldwell, though he understood that this may not occur for a week or two. (*Id.* at D3842-43.) Ms. Grob and MRL traded messages over the next week. (*Id.* at D3843-44.)

On September 5, 2013, Ms. Grob called Complainant to check in. He reported improvement and noted “that last week he felt that he needed an injection but this has calmed down and does not feel he needs to proceed with this at this time.” (*Id.* at D3844.) Ms. Grob called Complainant a week later, on September 12<sup>th</sup>, but he did not return her call. She called him again on September 16<sup>th</sup>. He called her back and they spoke for over 20 minutes. He reported that “work is going well” though he had continued complaints of pain. No mention was made of injections and he said that he would contact her if he had any concerns. (*Id.*)

Their next contact was on September 30, 2013—the Monday after Complainant had received his notice of fact-finding—when Complainant called Ms. Grob and reported a possible injury the prior week, but that had since improved. Complainant mentioned that he might go see Dr. Caldwell and was considering getting more injections. (*Id.* at D3844-45.) Ms. Grob then initiated calls with Dr. Headapohl and MRL to determine if Dr. Headapohl thought Complainant should see her and to start working on getting prospective treatment by Dr. Headapohl approved, since Complainant had been discharged from her care. Dr. Headapohl was out of the country in the first part of October 2013. (*Id.* at D3845-46.) Complainant followed-up with Ms. Grob on October 16, 2013, to check on the status of any appointments and was told that she was still trying to coordinate with Dr. Headapohl. Ms. Grob was able to reach Dr. Headapohl on the same day. She reported his complaints and Dr. Headapohl recommended that he continue with the conservative care as he had been doing since he was still at a high level of function, was very active, and he had been told to expect occasional flares that he had been taught how to manage. (*Id.* at D3846.) This was reported to MRL, and on October 22, 2013, MRL told Ms. Grob that if Complainant disagreed and felt he needed to be seen, they would like Ms. Grob to attend that appointment. (*Id.* at D3846.)

Complainant reported a second injury on October 22, 2013, and spoke with Ms. Grob. He related that he had been asking for injections, but Ms. Grob explained that he had told her he was flaring but self-managing and returning to normal in a few days and that Dr. Headapohl had recommended continuing with conservative care unless there was a change in his condition. With the new injury, she explained, that may change. Complainant made an appointment for October 30, 2013, with Dr. Caldwell and asked Ms. Grob to arrange to have MRL pay for it. (RX OO, p. D3107.) Ms. Grob called MRL that day and received authorization for the appointment with Dr. Caldwell. (*Id.*) She informed Complainant of this on the 23<sup>rd</sup> and also arranged for him to see Dr. Headapohl at the next available time, on October 28<sup>th</sup>. (*Id.*)

Considering all of this evidence, I find that Complainant has failed to show MRL delayed, denied, or interfered with his course of treatment. First, though the excellent work of Ms. Grob may have led Complainant to believe that medical care is authorized and provided immediately and on demand, that is not how the process ordinarily works. It is normal for there to be some gaps between when a patient requests something and when it is provided. Here, the providers needed to determine if care was appropriate, the requests had to be sent through Ms. Grob to MRL, MRL had to review and approve them, and then the appointments needed to be arranged. Doctors go on vacation, and unless a request is urgent, action may not be taken until they return. Complainant had an unrealistic sense that as soon as he decided he desired treatment it was going to be provided immediately, and if not, MRL had violated the law.

More importantly, any delays here do not appear to have anything to do with MRL. Per Complainant's own representation on October 28, 2013, the reason shots weren't provided on demand to him was that his medical providers determined that it would be better to wait and/or that it was not appropriate care at that time. (*See* CX 35, p. 1.) Ms. Grob's records show the same. Complainant, in retrospect, clearly does not like this medical determination or the manner in which it was made. But it was not a determination of MRL and so MRL did not delay, deny, or interfere with the medical treatment on this occasion. Hence, this is another instance in which Complainant's dispute is with his medical providers, not with MRL. Any delay that occurred was due to normal processing time for treatment requests, the fact that his doctor was on vacation, as well as decisions made by the providers about the course of treatment.

Moreover, Ms. Grob's records show that though Complainant mentioned injections on August 30<sup>th</sup>, *he* later decided that they didn't need to proceed with them on September 5<sup>th</sup>. He cannot then argue now that MRL somehow delayed his requests from late-August/early-September for treatment since these requests went nowhere because he rescinded them. The record reflects that once Complainant's condition did change, which the providers had decided could indicate the need for more treatment and shots, Ms. Grob quickly procured authorization for Complainant's treatment by Dr. Caldwell and arranged for the next available appointment with Dr. Headapohl. Contrary to Complainant's bare allegation in his closing brief, there was no actionable delay, denial, or interference with his medical care by MRL in this period.

Lastly, Complaint contends that MRL denied "[a]dditional treatment Wevers requested after MRL had him declared to be at MMI." (CPB, p. 14.) He does not expound on this assertion or cite to the record on this point. I have discussed the course of treatment in late summer/early fall 2013 in reference to his fifth claim of denial. Reviewing the record, I find no instances where MRL acted in the way described by Complainant. Without more than this barest of statements, I cannot otherwise evaluate Complainant's allegation. It is his burden to show an adverse action, and in this context to point to instances where treatment was denied, delayed, or interfered with by MRL. The unsupported reference to "[a]dditional treatment Wevers requested" fails to do so.

Complainant also alleges delays with the approval of injections, delays approving the MRI, and "delays getting MRL to approve treatment which has been recommended on several occasions," though he gives no examples and cites to no evidence. (CPB, p. 14.) Respondent replies that the only evidence of any delay is e-mails Complainant sent to his supervisor, and contemporaneously to his attorney, mentioning delay with injections. It adds that MRL had no role in the supposed delay and that the evidence shows that he in fact was receiving injections shortly thereafter. (RRB, pp. 15-17.)

The claim of delayed injections is intertwined with the assertion that injections were denied, which was discussed in detail above and found unpersuasive. As for the MRI, the record indicates that in March 2013 Dr. Caldwell queried whether a MRI would be necessary before proceeding with injections but that the response was that it was not. (*See, e.g.*, HT, pp. 435-36.) As discussed with reference to Ms. Grob's credibility (§ V.E), when an MRI was requested on April 25, 2013, Ms. Grob sent the request to and procured approval from MRL the same day and was able to get it scheduled for the next morning. To deem this a delay is incomprehensible. Finally, I do not countenance the allegation that MRL delayed treatment on "several occasions."

Complainant asserts that these delays are shown by the record, but is unable to describe what they were or cite to any part of the record to substantiate the claim.

Broadly, Complainant has argued that MRL has unlawfully controlled and interfered with his medical treatment for a work-related injury. (CPB, pp. 13-14.) As to this general allegation, Respondent disagrees, and contrasts its role with that of the respondent railroad in *Santiago*—whereas the railroad there was the decision-maker in the interference, here MRL contends that in each of the alleged instances of interference, it was not the ultimately decision-maker and so has not interfered. (RPB, pp. 60-63; RRB pp. 2-9.) In his reply brief, Complainant gives more specificity to his general claim of interference, arguing that shortly after his injury MRL inserted itself into his medical treatment by making appointments, enrolling him in the Wellness Program, and assigning a nurse case manager and thereafter interfered with, delayed, and denied treatment. Throughout, it had ultimate control. (CRB, pp. 5-6.) He concludes:

Railroad workers should be entitled to report an injury and seek medical treatment from any medical provider that they want or need to see for bulged discs, nerve damage, or anything else. They should be comfortable with the sacrosanct physician-patient relationship and not have to worry about the company or company selected doctors or PA's making crucial decisions about their health, taking directions from the railroad's claims department, or a nurse case manager attending physician-patient appointments with them and then informing their employer exactly what they or their doctor said.

(*Id.* at 6.)

For the most part I find this argument unconvincing for the reasons discussed above. Complainant is correct that MRL inserted itself into his medical care, but he has not established concrete instances in which MRL used its role to delay, deny, or interfere with any medical treatment. The evidence shows that no treatment request by a treating physician was denied. The record does not place Ms. Grob in a decision making role—she only passed information between MRL and the providers, facilitated approval, and coordinated care. Complainant has produced evidence showing her ubiquitous presence, but no evidence of any interference, a point at which she inserted herself into the decision-making process and altered his course of treatment. Finally, I have not accepted the generalized illusions that Dr. Headapohl and Ms. Colledge are mere agents of MRL. So the fact that these providers, seconded by the others, have refused to refer Complainant to neurological consultation has no tendency to show interference.

Moreover, though MRL was involved in the process through Ms. Grob, the fact that Complainant's use of a nurse case manager was entirely optional belies his argument. MRL provided a service that Complainant could have refused initially and at any time thereafter. He declined to do so, even after learning that part of Ms. Grob's job was to report to MRL. So contra his plea for freedom of medical care, he *was* free to attend appointments without a nurse case manager. Nor is this like participation in the Wellness Program, where there is high incentive for participation. He was entirely free and un-coerced as to the use of Ms. Grob. This does not mean that Ms. Grob couldn't be a source of interference (that is a faulty inference Respondent makes about voluntariness) but it compromises Complainant's general, intuitive case on the interference issue. The fact of the matter is that Complainant hasn't really given MRL a

concrete opportunity to interfere in his care because he hasn't found any doctor who thinks he should receive the treatment he argues he is being denied.

Complainant protests having physicians he contends are agents of the railroad, but has not provided a request for care from a different treating physician. The only request he has provided is to Dr. Sherry Reed, but Dr. Reed will not see Complainant without a referral. MRL hasn't denied authorization or payment for such treatment—it hasn't had the chance. It hasn't denied authorization for a different treating physician of Complainant's choice who might provide the sought after referral—it hasn't been given a chance. Complainant has behaved in a quite perplexing manner. He alleges ubiquitous interference with medical care, but has avoided putting MRL to the test as to the care he desires. Rather he has acquiesced in a course of care, albeit with some disagreements with treating providers, recommended by his treating physicians and that was been entirely approved by MRL. Then, after the fact, he brings a claim alleging interference on the grounds that he now disagrees with his providers. This gets the issue backwards. Complainant may have a sound general complaint as to interference—MRL is certainly involved in the medical of injured employees and thus at risk of violating § 20109(c)(1)—but his particular case is quite ill-suited to make out that general complaint

Complainant's argument does, however, draw more scrutiny to MRL's actions immediately after the December 2012 injury. In addition to the alleged instances of interference made by Complainant in his closing brief, I have reviewed the record for other possible instances at which MRL may have interfered with Complainant's course of treatment. Having done so, I find that MRL did interfere initially in December 2012 when it arranged for Complainant to see Dr. Headapohl after his injury.

After his injury Complainant attempted to self-treat, but was taken to the emergency room, at his request, by Mr. Johnson the next day. (HT, pp. 66, 207-08.) Over the next several days he self-treated and got some physical therapy from Ms. Mahoney, who he knew from the gym. (*Id.* at 69-70.) Mr. Gustin called to check on him on the 12<sup>th</sup>. (*Id.* at 70.) Complainant did not have a doctor, was not being treated beyond working with Ms. Mahoney, and there were no treatment or return to work plans. Ms. Duhamé testified that Mr. Gustin reported the situation to her and MRL then arranged an appointment with Dr. Headapohl and the Occupational Health Clinic. (*Id.* at 380-81; *see also* CX 58, p. 8.) Complainant was not involved with the discussions between Mr. Gustin and Ms. Duhamé. He was informed after the fact that an appointment had been made with Dr. Headapohl. (HT, pp. 73, 381-82.)

I find that these actions were importantly different than the other actions MRL took in implementing the Wellness Program, including notifying Stevenson Consulting of the injury. Complainant had received information about the Wellness Program and how it operated and so was on notice about the steps MRL would take after an injury and his options. Though Ms. Grob simply contacted him after being assigned his case, use of a nurse case manager was never made a condition of care. Complainant could have refused to sign the release, could have asked Ms. Grob to stop assisting him, and could have declined her services from the start. While Complainant could also have attempted to switch providers, in the very beginning of his care he was simply told when he had an appointment and who he had it with. This was not basic, mechanical operation of the Wellness Program. Nor was it a sort of add-on to care like nurse case management. A nurse case manager facilitates care, a physician provides it. Put otherwise,

Complainant was in a position to refuse the services of Ms. Grob from the start and would have still continued to receive medical treatment. But seeing Dr. Headapohl *initiated* his treatment and had he refused, he would have not received treatment at all at that stage. MRL simply gave him initial treatment with Dr. Headapohl as a *fait accompli*. By so doing, MRL established, absent Complainant's input and consent, where and with whom Complainant would at least begin to be treated for his work-related injury.

This is rather benign interference, but it is interference nonetheless. Based on the record, MRL did not deny or delay, it procured and expedited care for an injured employee who wasn't receiving care (beyond physical therapy from a friend) for his injury. But since MRL decided that he would start treating with Dr. Headapohl at the Occupational Health Clinic without asking Complainant or involving him, it took an active role in decisions regarding the treatment for his injury. Under the FRSA and the framework articulated by the ARB in *Santiago I*, this is enough to establish an adverse action regarding interference and shift the burden of proof to Respondent.

c. Would the Result Have Been the Same Absent Respondent's Interference?

Since MRL interfered with Complainant's medical treatment by procuring a doctor for him without his input, the burden shifts to MRL to establish "by clear and convincing evidence that the result would have been the same with or without the railroad carrier's interference." *Santiago I*, ARB No. 10-147 at 18. Like the affirmative defense as to the other provisions of the FRSA, the question posed is counterfactual, asking what would have happened if there had been no interference and whether it is highly probable that any reasonable medical professional would have reached the same determination as to the proper course of care. *Santiago II*, ARB No. 13-0062 at 3-4. To determine whether MRL has met its burden, I "must look at all the direct and circumstantial evidence, as a whole."<sup>37</sup> *Santiago I*, ARB No. 10-147 at 18.

*Santiago* concerned a well-defined issue: whether a particular procedure would have been approved or denied absent the interference by the railroad. So the counterfactual inquiry was not difficult to formulate. That is not the case here, where the interference was quite minor, but concerned steering Complainant to a particular doctor. There are (at least) two ways the inquiry might proceed. First, one could ask whether the record shows that it is highly likely that Complainant would have ended up treating with Dr. Headapohl even if Respondent had included him in the conversation and allowed him to make the initial decision. Second, one could ask whether Complainant's course of treatment would have been materially different in any of the ways he complains of. The second inquiry strikes me as the more appropriate one given *Santiago* and the nature of the harm that is done by interference. *Santiago I* and *II* focused on whether the medical treatment, the procedures that were approved and performed would be the same. When the railroad interferes, the harm is done when the course of treatment is altered in some way. So the particular identity of a provider is less important than the treatment provided. Of course the identity of the provider could matter a great deal, but only insofar as who is providing care affects the nature of the care being rendered.

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<sup>37</sup> Though Complainant addressed this issue, he did so based on other allegations of interference, so his arguments do not directly bear on the particular interference at issue. (See CRB, pp. 14-15.)

The burden-shifting framework in *Santiago I* is a way to determine whether 49 U.S.C. § 20109(c)(1) has been violated—whether the railroad carrier denied, delayed or interfered with the medical treatment of an employer who has suffered a work-related injury. Though a complainant establishes as much by establishing the adverse action under *Santiago I*, the ARB still allows for an affirmative defense. In parallel to the other FRSA whistleblower provisions, in establishing the affirmative defense the employer is establishing that no harm followed from the violation—contribution with the other provisions and interference here. Since in the standard AIR-21 framework the point of the affirmative defense is to not attach liability when no harm was done (because the adverse action would have occurred even despite the protected activity and its contribution), it is logical to approach the inquiry under § 20109(c)(1) into whether “the result would have been the same” as an inquiry into whether the same harm would have followed. In the “ordinary” retaliation context the affirmative defense is evaluated by factoring out the protected activity and looking to whether the harm, the adverse action, would still have been taken. This is not possible per *Santiago I* for an interference claim since the instruction is to factor out not the protected activity, but the interference, which *is* the adverse action, and then ask if the “same” result would have occurred. The harm here cannot be the interference, since that has already been factored out. Intuitively, the harm of the denial, delay, or interference, however, is the course of medical treatment that the complainant actually receives. It is sensible, then, to evaluate the affirmative defense by asking whether the course of medical treatment would have been different, or put otherwise, whether the same, allegedly harmful care would or would not have been provided absent the interference. In the present context, that question is whether absent Respondent’s interference by sending Complainant initially to Dr. Headapohl, his course of treatment would have differed as to the ways he alleges were harmful.

Complainant saw a variety of other providers beyond Dr. Headapohl who also made treatment recommendations. Dr. Caldwell, for instance, made various recommendations, all of which were approved by MRL. Dr. Caldwell also reviewed and approved of the treatment plans of Ms. Colledge and Dr. Headapohl. (HT, pp. 402-04.) Hence, despite being sent to Dr. Headapohl initially, Complainant has not been limited to treatment with her and Ms. Colledge. Complainant has also seen, and MRL has authorized care from, Dr. Caldwell, Dr. Davis, Dr. Terri Reed, Dr. Nelson, and several physical therapists. His course of treatment, then, has been the product of a group of providers, not the decision of the one particular doctor that MRL directed him to. The fact that Dr. Headapohl was only one doctor in a group of doctors who treated the Claimant suggests that the Complainant’s care would have been the same even if he had not been directed to Dr. Headapohl.

More importantly, the most concrete harm that Complainant has alleged is that he has not been referred to a neurologist, neurosurgeon, or back specialist. (CPB, pp. 13-14.) Respondent replies that no doctor has ever opined that such treatment is appropriate. (RPB, p. 73.) It stresses that the multiple physicians here viewed the evidence and came to a uniform conclusion that referral was not appropriate and that, not any interference by MRL, is the reason Complainant has not seen a specialist. (RRB, p. 8.)

I find Respondent’s argument persuasive. It is not just Dr. Headapohl who has declined to refer Complainant to a neurologist, neurosurgeon, or unspecified back specialist. Ms. College, Dr. Caldwell, and Dr. Nelson treated Complainant as well and he was not referred to one of these specialists. The physical therapy providers, though not well-qualified to make the determination,

have not opined in favor of treatment by a specialist. Dr. Davis and Dr. Terry Reed evaluated and treated Complainant for the psychological/social aspect of his symptoms. Neither opined that neurological treatment was appropriate. The only doctor to mention such a referral was Dr. Muskett in the ER. (See CX 42, pp. 1-3; RX OO p. D3243.) But his instruction was for Complainant to follow-up with his regular physicians or a neurologist. The disjunctive instruction was sensible, as the treating physicians would be better able to determine, based on the history of the case, whether a particular line of treatment was appropriate. Complainant saw his regular physicians, both Dr. Headapohl and Dr. Caldwell, who determined based on their deeper knowledge of the case, that such a referral was not appropriate.

The opinion that treatment with a specialist is inappropriate is not arbitrary—it is based on the history of the symptoms, EMG testing, x-rays, and MRIs, all of which the doctors determined made referral inappropriate. What is more, Complainant sought out alternative avenues for treatment at the VA, received an MRI, and was not referred to a neurologist or neurosurgeon. I infer that independent physicians examined Complainant and reached the same conclusion as his treating physicians: treatment by a neurologist, neurosurgeon, or unspecified back specialist is not medically appropriate. Therefore, based on the totality of this evidence, I find that it is highly likely that even if Complainant had treated with a different provider initially, he would not have been referred to a neurologist or neurosurgeon. The medical evidence in the record is *united* on this point. The only objecting voice is Complainant's, but he is not a medical expert and is not qualified to offer opinions on the medically appropriate course of treatment.

I reach the same conclusion as to Complainant's course of treatment generally. The medical evidence in this case is remarkable for the lack of discord or disagreement about the appropriate course of care. Each of the complained of aspects of Complainant's course of treatment were discussed above in reference to the alleged interference (§ VI.B.2.b). For each, there is not only a lack of interference, but a lack of dispute over how Complainant should have been treated. For example, in switching physical therapy providers the only possibly dissenting voice was Ms. Mahoney, who had requested additional care. But she is not as qualified to make the determination as the other providers and in the record before me was not much of a dissenting voice, stating no opinion as to why treatment with her was more appropriate than treatment with Mr. Cordial. Mr. Cordial mentioned that he might seek chiropractic treatment for Complainant. This was not challenged by another provider. Ultimately, Mr. Cordial never made the recommendation. Complainant has raised complaints regarding the shots he was, and was not given and when he was given them, but as discussed at length above (§ VI.B.2.b), at the time, the delay was due primarily to Complainant's decision in early September to not pursue the shots for the time being, not some peculiar aspect of Dr. Headapohl's decision-making. As discussed, she did recommend more conservative treatment unless there was a change in Complainant's condition. But Dr. Caldwell (and the others) did not disagree. In fact, Dr. Caldwell has also opined that the number of injections Complainant receives should be limited in number and only provided during particular flare-ups. (See CX 343, pp. 1-2; RX OO, pp. 3197-201.)

Respondent must show by clear and convincing evidence that absent its interference, the result would have been the same. The interference here was sending Complainant to Dr. Headapohl for treatment instead of seeking his input on who he wanted to be his treating physician. So Respondent must show that it is highly probable that even absent this interference,

and perhaps with a different initial treating physician, he would have received materially<sup>38</sup> the same course of treatment, at least in reference to the points he alleges were deficient or harmful. On the record before me, I find that Respondent has made this showing. This case involves many providers and the treatment plans were made considering input from many, not just one provider. Moreover, there is consensus in the medical records as to the course of treatment, with none of the providers expressing a contrary opinion on the course of treatment. Given plans developed by a group of qualified professionals, opinions by multiple professionals in accord with the treatment provided and not provided at the relevant points, and the absence of any dissenting voices, I am convinced that it is highly probable that absent Respondent's interference, the result would have been the same.

d. Conclusion

Complainant's interference complaint under 49 U.S.C. § 20109(c)(1) is essentially a dispute between Complainant and his medical providers. In retrospect, he disagrees with some of the treatment and diagnostic decisions. He does not like that he was treated by a physician's assistant. (HT, pp. 106-07, 121) He takes issue with the opinion of his providers that his symptoms have a psychological and social element and he is upset that he was sent to a psychologist. (*Id.* at 86.) He disagrees with the results of the objective testing, which do not indicate treatment by either a neurologist or neurosurgeon, and wants a referral in any case, even though none of his providers have opined that this is appropriate care. (*Id.* at 196.)

This interference complaint is an attempt to turn a disagreement between a patient and all of the medical professionals into an FRSA violation, casting united medical opinion as interference because it is contrary to what Complainant would like it to be. The FRSA, however, does not usurp the role of medical professionals in deciding what care is and is not appropriate and it does not require the railroad to take medical decision making out of the hands of doctors and put it into the hands of an employee with no medical training.

49 U.S.C. § 20109(c)(1) creates a cause of action when a railroad interferes in an employee's course of treatment. It does not upend the important role medical professionals play in making decisions about appropriate care. MRL has structured its Wellness Program so that it retains a role in the course of treatment. This is not a violation of the FRSA, though it puts MRL at great risk of violations—anytime it denies, delays, or interferes with a request for care it takes the “adverse action” that a complainant must establish under § 20109(c)(1) and flips the burden of proof, requiring MRL then to show by clear and convincing evidence that the result would have been the same absent its role in denying, delaying, or interfering with care. This is a high burden. Here, however, MRL didn't deny or delay any requests for treatment or interfere with the medical decision-making of the treating providers. Rather, it summarily approved requests that were submitted and though Ms. Grob kept MRL informed, I have found no convincing evidence of a more active role in the medical decision-making.

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<sup>38</sup> I have included qualifiers of this sort because of a strict reading of “the same” it would be nearly impossible to make out the affirmative defense, which is not a result at all suggested by the ARB in *Santiago I* and *Santiago II*. For example, with a different provider he would have certainly have been seen in a different place and at a different time etc. What matters for the affirmative defense is whether the alleged harms would have occurred, which means the same course of treatment.

I did find that MRL interfered with Complainant's medical care by initiating his treatment by Dr. Headapohl in December 2012. Incongruously, this was the opposite of a delay or denial—it was the provision and expedition of care. Complainant had no doctor and *expected* MRL to take care of everything. (*See* HT, p. 71.) Nonetheless, in fulfilling this expectation and getting him treatment for his injury, MRL did interfere with his care by initiating a course of treatment without getting his input and approval. This shifts the burden of proof to MRL. Given the involvement of multiple providers and the unity of medical opinion, however, I have found that MRL has satisfied its burden of showing by clear and convincing evidence that Complainant's course of treatment would have been the same absent that interference.

Therefore, I find that MRL has not violated § 20109(c)(1) of the FRSA.

## VII. ORDER

For the reasons stated above, it is hereby ORDERED that Complainant's October 22, 2013, complaint is DISMISSED.

JENNIFER GEE  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be

had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).