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

Issue Date: 16 May 2013

CASE NO.: 2009-FRS-00011

In the Matter of:

ANTHONY SANTIAGO,
Complainant,

v.

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

Before: Colleen A. Geraghty, Administrative Law Judge

Appearances:

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

Charles A. Deluca, Esq. and Beck S. Fineman, Esq., Ryan Ryan Deluca, LLP, Stamford, Connecticut for the Respondent.

DECISION AND ORDER ON REMAND

I. STATEMENT OF THE CASE

This matter arises from a complaint filed by Anthony Santiago ("Complainant") against Metro North Commuter Railroad Company, Inc. ("Metro North" or the "Respondent") under the employee protection provisions of the Federal Rail Safety Act (the "FRSA"), 49 U.S.C. § 20109, as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (the "9/11 Act"), Pub. L. 110-53, 121 Stat 266 (Aug. 3, 2007). A hearing was held before the undersigned administrative law judge on November 17-19, 2009, in New Haven, Connecticut.[1]

[1] At the hearing, the Complainant's exhibits were admitted as Santiago Ex 1-41 and 43-45, the Occupational Safety and Health Administration's exhibits were admitted as OSHX 14 and 20-21, the Respondent's exhibits were

On September 14, 2010, I issued a Decision and Order Dismissing Complaint ("ALJ D&O"), in which I determined that (1) the claim was not preempted by the Railway Labor Act ("RLA"); (2) the alleged unlawful conduct occurred after the effective date of Section 20109(c)(1) of the FRSA; and (3) Metro North did not violate Section 20109(a)(4) by requiring employees injured on the job to report to its Occupational Health Services ("OHS") or by applying the Injury Frequency Index to promotion and transfer decisions. ALJ D&O at 15, 16, 24, 25, 26. In regard to Section 20109(c), which prohibits railroads from "deny[ing], delay[ing] or interfere[ing] with medical or first aid treatment of an employee who is injured during employment," I interpreted this provision as applying only to the temporal period surrounding the injury, as opposed to the duration of ongoing medical treatment. Relying on this interpretation, I found that Metro North did not deny, delay or interfere with the Complainant's medical or first aid treatment within the meaning of Section 20109(c)(1), as Metro North approved and paid for the medical treatment provided by the Complainant's treating physician, Dr. Drag, for a period of eight weeks following the injury. *Id.* at 24.

The Complainant appealed my decision to the Department of Labor's Administrative Review Board ("ARB" or the "Board") and on July 25, 2012, the Board issued a Decision and Order of Remand ("ARB D&O") reversing the decision in part and remanding the matter for further proceedings. ARB D&O at 2. The Board remanded the matter based on its determination that I interpreted Section 20109(c)(1) too narrowly by applying it only to medical treatment immediately following the work injury. *Id.* at 14. The Board held that Section 20109(c)(1) bars a railroad from denying, delaying, or interfering with an employee's medical treatment throughout the period of treatment and recovery from a work injury. *Id.* at 12. The ARB accepted as final my conclusions that the RLA did not preclude the claim, that the alleged adverse action occurred after the effective date of Section 20109(c)(1), and that Metro North did not violate Section 20109(a)(4) by requiring employees to report to OHS or by applying its Injury Frequency Index to employee transfers and promotions, noting that the parties did not challenge these conclusions on appeal. *Id.* at 7. The ARB further stated that it was undisputed that the Complainant engaged in protected activity when he reported his work injury to his supervisor on July 25, 2008, and when he requested medical treatment for that injury. *Id.* at 7, 19.

On remand, the parties were permitted to submit supplemental briefs addressing the issues to be considered on remand. Briefs were received by both parties and will be referred to herein as "Comp'l Br." and "Resp't Br."

II. ISSUES ON REMAND

In remanding the case, the Board provided the following instructions: "because the ALJ too narrowly construed section 20109(c)(1), we remand this case for a determination of whether Santiago suffered an adverse action and, if so, whether Metro-North may avoid liability under the FRSA by clear and convincing evidence that the result would have been the same with or without the railroad carrier's interference." ARB D&O at 19. Specifically, on remand I must fully address "whether Metro-North interfered with Santiago's request for an MUA three months

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admitted as RX 1-8, 12-14, 20-28, 30-33, 36 and 38, and General Exhibits were admitted as GX 1-14, 16-17, and 20-23A.

after the injury occurred." *Id.* at 14-15. The Board instructed that I "make additional findings of fact as necessary to determine whether Metro North sufficiently inserted itself into Santiago's medical treatment and whether such involvement caused a delay, denial or interference with his medical treatment." *Id.* at 17.

Thus, the issues on remand are: (1) whether the Complainant has proven by a preponderance of the evidence that Metro North denied, delayed, or interfered with the Complainant's medical treatment; (2) if the Complainant satisfies his burden of proof, whether Metro North has proven, by clear and convincing evidence, that the result would have been the same absent any interference by Metro North; and (3) the Complainant's remedies under the FRSA if he should succeed in his claim.

III. PRIOR FINDINGS OF FACT

My prior findings of fact are set out in detail in my initial decision; they are largely undisputed and were not appealed by the parties. ALJ D&O at 2-10. Thus, for purposes of this remand, I will merely summarize those prior findings of fact that pertain to the issues on remand.

Prior to beginning his employment with Metro North, the Complainant underwent surgery for a herniated disc at the L5-S1 level in 2003. ALJ D&O at 2. Metro North's Occupational Health Services obtained the operative report from Complainant's surgeon before hiring him, performed a pre-employment medical examination, and cleared the Complainant for full duty as an electrician in October 2005. *Id.*

On July 25, 2008, the Complainant injured his back at work when a chair collapsed as he sat down. ALJ D&O at 2. The general foreman took the Complainant to the Putnam Hospital Center Emergency Department, where he had x-rays taken and was diagnosed with a lumbar sprain/strain. *Id.* at 3.

Metro North requires employees injured on the job to report to its medical department, Occupational Health Services ("OHS"). ALJ D&O at 3. Metro North's OHS operates through a contract with Take Care Health. Under Metro North's contract with Take Care Health, Metro North retains the right to terminate the contract at any time, for any reason, and has control over the hiring and termination of Take Care Health employees working at OHS. *Id.* at 3, 16 n.21. The administrator of OHS, Angela Pitaro, is an employee of Metro North, and her office is at the OHS location next door to Metro North's corporate offices. *Id.* at 6. Ms. Pitaro explained that as the OHS administrator she "make[s] sure that what is done within the department of OHS follows the guidelines of what's expected." *Id*. Ms. Pitaro interacts with the OHS staff daily and has staff meetings with them. *Id.* Ms. Pitaro described her duties as looking at the policies, the needs of the company and what has to get done and then informing the Take Care Health administrator what she needs to get done. *Id.*

OHS is a non-treatment, assessment center. ALJ D&O at 3. Among other things, OHS evaluates employees injured on the job to determine whether the condition is work related and evaluates the necessity and effectiveness of medical treatment provided by an employee's physician. *Id.* Metro North's operating procedures do not include any written instructions on the

criteria for determining whether an employee's injury is deemed occupational or non-occupational. *Id.* at 7. Ms. Pitaro explained that in making the determination that an injury, which was initially considered by OHS to be occupational, has resolved, OHS considers the Office of Disability Guidelines ("ODG") and/or the American College of Occupational and Environmental Medicine ("ACOEM") guidelines, the individual's injury, diagnosis, co-morbidities, statements of the treating physician, the treatment provided and progress made. *Id.* at 7. Metro North's policy is to pay medical expenses for occupational injuries unless they are "wholly unnecessary or inappropriate." *Id.* at 9.

The Complainant reported to OHS on the morning of July 25, 2008, after being released from the Putnam Hospital and was seen by physician assistant John Ella. ALJ D&O at 3. Mr. Ella diagnosed the injury as a lumbosacral strain/sprain and determined that the Complainant's injury was occupational. *Id.* Mr. Ella testified that he uses the ODG and ACOEM guidelines to determine how long an injury is expected to take to heal and that according to those guidelines, a back sprain ought to heal after four to six weeks. *Id.* Mr. Ella also explained that he makes a determination as to whether an employee's injury is deemed occupational or non-occupational "based on our medical knowledge and what the employee presents…." *Id.*

In the weeks following his work injury, Mr. Santiago's symptoms did not resolve and he continued to experience significant pain. ALJ D&O at 3. Mr. Ella approved six weeks of chiropractic treatment with Dr. Thomas Drag from August 23, 2008 to October 10, 2008. *Id.* at 4. The Complainant continued to report ongoing symptoms of pain and numbness which radiated down his leg to Mr. Ella and to his physicians. *Id.* At the end of the six weeks, Dr. Drag informed OHS that the Complainant had made "minimal improvement" and he requested an additional six weeks of chiropractic treatment and an MRI. *Id.* After examining the Complainant on September 26, 2008 and discussing the case with OHS/Take Care Health's physical therapist, Mr. Ella authorized an additional six chiropractic visits. *Id.* OHS/Take Care Health's nurse case manager, Eleanor Atienza, discussed Dr. Drag's request for an MRI with Mr. Ella and she approved the request on October 7, 2008. *Id.* Dr. Drag sent periodic reports of his treatment of the Complainant to OHS, and Mr. Ella saw the Complainant several times to monitor his treatment and progress. *Id.* Each time Mr. Ella saw the Complainant, including his last appointment on October 10, 2008, Mr. Ella indicated the Complainant's injury was occupational. *Id.*

The MRI taken on October 16, 2008 showed a "bulging and discogenic disease and a central subligamentous disc herniation at the L4-L5 level impressing on the thecal sac. This impresses on the exiting L5 nerve root in the lateral recesses as well. Discogenic disease, bulging and spondylosis at L5-S1 is also present." ALJ D&O at 4. The MRI report also identified "a disc herniation which is present at this level which is central and right predominant. It abuts the left S1 nerve root and impresses on the right S1 nerve root displacing slightly posteriorly in position." *Id.*

On October 27, 2008, Mr. Ella informed Dr. Drag that "Mr. Santiago's case concerning his back problem is considered resolved," denied Dr. Drag's request for further chiropractic treatment, and instructed him to submit charges for all treatment after October 10, 2008 to the Complainant's company-provided private health insurance. ALJ D&O at 4. Mr. Ella testified that

he made the determination that the work injury had resolved based on the x-ray report from the emergency room which showed degenerative disc disease. *Id.* Mr. Ella agreed that typical symptoms of a low back herniated disk pressing on a nerve include pain down the legs and numbness or tingling in the leg. *Id.* at 5. Mr. Ella acknowledged that he was not aware of any evidence indicating that the Complainant was symptomatic before his work injury. *Id.* When OHS determines that an occupational injury is resolved, or no longer occupational, it is required to reach out to the employee's treating physician. *Id.* at 6. Mr. Ella conceded that he never spoke with either of the Complainant's physicians, Dr. Drag or Dr. Krosser. *Id.* at 4 n.4. He admitted that at the time he made the decision that the occupational injury had "resolved," he had the operative report from the 2003 back surgery indicating that there was good decompression of the L5-S1 nerve root, but he had not looked at it. *Id.* at 4. He also had the MRI report which identified a herniated disk at L5-S1 that was impinging on the nerve root. *Id.* at 4-5. Mr. Ella understood that by changing the injury designation from occupational to non-occupational, Metro North would no longer pay for medical treatment provided by Dr. Drag after October 10, 2008. *Id.* at 5.

Following Mr. Ella's denial of additional chiropractic treatment and instruction to submit future bills to the Complainant's private health insurance, Dr. Drag wrote a letter of medical necessity to Mr. Ella on November 10, 2008, explaining the Complainant's diagnosis, symptoms, his course of treatment and the proposed course of treatment going forward as well as Dr. Drag's opinion that the condition was due to the work injury. ALJ D&O at 5. On November 14, 2008, OHS's medical director, Dr. Hildebrand wrote Dr. Drag stating she had reviewed the medical records as he requested and that "Mr. Santiago's case regarding his low back pain is considered resolved," meaning that the effects of the work-related injury had cleared. *Id.* at 5 & n.5. Dr. Hildebrand conceded that she approved the change in classification of the injury from occupational to non-occupational and the denial of additional treatment without examining the Complainant or speaking with either Dr. Drag or Dr. Krosser. *Id.* at 5. Dr. Hildebrand agreed that radiation of pain or tingling down one or both legs are typical symptoms of a herniated disk pressing on a nerve. *Id.* She also stated that a back sprain is a muscle sprain and one would not expect that condition to result in sustained radiation of pain down the leg. *Id.* at 5-6. Ms. Pitaro reviewed the Complainant's file with Dr. Hildebrand on November 24, 2008, and was aware that Dr. Hildebrand denied Mr. Santiago's physician's request for additional treatment. *Id.* at 7. Ms. Pitaro met with the Complainant on November 24, 2008, and gave him a copy of Dr. Hildebrand's denial letter. *Id.* at 7.

The Complainant continued to see Dr. Drag regularly after Metro North had determined his back injury was no longer occupational and stopped paying for the medical care. ALJ D&O at 6. In March 2009, the Complainant underwent Manipulation Under Anesthesia ("MUA") treatment over three days, a treatment Dr. Drag had recommended in his letter of medical necessity to OHS on November 10, 2008, and the treatment was successful. *Id.* His private health insurance declined to pay for the MUA. *Id.* His out-of-pocket costs for the MUA and the co-pays and deductibles amounted to $16,520.00. *Id.*

IV. ADDITIONAL FINDINGS OF FACT ON REMAND

Additional findings of fact must be established in light of the Board's instructions on remand. These additional findings are laid out below.

In a medical note dated September 8, 2008, Dr. Drag reported that the Complainant's back pain began after he fell off the chair at work. Santiago Ex. 22. He stated that the Complainant had pain radiating down into his buttocks and both legs to the knee, and had pins and needles in each foot. *Id.*

In the letter of medical necessity, dated November 10, 2008, Dr. Drag stated that the Complainant's ongoing symptoms were related to his work injury and although the Complainant had a "previous history of low back pain with hemilaminectomy at L5/S1 [he] had been asymptomatic for some time." Santiago Ex. 38. He stated that the Complainant's symptoms, including severe lower back pain and bilateral leg pain and numbness, began when he fell off the chair at work on July 25, 2008. *Id.* Dr. Drag indicated that conservative treatment had failed, and he recommended three MUA procedures "due to the chronicity of his condition." *Id.* He explained that the MUA "will effectively decompress lumbar discs, alter and remodel the scar tissue, fibrous adhesions, reduce pain, and increase the range of motion." *Id.* Dr. Drag stated that the Complainant had shown no lasting improvement and had made no progress in returning to his full normal activities. According to Dr. Drag, the Complainant fell "within the standard acceptable forms of conditions that have responded favorably to [MUA] as an alternative to chronic prolonged conservative care or possible future surgical intervention for a second time." *Id.* Dr. Drag stated that a series of three MUAs follows protocol as established by the National Academy of MUA physicians. *Id.*

Mr. Ella testified that he denied further medical treatment past October 10, 2008 because x-rays from the emergency room showed severe disc degeneration, which, according to Mr. Ella, was expected after a surgery like the one the Complainant had undergone several years prior. TR 314. Mr. Ella testified that the disk degeneration combined with the Complainant's weight, led to his determination that the occupational aspect of the injury had resolved. TR 314.

Dr. Hildebrand testified that the Complainant's occupational injury had resolved because:

> Mr. Santiago had a low back strain. Low back strains usually will get better within . . . a four- to six-week period. In my medical experience, I have seen it to be more like an eight-week period where the medical effects of a low back strain will go. Now, whatever pain Mr. Santiago was having after that – he did have a chronic medical condition with degenerative changes in the spine, and you can certainly have pain from that. But that would – degenerative changes would not be caused by falling off a chair.

TR 374. Dr. Hildebrand testified that she reviewed the x-ray from July 25, 2008, the MRI, and Dr. Drag's notes. TR 380-81. She testified that she applied her experience and the ODG and ACOEM guidelines to the back sprain and did not consider the herniated disk impressing on the L5 nerve root. TR 385. She conceded that a disk herniation can occur traumatically. TR 348.

OHS employees are paid by Take Care Health, and there are no financial incentives or bonuses for the employees for fewer occupational injuries or shorter durations of occupational injuries. TR 218, 294, 367. Mr. Ella and Dr. Hildebrand testified that their yearly reviews are conducted by Take Care Health. TR 294, 366-67. Ms. Pitaro testified that she has no input in determining whether an occupational injury has resolved and that no one at Metro North makes such a decision. TR 219-20, 237. Mr. Ella testified that he does not report to Ms. Pitaro. TR 293. Dr. Hildebrand testified that Ms. Pitaro acts as the expert in Metro North policies and is not involved in any of the clinical aspects of OHS. TR 371.

Metro North pays the budget for Take Care Health to operate OHS. TR 516. Metro North's policy is to pay for medical expenses for an occupational injury "even if there is a disagreement between the treating physician and Metro North's Medical Director as to the most appropriate medical services so long as the treatment rendered falls within the spectrum of appropriate medical treatment." RX 28. Vice President of Human Resources, Greg Bradley, supervises OHS and he has regular staff meetings with the OHS/Take Care Health staff. TR 537.

Mr. Ella testified that no one from Metro North, including Ms. Pitaro tried to influence him in the Complainant's case. TR 295, 319. He testified that it was his sole decision to treat the injury as "resolved," and he did not discuss the decision with Ms. Pitaro or anyone else from Metro North. TR 217-19. Ms. Pitaro stated that she did not consult with Dr. Hildebrand prior to her decision to treat the occupational injury as resolved or prior to Dr. Hildebrand sending the denial letter. TR 237-38. Ms. Pitaro testified that she first learned of the decision when she met with Dr. Hildebrand to review the Complainant's chart on November 24, 2008. TR 206-07. Dr. Hildebrand testified that Ms. Pitaro/Metro North did not try to influence her decision. TR 382.

The Complainant testified that at the time of Dr. Hildebrand's denial letter, there was no progress with the treatment he was receiving from Dr. Drag. TR 80. The Complainant requested a meeting with Dr. Hildebrand, seeking reconsideration of the denial. TR 81. He went to OHS on November 24, 2008, and he was not allowed to meet with Dr. Hildebrand but instead met with Ms. Pitaro, who told him his injury was resolved. TR 81; *see also* TR 208.

After the denial letter, the Complainant continued to see Dr. Drag and kept all his appointments with Dr. Drag. TR 83, 162. The Complainant underwent the MUA, performed by Dr. Drag and Dr. Michael McKeown, on March 10, 11, and 12 of 2009. Santiago Ex 43. His private health insurance provider under the Empire Plan denied coverage for the MUA. TR 80, 161. The Complainant took out a loan on a credit card called "Card Care" to pay for the MUAs. TR 95, 163-64. There was a four month gap between the time Dr. Drag requested the MUA and the date that the Complainant underwent the MUA. TR 84; ALJ D&O at 6. The Complainant testified that during the period between the denial letter and the MUA, he continued to experience pain. TR 106. The Complainant testified that the MUA procedures "helped a lot" and gave him his "life back." TR 81, 100.

The Complainant testified that he will never report an injury again because "you have to go through all of this [sic] procedures and if my treatment was –if I know my treatment will be put in the middle of treatment, I never go this way." TR 108. The Complainant testified that he

did not have any back symptoms or pain prior to his injury and was not receiving any medical treatment for his back prior to the injury. TR 56, 145.

Following my initial decision and order, the parties settled a related Federal Employers Liability Act ("FELA") case, in which the Complainant received a lump sum of $25,000 minus sick day liens of five sick days, and $12,000 for his outstanding medical bills for treatment from Dr. Drag and Dr. McKeown. Resp't Br. Ex. B. The parties agree that the Complainant is not entitled to double recovery of the $12,000 in medical costs. *Id.*

V. CONCLUSIONS OF LAW

On remand, I must determine whether the Respondent violated Section 20109(c)(1) of the FRSA, which states in relevant part: "A railroad carrier . . . may not deny, delay or interfere with the medical or first aid treatment of an employee who is injured during the course of employment." 49 U.S.C. § 20109(c)(1).

The ARB on appeal provided guidance on defining and applying the words "deny, delay or interfere" found in Section 20109(c)(1). The Board stated:

> These are prohibitive words simply meaning to impede, slow down, or prevent medical treatment from moving forward or occurring. An act that causes medical treatment to be rescheduled necessarily means that the treatment was delayed. Any obstacle placed in the way of treatment necessarily results in interference. Denial means to refuse or reject a request for medical care . . . [Issues] pertaining to the reasonableness or necessity of the treating physician's treatment plan . . . [are] not a factor in the employee's attempt to prove that the railroad interfered with medical treatment.

ARB D&O at 15-16. The Board stressed that Section 20109(c) acts as a mandate to stay out of the way of medical providers. For example, a railroad carrier need not provide medical insurance, but if it does, it must not interfere with the insurer's decisions. *Id.* at 16. Likewise, the Respondent was not required to create OHS, but once it did, it could not interfere with OHS's decision making. *Id.*

Claims under Section 20109(c)(1) are governed by the analytical framework and burdens of proof applied under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), 49 U.S.C. § 42121(b). ARB D&O at 16; 49 U.S.C. § 20109(d)(2)(A)(i). Under AIR 21, to prevail, a complainant must establish by a preponderance of the evidence that: "(1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; and (3) the protected activity was a contributing factor in the unfavorable personnel action." ARB D&O at 6 & n.23. If a complainant proves that his protected activity contributed to the adverse action, the employer may avoid liability if it "demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the protected activity]." *Id.* at 6 & n.24.

1. Complainant's Case in Chief

In applying the Complainant's burden under the AIR 21 framework to Section 20109(c)(1), the Board provided the following guidance:

> The instant that the railroad carrier directly or indirectly inserts itself into the process and causes a denial, delay, or interference with the medical treatment, the protected activity necessarily becomes a presumptive reason. In other words, a request for medical treatment is necessarily connected to the railroad carrier's act of denying, delaying, or interfering with such request rather than staying out of the medical treatment . . . Causation is assumed by virtue of the fact that the railroad carrier inserted itself into the medical treatment.

ARB D&O at 16.[2]

The Complainant's protected activity is undisputed in this matter, and thus the Board articulated that in order to prove the Respondent violated Section 20109(c), the Complainant must establish that "(1) the carrier inserted itself into the medical treatment and (2) such act caused a denial, delay, or interference with medical treatment." ARB D&O at 16.

In determining whether the Respondent inserted itself into the medical treatment, the Board stated that the "real question is whether physician's assistant Mr. Ella's decision to deny Dr. Drag's request to perform an MUA was truly an independent decision or whether Metro-North exerted sufficient influence over OHS and Ella to cause Ella to reject the treating physician's request." ARB D&O at 18. In my original decision, I noted that there was overwhelming evidence that Metro North has substantial control over the operations of OHS; specifically Metro North can terminate the contract between its OHS and Take Care Health unilaterally for any reason and has control over the hiring and termination of OHS personnel. *Id.* at 16 n.21. Additionally, Metro North pays the budget for OHS and has a constant presence at the OHS location. Ms. Pitaro, a Metro North employee, is the OHS Administrator; her office is located at OHS and she has daily interactions with the OHS staff.[3] Ms. Pitaro is in charge of implementing Metro North's policies at OHS, and as such she has significant influence over the OHS decision making process.[4] A main purpose of OHS and the classification of injuries is to reduce Metro North's liability for occupational injuries, and Mr. Ella was aware that by concluding the injury was resolved, Metro North would no longer pay for the Complainant's medical treatment. ALJ D&O at 5. Thus, I find that the extensive control Metro North has over

[2] The Board expounded upon the definition of the terms "deny, delay, or interfere" because it found that in a footnote in my decision suggesting that Metro North did not violate Section 20109(c), I too narrowly interpreted the words. ARB D&O at 15. The Board found that my reliance on the reasonableness and necessity of the MUA at this stage of the analysis was inappropriate. *Id.*

[3] Mr. Bradley, another Metro North employee, also has regular meetings with OHS employees. TR 537.

[4] Although created after Mr. Ella determined that the Complainant's injury was resolved, Metro North's written policy created in July 2009, demonstrates how much influence Metro North has over OHS—the policy lays out a specific procedure for determining whether injuries are "resolved," directly affecting the decision-making process of OHS employees. GX 23.

OHS including the hiring and firing of individuals working under Take Care Health's contract with OHS, its regular daily interactions with OHS staff, and its implementation of policies and procedures, influences the way OHS employees view and make decisions regarding an employee's injury.

In this case, Mr. Ella and Dr. Hildebrand's conclusion that the Complainant's occupational injury had resolved flies in the face of all the medical evidence that was available to them. At trial, Dr. Hildebrand stated that the injury was resolved because low back strains are typically resolved after eight weeks, and any remaining pain was due to an underlying degenerative disease caused by a prior back injury. TR 374. However, as acknowledged by Mr. Ella, the Complainant was asymptomatic prior to the injury on July 25, 2008, making it highly unlikely that his ongoing significant pain was due to his pre-existing condition. Santiago Ex. 22; Santiago 38; TR 67-74, 282-84. Additionally, the MRI taken after the injury and reviewed by Mr. Ella and Dr. Hildebrand showed a herniated disk pressing on the nerve, and Dr. Hildebrand conceded that a disk herniation can occur traumatically (such as by falling off a chair). TR 348. Both Mr. Ella and Dr. Hildebrand admitted that the Complainant's symptoms of pain radiating down his legs and numbness, which commenced following his injury, are typical symptoms of a disk herniation, yet they did not consider the disk herniation in rendering their decision. ALJ D&O at 4; TR 348; 385. Moreover, neither Dr. Hildebrand nor Mr. Ella reached out to Dr. Drag, despite an OHS requirement that treating physicians be contacted before rendering a decision. ALJ D&O at 5. Instead, Mr. Ella and Dr. Hildebrand rejected, without explanation, the MRI results, and Dr. Drag's medical opinions that the Complainant's ongoing symptoms were related to his work injury and the Complainant had made no improvement. Santiago Ex. 38. In fact, they did not provide any explanation at all for why the injury was resolved in their letters to Dr. Drag, in the meeting with the Complainant, or in the OHS records. Thus, on this evidence, Mr. Ella and Dr. Hildebrand's decision cannot be considered truly independent, without any influence, as the medical evidence fails to support their conclusion and they did not follow company policy to contact the treating physician. [5]

The Employer relies on testimony from Mr. Ella and Dr. Hildebrand that they made the determination that the Complainant's injury had resolved based solely on their own medical judgment and that they were not influenced by nor did they receive input from Ms. Pitaro or any other employee at Metro North. However, I view this testimony with considerable skepticism as both Mr. Ella and Dr. Hildebrand remain current employees of OHS and Metro North maintains the power to terminate them at any time. Additionally, I find that it is also the overall control

[5] Nor does Mr. Ella's reliance on the Official Disability Guidelines ("ODG") and the American College of Occupational and Environmental Medicine ("ACOEM") Guidelines support a finding that his decision was independent or that it did not interfere with Complainant's medical treatment. Mr. Ella initially diagnosed a lumbar strain, and in approving medical treatment for Complainant he used the ODG and ACOEM guidelines for the period of time a lumbar strain requires to heal. Once the MRI results were returned indicating a herniated disc impressing on a nerve and considering Complainant's consistent reports of pain radiating down the leg, Mr. Ella's and Dr. Hildebrand's continued reliance on the ODG and ACOEM guidelines for a lumbar strain injury is inexplicable. Mr. Ella was aware that his decision that the work injury had resolved, meant Metro North would no longer cover the cost of medical care prescribed by Dr. Drag for the work injury. By determining that the work injury had resolved, Metro North through Mr. Ella and Dr. Hildebrand clearly interfered with the medical treatment proposed and advised by the treating physician.

that Metro North has over OHS's structure and policies that ultimately exerted influence over Mr. Ella and Dr. Hildebrand's decision to designate the Complainant's injury as resolved.

Based on the foregoing, I find that the Complainant has established that Metro North inserted itself into the Complainant's medical treatment. The next issue is whether this insertion caused a denial, delay or interference with the Complainant's medical treatment. There was a four month period from when Dr. Drag requested that OHS approve the MUAs to when the Complainant actually underwent the procedures. The Complainant testified that Metro North's denial of medical payments delayed the MUA several months until the procedure was ultimately performed in March 2009. TR 84, 106. The Complainant testified that he would never report an injury again because his treatment is "put in the middle." TR 108.

In addition to the direct and uncontroverted testimony of the Complainant, there is substantial circumstantial evidence that Mr. Ella's and Dr. Hildebrand's determination that the work injury had resolved and the associated resulting denial of payment for additional medical care caused a delay of the Complainant's MUA procedures. On November 10, 2008, Dr. Drag wrote: "I have recommended as of November 17, 2008 that conservative care be discontinued." Santiago Ex. 38. He stated that conservative treatment had failed, and recommended "at this time" that they progress to a series of MUAs. *Id.* Based on this letter, it appears that Dr. Drag intended on conducting the MUAs once conservative treatment ended on November 17, 2008. However, the MUA did not occur until March 10, 2009. During this lapse in time, Metro North informed Dr. Drag that it would not pay for the MUA because the occupational injury was considered resolved, and as a result, the Complainant had to submit a request to his private health insurance, which denied payment for the MUA, and then had to figure out how to pay for the MUA procedures, eventually setting up a payment schedule using a credit loan. Thus, I find that the decision that the work injury had resolved resulting in denial of medical care by Metro North caused the MUA procedure to be delayed for four months.

Accordingly, the Complainant has met his burden of establishing by a preponderance of the evidence that Metro North inserted itself into the medical treatment process, and as a result of its insertion, the Complainant's MUA was delayed in violation of Section 20109(c)(1).

2. Respondent's Affirmative Defense

Under AIR 21, once a complainant establishes its burden of proof, the respondent is liable unless it can prove that it would have taken the same action in the absence of the protective activity. The Board acknowledged that the language in Section 20109(c) does not "fit exactly" with the AIR 21 burdens of proof. ARB D&O at 18. The Board stated that the protected activity in Section 20109(c) cases will always be the sole reason that a delay, denial, or interference is possible, thus making it impossible to literally apply the AIR 21 affirmative defense. *Id.* Thus, Board found that a reasonable interpretation of congressional intent is to require that the carrier prove by clear and convincing evidence that "the result would have been the same with or without the railroad carrier's interference." *Id.* The Board stated that this does not require an ALJ to weigh medical evidence or decide medical causation or reasonableness. Instead, the ALJ must consider the evidence as a whole to determine whether the Respondent clearly and convincingly proved that the outcome would have been the same without Metro North's interference. *Id.*

The Board indicated at this stage in the analysis, the Respondent "might argue that any reasonable doctor would have made the same decision that Ella made, absent Metro North's alleged interference, because it was so clear that Santiago's work injury had resolved or because the proposed MUA treatment was so unreasonable." *Id.* In converse, the Complainant, according to the Board, can rely on circumstantial evidence such as "temporal proximity, threat of government fines, debatable medical reasoning, policy violations, inconsistent treatment of employees, shifting explanations, and other evidence of pretext" to argue that the Respondent has not established its burden under the affirmative defense. *Id.*

I find that contrary to the Respondent's arguments on remand, "any reasonable doctor" would not have made the same decision that Mr. Ella made, because as discussed in the previous section and in my original decision, Mr. Ella and Dr. Hildebrand's medical reasoning that the occupational injury was resolved was contrary to the objective diagnostic tests, medical records, ongoing symptoms, and the treating physician's opinion. Thus, it cannot be said that any reasonable doctor would have reached the same conclusion. The Respondent argues that "a reasonable doctor" – Dr. Hildebrand – did determine that the work injury had resolved. However, there is an abundance of evidence establishing that Dr. Hildebrand's finding that the occupational injury had resolved was at the very least suspect. Furthermore, Metro North misinterprets the standard as "*a* reasonable doctor" reached the conclusion; the standard is that "*any* reasonable doctor" would have reached the same result. It cannot be said that *any* reasonable doctor would find that the occupational aspect of the Complainant's injury was resolved.

Metro North alternatively argues that even if Mr. Ella had not classified the Complainant's injury as "resolved," any reasonable doctor would have determined that the MUA was unreasonable, and thus the result would have been the same absent its inference.[6] In support of this argument, Metro North points to the fact that the Complainant's private health insurance under the Empire Plan denied coverage of the MUA. However, there is no evidence of Empire's reasons for denying coverage, and any inference from this fact is far too speculative.[7] Metro North asserted that OHS would have denied the MUA because it is not required to pay for

[6] Metro North requested the opportunity to submit additional medical evidence on remand, which I denied. The Board's guidance on what evidence to consider at the affirmative defense stage is perplexing. On one hand, the Board states that I need not "weigh medical evidence and actually decide the issue of medical causation or reasonableness one way or the other," and on the other hand, the Board states that the Respondent can establish the affirmative defense by demonstrating that "any reasonable doctor would have made the same decision." ARB D&O 18. I interpret the Board's decision as meaning that I should not focus on medical evidence to determine reasonableness, but rather on circumstances surrounding the decision as a whole to find that the result would have been the same, and for that reason I found that additional medical evidence was not necessary.

[7] Metro North refers to the testimony of Mr. Bradley that "the Empire document has lots of exclusions. I mean, they don't pay for workers' compensation-related injuries, nor do they pay for things like experimental procedures. And I think that's what happened in this particular case. I think under the plan the type of procedure he was receiving [MUA] was not really covered. If it was something that was being covered under the Empire plan, I believe that it would have been paid and it would have been no issue." TR 557. However, Mr. Bradley's testimony was pure speculation, and not based on any actual knowledge he had. He is not a medical doctor with knowledge of the appropriateness of MUAs, nor did he actually know why Empire denied coverage.

medical treatment that is not "reasonable" or "necessary." However, Metro North's policy is to pay for medical expenses for an occupational injury "even if there is a disagreement between the treating physician and Metro-North's Medical Director as to the most appropriate medical services so long as the treatment rendered falls within the spectrum of appropriate medical treatment." RX 28. Dr. Drag opined that an MUA was appropriate because conservative treatment had failed, and the Complainant fell "within the standard acceptable forms of condition that have responded favorably to manipulation under anesthesia as documented in other cases and references case studies throughout the country." Santiago Ex. 38. He explained that the MUA would, among other things, "effectively decompress lumbar discs, alter and remodel the scar tissue, fibrous adhesions, reduce pain, and increase the range of motion."[8] *Id.* He stated that the MUA plan "follows protocols as established by the National Academy of MUA Physicians," of which Dr. Drag is a member. *Id.* The MUA was in fact successful, and the Complainant testified that it gave him his "life back." TR 81, 100.

Additionally, there is circumstantial evidence of pretext in the present case. OHS staff's determination the work injury resolved, resulting in no payment for additional medical care was close in time to Claimant's request for medical care for the work injury supporting a finding of temporal proximity between the protected activity and the adverse action. Mr. Ella's and Dr. Hildebrand's failure to follow company policy requiring consultation with the treating physician before determining the work injury resolved, permits an inference that OHS's determination was pretext. Here the Complainant's symptoms continued, the MRI results indicated herniated disks impressing on nerves, and the treating physician explained the basis for his opinion and recommended treatment. At the time they determined the work injury had ended, neither Mr. Ella nor Dr. Hildebrand provided an explanation, to either the Complainant or his physician, as to reasons for their determination, or the reason for rejecting the treating physician's recommended course. The OHS staff's decision that the work injury resolved resulting in re-classification of the injury as non-occupational, interfered with the Complainant's medical care and caused a delay in medical treatment.

Based on the foregoing, I find that Metro North has failed to establish that the result would have been the same with or without the railroad carrier's interference. Therefore, the Complainant is entitled to relief under the FRSA.

3. Remedies

A successful complainant is entitled to be made whole under the FRSA. 49 U.S.C. § 20109(e)(1). The FRSA further provides for back pay, with interest and "compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees." § 20109(e)(2)(B)-(C). Though not explicitly stated in the FRSA, the Board has found that damages for emotional distress are available under language identical to § 20109(e)(2)(C). *See*

[8] Prompted by counsel for Metro North, Dr. Hildebrand testified that the Complainant's scar tissue and fibrous adhesions were caused by the Complainant's 2003 surgery and not his fall in 2008, suggesting that the MUA was for non-work related issues. TR 378-79. However, the MUA was also intended to "effectively decompress lumbar discs . . . reduce pain, and increase the range of motion" and thus the line of questioning of Dr. Hildebrand regarding the MUA is incomplete and misleading. Santiago Ex. 38.

Ferguson v. New Prime, Inc., ARB No. 10-075, ALJ No. 2009-STA-00047, PDF at 7-8 (ARB Aug. 21, 2011) (interpreting 49 U.S.C. § 31105(b)(3)(A)(iii)); *see also Mercier v. Union Pac. R.R. Co.*, ARB Nos. 09-101, -121, ALJ Nos. 2008-FRS-00003, 4, PDF at 8 (ARB Sept. 29, 2011) (noting complainant may seek damages for mental hardship under the Act). Punitive damages up to $250,000 are also authorized. § 20109(e)(3).

In order for the Complainant to be made whole, Metro North shall amend its records to reflect that the Complainant continues to have an occupational injury and delete any references to the occupational injury being "resolved." *See* 49 U.S.C. § 20109(e)(1). The Complainant is also entitled to five days of wages for the days he missed from work to attend an OSHA interview, a two-day deposition, and the three-day trial associated with this proceeding. Comp'l Br. 17. The Complainant earns $240.72 per day, and therefore he is entitled to a total of $1,203.60 for the five days he missed work, with interest. TR 96-97.

The Complainant also seeks compensatory damages for the out of pocket expenses he paid for his medical treatment with Dr. Drag and Dr. Kosser. The total amount of medical expenses owed by the Complainant, not covered by Metro North, the Empire Plan, or adjustments, equaled $16,520. The Complainant paid $4,520 of these medical expenses out-of-pocket, and through a settlement under the FELA, Metro North paid the outstanding $12,000. The Complainant is not entitled to, nor does he seek, the $12,000 he received in the FELA settlement, as it would result in a double recovery. However, the Complainant is entitled to the $4,520 that he paid and was not reimbursed for by Metro North.

The Complainant seeks compensatory damages for his emotional distress. A complainant must prove compensatory damages by a preponderance of the evidence. *Ferguson*, ARB No. 10-075, PDF at 7. A complainant's credible testimony alone is sufficient to establish emotional distress. *Id.* at 7-8; *see also Simon v. Sancken Trucking Co.*, ARB Nos. 06-039, -088, ALJ No. 2005-STA-00040 (ARB Nov. 30, 2007). The Complainant argues that he experienced "inconvenience, stress, and mental distress" due to the four month delay of the MUA procedure, his prolonged pain, and his medical debt for a period of over three years. Comp'l Br. 17. However, there is no testimony from the Complainant, or any other evidence in the record, that these factors caused him emotional distress, and accordingly, the Complainant is not entitled to compensatory damages. *See Simon*, ARB No. 06-039, -088, HTML at 8 ("Emotional distress is not presumed; it must be proven. 'Awards generally require that a plaintiff demonstrate both (1) objective manifestation of distress, *e.g.*, sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the violation and the distress.'") (internal citations omitted).[9]

[9] In the Complainant's FELA complaint, he sought damages for pain, suffering, and mental anguish. The parties settled the Complainant's FELA claim, in which Metro North paid the Complainant's outstanding medical bills and additionally paid a lump sum of $25,000. Because Metro North paid for medical expenses separately, the lump sum of $25,000 must be at least in part for damages for emotional distress. Thus, even if the Complainant was entitled to compensatory damages for emotional distress in this matter, the lump sum settlement would need to be taken into consideration to prevent an impermissible double recovery. Resp't Br. Ex. A.

The Complainant seeks punitive damages as permitted by the FRSA.[10] Punitive damages are to punish unlawful conduct and to deter its repetition. *BMW v. Gore*, 517 U.S. 559, 568 (1996). Relevant factors when determining whether to assess punitive damages and in what amount include: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the respondent's actions; and (3) the sanctions imposed in other cases for comparable misconduct. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 523 U.S. 424, 434-35 (2001); *Gore*, 517 U.S. at 575. Punitive damages are appropriate for cases involving "reckless or callous disregard for the [complainant's] rights, as well as intentional violations of federal law . . . ." *Smith v. Wade*, 461 U.S. 30, 51 (1983), *quoted in Ferguson*, ARB No. 10-075, PDF at 8-9. The Administrative Review Board further requires that an ALJ weigh whether punitive damages are required to deter further violations of the statute and consider whether the illegal behavior reflected corporate policy. *Ferguson*, ARB No. 10-075, PDF at 8.

I find that the circumstances of this case warrant an award of punitive damages. The recent whistleblower amendments to the FRSA were created in response to Congress' concern that some railroad policies reduce employees' willingness to report work-related injuries. The actions of Metro North are exactly what the amendments were intended to prevent. Metro North has tremendous control over the operations of OHS, influencing the OHS employees in their decision-making and approval of medical care. In addition to Metro North' influence over the OHS staff, Metro North's reckless indifference and disregard for its responsibilities under the newly enacted Section 20109(c) of the FRSA is reprehensible. Following the effective date of Section 20109(c), Metro North did not instruct the OHS staff to change anything nor did it instruct them not to delay, deny or interfere with the medical treatment of an employee's treating doctor. TR 207-08, 538. Dr. Hildebrand testified that no one at Metro North informed her of the FRSA provisions in 2008. TR 358-59. Metro North's exercise of extensive control over OHS on one hand, contrasted with its inaction regarding the implementation of procedures to respond to Section 20109(c) is telling.

The deleterious effect of Metro North's control over OHS is evidenced in the present matter. OHS employees did not follow the requirement to reach out to the treating physician before determining that the occupational injury had resolved, and reached a decision that was contrary to all the medical evidence presented to them. Metro North's interference resulted in a four month delay in the MUA procedure, prolonging the Complainant's pain and causing him to incur substantial medical debt for a period of over three years. As a result of Metro North's process for occupational injuries, the Complainant testified that he would never report an injury

[10] Metro North continues to maintain that as a public benefit corporation statutorily created by the State of New York, it is not subject to punitive damages. Resp't Br. 20. However, in my Order Granting Complainants' Motion to Compel Discovery, issued on October 27, 2009, I analyzed the issue in depth and determined that the FRSA permits an award of punitive damages against public railroad carriers such as Metro North.

again—undermining the purpose of the FRSA amendments. Based on the foregoing, I conclude that an award of punitive damages in the amount of $40,000.00 is appropriate in this case.[11]

4. Attorney's Fees

Having prevailed on his claim, the Complainant is entitled to reasonable attorneys' fees. 49 U.S.C. § 20109(e)(2)(C). Counsel for the Complainant filed a fee petition with this office on March 24, 2010, seeking $82,250.00 for services rendered, based on an hourly rate of $500, and $13,496.16 for expenses. Counsel has not submitted any supplemental fee requests for services rendered following remand of the matter back to this office, and in the Complainant's brief on remand, he sought attorney fees and costs pursuant to the original petition filed in 2010. In Metro North's brief on remand, it lodged several objections to the fee petition, each of which will be addressed below. Resp't Br. 24-34. The Complainant did not submit a reply to the objections.

a. Reduction of Counsel's Hourly Rate

Reasonable hourly rates "are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Valley Housing Limited P'ship and Hous. Operations Mgmt. Enter., Inc. v. Derby*, No. 3:06-CV-1319, 2012 WL 1077848, at *2 (D. Conn. Mar. 30, 2012) (citations omitted). "The reasonable hourly rate is the rate a paying client would be willing to pay." *Arbor Hill Concerned Citizens Neighborhood Assoc'n v. Cnty. of Albany*, 493 F.3d 110, 118 (2d Cir. 2007). There is a rebuttable presumption that the reasonable hourly rate is one based on prevailing fees in the district where the case was litigated. *Id.* "[C]urrent rates, rather than historical rates, should be applied in order to compensate for the delay in payment." *Valley Housing*, 2012 WL 1077848, at *2.

Metro North contends that Attorney Goetsch's hourly rate should be reduced because of the "reputational benefits" he will receive from successfully litigating a novel claim under the FRSA, and because his rate exceeds the highest hourly rates found reasonable by the District of Connecticut. In support of its argument, Metro North cites to several District of Connecticut cases, two of which I find particularly helpful: *Serricchio v. Wachovia Securities, LLC*, 706 F. Supp. 2d 237 (D. Conn. 2010) and *Valley Housing Limited P'ship and Hous. Operations Mgmt. Enter., Inc. v. Derby*, No. 3:06-CV-1319, 2012 WL 1077848 (D. Conn. Mar. 30, 2012).

In *Serricchio*, a 2010 case arising under the Uniformed Services and Employment and Reemployment Rights Act ("USERRA"), counsel requested an hourly rate of $550 per hour. The court found that this rate exceeded the "highest hourly rates awarded to date in Connecticut," which was $400 per hour as of 2008. *Id.* at 255. In determining the hourly rate, the court considered factors such as counsel's "extensive experience, high reputation, and remarkably successful results," the reality of rate increases over time, and the novelty and complexity of the case as the first USERRA case to be tried in the District of Connecticut. *Id.* The court also

[11] Although the Complainant seeks additional punitive damages for Metro North's failure to report missed work days due to a work-related injury, violations for such a failure to report are enforced by the Department of Transportation's Federal Railroad Administration, and are not within the purview of the Department of Labor. Thus, any award of punitive damages based on a violation of injury reporting regulations would not be appropriate in this forum.

considered that a "savvy client would recognize potential leverage to negotiate a lower fee from the reputational benefits that would accrue to Plaintiff's counsel" by taking on one of the first USERRA cases in the District. The court found $465 per hour to be a reasonable hourly rate. *Id.*

In *Valley Housing*, a more recent case decided in 2012, counsel sought a rate of $500 per hour. 2012 WL 1077848, at *4. The court noted that it has not yet awarded an hourly rate of $500 or more to a lawyer in the district of Connecticut, and concluded "based on the affidavits, other awards in this district, as well as the Court's own knowledge of fees generally charged by attorneys practicing in this district with similar levels of experience," that $485 per hour was a reasonable rate for counsel. *Id.* at *5 & n.5.

I find the *Serricchio* case cited by Metro North to be enlightening on the matter, as many of the factors considered by the court are present in this matter, including the novelty and complexity of this case arising under the new amendments to the FRSA and the high and well-known reputation and exceptional skills of Attorney Goetsch, and thus I find the court's determination of $465 per hour to an appropriate guidepost in this matter. I also note that this decision was in 2010, and since then, the District of Connecticut has awarded a higher hourly rate of $485 in *Valley Housing*, although this remains the "outer bounds" of awarded hourly rates in the district of Connecticut. Resp't Br. 27. Relying on the factors considered by the court *Serricchio*, the fact that three years have passed since the *Serricchio* decision, and the fact that Attorney Goetsch did not respond to the Employer's objections, I find that an hourly rate of $470 to be appropriate in this matter.

b. Reduction in the Number of Billable Hours

i. Travel Hours

Metro North first contends that Attorney Goetsch's entries for travel billed at his full hourly rate must be reduced according to Second Circuit precedent that travel time is compensated at half-rate, citing to *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132, 139 (2d Cir. 2008) (upholding district court's award of attorney fees, including the court's determination that travel time by counsel should be compensated at half-rate, in accordance with established court custom). I find that such a reduction is appropriate.

Counsel billed the following time for his travel.

Date	**Description**
10/1/09	2 hrs travel to Manhattan for depositions of Campbell, Bradely [sic], Pitaro
10/1/09	2 hrs travel from Manhattan re depositions of Campbell, Bradely [sic], Pitaro
10/29/09	2 hr travel to NYC for depositions of OSHA Wigger and Mabee
10/29/09	2 hrs travel from NYC depositions
11/2/09	2 hr travel from NH to NYC for deposition of Complainant
11/2/09	2 hrs travel from NYC to NH for deposition
11/4/09	2 hr travel from NH to NYC for depositions of Dr. Hildebrand and PA Ella
11/4/09	2 hrs travel from NYC to NH for deposition

Total	**16 hours**

The first four entries dated October 1, 2009 and October 29, 2009 were billed in association with the four previously consolidated cases, and thus counsel seeks only one quarter of the time for these entries attributable to the present matter. Thus, of the 16 hours, 10 hours are billed in this matter. The 10 hours should be cut in half to 5 hours to reflect time spent travelling.

Metro North also argues that the hours billed for travel to Washington, D.C. and Boston, Massachusetts to meet with representatives of the Department of Labor ("DOL") should be eliminated entirely, because travel was not necessary and the meetings could have occurred via a telephone conference. The hours associated with this travel are as follows.

Date	**Description**
7/28/09	2 hours travel to OSHA Region I HQ for conference with DOL solicitors
7/28/09	2 hours travel from OSHA Region I HQ for conference with DOL solicitors
9/15/09	5 hours travel New Haven to Wash DC re mtg w DOL re FRSA legal issues
9/16/09	5 hours travel Wash DC to New Haven re DOL mtg re FRSA legal issues
Total	**14 hours**

Counsel billed these travel entries in association with the consolidated cases, and acknowledges that he is only entitled to the portion attributable to the present matter. Thus, of the 14 hours, 3.5 are billed in this matter. Considering the length of the meetings in relation to the amount of time spent travelling, the fact that these meetings could have been conducted by telephone conference, and the fact that Attorney Goetsch did not submit a response to Metro North's objections, I find it reasonable to eliminate these entries. Thus, the fee petition should be further reduced by 3.5 hours.

ii. Billable Hours Associated with Paul Bodnar and Undisclosed Experts

Next, Metro North argues that the fees and costs associated with counsel's retention of Paul Bodnar should be excluded because Mr. Bodnar's opinions "are wholly irrelevant to the claims at issue," the Complainant did not rely on Mr. Bodnar's opinions in his post-trial brief, and I did not rely on his opinions in my original decision. Resp't Br. 31.

Fees associate with Mr. Bodnar are as follows:

Date	**Description**
9/28/09	45 min phone conf with expert Paul Bodnar
10/21/09	25 min phone conference with expert Paul Bodnar re occupational injuries
10/31/09	1 hr 25 min conference with FRA expert Bodnar re opinions
10/31/09	2hr 50 min conference and review of documents with FRA expert Bodnar
11/1/09	2 hrs 20 min conference re expert Bodnar report
11/5/09	1 hr 55 min consultation with FRA expert Bodnar
11/11/09	25 min phone conference with expert Bodnar re MN deposition

11/13/09	45 min review and analysis of MN Motion in Limine re expert Bodnar
11/15/09	35 min prep for deposition of expert Paul Bodnar
11/15/09	1 hr 40 min attendance at deposition of expert Paul Bodnar
11/15/09	1 hr 5 min draft and editing of Memo In Opp to MN Motion in Limine re Bodnar
Total	**14 hours, 10 minutes**

I do not agree with Metro North that the fees and costs associated with retaining Mr. Bodnar should be eliminated entirely, as it was reasonable, in the process of discovery, to retain Mr. Bodnar. However, I find that Attorney Goetsch spent an excessive amount of time, 10 hours and 5 minutes, consulting with Mr. Bodnar, especially in light of the fact that Mr. Bodnar's opinions were ultimately not critical to the case. Thus, the total billable hours should be reduced by 7 hours, to reflect a more appropriate amount of time spent on consultation with Mr. Bodnar.

Metro North also argues that Attorney Goetsch should not be permitted to recover fees associated with his consultation with undisclosed expert witnesses in this case. Attorney Goetsch spent 1 hour and 10 minutes on his initial inquiries with Larry Mann and George Gavalla in association with the consolidated cases, and seeks fees for a quarter of this time, 17.5 minutes, in this matter. These two experts never appeared in this proceeding, and counsel can recover these fees in the other de-consolidated cases; thus the fee petition should be reduced by 17.5 minutes.

iii. Elimination of Fees Associate with DOL/OSHA Meetings

Lastly, Metro North objects to time billed for meetings with the DOL, arguing that DOL was represented by its own counsel in this matter and there is no reason why the Complainant's counsel would be required to participate in meetings with the agency. Resp't Br. 32. Metro North further argues that the billing entries associated with DOL meetings were too vague to justify an award of fees. I do not find Metro North's position to be persuasive. I do not find that entries to be too vague, nor do I find it unreasonable for Complainant's counsel to confer with the DOL in preparing the case, especially as both parties presented similar positions in the matter. As such, counsel for the Complainant is entitled fees associated with these time entries.

iv. Award of Attorney Fees

Counsel originally sought 176.5 hours of services rendered at a rate of $500.00 per hour for a total of $88,250.00.[12] For the reasons stated above, the hourly rate is reduced to $470.00 per hour, and the total number of hours is reduced by 15.75 hours.[13] Thus 160.75 hours at the rate of $470.00 per hour results in an award of $75,552.50. Counsel is also entitled to costs in the amount of $13,496.16, for a total of $89,048.66 in fees and costs.

[12] In his affidavit, Complainant's counsel indicated that the total amount was $82,250.00; however his attached breakdown of time shows a total of $88, 250.00. I presume that it was a mere typographical error in the affidavit.

[13] The exact time reduced was 15 hours and 47.5 minutes. Rounding this down to the nearest quarter hour, results in a reduction of 15.75 hours.

ORDER

For the foregoing reasons, I find that the Complainant has established that the Respondent violated Section 20109(c)(1) of the Federal Rail Safety Act by delaying the Complainant's medical treatment. It is hereby ORDERED:

1. The Respondent shall amend its records to confirm that the Complainant's July 25, 2008 injury was occupational in nature;

2. The Respondent shall reimburse the Complainant for his out-of-pocket medical expenses related to his July 25, 2008 injury in the amount of $4,520;

3. The Respondent shall pay the Complainant $1,203.60 for the five days he missed from work to attend the OSHA interview, his two-day deposition, and the three-day trial, with interest from the date of the missed days of work until the date paid;

4. The Respondent shall pay punitive damages in the amount of $40,000.00; and

5. The Respondent shall pay the Complainant's reasonable attorney's fees and costs, in the amount of $89,048.66. If the Complainant wishes to supplement his fee petition for services rendered following remand, the Complainant shall file a supplemental fee application within **20 days** of the date on which this order is issued. Should the Respondent object to any fees or costs requested in the application, the parties' attorneys shall discuss and attempt to informally resolve the objections. Any agreement reached between the parties as a result of these discussions shall be filed with the court in the form of a stipulation. In the event that the parties are unable to resolve all issues relating to the requested fees and costs, the Respondent's objections shall be filed not later than **20 days** following service of the Complainant's fee application. **Any objections must be accompanied by a certification that the objecting party made a good faith effort to resolve the issues with the Complainant's attorney prior to the filing of the objections.**

SO ORDERED.

Digitally signed by Colleen Geraghty
DN: CN=Colleen Geraghty, OU=Administrative Law Judge, O=Office of Administrative Law Judges, L=Boston, S=MA, C=US
Location: Boston MA

COLLEEN A. GERAGHTY
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).