

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

(415) 625-2200
(415) 625-2201 (FAX)



Issue Date: 10 September 2014

CASE NOs.: 2014-NTS-00001, 00002

In the Matter of

MICHAEL BEN GRAVES,
Complainant,

v.

MV TRANSPORTATION, INC.,
BROADSPIRE SERVICES, INC.,
Respondents.

DECISION AND ORDER

This case arises under the National Transit Systems Security Act of 2008 (“NTSSA”), 6 U.S.C. § 1142, and the regulations published at 29 U.S.C. Part 1982. The NTSSA provides protection from retaliation when an employee has engaged in protected activity pertaining to public transportation safety or security, or the employee is perceived to have engaged in or is about to engage in protected activity. 29 C.F.R. § 1982.100(a).

Complainant works as a bus driver for MV Transportation (“Employer”) and alleged that he was entitled to receive workers’ compensation disability related to two separate incidents that occurred on January 31, 2012 and November 27, 2012. Broadspire is the workers’ compensation administrator for Employer, and does not participate in the day-to-day operation of Employer. Complainant alleges that Employer and Broadspire conspired together to deny him workers’ compensation benefits in retaliation for having filed a whistleblower complaint against Employer in January 2011. Employer and Broadspire denied his allegations, and contend that Complainant has failed to make out a case of retaliation within the meaning of the NTSSA.

For the reasons discussed below, I dismiss the complaint because Complainant did not prove a case of retaliation under the NTSSA.

I. Procedural Issues

This case involved two separate matters. In the first matter (2014-NTS-00001), the Department of Labor’s Occupational Safety and Health Administration (“OSHA”) denied Complainant’s whistleblower complaint on November 15, 2013, and he requested a hearing before this Office on November 21, 2013. In that matter, Complainant alleged that Employer

and Broadspire retaliated against him by failing to pay workers' compensation benefits in November 2013 because Broadspire said his doctor was outside the provider network. Complainant later acknowledged to OSHA that he was receiving benefits, and OSHA determined the complaint was moot. In the second case (2014-NTS-00002), OSHA denied Complainant's whistleblower complaint on January 14, 2014, and he requested a hearing before this Office on February 3, 2014. In the second matter, Complainant alleged he was being denied workers' compensation benefits and was being discriminated against because of his disability. OSHA determined that the Department of Labor did not have jurisdiction to investigate either allegation. I consolidated both matters, and held a hearing on May 20, 2014 in Long Beach, California.

At the hearing, Complainant represented himself. Attorney Nicholas Rosenthal appeared on behalf of Employer. Attorneys Christopher Wong and Katrina Veldcamp appeared on behalf of Broadspire. During the hearing, Complainant's Exhibits ("CX") 3 to 11 and 15 to 19 were admitted into evidence.¹ Hearing Transcript ("TR") at 25, 213. Employer Exhibits ("MVX") A to C were also admitted into evidence, as were Broadspire's Exhibits ("BX") A to H. TR at 29-30. The record remained open for the submission of simultaneous closing arguments, which were all timely received.² TR at 214. The record closed on July 17, 2014.

II. Issues for Hearing.

This matter involves only issues related to whether Employer and Broadspire conspired together to deny Complainant workers' compensation benefits as retaliation for Complainant having engaged in protected activity in January 2011. Any issues related to the appropriateness of the workers' compensation benefits, whether there is an overpayment, or whether Complainant otherwise received what he was entitled to under the workers' compensation statutes, are not decided here. While there has undoubtedly been crossover of evidence, entitlement to workers' compensation benefits do not fall within the jurisdiction of this Office, and I do not make any findings regarding Complainant's entitlement to those benefits. The only findings I make are in relationship to Complainant's retaliation claim under the NTSSA.

Complainant has the burden to prove by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action alleged in the complaint. 29 C.F.R. § 1982.109(a). In order to prove his case, Complainant must show that: 1) he engaged in a protected activity in January 2011 related to backing of buses without a spotter as determined by Judge Dorsey in a Decision and Order issued April 18, 2012; 2) both Employer and Broadspire each knew or suspected that he engaged in the protected activity; 3) he suffered an

¹ In his closing brief filed on May 28, 2014, Complainant included two documents, a one page document marked as CX 24-1, and a two page document marked as CX 24-2 and CX 24-3. Complainant requested to admit these exhibits into evidence asserting that they provided "critically important" information about Dr. Shamlou's use of "orthopedic" to refer to his back injury and not the head and neck. Complainant's Closing Brief at 8. I have reviewed the documents, and while I do not find they relate to Dr. Shamlou and find them to have marginal relevance, because they were offered so close in time to the hearing, I admit CX 24-1 to CX 24-3 into evidence.

² On May 28, 2014, Complainant filed his closing brief. He also filed Points and Authorities in support of his closing brief on June 2, 2014, and proposed findings on June 9, 2014. Employer and Broadspire filed their closing briefs on July 17, 2014. On the same day, Broadspire also filed a separate declaration from Chris Wong in support of its request for attorney's fees and costs.

adverse action on May 28, 2013, July 15, 2013, August 13, 2013, November 18, 2013, January 7, 15, and 22, 2014, and February 26, 2014³; 4) and that the protected activity was a contributing factor in the adverse action. If Complainant proves a case of retaliation under the NTSSA, then Employer and Broadspire may avoid liability by demonstrating by clear and convincing evidence that they would have taken the same adverse action in the absence of Complainant's protected activity. 29 C. F. R. §§ 1982.104, 1982.109; *see also* Order Following Pre-Hearing Conference at 5 (May 15, 2014).

III. Factual Findings

A. Complainant's Case

1. While working at Employer, Complainant reported two separate injuries. On January 31, 2012, he reported a work-related lower back injury and a pilonidal cyst, which he maintains occurred from sliding on the bus driver seat. TR at 47-48. Complainant filed for workers' compensation benefits for the cyst, which Broadspire denied as not work-related. TR at 48. On November 27, 2012, Complainant was assaulted on his bus route while at work and received a head injury. TR at 48. Broadspire accepted this workers' compensation claim. TR at 48.

2. At hearing, Complainant testified that Employer told him he was going to be on temporary disability, which he was expecting to last six months from the date of injury. TR at 43. A few days after he was placed on temporary disability, he received a letter from Broadspire dated May 28, 2013, and sent by Broadspire employee Linda McDonnell acknowledging he was on temporary disability, but stating that he would not receive payments because his doctor was allegedly outside the provider network. TR at 43; BX E. Complainant complained to both Employer and Broadspire that the Broadspire website showed that Dr. Shamlou was within the network, but he never got a response from Broadspire. TR at 43-44; CX 4, CX 5. The letters he received from Broadspire were sent by Ms. McDonnell or Christine Coopman, and neither would take his phone calls. TR at 43, 45.

3. Complainant filed a union grievance against Employer, and had a meeting about the grievance with Lawena Carter and Monica Tapia, who both worked for Employer, and a union representative in about July 2013. TR at 44. Complainant had been out of work for about six weeks with no pay. TR at 44. Ms. Carter told him that he would have to go to Broadspire about the disability payments because she knew nothing about his not receiving payments. TR at 45. Complainant filed for SDI, and shortly thereafter, in late July or early August 2013, Broadspire notified him that were going to start paying him. TR at 45. He received SDI from June 4 to July 13, 2013. TR at 46.

³ These dates appear to correspond to the dates of letters sent by Broadspire to Complainant related to the processing of Complainant's workers' compensation claims, and not to any tangible job action or work-related incident. *See* CX 3. Complainant still works for Employer. TR at 95.

4. Complainant also filed two workers' compensation claims at the California Workers' Compensation Appeals Board ("WCAB"). Complainant participated in a deposition regarding his workers' compensation cases on September 5, 2012, conducted by Russell Ching, an attorney representing Broadspire, who questioned Complainant in detail about his work history and background, including the protected activity in January 2011. TR at 46, 64, 71. Complainant felt that there was something improper in how his payments were handled by Broadspire. TR at 46. Mr. Ching sent a letter dated August 30, 2012, to Eric Schwartz, who was then Complainant's attorney in the workers' compensation matter, about Complainant's request for payment to attend the deposition in case WCAB ADJ 8191986. A courtesy copy of the letter was sent to Ms. Linda McDonnell at Broadspire Claims Services, Inc., in Lexington, Kentucky, and to Jan Piel at Employer. CX 19 at 8. Ms. McDonnell works for Broadspire, but in California. TR at 112-113. Complainant alleged that Broadspire was aware of his protected activity following the deposition he took with Mr. Ching, but other than the letter that was courtesy copied to Ms. McDonnell at the wrong address, he has no evidence that Ms. McDonnell used the letter in the decision making process about his claims, or otherwise had knowledge of his protected activity. CX 19 at 7; TR at 62-64.

5. On August 13, 2013, Complainant reached a stipulated agreement with Broadspire and Employer as to his head injury only (WCAB ADJ 8717495), and agreed to take the other matter off calendar (WCAB ADJ 8191986). TR at 47-48; CX 10. As part of the agreement, he would receive retroactive benefits to May 28, 2013, and his temporary disability would continue for his head injury until Dr. Shamlou said he had reached maximum medical improvement ("MMI"). TR at 48; CX 10 at 2.

6. Complainant selected Dr. Shamlou as his treating physician for his injuries. TR at 49. Dr. Shamlou found that Complainant was at MMI for his orthopedic condition as of November 18, 2013. TR at 49. Broadspire sent Complainant a letter dated January 7, 2014, claiming that because Dr. Shamlou said he was at MMI as of November 13, 2013, his temporary disability payments would stop as of January 8, 2014. TR at 50. Broadspire sent him another letter saying he would receive permanent disability payments for his back injury beginning on January 22, 2014. TR at 51. Complainant said that the permanent disability amount was about half the amount he was receiving on temporary disability. TR at 51. Broadspire also told him that he had been overpaid approximately \$3,500 because he received payments from November 18, 2013, the date of MMI, until January 7, 2014. TR at 51-52. Complainant said that he applied for SDI again in January 2014, but was allegedly denied SDI benefits for about three weeks because of the overpayment. TR at 52-53.

7. In Complainant's opinion, Broadspire was required to pay his disability and medical treatment, and he was "suspicious" with how Broadspire handled his case because it did not deny his claim until February 9, 2012, even though he had seen a doctor on January 31, 2012. TR at 55. Complainant believed Employer and Broadspire were a partnership and interchangeable, and therefore, in his opinion, both companies were responsible for the workers' compensation payments. TR at 56-57. According to Complainant, Broadspire created a "hardship" for him when it refused medical care, did not responded to requests from his treating physician, and claimed an overpayment. TR at 58-59. When asked specifically if he had any information that Employer told Broadspire to deny him benefits, he deflected the question and

then responded that they are “one and the same.” TR at 73. He contends that Employer is responsible for any actions taken by Broadspire relating to the provision of benefits to him. TR at 78.

8. Employer allowed Complainant to work modified duty for 26 weeks before he was placed him on temporary disability. TR at 70-71. Complainant thought Employer had the option to keep him on temporary duty longer than six months, and was “uncomfortable” when it did not do so. However, he did not think it was retaliation when he was put on temporary disability. TR at 71-72. Complainant went on temporary disability on May 28, 2013, related to the head injury only, and reached MMI for the head injury on January 13, 2014. TR at 48-49.

9. Complainant prepared a declaration dated February 12, 2014, wherein he alleged that he made Broadspire aware of Employer safety matters in correspondence to Broadspire and during a deposition regarding his workplace injuries. CX 15 at 3, 5. He also alleged that the letters he received from Broadspire were sent under false pretenses. *Id.* at 2-3, 5. He made similar allegations in a declaration dated March 1, 2014, including that he complained to Broadspire and Employer about improper handling of the January 31, 2012 injury. *Id.* at 5; see also CX 19 at 1. Complainant asserted that all the documents sent to him by Broadspire are false and fraudulent because they are inaccurate. TR at 66-67, 68-69; *see* CX 3. According to Complainant, this case is about hardships caused by the failure to provide benefits, by Broadspire’s claim that he was overpaid, and his not getting SDI the second time he applied. TR at 75, 209.

B. Lawena Carter

10. Lawena Carter is the general manager for Employer at the Employer’s Carson facility, where Complainant works. She has worked for Employer since 2005, and has been at the Carson facility since May 2012; she is the highest ranking person at the Carson facility. TR at 81-82. Complainant is still an employee of Employer. TR at 95.

11. Ms. Carter does not communicate directly with Broadspire over workers' compensation issues, but said that the safety manager typically does. TR at 83. The safety manager lets her know if someone is injured, but usually Ms. Carter is made aware of what work restrictions the employee has, and if the employee can work the regular job or needs modified duty. TR at 84. She is not always made aware of whether a workers’ compensation claim has been accepted, but she will often hear from Jan Piel, who is an employee in the workers' compensation department. TR at 85. Ms. Carter does not receive paperwork for someone on temporary disability. TR at 91-92.

12. Ms. Carter was aware that Complainant was on modified duty until May 28, 2013, when he went on temporary disability. TR at 91, 93. Complainant’s modified duty consisted of filing in the parts department, which is available to all employees who are on modified duty. TR at 101-102. The parts clerk was laid-off, but returned to work after another employee was promoted. TR at 106. Ms. Carter spoke to Ms. Piel about Complainant’s case when his 26 weeks were up, but she did not speak to Ms. Piel about whether he was receiving his pay or about his doctor. TR at 93-94. As far as Ms. Carter knew, it was a normal process for putting

Complainant on temporary disability. TR at 94. She became aware he was not receiving workers' compensation when Complainant filed a grievance in approximately July 2013. TR at 94.

13. Employer's Temporary Modified Work Policy allows employees to continue to work when the employee has been released by a health care provider to return to work with medical or physical restrictions, but the compensable, on-the-job injury prevents an immediate return to work at the pre-injury jobs. MVX A at RMV1. Temporary modified work can be assigned up to 26 weeks, and can be extended "under certain circumstances with approval from the division and risk management." *Id.* On November 28, 2012, Complainant accepted the temporary modified work program for 26 weeks. MVX B at RMV3.

14. Ms. Carter has never spoken to Broadspire employees Linda McDonnell or Christine Coopman, has never met either of them and does not know who they are. TR at 84. She also does not know Rod Bramasco. TR at 97. Ms. Carter never spoke to anyone at Broadspire about Complainant's workplace safety complaint from January 2011, she never spoke to Ms. Piel about it, and she never told anyone at Broadspire to retaliate against Complainant because of it. TR at 102-103.

C. Jan Piel

15. Jan Piel handles workers' compensation matters for Employer and is the California Workers' Compensation Supervisor, a position she has held for over six years. TR at 183, 206; BX B at RBS5. Ms. Piel works remotely, and does not work at the Carson facility. TR at 207. She is aware of Complainant because he filed two workers' compensation claims, and she assisted Broadspire in handling the claims. TR at 183. According to Ms. Piel, Complainant's situation was unique because Employer's medical clinic made a determination regarding Complainant's injury, but Complainant disagreed and wanted to see a list of network doctors rather than having the determination made by a panel-qualified medical evaluator. TR at 188-89. Ms. Piel became aware of Complainant's retaliation claims when he wrote letters mentioning his grievances, lawsuits, complaints, and issues with the handling of the workers' compensation claim. TR at 190. After the third or fourth letter, she only skimmed his later letters for the portions dealing with his issues related to workers' compensation. TR at 191.

16. In a declaration signed by Ms. Piel on February 7, 2014, Ms. Piel established that the benefits under Employer's workers' compensation program are insured by Ace American Insurance Company. BX B at RBS5-6. Broadspire provides administrative services for the portion of Employer's workers' compensation program that is insured by Ace American. *Id.* at RBS6. Broadspire is not involved in Employer's work decisions or its compliance with the NTSSA and Broadspire has never provided any input to Employer about any employment action involving Complainant. *Id.* Employer has no influence over decisions made by Broadspire or Ace American relative to any claims for workers' compensation benefits, including those for Complainant. *Id.*

17. Broadspire makes its determination of whether a claim is work-related after reading the narrative from the doctor and medical reports. TR at 185. Broadspire determines what monetary benefits an employee receives pursuant to the Labor Code and whatever medical documents it has. TR at 192-93. There is no partnership between Employer and Broadspire; Broadspire has a contractual duty to handle the workers' compensation claims. TR at 194. If Broadspire determines that an injury is not work-related, then it is not required to pay for medical care. TR at 187-88. Regarding modified duty, Employer determines whether someone is on modified duty, and whether to extend it. Ms. Piel notifies Broadspire when an employee is on modified duty; Broadspire has no input about whether to give an employee modified duty. TR at 191-92; 201; 203. Broadspire also has no input regarding employment issues with an employee at Employer. *Id.*

18. Ms. Piel had never met Rod Bramasco before the day of the hearing, though she had heard his name. TR at 195. She did not discuss Complainant's case or complaints with anyone at Broadspire. TR at 198. She also did not talk about the specifics of his complaints with Lawena Carter or the safety manager. TR at 198.

D. Rod Bramasco

19. Rod Bramasco is the California Technical Operations Manager for Broadspire, which is a business that administers claims for work-related injuries; he does not handle claims. TR at 112-113; BX A at RBS1. According to Mr. Bramasco, Employer's workers' compensation program is fully insured by Ace American Insurance Company. BX A at RBS2. Broadspire has no input regarding Employer's employment decisions, and does not have any role in managing or monitoring Employer's compliance with the NTSSA, or even workplace safety issues in general. BX A at RBS2. Mr. Bramasco knows both Ms. McDonnell, who is a manager, and Ms. Coopman, who is an employee, but he does not supervise either and is in a different chain of command; all three work in the same office, but do not interact on a daily basis. TR at 112-113, 118. Complainant has never been an employee of Broadspire. BX A at RBS2.

20. According to Mr. Bramasco, Complainant, who is an employee of Employer, submitted a claim to Broadspire for workers' compensation benefits on January 31, 2012, for a work-related injury involving a pilonidal cyst. BX A at RBS2. Broadspire denied the claim on February 2, 2012, based upon a report from Dr. Edgar Russell that the injury was not work-related, and no workers' compensation benefits were paid for the claim. *Id.* Dr. Michael Borok, a Qualified Medical Examiner, specializing in dermatology, agreed that the injury was not work-related on October 30, 2013. *Id.* Complainant appealed that determination to the California Workers' Compensation Appeals Board (WCAB ADJ 8717495).

21. Complainant submitted a separate claim for workers' compensation benefits to Broadspire for an alleged work-related injury that occurred on November 27, 2012, when a bus passenger hit Complainant in the head causing injury to his neck and head. BX A at RBS 2-3. Broadspire accepted the claim as work-related and approved payment of medical expenses for that injury from November 28, 2012, to November 20, 2013. BX A at RBS 3.

22. On May 28, 2013, Broadspire notified Complainant that he was eligible for benefits, but would not receive them because Broadspire mistakenly believed he was being

treated by a doctor who was outside the provider network. *Id.* Complainant could have still treated with another physician that was within the network. TR at 173. Mr. Bramasco acknowledged that Complainant received contradictory information about whether he could treat with Dr. Shamlou, and whether Dr. Shamlou was in the provider network, but once it learned that the doctor was part of the provider network, it approved the claim and paid retroactive benefits in full from May 28, 2013 to July 15, 2013. *Id.*; TR at 145-147, 172. Dr. Shamlou's letter said Complainant was at MMI for orthopedic issues and not at MMI for a specific injury date, which created the confusion about Complainant's workers' compensation benefits. TR at 134. Mr. Bramasco said Complainant never contacted Broadspire after it determined he was at MMI to tell them that it made an error, though Complainant provided a letter from his then-attorney regarding his benefits in December 2012. TR at 174-76. Mr. Bramasco acknowledged a clerical error in a declaration he signed (the date of February 2 should have been February 9), but it did not change any of his opinions. TR at 171.

23. Broadspire received notice from Complainant's doctor that he had reached maximum medical improvement and was discharged from his doctor's care on November 13, 2013, which terminated his benefits. However, Broadspire continued to pay benefits until January 8, 2014, which resulted in an overpayment of benefits. BX A. In a letter dated January 22, 2014, Broadspire told Complainant that his benefits had been overpaid. Complainant disputed the overpayment and filed a second complaint with OSHA on January 24, 2014, as well as another dispute with WCAB (WCAB ADJ 8191986). *Id.*

24. In May or June 2013, Mr. Bramasco reviewed the claim filed by Complainant for allegations related to retaliation, and found nothing in the handling of the claim that showed any involvement of that type. TR 114, 116. According to Mr. Bramasco, the decisions made about the claims were consistent with how claims are handled. TR at 116. Mr. Bramasco explained that workers' compensation benefits are about statutory rights, and a party is notified about what benefits they are entitled to and what benefits will be received. TR at 158. Decisions about claims are made based upon paperwork and what is compensable under the workers' compensation statute and California law, even if it may be a hardship for an employee to not get medical care or benefits. TR at 158-159. Mr. Bramasco generally agreed that being denied payment of temporary disability could be a hardship, and that if Complainant did not receive temporary benefits from May 28 to July 14, 2013, it could have been a hardship to him, but in this case, Complainant's benefits were provided correctly and consistent with the statutory regulations and his experience. TR at 147-148, 150, 159. Mr. Bramasco also said that the employer generally determines what modified duty is assigned, and Broadspire has no input into that decision. TR at 160-61. Mr. Bramasco was not aware of Complainant's protected activity until he received Complainant's complaint in May or June 2013. TR at 169-170.

E. Letters and Other Information

25. Complainant received a number of letters from Broadspire regarding his workers' compensation benefits that were sent by Senior Claim Examiner Linda McDonnell (CX 3-1 to 3-15, 3-18 to 3-19), except the February 9, 2012 letter, which was sent by Senior Claim Examiner Christine Coopman (CX 3-16 to 3-17). *See generally* CX 3; TR at 34, 69. Broadspire sent a letter dated February 9, 2012, which denied Complainant benefits for the January 31, 2012

injury. CX 3 at 16. In letters dated February 14, May 28, and June 6, 2013, Broadspire stated that Dr. Shamlou is out of the provider network. CX 3 at 10, 12, 14. On July 31 and August 6, 2013, Broadspire notified Complainant that his benefits were started again. CX 3 at 6, 8; BX G. In a letter dated January 7, 2014, Broadspire notified Complainant that his benefits were terminated based upon Dr. Shamlou finding him at MMI as of November 18, 2013. CX 3 at 4. On January 22, 2014, Broadspire sent a letter to Complainant notifying him of an overpayment from November 18, 2013, to January 8, 2014, in the amount of \$3500.64, and that permanent disability benefits would be paid. CX 3 at 1, 3; BX H. On February 26, 2014, Broadspire sent a letter amending the January 22, 2014 notice. CX 3 at 18.

26. On February 8, 2013, Mr. Ching, Broadspire's workers' compensation attorney, sent notice of a qualified medical examination appointment⁴ with Dr. William Mealor for March 14, 2013, which was courtesy copied to Linda McDonnell at Broadspire Claims Services in Lexington, KY. CX 24-2, 24-3.⁵

27. Complainant sent a letter to Broadspire on July 9, 2013, appealing Broadspire's denial of the pilonidal cyst claim. CX 16; CX 3 at 12, 14; CX 4 at 1. On April 11, 2014, Complainant sent a letter to the attorneys representing Broadspire, as well as Ms. McDonnell and Ms. Coopman explaining why Broadspire's position on SDI benefits and the overpayment was in error. CX 20. He included a copy of the January 7, 2014, letter about the termination of his benefits, and also a copy of the stipulated settlement of the WCAB matter. *Id.* at 3, 6; *see* CX 3 at 4, CX 10 at 2.

28. Dr. Shamlou prepared a medical report dated November 18, 2013, which listed the dates of injury in the report as August 1, 2011 to February 9, 2012, and November 27, 2012. CX 9 at 1. Dr. Shamlou stated that, regarding Complainant's "orthopedic condition," he was at maximum medical improvement. *Id.* at 3. On January 13, 2014, Dr. Shamlou prepared another report, reflecting that Complainant had anxiety and depression, which were treated with medication. CX 9 at 8. The January 13 report reiterated that, from an orthopedic point of view, he was at MMI, but he still had issues with the pilonidal cyst, which Dr. Shamlou believed to be industrial in nature. *Id.* at 9.

IV. Discussion and Legal Conclusions

A. NTSSA Statute

Under the NTSSA, a public transportation agency, or a contractor or subcontractor of the agency, may not retaliate against a public employee "in whole or in part" because of the employee's cooperation in the investigation of a violation under the NTSSA, or the employee's report of hazardous safety and security conditions in public transportation. 6 U.S.C. §§ 1142(a), (b); 29 C.F.R. §§ 1982.102(a)(1), (2). The prohibition against retaliation extends to discharge, demotion, suspension, reprimand, intimidation, threats, restraints, coercion, blacklisting, or

⁴ On December 26, 2012, Complainant and the other parties to the workers' compensation claims received notice from the California Division of Workers' Compensation that a qualified medical evaluator panel had been selected, which included Dr. Kevin Hanley, Dr. Emmett Cox, and Dr. William Mealor. CX 24-1.

⁵ CX 24 was attached to Complainant's Closing Brief and admitted into evidence. *See infra*, FN 1.

discipline, if the report of hazardous safety and security conditions contributed in any way to that action. 6 U.S.C. §§ 1142(a), (b); 29 C.F.R. §§ 1982.102(a)(1),(2).

The implementing regulations for the NTSSA whistleblower protections are found in the same regulations as the Federal Rail Safety Act of 1982 (“FRSA”), 49 U.S.C. § 20109. However, the FRSA specifically incorporates the procedures for handling whistleblower matters under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (“AIR 21”), while the NTSSA does not. 49 U.S.C. § 20109(d)(2). There is very limited case law dealing with NTSSA whistleblower matters, but the whistleblower protections afforded by the NTSSA, and the elements necessary to prove a case of retaliation under the NTSSA, are similar to those found in the FRSA, AIR 21, and other statutes, such as the Surface Transportation Assistance Act (“STAA”), 49 U.S.C. § 31105, and the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (“SOX”). Therefore, I will look to decisions issued by the ARB in similar whistleblower statutes for guidance in examining the issues presented here.

B. Retaliation under the NTSSA

In order to prevail in an NTSSA whistleblower retaliation action, Complainant must demonstrate by a preponderance of the evidence that the protected activity was a “contributing factor in the adverse action alleged in the complaint.” 29 C.F.R. § 1982.109(a). If Complainant meets his burden, Employer or Broadspire may avoid liability if each shows by clear and convincing evidence that it “would have taken the same adverse action in the absence of any protected behavior.” 29 C.F.R. § 1982.109(b). Complainant has not carried his burden.

1. Protected Activity

Complainant alleged that he engaged in protected activity under the NTSSA in January 2011 as determined in a Decision and Order issued on April 18, 2012, by Administrative Law Judge William Dorsey. *Graves v. MV Transportation, Inc.*, 2011-NTS-00004 (ALJ Apr. 18, 2012), *aff’d* ARB No. 12-066, ALJ No. 2011-NTS-4 (ARB Aug. 30, 2013). Judge Dorsey determined that Complainant engaged in protected activity in January 2011 when he complained about the backing up of buses in the work yard between other buses without the use of a spotter. *Id.* at slip op. at 2, 14, 24. Judge Dorsey found that a yard supervisor at Employer retaliated against and harassed Complainant in January and February 2011, at least in part, due to Complainant's objections to the backing of his bus without a spotter, which Judge Dorsey found was a contributing factor in the harassment and retaliation. Employer was not able to show by clear and convincing that it would have taken the same action absent the protected activity. *Id.* at slip op. at 2, 17, 22. Judge Dorsey further determined that Complainant did not prove any damages, and ordered as relief only that his decision and order be posted for a period of 60 days.⁶ *Id.* at 3, 24.

⁶ The current case is Complainant's third proceeding before the San Francisco OALJ. On March 14, 2014, Judge Jennifer Gee denied and dismissed a complaint filed by Complainant after finding that a series of work-related incidents were not retaliatory or adverse actions. *Graves v. MV Transportation*, 2013-NTS-00002 (ALJ Mar. 14, 2014); MVX-C. The protected activity in Judge Gee's case was the same protected activity determined by Judge Dorsey in his April 2012 decision. *Id.* at slip op. 2, 4. According to the Complainant, the denial by Judge Gee is on appeal to the ARB and is not final. TR at 31.

I take judicial notice of Judge Dorsey's Decision issued on April 18, 2012, finding Complainant engaged in a protected activity in January 2011. *See* 29 C.F.R. § 18.201. There were no other protected activities alleged by Complainant. Even though the protected activity is remote in time now, a period of over three years, and there has been a change in management at Employer, for purposes of this analysis, Complainant has shown that he engaged in a protected activity protected under the NTSSA.

a. Employer

Further, the evidence demonstrated that Employer had knowledge of the protected activity. Complainant continued to work for Employer after the protected activity occurred in January 2011, and after the Decision and Order was issued in April 2012. Ms. Carter was not the manager of the Carson facility when the protected activity and decision were issued, and she did not specifically testify about knowing of the protected activity, but as the head of the Carson facility where Complainant worked, it is reasonable to infer that Employer would have knowledge of the protected activity.

b. Broadspire

However, I do not find sufficient evidence that Broadspire had knowledge of the protected activity at the time it was handling Complainant's workers' compensation claims. Mr. Bramasco persuasively established that Broadspire did not have knowledge of any workplace protected activity until May or June 2013, and that Broadspire did not participate in any employment actions with or for Employer in the workplace. Factual Finding ("F.F.") ¶ 24. Broadspire is under a contractual obligation to handle the workers' compensation program for Employer, but that is as far as the connection goes. Ms. Carter and Ms. Piel corroborated the same information, and went further to state that they did not know any of the Broadspire employees and had not instructed them to take any action about Complainant's workers' compensation benefits. F.F. ¶¶ 12, 14, 18. Ms. Carter specifically said she told Complainant at a grievance filed over the workers' compensation benefits that only Broadspire could address the issues about the handling of the workers' compensation claim. F.F. ¶¶ 3, 12. I found this testimony and evidence to be credible and persuasive, as well as consistent with the other evidence in the case. There was no persuasive evidence that Broadspire was in anyway engaged in the day-to-day operation of Employer, and there was no persuasive evidence that Broadspire would have known about Complainant's protected activity from January 2011 or even about the decision and order issued in April 2012.

Complainant attempted to show Broadspire had knowledge of the protected activity because he gave a deposition on September 5, 2012, in the workers' compensation actions that form the basis for the current whistleblower action. F.F. ¶ 4. According to Complainant, Broadspire's attorney, who is not involved in this litigation, asked questions about his work history and the protected activity. F.F. ¶ 4. Further, the same attorney sent a letter that was courtesy copied to Ms. McDonnell, a Broadspire employee, about scheduling of a deposition and Complainant's request for fees to attend. F.F. ¶¶ 4, 26. The courtesy copy was sent to Ms. McDonnell at Broadspire's office in Kentucky, when Ms. McDonnell works in Fresno, California. I am not persuaded that the connection between the deposition and the copied letter is sufficient

to give Broadspire knowledge of the protected activity under the whistleblower statute. In order for Broadspire to have knowledge of the protected activity to the point that it would engage in a conspiracy with Employer to deny Complainant workers' compensation benefits, presumably that knowledge would have to be shown before the workers' compensation actions were being litigated. The only connection offered by Complainant is that Broadspire knew of the protected activity based upon his testimony at a deposition in the workers' compensation claim, but the temporary denial of his benefits had already occurred – in order to have the workers' compensation deposition, Broadspire had already denied his benefits. Thus, according to Complainant, they would have denied his benefits before they knew of the protected activity, which Complainant contends they learned of at the workers' compensation deposition. The evidence related to the deposition and letter does not establish knowledge on the part of Broadspire regarding the protected activity. Further, there was no evidence that anyone at Broadspire read or considered the deposition transcript when making decisions about Complainant's workers' compensation claims.

The only other evidence offered by Complainant was his feeling that something was not right about how Broadspire handled his claim, and his belief that Broadspire and Employer were interchangeable entities. F.F. ¶¶ 4, 7, 8. His feeling does not amount to credible evidence demonstrating knowledge about the protected activity. Further, Complainant offered no evidence, other than his subjective view, that the agencies were interchangeable. The more persuasive evidence was that the two had a contractual agreement to process workers' compensation claims, and that they otherwise were separate and distinct entities. Complainant's case against Broadspire fails because he did not establish that Broadspire had knowledge of the protected activity. Therefore, the complaint against Broadspire is dismissed.

2. Adverse Action

However, assuming arguendo that Complainant had showed that Broadspire had knowledge of the protected activity, Complainant must next show that his protected activity was a contributing factor in an adverse action taking by Employer or Broadspire. Here, rather than argue he suffered adverse actions, Complainant alleged that he was subject to a series of "hardships" due to the temporary denial of his workers' compensation benefits, because Broadspire alleged an overpayment of workers' compensation benefits, and, due to the alleged overpayment, he was denied SDI the second time he applied. F.F. ¶¶ 6-9. After considering the record as a whole, I find that Complainant has not established any adverse employment action. Even if I assume that the temporary denial of his workers' compensation benefits or the other alleged "hardships" were adverse actions, Complainant has not established that the protected activity in anyway contributed to the denial of his workers' compensation benefits or to the other hardships he alleged.

The presumptive starting point for an adverse action is the statute and regulation which should be read broadly, and where it defines the prohibited action, that should be sufficient to define adverse action. *Williams v. American Airlines, Inc.* ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 10 (ARB Dec. 29, 2010). An adverse action under the NTSSA is expansive, and includes any conduct which involves discharge, demotion, suspension, reprimand, intimidation, threats, restraint, coercion, blacklisting or discipline of an employee for

engaging in protected acts. 29 C.F.R. § 1982.102(a). It is the same expansive list of conduct prohibited under the FRSA. 29 C.F.R. § 1982.102(b).

In addition, the ARB has clarified the definition of “adverse action” to be an unfavorable employment action that is more than trivial, either as a single event or in combination with other alleged deliberate employer actions. *Williams v. American Airlines, Inc.* ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 15 (ARB Dec. 29, 2010). An adverse action can also include an employment action that “would dissuade a reasonable employee from engaging in protected activity.” *Menendez v. Halliburton*, ARB Nos. 09-002, - 003; ALJ No. 2007-SOX-2005 (ARB Sept. 13, 2011), slip op. at 20 (in SOX matter, use of the broad adverse action definition to include activity that would dissuade a reasonable employee from engaging in protected activity is “consistent with the expansive construction required by whistleblower statutes”). “Where termination, discipline, and/or threatened discipline are involved, there is no need to consider the alternative question whether the employment action will dissuade other employees.” *Vernace v. Port Authority Trans-Hudson Corp.*, ARB No. 12-003, ALJ 2010-FRS-00018, (ARB Dec. 21, 2012), slip op. at 2, FN 4 (approving use of the *Williams* and *Menendez* standards in FRSA matters.) Given the similarities in the statutes, I find that the definition of adverse action adopted in *Williams* and applied in FRSA cases, is equally applicable to NTSSA matters.

Here, there was no evidence of an adverse action taken by Employer either under the statute or under circumstances that might dissuade a reasonable employee from engaging in protected activity. Employer contracts with Broadspire to handle its workers’ compensation matters. Once Complainant filed for his benefits, the process was handled by Broadspire and Employer had no input into the decision making process by Broadspire. F.F. ¶¶ 11, 16, 19-24. There was no evidence that Employer or Broadspire took any concerted workplace action against Complainant. I find that Complainant’s alleged hardships related to delayed workers’ compensation benefits and the process for workers’ compensation were not adverse actions under the NTSSA. I also find that there was no evidence that Broadspire and Employer conspired or even communicated inappropriately regarding his benefits. Mr. Bramasco persuasively described the workers’ compensation process undertaken by Broadspire regarding Complainant, and persuasively established that Broadspire acted professionally and appropriately when handling Complainant’s benefits. F.F. ¶¶ 19, 24. Complainant has not shown that Employer took any adverse action against him related to his workers’ compensation benefits.

Further, Complainant has not shown that Broadspire took any adverse action against him. Complainant alleges that letters sent by Broadspire to him were the actual adverse actions, though he refers to them as hardships. F.F. ¶¶ 2, 4, 6, 7, 9. However, each of the letters sent was delivered in the regular course of Broadspire’s duty to manage the workers’ compensation program, and in most cases appear to be generic, standard letters that Broadspire sends daily in the regular course of its business. F.F. ¶¶ 24, 25. Complainant chose to interpret the letters as personal attacks. There was nothing about the letters that amounted to an unfavorable personal action. The letters read individually, and collectively, do not involve discharge, demotion, suspension, reprimand, intimidation, threats, restraint, coercion, blacklisting or discipline of an employee. 29 C.F.R. § 1982.102(a). The letters also are nothing more than routine business behavior, and there is no link to any conspiracy or concerted action by Employer and Broadspire, and there was no showing of any link to deliberate employer action by either Employer or

Broadspire. *See generally* CX 3. Each letter informed Complainant of what was occurring on his workers' compensation claim, and offered nothing other than factual, business explanations. There was nothing about the various letters sent by Broadspire that would dissuade a reasonable employee from engaging in protected activity. Broadspire's actions related to Complainant's workers' compensation benefits were not adverse actions.

Mr. Bramasco agreed that it was possible that Complainant experienced a financial hardship from delayed payments, but he also established that the delays in payments were for legitimate business reasons and that Broadspire was legitimately, though later shown to be mistakenly, convinced that Complainant was not entitled to benefits because his doctor was out of the provider network, and then later that he had reached MMI. F.F. ¶¶ 22-25. Complainant showed why Broadspire was mistaken, but that in no way proves a conspiracy by Broadspire and Employer. I believed Mr. Bramasco's testimony and found it more credible than Complainant's testimony, which was based upon his suspicions and beliefs, and nothing more than his unsubstantiated hunch, and were not tied to any other credible evidence. Mr. Bramasco reviewed the entire Broadspire file, and found that it was handled appropriately and in accord with its policies and standards. He was aware and knowledgeable of the workers compensation process, and persuasively established that Complainant's case was handled appropriately, without any indication of conspiracy with Employer. His testimony was corroborated by Ms. Carter and Ms. Piel from Employer, who both established that they did not conspire with Broadspire to deny Complainant benefits. In fact, Complainant has received all of his workers' compensation benefits.

Similarly, Ms. Carter established that Employer did not take an active role in workers' compensation matters, which was confirmed by Ms. Piel. Both were credible and believable witnesses, and testified in an honest and straight forward manner. Ms. Carter, who was the highest ranking person at the Carson facility where Complainant worked, but was not the general manager when the unsafe backing incident occurred in January 2011, established that she learned of Complainant's difficulties with his benefits when he filed a union grievance, and she established that Complainant was told that he had to work out those issues directly with Broadspire. F.F. ¶¶ 3, 12. Ms. Carter did not interact with Broadspire and did not know any of the Broadspire workers that Complainant alleged were causing him hardships (Mcdonnell and Coopman). F.F. ¶¶ 11, 14. She also did not know Mr. Bramasco. F.F. ¶ 14. Ms. Piel similarly established that she did not communicate with Broadspire other than to exchange business paperwork regarding the process, and that she also did not know the employees and did not in any manner tell them to mishandle Complainant's benefits. F.F. ¶ 18. The evidence also showed that Employer followed its modified work policy and applied it appropriately to Complainant. F.F. ¶¶ 8, 12, 13. I found both Ms. Carter and Ms. Piel to be more credible and more persuasive than Complainant. They referenced specific events, talked candidly about the process, and each corroborated the other, and were also independently corroborated by Mr. Bramasco's testimony and the evidence from Broadspire. Considering the record as a whole, the evidence from Employer and Broadspire was more credible than Complainant's testimony and evidence, which was based upon his suspicions and feelings over independent proof. Further, Complainant's explanations went to individual incidents, such as when letters were received and his response to a particular letter, rather than connecting those incidents to some larger conspiracy. I do not find

any evidence of conspiracy, collusion, or inappropriate interactions between Broadspire and Employer.

Here, Complainant contends that Employer and Broadspire acted together to retaliate against him in November 2012, when it allegedly refused to pay him workers' compensation that he was otherwise entitled to. Broadspire demonstrated that an error occurred when it received a report from Complainant's medical doctor stating that he was permanent and stationary, and therefore stopped his benefits. The letter from Dr. Shamlou referred to Complainant's orthopedic condition, which created confusion. In addition, Broadspire initially denied benefits because Complainant's treating physician was not within the treatment network. When Broadspire learned that the doctor worked at a clinic that was within the treating network, it reinstated benefits and paid him retroactive benefits in full. Broadspire also remedied the situation caused by the unclear letter from Dr. Shamlou stating Complainant's orthopedic condition was permanent and stationary. I find that Dr. Shamlou created the confusion, and that Broadspire acted reasonably regarding the letter from Complainant's doctor. Complainant alleges that it was the denial of the workers' compensation benefits that caused him "hardships" and thus served as the adverse actions in this whistleblower complaint. However, there was no threatened disciplinary conduct protected under the NTSSA, and a reasonable person in the same situation would have recognized that there was a communication breakdown, and not that there was retaliation for having engaged in protected activity and filing a workers' compensation claim. Complainant maintained his job status at all times, with the same pay, benefits and conditions. Had Complainant shown knowledge by Broadspire of the protected activity, then his complaint would fail against Broadspire because he did not show any adverse employment action by Broadspire. Thus, there were no adverse actions taken against him by Employer or Broadspire within the meaning of the NTSSA.

C. Conclusion

Having heard the testimony and evaluated the evidence, I find that Complainant has failed to prove a case of discrimination under the NTSSA statute. Complainant did not suffer any adverse action in this matter, and both Broadspire and Employer handled Complainant's workers' compensation benefits according to their standard business practices for claims. Further, there were no adverse actions taken by either Employer or Broadspire within the meaning of the NTSSA statute and regulation. While it is undoubtedly true that temporarily stopping Complainant's workers' compensation benefits may have caused him some hardship, it is not the kind of hardship protected as an adverse action by the NTSSA. The evidence also established that as soon as the mistakes were identified, Broadspire remedied the errors, including providing all past due compensation. There was no retaliatory link shown between Broadspire's handling of the workers' compensation issues and Employer, and there was no evidence that the two entities conspired to handle Complainant's claims in other than an appropriate and professional manner, the same way they have handled other cases. Complainant failed to make out a claim of retaliation within the meaning of the NTSSA and his complaint is dismissed in its entirety.

Because I do not find any adverse actions in this matter, I do not reach the next step in the analysis of whether Complainant can show that the protected activity was a contributing factor in the adverse action. Also, because Complainant has not proven a case of retaliation under the NTSSA, I do not reach the issue of whether the Respondents have shown by clear and convincing evidence that they would have taken the same actions absent the protected activity. *See* 29 C.F.R. § 1982.109.

D. Attorney's Fees

In its closing argument, and for the first time, Broadspire asked for an award of attorney's fees against Complainant if it prevailed in this matter. See Closing Brief by Respondent Broadspire Services, Inc. at 8-9. The NTSSA statute and regulations provide for the payment of attorney's fees to the Respondent not to exceed \$1,000 if the ALJ determines the complaint was frivolous or brought in bad faith. 6 U.S.C. § 1142(c)(3)(D); 29 C.F.R. § 1982.106(a). Broadspire did not provide Complainant with sufficient notice that it would be seeking attorney fees, and bringing up the issue for the first time in its closing arguments is not timely. The request is denied on that basis. In light of that ruling, I do not reach the issue of whether Complainant brought this case based upon bad faith or for frivolous reasons.

ORDER

1. Complainant's request for relief against MV Transportation under the NTSSA is denied.
2. Complainant's request for relief against Broadspire Services, Inc., under the NTSSA is denied.
3. Broadspire's request for an award of attorney's fees is denied.

RICHARD M. CLARK
Administrative Law Judge

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, Division of Fair Labor Standards. *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).