

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
BOSTON, MASSACHUSETTS

Issue Date: 07 December 2017

CASE NO.: 2016-FRS-00066

In the Matter of:

DAVID McCARTY,
Complainant,

v.

UNION PACIFIC RAILROAD COMPANY
Respondent.

Before: Jonathan C. Calianos, Administrative Law Judge

Appearances:

For the Complainant:

Joseph Bauer, Esq., The Bauer Law Firm, LLC, St. Louis, Missouri

For the Respondent:

Torry N. Garland, Esq., Union Pacific Railroad Company, Denver, Colorado

Ryan Wilkins, Esq., Union Pacific Railroad Company, Omaha, Nebraska

DECISION AND ORDER DENYING BENEFITS

I. **STATEMENT OF THE CASE**

This case arises under the employee protection provisions of the Federal Rail Safety Act of 2007 (“FRS”), 49 U.S.C § 20109, as amended by the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, Div. A, Title IV, § 419, 122 Stat. 4848, 4892 (Oct. 16, 2008). David McCarty (“the Complainant” or “McCarty”) filed a complaint alleging his employer, Union Pacific Railroad Company (“Union Pacific” or “the Employer”), retaliated against him for engaging in protected activity. Specifically, McCarty alleges that he engaged in protected activity by taking Klonopin pursuant to a psychiatric treatment plan, and as a result, Union

Pacific will not let him return to work as a Centralized Dispatching Center Electronic Technician (“CDCET”).

In response, Union Pacific argues that it did not violate McCarty’s rights under the FRS because it is exempt from liability under the statute’s safe harbor provision. Namely, Union Pacific has a restricted drug policy pursuant to its own fitness for duty standards, and McCarty’s use of Klonopin violates that policy.

On March 31, 2017, I held a formal evidentiary hearing in Omaha, Nebraska.¹ I admitted the following evidence in full without objection: Official Documents (“ALJX”) 1 through 11, and Joint Exhibits (“JX”) 1 through 31, and 40 through 43. (TR at 7, 9, 22-23, 88). McCarty did not present any evidence independent of the Joint Exhibits that were offered. I admitted Respondent’s Exhibits (“RX”) 33, 34, 35, 37, and 38 over objection, and Union Pacific voluntarily withdrew RX-32, 36, and 39 without objection. *Id.* at 13, 15-16, 18, 21. Four witnesses testified live: the Complainant, the Complainant’s mother Sandra McCarty, Union Pacific nurse Rhonda Ross, and Union Pacific’s Chief Medical Officer Dr. John Holland. Both parties filed post-hearing briefs,² and the record is now closed. *Id.* at 24, 92, 106, 135.

II. STIPULATIONS

The following facts are undisputed:

- 1) On April 7, 2008, McCarty started working for Union Pacific as a Signal Candidate;
- 2) On May 4, 2012, Union Pacific transferred McCarty to a level 1 CDCET position, but he eventually attained level 3 in Omaha, Nebraska;
- 3) On August 5, 2014, Union Pacific approved McCarty for a medical leave of absence;
- 4) On April 7, 2015, Union Pacific notified McCarty that it could not accommodate his medical restrictions;
- 5) In a note dated May 2, 2015, Union Pacific’s personnel record for McCarty indicates he was medically disqualified from performing his job duties;
- 6) On July 7, 2015, McCarty submitted another letter from his treating physician clearing him to work without restrictions;
- 7) The Federal Rail Administration (“FRA”) has promulgated medical standards contained in 49 CFR § 219.101 *et seq.* for rail employees who have been prescribed Schedule II through V drugs; and

¹ “(TR at [page number])” refers to the hearing transcript.

² McCarty’s brief appears as “(Compl. Br. at [page number]),” and Union Pacific’s brief is cited “(Resp. Br. at [page number]).”

8) Union Pacific is a railroad carrier engaged in interstate commerce within the meaning of the FRS, 49 U.S.C § 20109.

(ALJX-11); *see also* (TR at 7).

III. ISSUES PRESENTED AND SUMMARY OF FINDINGS

The dispositive issue here is whether the safe harbor exemption found at 49 U.S.C. § 20109(c)(2) applies. Based on the record as a whole, I find that Union Pacific carried its burden of proving that the safe harbor exemption applies because: (1) pursuant to its own fitness for duty standards, it has a uniform policy restricting the use of Klonopin by individuals who perform tasks involving critical decision making; and (2) McCarty's use of Klonopin violates that policy where an essential function of his former CDCET job involves critical thinking.

IV. FACTUAL BACKGROUND

McCarty is a thirty-four year old man who began working for Union Pacific on April 7, 2008. (ALJX-11); (JX-10 at 1); (JX-15 at 1); (JX-30 at 1); (TR at 25). He initially worked in the Signal Department until transferring, at some point in 2012, to the Centralized Dispatching Center where he consistently engaged in critical decision making as a CDCET. (JX-1); (TR at 26-27, 59-63). In August of 2014, McCarty sought psychiatric treatment and was ultimately prescribed Klonopin. (TR at 34-36). As a result, Union Pacific will not allow McCarty to return to his CDCET job because, pursuant to its fitness for duty standards, the railroad has a blanket policy restricting the use of Klonopin by individuals who perform tasks involving critical decision making. (JX-4); (JX-9); (JX-11); (TR at 154, 160-64).

A. An Essential Function of McCarty's Former CDCET Job Involves Critical Decision Making.

McCarty's former CDCET role with Union Pacific is indisputably a safety critical position that requires critical thinking. (TR at 59-60, 63). Union Pacific's CDCET job description reads:

An employee headquartered at the Centralized Dispatching Center assigned to install and maintain signal control systems. The employee may be assigned to direct others at various locations over the entire Union Pacific System in analyzing, locating and pinpointing signal facility problems at field locations and to direct, advise, and assist field forces on the signal proficient in the use and understanding of electronic signal equipment and basic signal systems:

- must be able to use and understand diagnostic and other test equipment;
- must be proficient in reading signal circuit plans and schematic electronic diagrams;

- must be proficient in electronics, including digital electronics;
- must possess an FCC General Class Radio Telephone License or its equivalent; and
- must have general knowledge of computers with the ability to use and work from a computer terminal.

(JX-1); *see also* (TR at 28-29).

In describing his CDCET duties, McCarty acknowledged that attention to detail is important, in part, to protect both railroad employees and the public at large. (TR at 59-60, 62-63). A CDCET has to field telephone calls while simultaneously monitoring about eight screens for any troubles on the railroad including signal malfunctions and other maintenance issues. *Id.* at 60. When alerted to a possible maintenance problem, a CDCET has to issue a ticket identifying where the problem is by mile post and call the dispatcher to have trains slow down until the matter is addressed. *Id.* at 62. McCarty confirmed that identifying the wrong mile post, for example, could be “[v]ery” problematic. *Id.* at 63. And even worse, failing to timely remedy a misaligned switch, for example, could cause trains to collide and possibly even cause a derailment situation. *Id.*

B. McCarty’s Treating Psychiatrist Prescribes Him Klonopin to Manage His Psychiatric Conditions.

On August 15, 2014, McCarty took a medical leave of absence from Union Pacific to undergo sinus surgery. (TR at 30, 34). During that time, on August 26, 2014, McCarty also sought psychiatric treatment from Dr. Michael Egger complaining of “anxiety and mood problems as a result of his very stressful job as he had been ‘butting heads’ with his bosses.” (JX-20 at 2); *see also* (JX-15 at 1); (JX-26 at 2); (TR at 34-35).

“On initial presentation he had signs and symptoms consistent with Major Depressive Disorder, recurrent episode, moderate (in regards to severity) and Generalized Anxiety Disorder with panic attacks.” (JX-15 at 1); *see also* (JX-20 at 5); (TR at 35). Specific symptoms include: difficulties sleeping, getting out of bed, going to work, and being around crowds; “feelings of hopelessness, helplessness and/or worthlessness”; disinterest in hobbies and socializing; thoughts of dying, but not suicidal; being a “clean freak”; and other physical manifestations including “his heart skipping, getting hot or cold, room closing in, chest tightening, light headedness, confusion and sweating.” (JX-20 at 2) (internal quotation marks omitted).

Over the years, McCarty has tried at least sixteen different medications to treat his psychiatric conditions. *See* (JX-15 at 1). When he first treated with Dr. Egger, McCarty “had

been on Zoloft for the past year, but was not sure it was working. He reported previously being on Lexapro, which worked to lessen his symptoms; but, when trying Lexapro again later, it proved to be of no benefit.” (JX-20 at 2). McCarty had also tried Ambien and Xanax before treating with Egger, but to no avail. (JX-15 at 1); (JX-20 at 2).

While in Egger’s care, McCarty also tried a number of other drugs before finally establishing a treatment plan that worked for him. (JX-15 at 1). Specifically, McCarty unsuccessfully tried Pristiq, Viibryd, Brintellix, Luvox, Wellbutrin, Remeron, Latuda, Seroquel XR, Phenergan, Clonidine, and Buspar. (JX-15 at 1); (JX-20 at 5-6); (TR at 35-36). In October of 2014, Egger ultimately prescribed Klonopin, which is a benzodiazepine. *See* (JX-10 at 2-3); (JX-15 at 1); (JX-20 at 5); (TR at 36-37). McCarty responds well to Klonopin and has taken it ever since. (TR at 36-37).

C. Union Pacific Will Not Allow McCarty to Resume His Former CDCET Role.

Because McCarty takes Klonopin, Union Pacific’s Health and Medical Services (“HMS”) imposed permanent restrictions prohibiting him from performing any tasks involving critical decision making, and as a result, he cannot resume his former CDCET role.

i. Union Pacific’s Fitness for Duty Policy and Restricted Prescription Drugs List

Union Pacific has had medical rules in place since at least 1997 (TR at 148), and its current fitness for duty standards read:

Union Pacific requires employees to have a written copy of their treating medical practitioner’s evaluation/determination (as above) available upon request of the Medical Review Officer (MRO) or the Fitness for Duty Nurse.

Union Pacific may require an employee, to inform HMS of specific or general types of therapeutic (prescription or over-the-counter) drugs, if HMS concludes that use of such drugs poses significant safety risks for work. To be valid, under this policy, the prescription must have been issued within one year prior to the employee’s use of the drug.

Union Pacific may place restrictions on the use of specific or general types of therapeutic (prescription or over-the-counter) drugs by an employee, or group of employees, if HMS concludes that use of such drugs poses significant safety risks for work. Work restrictions may include requirements for monitoring by EAP or HMS, including periodic drug screens.

If Union Pacific managers become concerned that an employee’s use of therapeutic drugs may pose safety risks for work, then this can be evaluated in a Fitness for Duty review by Health and Medical Services. In such cases, the FFD determination of HMS will supersede any statements from the employee’s

treating physician's statement regarding the employee's ability to use therapeutic drugs at work.

(JX-9 at 8).

Pursuant to its authority under the Union Pacific's fitness for duty standards, HMS developed a restricted prescription drug policy prohibiting the use of benzodiazepines including Klonopin (Clonazepam) by all employees who perform tasks involving critical decision making. *See* (JX-9 at 8); (JX-11); (TR at 119, 131, 159, 170-71). HMS restricts the use of Klonopin because it is a known sedative designed to slow physical and mental processes. (TR at 154-55, 157-60, 170-71).

Union Pacific's Chief Medical Officer, Dr. John Holland, explained that when benzodiazepines, such as Klonopin, are compared to alcohol, "usually the level of impairment during the active phase, during the first several hours is well over the limit of what would be the equivalent of the legal limit of alcohol, the blood alcohol concentration of .08." *Id.* at 157. Dr. Holland further explained that:

[E]ven fairly low levels of what would be the equivalent of .02 percent of alcohol, one-fourth of the legal limit in this country, people start to lose their divided attention. And these higher executive functionings about concentrating on complex tasks, remembering things, short-term memories, many of them are quite affected, even if a person is at a level, for instance, equivalent to the blood alcohol concentration that isn't over the legal limit.

Id.

HMS published the restricted prescription drugs list on the internet in 2015, but the policy has been used and applied the same way since at least 2011. *Id.* at 111-12. As soon as HMS learns that an employee is taking a restricted drug, it notifies the employee's treatment provider and suggests permissible alternatives based on an evaluation of that employee's medical history and personal circumstances. (TR at 144-45, 151, 159-61, 170-71); *see also* (JX-4); (JX-30). Before the employee can return to work, HMS makes a fitness for duty determination. (TR at 144-45); *see also* (JX-5); (JX-6); (JX-7); (JX-16); (JX-17); (JX-30); (RX-33). If restrictions are imposed, HMS asks the employee's department whether the restrictions can be reasonably accommodated. (TR at 188, 190); *see also* (JX-3); (JX-30). If not, HMS refers the employee to Union Pacific's Disability Management Department ("Disability Management") to discuss his or her vocational future if so desired. (JX-17).

ii. *Union Pacific's Fitness for Duty Determination Regarding McCarty*

On October 9, 2014, Amber Bond, a Physician Assistant from Dr. Egger's office, sent Union Pacific a medical progress report indicating McCarty had been prescribed Klonopin. (JX-10). Less than a week later, on October 14, 2014, Dr. Holland sent Egger's office a letter indicating McCarty cannot perform safety critical tasks while under the influence of, among several other drug categories listed, benzodiazepines including Klonopin. (JX-4); (JX-30). Five months later, on March 18, 2015, Egger sent Union Pacific a letter releasing McCarty to full duty work expressing his belief that McCarty could safely perform his job functions while using Klonopin. (JX-15 at 1-2).

Shortly thereafter, on March 27, 2015, HMS issued a letter clearing McCarty to return to work, but with permanent restrictions prohibiting him from performing any tasks involving critical decision making while under the influence of Klonopin. (JX-16); (JX-30). That same day, HMS sent McCarty's department a "Restriction Review Form" asking his supervisors if his new limitations could be reasonably accommodated. (JX-5). Manager Stephen Kuhn, Director Terry Miller, and Superintendent Neal Hathaway all signed off that McCarty's restrictions could not be reasonably accommodated because critical decision making is an essential function of the CDCET job. *Id.* By letter dated April 7, 2015, HMS advised McCarty that his restrictions could not be reasonably accommodated and referred him to Disability Management for further assistance. (JX-7); (JX-17); (JX-30); *see also* (JX-5). To aid McCarty in receiving and maintaining disability benefits and healthcare coverage, HMS issued a "Supplemental Doctor's Statement" the following day as proof of disability through December 31, 2025. (JX-6 at 3); (JX-30).

Three months later, on July 7, 2015, Egger sent Union Pacific another letter supporting McCarty's fitness to work with full duties. (JX-18). In the letter, Egger emphasized that "McCarty is in a better frame of mind now and more equipped to make immediate critical decisions than he was prior to taking medical leave in August 2014." *Id.* Nevertheless, HMS affirmed its initial determination by letter the following day. (JX-7).

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Union Pacific did not violate McCarty's rights under the FRS. To promote "safety in every area of railroad operations and reduce railroad-related accidents and incidents," the FRS

affords McCarty significant protection to engage in certain defined activities. 49 U.S.C. § 20101. At issue here is § 20109(c)(2), which reads:

A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee . . . for following orders or a treatment plan of a treating physician, **except that a railroad carrier’s refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier’s medical standards for fitness for duty.**

49 U.S.C. § 20109(c)(2) (emphasis added); *see also* 29 C.F.R § 1982.102(vii)(3)(ii)(A).

In the scant precedent that exists on this discrete and rather atypical employee protection provision, the Administrative Review Board (“ARB”) interprets § 20109(c)(2) as creating “a carve-out ‘safe harbor’” that exempts fitness for duty situations from FRS coverage if certain conditions are met. *Ledure v. BNSF Railway Co.*, 2012-FRS-00020, slip op. at 7 (June 2, 2015); *see also Rudolph v. Nat’l R.R. Passenger Corp. (AMTRAK)*, 2009-FRS-00015, slip op. at 17 (Apr 5, 2016) (citing *Ledure* for safe harbor exemption). Namely, Union Pacific must prove: (1) relevant fitness for duty standards exist, and (2) McCarty does not satisfy them.³ *Ledure*, 2012-FRS-00020, slip op. at 7. *See also Rudolph*, 2009-FRS-00015, slip op. at 17 (discussing two-pronged approach for evaluating safe harbor exemption’s applicability). If Union Pacific fails to prove that the safe harbor exemption applies, McCarty’s claim is governed by the legal burdens of proof set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21”), 49 U.S.C. § 42121(b). *See* 49 U.S.C. § 20109(d)(2)(A)(i); *Ledure*, 2012-FRS-00020, slip op. at 7-8.

In his brief, McCarty exclusively analyzed this claim under the AIR-21 burden-shifting framework; however, I need not evaluate this claim under AIR-21 where Union Pacific successfully proved that the safe harbor exemption applies. *See Ledure*, 2012-FRS-00020, slip op. at 7; (Compl. Br. at 7-19). Although pertinent FRA standards exist, I find that Union Pacific has more stringent standards applicable here. Based on those standards, McCarty’s use of Klonopin renders him ineligible to work as a CDCET.

³ As Union Pacific correctly points out, during trial I misspoke by suggesting that the case boils down to the reasonableness of Union Pacific’s restricted drug policy under the statute and regulations. *See* (Resp. Br. at 11); (TR at 104-05). In hindsight, I find that the law as stated in this opinion governs McCarty’s claim. Nevertheless, I still find that my decision denying Union Pacific’s motion for summary decision was appropriate where, at the time, genuine issues of material fact existed warranting a full trial on the merits.

A. Union Pacific’s Restricted Drug Policy Applies Where it is More Stringent Than the Minimal Standards Implemented by the FRA.

The FRA has fitness for duty standards designed “to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.” 49 C.F.R. § 219.1(a). To that end, “[n]o regulated employee may use a controlled substance at any time, whether on duty or off duty, except as permitted by § 219.103.” 49 C.F.R. § 219.102; *see also* 49 C.F.R. § 219.101. As used by the FRA, “‘controlled substance’ means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of . . . [21 USCS § 812].” 21 U.S.C. § 802(6); *see also* 49 C.F.R. § 219.5. Clonazepam, also known as Klonopin, is a schedule IV depressant. 21 U.S.C. § 812(b)(4); 21 C.F.R. § 1308.14(c)(11).

Not only is it unlawful for a covered employer to knowingly violate FRA fitness for duty standards, but the regulations warn that a “railroad must exercise due diligence to assure compliance with §§ 219.101 and 219.102 by each regulated employee.” 49 C.F.R. 219.105(b). Accordingly, a “railroad’s alcohol and/or drug use, education, prevention, identification, intervention, and rehabilitation programs and policies must be designed and implemented in such a way that they do not circumvent or otherwise undermine the requirements, standards, and policies . . .” implemented by the FRA. 49 C.F.R. § 219.105(c).

Section 219.1(b) speaks to the scope of the FRA standards by stating “[t]his part prescribes minimum Federal safety standards for control of alcohol and drug use. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.” 49 C.F.R. § 219.1(b). Section 219.101(c) echoes 49 C.F.R. § 219.1(b) by emphasizing “[n]othing in this section restricts a railroad from imposing an absolute prohibition on the presence of alcohol or any drug in the body fluids of persons in its employ, whether in furtherance of the purpose of this part or for other purposes.” 49 C.F.R. § 219.101(c). In other words, the FRA standards are applicable to the extent they provide a floor, not a ceiling, for controlling drug and alcohol use in railroad employment. *See* 49 C.F.R. §§ 219.1(b) & 219.101(c).

Here, not only is Union Pacific’s restricted drug policy consistent with the FRA regulations, it actually further the goals of both the FRS and the FRA by imposing more stringent safety standards than required by law. Specifically, the FRA permits the use of Klonopin as

provided in 49 C.F.R. § 219.103 while Union Pacific absolutely prohibits the use of Klonopin by employees involved in critical decision making. *See* 49 C.F.R. § 219.102; (JX-11); (TR at 119, 131, 159, 170-71). Accordingly, the terms of Union Pacific's restricted drug policy apply. *See* 49 C.F.R. §§ 219.1(b) & 219.101(c).

McCarty argues that, pursuant to 49 U.S.C. § 20109(c)(2), Union Pacific's more demanding policy is irrelevant where pertinent FRA standards exist; however, this interpretation is completely at odds with congressional intent. Facilitating railway safety by diminishing opportunities for human error is a key sentiment permeating the congressional record of the 2008 FRS amendments from which the safe harbor exemption was enacted.⁴ At the time, there had been more than 9,000 train-related fatalities and over 100,000 injuries since the last railway safety legislation had passed in 1994. 154 Cong. Rec. S10283-01 (daily ed. Oct. 1, 2008) (statement of Sen. Frank Lautenberg); 154 Cong. Rec. S10031-02 (daily ed. Sept. 29, 2008) (statement of Sen. Frank Lautenberg). Arguably the worst tragedy of all involved a Union Pacific train, which was cited at least sixteen times by at least nine different senators in support of the bill enhancing railway safety.⁵

For example, Senator Barbara Boxer stated:

I must emphasize the importance of strengthening our safeguards for railroads, to protect the lives and safety of our citizens. We have just been reminded how critical it is for us to pay attention to this issue by the tragedy in my home State of California on September 12, 2008. On that day, a Metrolink train crashed head on into a Union Pacific freight train in Chatsworth, northwest of downtown Los Angeles, killing 25 people and injuring at least 135 in the most deadly commuter rail accident in modern California history, and one of the worst rail accidents in recent U.S. history.

154 Cong. Rec. S10283-01 (daily ed. Oct. 1, 2008) (statement of Sen. Barbara Boxer).

⁴ *See* 154 Cong. Rec. S10283-01 (daily ed. Oct. 1, 2008) (statements of Sen. Frank Lautenberg, Sen. Dianne Feinstein, Sen. Kay Bailey Hutchison, Sen. Barbara Boxer, Sen. Carl Levin, Sen. Jon Kyl, Sen. Kit Bond, and Sen. Daniel Inouye); 154 Cong. Rec. S10031-02 (daily ed. Sept. 29, 2008) (statements of Sen. Frank Lautenberg, Sen. Barbara Boxer, Sen. Bill Nelson, Sen. Dianne Feinstein, and Sen. Harry Reid); 154 Cong. Rec. S10039-03 (daily ed. Sept. 29, 2008) (statement of Sen. Tom Carper); 154 Cong. Rec. E2035-02 (daily ed. Sept. 27, 2008) (statement of Sen. Grace Napolitano).

⁵ *See* 154 Cong. Rec. S10283-01 (daily ed. Oct. 1, 2008) (statements of Sen. Frank Lautenberg, Sen. Dianne Feinstein, Sen. Kay Bailey Hutchison, Sen. Barbara Boxer, Sen. Carl Levin, and Sen. Jon Kyl); 154 Cong. Rec. S10031-02 (daily ed. Sept. 29, 2008) (statements of Sen. Frank Lautenberg, Sen. Barbara Boxer, Sen. Dianne Feinstein, and Sen. Harry Reid); 154 Cong. Rec. S10039-03 (daily ed. Sept. 29, 2008) (statement of Sen. Tom Carper); 154 Cong. Rec. E2035-02 (Sept. 27, 2008) (statement of Sen. Grace Napolitano).

In addition to the Chatsworth incident, Union Pacific was also a legislative focus for the nature and extent of its operations. For instance, Congresswoman Grace Napolitano commented:

H.R. 2095 is vital legislation for my district which has 160 trains traveling through it every day, 90 on the Union Pacific line and 70 on Burlington Northern Santa Fe line. These trains carry approximately 14,000 containers every day, with many of them holding hazardous materials. This train traffic is expected to triple by 2020, which will mean a train every 10 minutes.

From October 2004 to May 2005, five derailments occurred in or near my district. These derailments damaged homes and businesses, threatened public safety and caused anxiety for those who lived and worked along the railroad.

H.R. 2095 will take major steps to prevent derailments by improving track safety and grade crossing safety, increasing whistleblower protections, setting hours of service requirements, and strongly enforcing rail safety violations.

154 Cong. Rec. E2035-02 (daily ed. Sep. 27, 2008) (statement of Sen. Grace Napolitano).

With that backdrop, I am unconvinced that § 219.103(a) can be utilized as McCarty's golden ticket to reinstatement. 49 C.F.R. § 219.103(a); *see also* (Compl. Br. at 15-16). Section 219.103(a) reads:

(a) This subpart does not prohibit the use of a controlled substance (on Schedules II through V of the controlled substance list) prescribed or authorized by a medical practitioner, or possession incident to such use, if –

(1) The treating medical practitioner or a physician designated by the railroad has made a good faith judgment, with notice of the employee's assigned duties and on the basis of the available medical history, that use of the substance by the employee at the prescribed or authorized dosage level is consistent with the safe performance of the employee's duties;

(2) The substance is used at the dosage prescribed or authorized; and

(3) In the event the employee is being treated by more than one medical practitioner, at least one treating medical practitioner has been informed of all medications authorized or prescribed and has determined that use of the medications is consistent with the safe performance of the employee's duties (and the employee has observed any restrictions imposed with respect to use of the medications in combination).

49 C.F.R. § 219.103(a).

In considering the FRA regulations as a whole, it is clear that § 219.103(a) is designed to balance safety interests with interests in promoting free enterprise by allowing a railroad to employ individuals as it sees fit if certain criteria consistent with safe performance is satisfied. *See* 49 C.F.R. § 219.103(a). Hence, the provision is directed at employers with either no fitness

for duty standards or fitness for duty standards more lax than the FRA – it is not directed at employees as a means to undercut an employer’s more demanding safety standards. *See id.* This interpretation is buttressed by § 219.103(b), which reads “[t]his subpart does not restrict any discretion available to the railroad to require that employees notify the railroad of therapeutic drug use or obtain prior approval for such use.” 49 C.F.R. § 219.103(b).

To be sure, Union Pacific (and not McCarty) assumes sole responsibility for noncompliance with the FRA standards, and given that, it is Union Pacific, and not McCarty, who can exclusively invoke § 219.103 at its discretion. *See* 49 C.F.R. §§ 219.105(b) & (c). Because Union Pacific’s more stringent restricted drug policy is not inconsistent with the FRA fitness for duty standards, I find that the railroad’s policy applies here.

B. McCarty’s Use of Klonopin Does Not Satisfy Union Pacific’s Fitness for Duty Policy.

Union Pacific has had fitness for duty standards in place since at least 1997 (TR at 148), and its current policy states that, irrespective of a treating physician’s opinion, HMS may restrict employees from working under the influence of certain drugs if it determines that the drugs pose a significant safety risk at work. (JX-9 at 8); (JX-30). In accordance with its authority under Union Pacific’s fitness for duty standards, HMS developed a restricted drug policy that uniformly prohibits employees from performing any tasks involving critical decision making while using Klonopin. (JX-11); (TR at 119, 131, 159, 170-71). While HMS did not publish the restricted prescription drugs list publicly until 2015, the policy has been used and applied the same way since at least 2011. (TR at 111-12).

Union Pacific’s restricted drug policy applies to McCarty where he concedes that he has taken Klonopin since October of 2014, and his former CDCET job involves critical decision making. *See* (JX-1); (JX-15 at 1); (JX-20 at 5); (TR at 28-29, 36-37, 59-60, 62-63). Considering Union Pacific’s involvement in the Chatsworth tragedy at the focal point of congressional debates, it is not surprising that the railroad does not want to risk safety by allowing McCarty to work as a CDCET while using Klonopin. *See* sources cited *supra* note 5. Klonopin is a known sedative designed to slow the physical and mental processes, and as McCarty testified, collisions and derailments can result from CDCET errors. *See* sources cited *supra* note 4; (TR at 63, 154-55, 157-60, 170-71). To hold that Union Pacific is incapable of enforcing its restricted drug policy here would undermine Congress’s intent to enhance railway safety by reducing opportunities for human error in railway operations. *See* sources cited *supra* note 4.

McCarty's argument that "a review of UP's Drug and Alcohol Policy shows that it is internally inconsistent" is unpersuasive. (Compl. Br. at 13). Specifically, McCarty says: "Section 5.3.1 of the Policy (JX-9) is taken directly from the FRA's medical standards found at 49 CFR Section 219.103" *Id.* Preliminarily, McCarty seems to conflate Union Pacific's fitness for duty standards with its restricted drug policy. *See id.* Union Pacific's fitness for duty standards merely provide the authority under which HMS developed the restricted drug policy as opposed to the two being one in the same. *See* (JX-9 at 8); (JX-11). Given that, § 5.3.1 may be an exception to other aspects of Union Pacific's fitness for duty standards, but it is clearly not applicable to the restricted drug policy. *See* (JX-9 at 7-8); (JX-11).

Instead, Union Pacific's restricted drug policy has blind application in that it absolutely prohibits the use of Klonopin without exception, and McCarty does not claim that the policy was applied to him in any discriminatory way. *See* (JX-11); (TR at 119, 131, 159, 170-71). Thus, for reasons discussed prior, it is irrelevant that McCarty may be eligible to return to work under 49 C.F.R. § 219.103 of the FRA regulations. *See* sources discussed Part (V)(A) *supra*. And it is equally irrelevant that Union Pacific did not physically evaluate McCarty to determine how Klonopin personally affects him or that Dr. Egger believes he is capable of functioning safely at work under its influence. *See* (JX-9 at 8); (JX-11); (TR at 119, 131, 159, 170-71). The only reason HMS reviewed McCarty's medical history was to help him find permissible alternative drugs to treat his medical conditions and get him back to work without restrictions. *See* (TR at 170-71).

I acknowledge Egger's opinion that it is safer for McCarty to work under the influence of Klonopin than for him to work un-medicated, however, that does not alter the outcome here. *See* (JX-18). According to Dr. Holland, even if McCarty stopped taking Klonopin, HMS would not lift his restrictions if it determined that his untreated mental state also posed a safety risk. (TR at 208-11). Where McCarty's use of Klonopin does not comply with the railroad's restricted drug policy, I find that Union Pacific satisfied the second and final element necessary to prove that the safe harbor exemption applies here.

VI. ORDER

Based on the record as a whole, I find that McCarty does not have a valid FRS claim where Union Pacific proved that the safe harbor exemption applies. Namely, Union Pacific has applicable fitness for duty standards, and McCarty's use of Klonopin does not satisfy those

standards. Accordingly, it is hereby ORDERED that McCarty's claim for relief is hereby DENIED.

SO ORDERED.

JONATHAN C. CALIANOS
Administrative Law Judge

Boston, Massachusetts

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business 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. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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).

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: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) 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.

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: (1) 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 (2) 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, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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.

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 for Occupational Safety and Health. *See* 29 C.F.R. § 1982.110(a).

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).