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Issue Date: 11 August 2014

Case Number: 2013-FRS-00033

In the Matter of:

WEBSTER WILLIAMS, JR.,
Complainant

v.

GRAND TRUNK WESTERN RAILROAD COMPANY,
Respondent

FINAL DECISION AND ORDER

This proceeding arises under the employee protection provisions of the Federal Rail Safety Act, 49 U.S.C. § 20109 ("FRSA"), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53 (Aug. 3, 2007) and Section 419 of the Rail Safety Improvement Act of 2008, Pub. L. No. 110-432 (Oct. 16, 2008), and the FRSA regulations issued under at 29 C.F.R. Part 1982.

I. BACKGROUND

Complainant Webster Williams, Jr. ("Complainant" or "Williams") worked as a railroad locomotive engineer for Respondent Grand Trunk Western Railroad Company ("Respondent" or "Grand Trunk") in Flat Rock, Michigan. Hearing Transcript ("Tr.") 109. In November and December 2011, Williams was directed several times by his treating physician to take sick leave from work as a result of a "medical condition." *Id*. at 121. In late December 2011, Grand Trunk provided Williams with a Notice of Investigation for failing to work on a regular basis between November 28, 2011 and December 29, 2011. *Id.* at 130; Joint Exhibit ("JX") 14. Williams responded with documentation showing that his absences were at the direction of his treating physician. Tr. 193-94; JX 18; JX 20 at 43.

Grand Trunk conducted a disciplinary investigation on January 13, 2012. Tr. 195. At the hearing, Williams again provided documentation showing that his absences were pursuant to his physician's treatment plan and that his condition interfered with his job duties. *See generally* JX 1; *see also* JX 4 (stating Williams provided medical documentation at the investigation hearing). Despite Williams' arguments and the documentation he provided in support of his position, Grand Trunk fired Williams for failing to work on a regular basis. Tr. 136-37; JX 2.

Williams filed a whistleblower complaint with the Occupational Safety and Health Administration ("OSHA") on March 1, 2012. Therein, Complainant alleged that Grand Trunk unlawfully terminated him for missing work in December 2011 at the direction of his treating physician. He "proclaimed that due to Complainant's ongoing medical issues he was required to occasionally miss work and that he was following the treatment plan." RX 10 at 74;[1] OSHA Finding Letter ("OFL") 2.

On February 6, 2013, OSHA dismissed Williams' claim. OSHA found that Williams did not engage in protected activity under the Family and Medical Leave Act ("FMLA") because "he was not authorized at the time of his illness" to use FMLA leave. *Ibid.* OSHA further ruled that "Complainant's argument that he was following the treatment plan of his treating physician is also not applicable because the Complainant's illness was a non-work related illness and does not fall within the scope of 49 U.S.C. §2010[9]."[2] *Ibid.* OSHA also determined that "[i]t has been shown that Complainant did not participate in an activity that is considered protected." *Ibid.* As such, OSHA dismissed the claim because the "activity was found not to have been a contributing factor in his adverse employment action." *Ibid.*

On February 25, 2013, Williams filed an appeal and request for hearing with the Office of Administrative Law Judges ("Office" or "OALJ"). The case was duly docketed and subsequently set for a *de novo* hearing before this Office. I presided over the formal hearing in this matter on February 19, 2014 in Detroit, Michigan. At the conclusion of the hearing, I ordered Complainant to file his brief 30 days after he received a copy of the hearing transcript. I ordered Respondent to file its closing brief 30 days after Complainant filed his brief. Finally, I allowed Complainant 15 days to file a reply brief.

Complainant filed his closing brief on April 25, 2014. Respondent filed its closing brief on May 29, 2014. Complainant then filed his reply brief on June 13, 2014.

II. SUMMARY OF THE EVIDENCE

A. WITNESS TESTIMONY

Phillip Tassin

Phillip Tassin ("Tassin") is a general manager for the Illinois Central Railroad ("IC"), which is a subsidiary of the Canadian National Railway ("CN"). Tr. 18-19. CN is a parent of three separate railroad companies: IC, Wisconsin Central Ltd., and Grand Trunk. *Ibid.* Tassin manages Grand Trunk's operation while remaining an employee of IC. *Ibid.*

[1] The pages of the OSHA Finding Letter included as Respondent Exhibit 10 were not ordered properly. The pages were reordered to reflect the Finding Letter received February 7, 2013 from Karena Lorek, the Regional Supervisory Investigator of OSHA. The exhibit pages were reordered as follows: R-73, R-77, R-75, R-74, and R-76, the latter three refer to the three-page Finding Letter.

[2] OSHA incorrectly cited 49 U.S.C. §2010**2**(a)(4). However, 49 U.S.C. §2010**2(a)(4)** does not exist. It is clear that OSHA intended to cite 49 U.S.C. §20109(a)(4) of the FRSA, the applicable employee protection statute.

In January of 2012, Tassin was a superintendent. *Id.* at 20. In the Michigan Division of Grand Trunk, the superintendent is the "number two man" to the general manager who is the "senior officer." *Ibid*. Tassin stated, "I'm a general superintendent title working in a general manager role. The general manager reports directly to the senior vice president of the region and the superintendent reports to me. I essentially have the same territory, just with greater responsibility." *Id.* at 74. Tassin currently works from Flat Rock, Michigan, and supervises operations in Michigan, Pennsylvania, and Indiana. *Id.* at 19. He manages six hundred "transportation and . . . engine" employees. *Id.* at 69.

Leave Policies at Grand Trunk

Tassin testified at length about a typical work week for Grand Trunk engineers. Employees work between ten and twelve hours a day, often exceeding ten hours a day. *Id.* at 35. In a week an employee will work five days and rest two days. *Ibid*. An employee's rest days are staggered throughout the work week to ensure adequate personnel on staff at all times. *Ibid.*

Tassin discussed four different categories of leave: vacation, personal, FMLA ("Family Medical and Leave Act"), and "sick." *Id.* at 31-33, 75. Vacation and personal leave are considered excused absences, and the employee continues to receive pay. *Id.* at 32, 75. An employee usually receives five weeks of vacation and 11 personal days per year. *Ibid.* "Sick" leave is unpaid and considered unexcused without regard to an employee's actual health. *Id.* at 31-32. FMLA leave[3] is also unpaid but considered as an excused absence. *Ibid.*

Sick days are considered unexcused absences regardless of whether an employee is legitimately sick because "it's easily abused. Whether the employee is sick or not, we need employees to work. We don't expect employees to work when they're sick, but we don't expect employees to abuse using sickness or the excuse of sickness to take off of work." *Id.* at 90. So, if an employee reports that he or she is sick and cannot work, then Grand Trunk will mark the absence as unexcused. *Id.* at 90-91. Employees can have their absences marked as "excused" when they are sick by using vacation, personal or FMLA leave days. *Id.* at 91-92. If Tassin believes an employee is legitimately sick, and the employee calls Tassin ahead of time and informs him of the situation, then Tassin will try to work out an accommodation with the employee to use personal or vacation days in lieu of taking an unexcused and unpaid absence. *Id.* at 92-93, 97. Tassin also testified to a fifth type of leave, medical leave, which occurs when an employee needs a one-time leave of absence for a medical reason. *Id.* at 92.

Tassin categorized employees who marked off sick for being "lightheaded or faint" as unexcused. *Id.* at 40. Tassin expected that any employee who is under a physician's care should utilize FMLA leave. *Ibid*. If an employee was sick, visited a doctor, and received medical direction to not report to work, the employee would be required to take an unexcused absence, unless he or she had a prior approved FMLA leave. *Id.* at 41.

An employee must receive prior approval for FMLA leave from Grand Trunk's medical or human resource department. *Id.* at 74. If denied approval, an employee can expect

[3] FMLA leave is a statutory entitlement which requires at least 1,250 hours of service during the prior 12 month period. 29 U.S.C. § 2611(2)(A)(ii).

disciplinary action for subsequently reporting an absence as FMLA leave. *Id.* at 51. Grand Trunk provided this information to Williams in a January 6, 2012 letter. Tr. 51.

The proper procedure for notifying Grand Trunk of any absence is for an employee to inform the crew caller that the employee plans to take leave. *Id.* at 97-98. The crew caller, a clerical employee, answers phones to keep track of the status of employees. *Id.* at 101-02, 104. According to Tassin, an employee satisfies his or her responsibility if they just call the crew caller. *Id.* at *105*. While there is no written policy requiring employees to call anyone other than the crew caller when they are going to be absent, Tassin reported it was a "personal responsibility" for the employee to call his or her supervisor. *Id.* at 105. Crew callers do not possess the authority to determine what constitutes an excused absence. *Ibid.* Tassin testified that Williams called the crew caller the days he was going to take off in December 2011 and did not specify that he was "marking off sick under the care of a physician." *Id.* at 101, 102.

Tassin described "excessive or pattern absenteeism" in the context of the Williams' dismissal letter issued on January 24, 2013 in which Tassin stated Williams violated "USOR - General Rule I – Duty or Absence." JX 2; Tr. 22. ("USOR", i.e. "United States Operating Rules," which are the rules for U.S. employees working for Grand Trunk. Tr. 71.) Specifically, the rule under which Williams was disciplined reads:

> Employees are required to work regularly and without excessive layoffs or absences. An employee who is permitted to layoff is expected to mark-up promptly within 24 hours or less of the mark-off time, unless the employee requests and receives permission to be off for a specific period of time longer than 24 hours.

Id. 23; JX 1 at 779. Rule I "specifically" applies to unexcused absences. *Id.* at 33. Rule I contains two parts: a 24 hour-notice rule and an excessive absence rule. Tr. 23.

While Grand Trunk found Williams violated Rule 1, the USOR does not include a definition of "excessive absences and layoffs" nor does it provide guidelines as to what is required to make a determination of "excessive absences and layoffs." *Id.* at 23-24, 28.[4] Further, neither the USOR generally, nor Rule I specifically, includes the term "pattern absenteeism" or information on proper policy regarding sick leave and rest days taken on adjacent days. *Id.* at 30. Tassin, however, believes Rule 1 proscribes "pattern absenteeism." *Id.* at 31-32. According to Tassin: "A pattern of absence is when you see the same thing recurring. Typically, it's people taking off days in conjunction with rest days to extend their rest days, that's the biggest abuse of patterns [sic]." *Id.* at 76. It could also occur when someone takes the same day off every week. *Ibid.* According to Tassin, these behaviors show a suspicious pattern. *Ibid*. In his view, "anyone who's less than 90 percent available over and above any excused

[4] Grand Trunk fired Williams on the grounds he violated USOR – General Rule 1 – Duty Reporting or Absence; however, the record is unclear as to what exact part of Rule 1 or interpretation of it ultimately resulted in Tassin's determination. JX 2, see also Tr. 21-22 for Tassin's testimony in which he stated that Williams was charged with "excessive absenteeism" in his December 29, 2011 charge letter and Tassin stated that "failure to work regularly in accordance with Rule 1" and "excessive absenteeism" "mean the same to me", Tr. 52 for further testimony regarding Tassin's rationale for finding Tassin violated Rule 1, both for "excessive absenteeism and pattern absenteeism," and Tr. 77 for testimony from Tassin that "either the pattern or the excessive absenteeism would have triggered a – at least a review of this work history."

absences [is considered] to be excessively absent," meaning a person exhibits pattern absenteeism if he or she has unexcused absences more than 10% of the month. *Id.* at 32-34, 71. Tassin has operated under this unwritten policy his entire career. Tr. 71. Tassin has never provided any description of "excessive absences and layoffs" to Grand Trunk employees. *Id*. at 28-29, 31.

Tassin acknowledged that an employee has a 40% chance of taking a sick day in connection with a rest day. *Id.* at 35. That is, two workdays will necessarily fall next to a rest day during any given week. If an employee is sick four days in a work week, all of the sick days would be in connection with, or fall next to, a work day. *Id.* at 36.

Grand Trunk will not investigate an employee until he or she accrues three unexcused absences over a one-month period and the employee will be disciplined if he or she takes a fourth unexcused absence. *Id.* at 34. Tassin stated that Williams' fourth, fifth, and sixth unexcused absences in December 2011 precipitated his discipline. *Id.* at 35. Tassin stated he would find an employee excessively absent if they did not come to work over 90% of a work month irrespective of whether the employee was legitimately sick and Williams would have been disciplined for four or six[5] sick days in December of 2011 regardless of whether Tassin saw a pattern. *Id.* at 65-66, 77. Tassin believes all railroad employees know excessive absenteeism is a wide spread problem on railroads because maintaining a schedule is impossible without adequate staff. *Id.* at 72. Tassin also believes employees knew they would likely be punished if they exhibited excessive absenteeism. *Ibid.*

Tassin believes that if an employee followed a doctor's treatment plan *and* used FMLA leave days, the missed days would be considered excused absences. *Id.* at 96. In contrast, if the employee elected sick leave while following a doctor's treatment plan the absence would be unexcused. *Ibid*.

Grand Trunk Policy Regarding Use of Prescription Medication

Tassin stated Grand Trunk prohibits employees from *working* under the influence of a prescribed medication if it affects the employee's job performance. *Id.* at 41-42. Tassin also testified about the rule prohibiting employees from *taking* prescribed medications while on duty if it affects their performance. Tr. 42; JX 5. At his deposition, he elaborated that "even having it in their possession" is prohibited. Tr. 43. The rule states as follows:

> While on duty or on company property, the use or possession of intoxicants, over-the-counter or prescription drugs, narcotics, controlled substances, or medication that may adversely affect the safe performance is prohibited. Employees must not possess, sell, use, or have in their bodily fluids any illegal drug or controlled substances while on or off duty.

JX 5.

[5] Tassin testified to two separate scenarios regarding Williams' December 2011 absences depending on whether two of Williams' absences are considered excused but unavailable under the FMLA. *See* Tr. 50, 61-62, 77. In one scenario, Williams had four unexcused absences, in which the days are considered FMLA leave days, and, in the second scenario, Williams had six unexcused absences and the two days are not considered excused. *Id.* at 61-62.

Tassin believed employees could work while taking some types of medication, such as blood pressure medication or eczema cream; however, he personally does not make the decision whether an employee can work while taking a prescription medication. Tr. 86. An employee must first make a determination as to whether the medicine will adversely affect their safe performance. *Ibid*. If he or she is unsure, the employee reports to their supervisor, who then relates the situation to the medical department. *Ibid*. The medical department then makes the determination if the medication may affect work place safety. *Id.* at 86-87.

Tassin does not expect employees to work if they are sick and testified that he does not need a doctor to tell him if an employee is unsafe to work and should not be working. *Id.* at 78. Tassin paraphrased the applicable USOR rule – General Rule A – as "employees are required to work safely; when in doubt, take the safe course." *Ibid*.

Investigation into Williams' December 2011 Absences

In December 2011, Williams was on "regular assignment that was called a relief assignment" and assigned to cover rest day shifts of employees on regular assignment. *Id.* at 73. Williams usually started work at a different time each day; however, because he knew his schedule ahead of time he knew by what time he needed to call in sick. *Id.* at 74.

Wednesday and Thursday, December 15-16, 2011 were designated rest days Williams marked Monday and Tuesday, December 12-13, 2011, as sick days. *Id.* at 83; JX 19. The following week, Thursday and Friday, December 19-20, 2011 had been designated as rest days Williams marked Tuesday and Wednesday, December 17-18, 2011, as sick days. *Ibid.* Thus, for this second set of days, Williams' rest days and sick days occurred consecutively. The record does not indicate Lance Osmond, William's supervisor in December 2011, contacted Williams about the proximity of Williams' sick leave and rest days. Tr. 64. Tassin testified managers do not normally talk to employees about sick leave days. *Ibid.*

During the same month, Williams also took FMLA leave on December 9 and 16. *Id.* at 83-84. These absences were excused. *Id.* at 84. Tassin did not know if Williams had been approved for FMLA leave for the time he took off those days. *Ibid*. Tassin testified that William's December 12 and 13 taking of sick leave days showed him that Williams was not using available FMLA leave days. *Ibid*. Tassin expected Williams to use available FMLA leave days because "he had quite often in the past." *Ibid*. Tassin stated that Williams is "familiar with the [FMLA leave] process." *Ibid*.

Tassin testified that Grand Trunk's investigation follows set procedures. *Id.* at 98. Tassin called the policy a "progressive discipline policy." *Ibid.* If a rule violation may have occurred, Grand Trunk conducts a formal investigation to collect facts. *Id.* at 79. The superintendent reviews the investigation record and decides if a rule has been violated. *Ibid.* Generally, violations result in discipline based on an employee's work history; however, violations of major rules may result in dismissal regardless of the employee's work history. *Ibid.* There was an investigation prior to the decision to fire Williams, and Tassin was the superintendent who decided his case. *Ibid.*

A December 29, 2011 investigation notice charged Williams with excessive absenteeism. *Id.* at 20. The issue was whether Williams "violated any company rules or regulations and our policies in connection with [Williams] allegedly failing to work on a regular basis between the periods of November 28, 2011 and December 29, 2011." *Id.* at 20-21; JX 1 at 42, GTW 772. The investigation hearing was held on January 13, 2012, and Brian Miscikowski ("Miscikowski"), the local labor representative, represented Williams at the hearing. Tr. 80-81.

Tassin was the superintendent who decided whether Williams violated company rules. *Id.* at 25. Tassin relied on the transcript of the hearing, exhibits attached to the hearing record, and the hearing officer's summary of the investigation. *Ibid*; JX 4. Tassin testified that he did not rely on Williams' work history to determine Williams' guilt. Tr. 27. Tassin used Williams' disciplinary history to determine the appropriate level of punishment. *Ibid*.

Tassin found Williams guilty of violating Rule I for two reasons: excessive absenteeism and pattern absenteeism. *Id.* at 52. He said he did not believe Williams was legitimately sick because "people mark-off sick for other purposes at different times. I was a conductor and that was a horrible misuse of marking off sick and it continues to be." *Ibid*.

In January 2012, Tassin believed that it is "not right" to hold someone accountable for marking off on "sick leave" while under a doctor's care and was unaware that there was a Federal FRSA regulation protecting employees in the situation. *Id.* at 38-39.

Tassin did not remember any witness testimony at the hearing that Williams failed to exhibit symptoms of illness such as headaches, depression, or anxiety. *Id.* at 46. He stated the record did not show that Williams engaged in any activities which would have raised a suspicion that he was *not* sick. *Ibid*. Tassin also testified that he had no reason to believe Williams had exhausted his vacation and personal leave at the time. *Ibid*. He stated Williams testified at the investigatory hearing that "his FMLA days had run out and needed to resubmit." *Id.* at 47 (referring to JX 26).

At the time of Williams' investigation, Tassin knew that Williams' treating physician, Dr. John Bernick ("Dr. Bernick"), had prescribed medication for Williams' condition. Tr. 48. He also knew that when Williams' "condition flared up or whatever when he was experiencing the symptoms of the condition, his physician had indicated that he shouldn't go to work and perform – and he couldn't safely perform any of his job functions[.]" *Ibid*. Tassin testified that these factors did not make any difference to him in making his violation determinations. *Id.* at 49.

Tassin considered the transcript of the hearing and exhibit JX 1 when he made his decision. *Id.* at 81. Tassin highlighted JX 1 at 48; GTW 778, a note from Dr. Bernick dated January 6, 2012, as especially important. Tr. 82. The note stated that Williams was under Dr. Bernick's care for a medical condition on December 9-10, 12 to 16, 18 to 19, and 21 to 22. *Id.* at 82. The note did not state Williams needed to use leave for the days and the days noted did not match the December absences. *Ibid.* The note included days that Williams reported to work as well as omitting days when Williams called in sick and received an unexcused absence. *Ibid.*

Tassin thought it was suspicious that "the dates just didn't match up" and that "he got [the note] after the fact." *Id.* at 83. Tassin "didn't believe that he was legitimately sick for those days." *Id.* at 67. Tassin acknowledged that Grand Trunk did not charge Williams with a false claim of sickness, failing to comply with company policy, or missing a call when he was on-call. *Id*. at 24, 67.

During his deliberations, Tassin knew that Grand Trunk authorized Williams' request for FMLA leave from November 20, 2011 through April 20, 2012 on January 6, 2012. *Id.* at 49; JX 1.

Determination of Williams' Punishment

When making discipline decisions, Tassin takes into account an employee's work history to determine how severely to punish the employee. *Id.* at 66. When he made his decision to terminate Williams, Tassin reviewed Williams' work history for his three prior years of service. *Id.* at 87. During this period, Williams signed a waiver accepting responsibility for failing to properly secure a locomotive in 2008, for which he was suspended for 10 days. *Id*. at 87. In February 2009, Williams also signed a waiver accepting responsibility for missing a recertification class and was suspended for 30 days. *Id.* at 88. Grand Trunk also could not contact Williams in December 2009, resulting in a five day suspension. *Ibid*. Williams ran through a switch causing a trail derailment in February 2010 and was suspended for five days. *Id.* at 88-89. He then ran through another stop signal (although the date when this occurred, is unclear) and received a 30-day suspension. *Id.* at 89.

Tassin testified that Williams had been disciplined for excessive absenteeism once during the three years preceding the investigation, as well as once in 2004. *Id.* at 99, 102-03. Tassin stated that the most recent discipline relating to excessive absenteeism was "just a missed call," and the 2004 discipline was not considered when determining Williams' punishment. *Id.* at 99.

Tassin testified that Williams would know Grand Trunk's policy regarding excessive absenteeism because Williams had previously been disciplined under the same provision. *Id.* at 103. Generally, employees would not know what the discipline policy was unless they asked the superintendent. *Id.* at 99.

Webster Williams, Jr.

Webster Williams, Jr. ("Williams") is 42 years of age, married in 2000, and divorced in October 2012. *Id.* at 107. He has two children from the marriage and has custody of one of the children. *Id.* at 107-108.

In 1994 when he was 22, Williams suffered a head injury as a victim of a carjacking and spent six months in a hospital for rehabilitation. *Id.* at 108. Although he had to relearn basic skills including walking, he feels he has recovered from this injury. *Id.* at 108-109.

Grand Trunk hired Williams in 1994 as a brakeman in Flat Rock, Michigan. *Id.* at 109. He was promoted to conductor and then locomotive engineer in 1995. *Ibid*. He has been a

certified locomotive engineer since 1995. *Ibid*. As a locomotive engineer for freight trains, he operates and handles the locomotive engine and the attached train cars. *Id.* at 110. His job duties require him to be able to pay close attention, be constantly alert, concentrate, and have a clear head, without which the safety of the train is affected. *Ibid*.

December 2011

Williams called in "sick" for a total of six days in December 2011. He called in sick on December 12, 2011 because he was having an anxiety episode. *Id.* at 171. He does not remember when during the day the episode started. *Ibid*. He called into work at 6:29 PM. *Ibid*. He took a Xanax that day, and probably took more than one. *Id.* at 173. The reason Williams used sick days on December 12 and 13 instead of FMLA leave was, according to Williams, because "I was unsure how many FMLA days that I had left, and I didn't want to use too many, and I – I just used sickness because I – I mean because I was sick. I was unsure how many FMLA days I had and I didn't want to use too many and get myself in trouble." *Id.* at 134.

Williams elected to take sick leave again on December 13, 2011. *Id.* at 176. He does not remember calling in sick on December 13 and believes that Grand Trunk marked him as sick on December 13 because his sick day from December 12 rolled over at midnight. *Ibid*. Williams affirmed that he was actually sick on December 13, but he does not remember what he did that day. *Ibid.*

December 14 and 15 were Williams' rest days. *Id.* at 177. Williams believes that he was probably sick on December 14, although he was not sure. *Ibid*. He does not remember if he was sick on December 15. *Ibid*. He did not know why he remembers that he was sick on December 12 and 13, but not on December 14 or 15. *Id*. at 178.

Williams called in and used FMLA leave on December 16, but he did not know why he used FMLA instead of sick leave for that day. *Id.* at 175. He did not call anyone at Grand Trunk or his union to find out how many FMLA leave days leave he had left. *Ibid.*

Williams called in sick on December 18 and remembers he was sick on that specific day because his ex-wife told him she would visit. *Id.* at 178-179. She did not visit and called Williams, which ended in argument. *Id.* at 180.

Williams reported for work at 8:20 AM on December 19 and worked the entire day. On December 21, Williams had the symptoms of a normal anxiety episode for him – heavy breathing, "probably short breath, headache, [and] nosebleed." *Id.* at 180-181. As a result, he called in sick. *Ibid.*

Williams had rest days on December 22 and 23. *Id.* at 181. He does not remember if he was sick on his December 22 and 23 rest days. *Ibid*. He did, however, testify that he marked-up at 11:12 AM on December 22 indicating that he was well enough to work if called upon. *Id.* at 181-82.

Williams worked December 24 and testified he was available December 25 and was not called in. *Id*. at 182. While he worked December 26, he called in sick December 27 and 28, and he cannot remember when he took medication or what he did. *Id*. at 182-183.

Williams marked-up on December 29. *Id.* at 183. He does not remember what he did on December 30, a rest day. *Ibid*.

Williams said that he did not go to work and marked off sick on December 12, 13, 18, 21, 27, and 28 because he was experiencing anxiety episodes. *Id.* at 121. He took Xanax on those days and did not work pursuant to Dr. Bernick's advice. *Ibid*. Williams did not receive any phone call inquiries regarding his absences. *Id.* at 121-22. Williams testified that December is a difficult month for him because he regularly argues with his ex-wife during the holidays. *Id*. at 222. Williams did not believe he had any available personal or vacation days as of December 2011. *Id*. at 122.

Williams received a letter asking him to recertify his FMLA leave on December 5, 2011. *Id.* at 223; JX 12. The letter states that his "requested absence dates exceeded the frequency and/or duration of intermittent time off work provided on his certification." JX 12 at 90, GTW 594. The letter therefore asked for updated information supporting his continued need for FMLA leave. *Ibid*. Williams said that this letter caused him to have concern about taking FMLA leave and not having any FMLA leave days available in December. Tr. 223.

Investigation

Williams received a notice of investigation for excessive absenteeism from Grand Trunk on or around December 28, 2011. *Id.* at 130. The notice did not explain what days he was alleged to have failed to work. *Id.* at 131. Both Williams and his union representative received a copy of the notice of investigation. *Id.* at 215. When Williams received the notice, he immediately contacted Miscikowski. *Ibid.* Miscikowski then checked Grand Trunk's database to provide Williams with the dates he was absent in December. *Ibid*. Williams testified that "I, in turn, went to my doctor with those dates and got a note per [Miscikowski's] instructions." *Ibid*. Dr. Bernick wrote a note listing the dates Miscikowski provided and stating that Williams was under his care. *Id.* at 133; JX 18 at 101, GTW 354. Williams assumed that union reps have access to a "broader range of anybody's work history" and deferred to the dates provided by Miscikowski when he contacted Dr. Bernick. Tr. 133.

Williams testified that: "my union rep would normally get the investigation notice in advance before me, and he relayed to me that in regards to the investigation to, 'Get a doctor excuse for these days. These are the dates that they're questioning or coming after you for, and you get a doctor's note for the dates in question and everything should be fine.' So he gave – he gave me the dates and I just done what I was instructed." *Id.* at 215.

Dr. Bernick's note stated that Williams was under the care of Dr. Bernick on December 10 and 19, but Williams actually worked on those days. *Id.* at 191. Additionally, Williams reported sick on December 27 and 28, and Dr. Bernick did not write that Williams was under his care at that time. *Id.* at 192. Williams testified that Dr. Bernick's note does not accurately

reflect the correct dates he marked off sick because Williams provide Dr. Bernick the dates that Miscikowski said Grand Trunk was concerned about – Williams did not do any independent verification of whether the dates matched his absences. *Ibid.*

On January 6, 2012, Williams saw Dr. Bernick to have him complete the FMLA paperwork, in which Dr. Bernick stated that Williams needed up to five days of leave each month for up to three times per month. *Id.* at 193-94, 194; JX 1 at 58; GTW 788. Williams reviewed his December 2011 work chart and testified that it appeared he had eight episodes. Tr. 194. Eventually, Grand Trunk certified Williams needed November and December FMLA leave based on Dr. Bernick's paperwork on January 6, 2012. *Id.* at 195; CX 1 at 792-93.

Williams' investigative hearing was held on January 13, 2012. Tr. 195. Miscikowski represented Williams, James Golombeski was the Hearing Officer, and Lance Osmond was Respondent's witness. *Id.* at 195-196. The main issue addressed at the hearing was whether Williams was excessively absent under company Rule I from November 28 to December 29, 2011. *Id.* at 197. He admitted at the disciplinary hearing that he had run out of FMLA days during the period despite not being sure of the correct response. *Id.* at 197-98. But he testified that he should have stated during the investigative hearing that he did not know whether he had FMLA leave available. *Ibid*.

Williams met with Dr. Bernick on about January 18, 2012. *Id.* at 136. During this appointment, Williams told Dr. Bernick that he had received a 60-day suspension from work even though no decision had been made yet. *Ibid*. At the time Williams assumed he was going to get suspended. *Id.* at 137.

Williams received a dismissal letter on January 24, 2012, and was then sent to see Dr. Bernick on January 25, 2012. *Id.* at 136-137; JX 2. Dr. Bernick wrote a note saying that Williams could not work on January 25, 2012 because he was too depressed about being terminated. Tr. 137; CX 9.

Williams' Understanding of Grand Trunk's Attendance Policy

Williams testified that he was familiar with Rule I in December 2011, but he did not know how many unexcused absences qualified as excessive absenteeism nor had he been informed of the definition of excessive absenteeism and "pattern mark-off." Tr. 117-18.

Williams also testified that he probably used sick days sometime in 2011 for conditions other than anxiety or migraines, such as colds or stomach flu. *Id.* at 150. In those circumstances, he was not required to explain why he was using a sick day, though he was aware that he could not call in sick indefinitely without being punished. *Id.* at 150-51.

Williams' Medical Condition

Dr. Bernick has been treating Williams for about six to eight years for both on-duty and off-duty injuries, including migraine headaches, anxiety, depression, and high blood pressure.

Id. at 11-12. Williams' current anxiety and depression symptoms are caused by a combination of his preexisting anxiety and depression and the stress caused by the loss of his job. *Id.* at 212-13.

Williams has had problems with migraine headaches, depression, and anxiety for most of his life. *Id.* at 112. Dr. Bernick has prescribed medication to treat the symptoms. *Ibid.* Specifically, Dr. Bernick has prescribed Xanax, which Williams is supposed to take whenever he is "experiencing an anxiety episode." *Ibid*. An anxiety episode is typified by "headaches, shortness of breath, breathing heavy at times, nosebleeds, my insides feels [*sic*] like it's rushing, my temple the – yea, my temple it coincides with my heartbeat, it's just like ba-kum, ba-kum, ba-kum, constantly beating it." *Id.* at 112-13. He cannot predict when he will have an episode, and each episode will last from one to five days. *Id.* at 113. Williams does not feel it is safe for him to work when he is having an episode. *Id.* at 114.

Dr. Bernick has told Williams that, in addition to taking Xanax, he "shouldn't work" when he has an anxiety episode. *Id.* at 113. Dr. Bernick has told him this "[j]ust about every time I come in his office – or when I'm in his office and we're discussing my condition." *Ibid*.

Dr. Bernick has recommended many times that Williams see a psychiatrist. *Id.* at 114. Williams has seen a psychiatrist twice: once in 2007 and once in 2013. *Ibid*. He was diagnosed by the psychiatrist as having depression. *Ibid*. Williams admitted that he has not followed Dr. Bernick's advice about visiting a psychiatrist. *Id.* at 153. Williams has not seen a psychiatrist more because he is reluctant to speak with anyone about his personal problems. *Id.* at 115.

Williams believes that he is barred from Grand Trunk property when taking Xanax. *Ibid*. When he is having an episode, he follows the advice of Dr. Bernick and does not report to work. *Ibid*. Williams does not have any documentation showing that Dr. Bernick said he cannot work when he is taking Xanax and having an anxiety episode. *Id.* at 154. Dr. Bernick never told Williams a specific day on which he should take medication or take leave. *Id.* at 155.

Williams did not tell anyone at Grand Trunk about his medical condition or doctor's orders. *Id.* at 157. Williams did not tell anyone at Grand Trunk that he was taking Xanax. *Id.* at 164. He was aware that he could have talked to Grand Trunk's FMLA administrator about his situation. *Ibid.*

Williams first applied for FMLA leave in 2010 and believes that Dr. Bernick submitted a FMLA certification in 2010 for his lifelong condition of migraine headaches, anxiety, and depression. *Id.* at 116, 160. Grand Trunk approved the request. *Ibid*. He has since renewed or modified his FMLA requests every six months. *Id.* at 117.

Williams never called his union rep to ask for help with his FMLA leave because Williams knew that the right way to ask for leave was to call the crew caller to report that he was either sick or on FMLA leave. *Id.* at 168, 170.

Dr. Bernick completed an FMLA certification form for Williams in February 2011. *Id.* at 161; JX 7 at 1; GTW 619. Dr. Bernick estimated that Williams would have one episode per month for four to five days each episode. Tr. 161.

Williams met with Dr. Bernick in August 2011 to recertify his FMLA leave request. *Id.* at 162; JX 9. Dr. Bernick may have told him to see a psychiatrist at that time. Tr. 163.

Williams saw Dr. Bernick in December of 2011 or January of 2012. *Id.* at 164. Dr. Bernick did not tell him to take a particular day off in December 2011. *Id.* at 165. Williams stated at the hearing that he did not see Dr. Bernick between November 28 and December 28, 2011. *Id.* at 184. However, at his deposition, Williams stated that he remembered seeing Dr. Bernick at his office between those dates. *Id.* at 187. He admitted that if he had a doctor's appointment sometime between those dates he would not have called Grand Trunk ahead of time to let them know. *Id.* at 188.

Lost Wages

Williams received a termination letter on January 24, 2012 or sometime shortly thereafter for excessive absenteeism. *Id.* at 204. Williams and the union representative actively tried to get Williams reinstated. *Id.* at 216. He talked to the union representative "at least a half-a-dozen times or so" about getting his job back. *Ibid*. The representative later explained that there was a chance Williams would receive his job back and the appeal could take up to two years. *Id.* at 217.

Williams did not look for work after receiving his termination letter on January 24, 2012. *Ibid*. At his deposition, Williams reported he did not know why he did not look for a job at that time, but he stated at the hearing that he wanted to be ready if Grand Trunk called him back to work. *Id.* at 205-06.

Williams lost his medical insurance when he was fired. *Ibid*. As a result, he incurred a $3,047.50 medical bill when his son had to be treated in the hospital. *Id.* at 140; CX 3. The majority of the bill is still outstanding as Williams testified that he has only paid $100. Tr. 141.

Williams estimates that he lost about $47,000 in gross wages for his position with Grand Trunk as he did not look for work while he was terminated. *Id.* at 142. He also believes that his depression has become worse since being fired. *Id.* at 142-43.

Williams was unable to provide documentation of the amount paid on his son's hospital bill. *Id.* at 206. The gross wage calculation Williams provided at the hearing does not consider the two month period following his termination that Williams was unable to work due to his medical condition. *Id.* at 206-208.

Prior Discipline

Williams also testified about his prior discipline. In July 2011, he was suspended for 30 days without pay for going through a stop signal and in March 2010 for running a switch. *Id.* at 200. He was also suspended in July 2011 and December 2009 for safety violations. *Id.* at 200-01. He was suspended for 30 days in 2004 for absenteeism. *Id.* at 202.

Lance Osmond

Lance Osmond ("Osmond") is the Assistant Superintendent at Grand Trunk in Battle Creek, Michigan, and in, December 2011 and January 2012, he was trainmaster in Flat Rock, Michigan. *Id.* at 229. He has been with Grand Trunk since January 1998. *Ibid.* As trainmaster, he managed the day to day operations of the train, made sure Respondent was following safety regulations, and oversaw operations generally. *Ibid.* He ensured that the train cars arrived on time for Grand Trunk's customers. *Ibid.* He also supervised the conductors, engineers, and yardmasters. *Id.* at 230. Osmond worked with Williams at Flat Rock in December 2011. *Ibid.*

Williams' name came to Osmond's attention in December 2011 when he received an email showing a report with a list of employees who accrued the most absences. Williams was listed as having three or more unauthorized absences. *Id.* at 230. Osmond testified that other employees were listed as having less than three absences and explained that if an employee has less than three absences, Grand Trunk does not commence an investigation. *Ibid.* If someone had three or more absences, Grand Trunk would check the work history tracking system to verify the leave status was recorded properly. *Id.* at 231. If the leave was recorded properly, Grand Trunk would look for patterns of absenteeism before or after rest days. *Id.* at 232.

Osmond found after reviewing Williams' December 2011 leave record that he had six unexcused sick absences over a 28-day period, many of which were in conjunction with rest days. *Id.* at 233.

Osmond attended and testified at Williams' disciplinary hearing. *Id.* at 233. He was not involved with the decision to terminate Williams. *Id.* at 234.

Melissa Fountain

Melissa Fountain is the manager of United States benefits for Illinois Central Railroad and Grand Trunk – a position she held in December 2011. *Id.* at 241. She oversees the health and benefits of Grand Trunk employees and is responsible for leave administration, including FMLA and other medical leave administration. *Id.* at 242.

RX 11 is Grand Trunk's FMLA leave policy. *Id.* at 243. RX 12 is a copy of the procedures that implement Grand Trunk's FMLA leave policy. *Ibid.* They are posted on Grand Trunk's internal system and on posters in several locations around Grand Trunk premises. *Ibid.*

If an employee wants FMLA leave, he or she can obtain it in three ways. An employee can call the Human Resource ("HR") office and speak with a representative. *Id.* at 244. The representative in turn sends the employee a notification packet to complete and return. *Ibid.* The employee can also receive a referral from one of his or her managers, or the employee can inform the HR office by phone of the need for FMLA leave and the office will then follow up to get the information necessary for approval. *Id.* at 244-45.

JX 9 is Williams' FMLA certification form. *Id.* at 247. JX 9 shows that Williams was approved for FMLA leave for as many as two times per month, once for scheduled appointments

every four to eight weeks and a second for medical reasons lasting up to four days. *Ibid*. Dr. Bernick wrote on the form that Williams would need leave for one flare up a month, and that he would need a follow up appointment every four to eight weeks. *Ibid*. HR approved leave for the two occurrences each month which Williams would likely use for an appointment and a possible flare up. *Ibid*.

JX 9 shows that Dr. Bernick requested four to five days of FMLA leave per occurrence, but Grand Trunk authorized only "up to 4 days per occurrence." *Id.* at 247. The reason why Grand Trunk did this was because:

> once an employee is gone for five or more days medical related, they can't work for a medical reason for five or more days, medical clearance is required for them to return to work, so at day five what we do is it goes into a medical leave of absence status. It still can run concurrent with FMLA but it requires an extra step. They require that extra step to be released by medical in order to return to work. So it's not that they can't take five days in a row, just once the fifth day of FMLA kicks in, then we counsel them on the need for a medical leave.

Id. at 248.

JX 12 is the recertification letter sent to Williams because he went over the FMLA estimate provided by his doctor. *Id.* at 248. The days listed as taken outside his current FMLA authorization are mostly in November, except for two days in December: December 9 and 15. *Id.* at 254. When an employee takes FMLA leave days over the approved amount, HR provides the employee a chance to obtain doctor approval for additional FMLA leave. *Id.* at 248-49. If Grand Trunk does not receive any recertification documents, then the employee's FMLA leave overage would be denied and the absences marked unexcused subject to discipline. *Id.* at 255-256. The HR Office approved Williams' overage of FMLA leave days through this process. *Id.* at 256; JX 1 at 62, GTW 792.

JX 17 is an incomplete certification letter sent to Williams on February 26, 2011 to be completed by the doctor because it was missing critical information. Tr. 251. The employee must submit the missing information within seven days. *Ibid*.

To be protected by FMLA, an employee must state he or she opts to take a FMLA leave day when the employee calls to report their absence. *Id.* at 252. If an employee called in sick, he or she would not be protected by the FMLA leave provisions. *Ibid*. Fountain testified that her department does not go back and change a day's designation retroactively. *Ibid*.

Fountain reported her office received paperwork from Williams on January 6, 2012; however, Dr. Bernick's note was insufficient to qualify Williams for FMLA leave. *Id.* at 253. Williams needed FMLA-specific forms filled out. *Ibid*. Fountain also testified that Williams had remaining December FMLA leave days. *Ibid.* Based on her understanding, Williams never sought FMLA for the days that he called in sick in December of 2011. *Id*. at 258.

Dr. John Bernick

Dr. Bernick was deposed on February 12, 2014, and his deposition was admitted in lieu of testimony as JX 20.

Dr. Bernick is a medical doctor licensed in Michigan and has been licensed for about 30 years. JX 20 at 5. His primary practice is in occupational medicine. *Id.* at 6.

Webster Williams has been a patient of Dr. Bernick for about seven or eight years. *Id.* at 9. Dr. Bernick has treated Williams for a variety of conditions, including anxiety and depression. *Id.* at 10, 13. He diagnosed Williams with depression and anxiety, and, as a physician, he believes that he can make that diagnosis. *Id.* at 10-11.

Dr. Bernick found Williams' depression and anxiety to be episodic. *Id.* at 14. "It comes and goes. Anxiety and depression are, again, common feelings in life that come and go. The medical conditions of anxiety and depression also tend to have a natural history of exacerbations and remissions." *Ibid*. As such, Williams' condition waxes and wanes. *Id.* at 19, 21.

Dr. Bernick has given Williams medical advice about when he should work and when he should not: "It was the same advice I would give any patient, and particularly in a patient who is in a critical job that if you don't feel that you can perform safely, you should not be at work." *Id.* at 15-16.

Dr. Bernick prescribed Williams an anxiety medication, and he believes it was most likely Xanax. *Id.* at 16. Symptoms such as poor concentration can be a side effect from taking Xanax, although the side effects vary from person-to-person. *Id.* at 17-18.

When asked whether an employee such as Williams should go to work if he is taking Xanax and suffers side effects that could affect his safety, Dr. Bernick said, "I would have given the advice if you can't function safely then you shouldn't be at work." *Id.* at 17. "If in his or her determination they do not feel safe at work, they should not be at work." *Id.* at 18. During his interactions with Williams, Dr. Bernick did not find any evidence that Williams was not honest about his condition. *Id.* at 18-19. It was a regular practice for Dr. Bernick to call in a prescription to a local pharmacy for Williams or for Williams to visit the office to pick up a prescription sheet and deliver the sheet to a pharmacy himself. *Id.* at 221.

Dr. Bernick filled out FMLA forms for Williams. *Id.* at 21. He noted on the October 2010 FMLA form that Williams had a lifelong condition of migraine headaches. *Id.* at 22. The migraines are episodic in that they come and go like depression and anxiety. *Ibid.* When someone is having an acute migraine headache, he or she is not likely to be very functional for hours to a day or so. *Id.* at 23. Dr. Bernick recommended one day of leave per episode, with episodes occurring once a month. *Id.* at 24. He admitted he is not capable of accurately estimating the number of migraine type episodes a patient can have a month. *Ibid.*

Dr. Bernick filled out another FMLA form on February 5, 2011. *Ibid.* It listed essentially the same symptoms and increased the length of time of an episode from four to five days. *Ibid*.

Dr. Bernick has prescribed Williams Xanax since November 13, 2010 to treat anxiety and depression. *Id.* at 26. The prescriptions continued beyond 2010. *Ibid*. He told Williams to take it as needed and did not see any indication that Williams abused his use of Xanax. *Id.* at 27.

Dr. Bernick filled out an FMLA form for Williams again on February 23, 2011 and advised that if Williams could not concentrate because of his migraines, he should not work. *Id.* at 29-30. He indicated this advice on the FMLA form. *Id.* at 30.

Dr. Bernick did not think it was reasonable for Williams to come into his office every time he has a flare-up of depression or anxiety; however, if there was a change in intensity or frequency then he was to visit Dr. Bernick in person. *Id.* at 32.

Dr. Bernick reviewed the letter from Grand Trunk asking for a doctor to sign off on Williams' absences in November 2011. *Id.* at 34-35, CX 8. Dr. Bernick said he probably would have talked with Williams about his absences before signing off on them. CX 20 at 36. "I trusted Mr. Williams to do what he had to do. If he didn't feel he was safe, he should not be functioning in the workplace." *Ibid*.

Dr. Bernick discussed Williams' January 6, 2012 visit. Williams said that he needed a doctor's note because he was sick, his FMLA leave needed to be revised, and "he was actually doing better, he had a sad affect but he was sleeping well, his weight was stable, he was exercising." *Id.* at 39. Williams gave him a list of dates indicating he was under Dr. Bernick's care. *Id.* at 39-40. Dr. Bernick felt that Williams was telling the truth:

> Again, I take him at his word, if he told me that he was not functioning on those days, then, I told him before, that if he can't work safely, don't work, but I would expect that if he's having increasing problems, that there would be increased visits.

Id. at 41. As a result of the visit, Dr. Bernick recommended that Williams see a psychiatrist. *Id.* at 43. Dr. Bernick stated that as a result of what Williams told him he was feeling in December 2011, he gave the medical advice that Williams would have to be off of work if he could not "function safely." *Ibid*.

When asked whether Williams was under his care for depression and anxiety in December 2011, Dr. Bernick stated:

> I didn't see him and, but certainly I don't see him every day when he takes his blood pressure pill, but I was aware of those diagnoses, and I would expect that if he was having more trouble that he would see me at the time he was having the trouble.

Id. at 40.

Williams has had depression, anxiety, and migraines his whole life. *Id.* at 66. The depression and anxiety existed before he started to work for Grand Trunk. *Ibid*. Dr. Bernick referred Williams to a psychiatrist "years ago," although he believes that Williams did not end up going when he first recommended it. *Id*. at 66-67. He has since referred Williams to psychiatric treatment but Williams did not always comply. *Id.* at 68.

Dr. Bernick testified about his understanding of a treatment plan saying:

> A treatment plan can have both immediate short-term and long-term implications. If I've seen someone for cardiovascular disease, then they may have acute exacerbation of hypertension that requires an [sic] medication immediately, but then there would be a longer term medication, and then monitoring of that to see that it's effective.
>
> The treatment plan would include the medication, lifestyle medication, exercise, dietary changes often times, particularly blood pressure, weight control, many, many different factors.

Id. at 69. Referral to a psychologist was part of his treatment plan for Williams. *Ibid*.

Dr. Bernick believed that there is a difference between a "treatment plan" and "advice" stating:

> You can give a lot of advice about this, that and the other thing that may or may not reach significance, but the treatment plan should be based on something that is of medical significance.

Ibid.

Dr. Bernick said that the FMLA paperwork submitted to Grand Trunk is for "administrative purposes as opposed to specific treatment." *Id.* at 70. "I mean administrative in the context that this whole concept of FMLA as a legal entity that has medical implications." *Id.* at 71.

Dr. Bernick said "I've certainly told him, as I've told other patients, that if you're having certain problems and you do not feel safe, then you should not be in the workplace, but the administrative form that they call FMLA is not how that sort of information is transmitted to the patient." *Id.* at 123. Dr. Bernick tells his patients this information during visits. *Id.* at 124. Dr. Bernick said that a prescription he gives a patient is a form of treatment. *Ibid*.

Dr. Bernick did not order Williams to take off any specific day of work or to take Xanax on any particular day. *Id.* at 126. Williams did not contact Dr. Bernick's office in December 2011. *Id.* at 91. He visited Dr. Bernick in January 2012 because he was ill, stressed, and needed FMLA paperwork revised. *Id.* at 91-92. After the January 2012 visit, Dr. Bernick started

estimating that his flare-ups would occur up to three times per month, five days per episode. *Id.* at 92. The FMLA paperwork he filled out in January 2012 was prospective, not retrospective. *Id.* at 92-93.[6]

The dates that Dr. Bernick signed off on for December 2011 are based on what Williams told him. *Id.* at 94. He had no recollection of what Williams actually did on those days. *Ibid.* Dr. Bernick stated, the January 6 note "was at the request of Mr. Williams regarding the time that he was off work." *Ibid.*

B. DOCUMENTARY EVIDENCE

Joint Exhibits

The parties submitted the following 19 joint exhibits ("JX") that were admitted into evidence:

JX 1

JX 1 is the transcript of Grand Trunk's investigative hearing into the Webster Williams excessive absenteeism charge held on January 13, 2012 in Flat Rock, Michigan. JX 1 at 1, GTW 731. James Golombeski ("Golombeski") was Grand Trunk's interrogating officer. *Ibid.* Ryan Miscikowski represented Williams. *Ibid.* Williams and Lance Osmond, his manager, testified at the hearing. *Id.* at 3, GTW 733

Osmond stated the issue considered at the hearing: "Monthly attendance audits for Flat Rock were being done, and I noticed a matter or absenteeism from Mr. Williams for the month of December 2011; marking off sick in conjunction with rest days." *Id.* at 8-9, GTW 738-739. Osmond also testified to "instances where we do allow a day off" in which a company manager approves the day even if an employee has used all available personal and vacation days. *Id.* at 20, GTW 750.

During the hearing, additional provisions of the attendance policy were highlighted including Article 32 of the BLET Agreement, Section A, which states, "Engineer shall not be expected to work when sick, but in case of being compelled to lay off on account of sickness of themselves, or family, must in some manner notify the Crew Management Center of their inability to protect the service requirements of the Company." *Id.* at 16-17, GTW 746-47.

When questioned about the unexcused leave days in December, Williams claimed, "The days that are alleged that I marked off were for my sickness. It's just that simple." *Id.* at 25, GTW 755.

[6]Prior to January 2012, on September 2, 2011, Williams had sought FMLA leave after a particular absence, and then Grand Trunk excused the absences. JX 11 at 88, Tr. 148.

JX 2

JX 2 is a letter from Tassin to Williams dated January 24, 2012. JX 2 at 64, GTW 80. Tassin stated the "record contains credible testimony and substantial evidence proving that you violated USOR – General Rule I – Duty Reporting Absence" and after considering the violation and past discipline record Tassin dismissed Williams from service. *Ibid*.

JX 3

JX 3 contains copies of Williams' W-2's from 2010 to 2012. JX 3 at 65-67, Williams 67-69.

JX 4

JX 4 is an email from Golombeski to Tassin and Steve Napierkowski, on January 22, 2012. JX 4 at 68, GTW 820. Golombeski stated that a hearing had been held in the Williams case on January 13, 2012, proving that Williams was:

> . . . absent 6 days within a 16 day span. 5 of the sick days were in conjunction with his off days.
>
> Mr. Williams provided Medical Documentation on January 6th with all the dates covered for his unexcused absences. He did not secure documentation at the time of sickness but did so January 6th. Mr. Williams exhausted all FMLA prior to the end of the year and was not available to him.
>
> I believe Mr. Williams is in violation of General Rule I by marking off sick in conjunction with his off days to extend his time off.

Ibid.

JX 5

JX 5 is a copy of CN's operating rules. JX 5 at 69. Importantly for this case, Rule I reads:

> Duty-Reporting or Absence. Employees must report for duty at the designated time and place with the necessary equipment ready to perform their duties. Those subject to call must not leave their usual calling place without notifying those required to call them.
>
> Employees must not engage in other business, be absent, allow others to fill their assignment or exchange duties with others unless authorized to do so.
>
> Employees must immediately give change of address and telephone number to their supervisor and those required to call them to duty. Employees must call for their mail regularly and answer correspondence promptly.

> Employees are required to work regularly and without excessive layoffs or absences. An employee who is permitted to layoff is expected to mark up promptly within 24 hours or less of the mark-off time, unless the employee requests and receives permission to be of for a specific period of time longer than 24 hours.

Ibid.

JX 6

JX 6 is a Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act), completed by Dr. Bernick on October 13, 2010, in which Dr. Bernick states that Williams is under his care and has a "lifelong" condition of migraines. JX 6 at 71-2, GTW 638-39. Dr. Bernick recommends that Williams have FMLA leave for one time each month for one day at a time. *Id*. at 72, GTW 639.

JX 7

JX 7 is a Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act), completed by Dr. Bernick on February 5, 2011, in which Dr. Bernick diagnoses Williams with migraines, and recommends that he be given leave one time each month for 4-5 days per episode. JX at 74, 76, GTW 619, 621.

JX 8

JX 8 is a Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act), completed by Dr. Bernick on February 5, 2011 and corrected on February 23, 2011. JX 8 at 78, GTW 613. This form corrects Dr. Bernick's previous version of the certification form. *Ibid.*; *see* JX 7. Dr. Bernick again diagnoses Williams with migraines, and recommends that he be given leave *two* times per month for 4-5 days per episode. JX 8 at 79, GTW 614 (emphasis added to reflect correction).

JX 9

JX 9 is a Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act), completed by Dr. Bernick on August 24, 2011. JX 9 at 82, GTW 599. Dr. Bernick diagnoses Williams with a lifelong migraine condition, and recommends leave for one time each month for 4-5 times per episode. JX 9 at 83-4, GTW 600-01. A note on the front of this document shows that the request was "Approved for: 7/29/11 – 1/29/12 Up to 2 occurrences per month . . . Up to 4 days per occurrence." JX 9 at 82, GTW 599.

JX 10

JX 10 is a Medical Status Report form for Webster Williams, completed by Dr. Bernick on January 25, 2012. JX 10 at 86. Dr. Bernick diagnoses Williams with depression and anxiety. *Ibid*. Dr. Bernick sates that Williams became unable to work on January 29, 2012, that he is currently taking Xanax, and that Williams is not cleared to return to work. *Ibid*.

JX 11

JX 11 is a letter from CN, dated September 2, 2011, notifying Williams that his request for FMLA leave was approved, entitling Williams to take FMLA leave up to two times per month and up to four days per occurrence. JX 11 at 88, GTW 597. The period he is approved to take leave is July 29, 2011 to January 29, 2012. *Ibid*. The letter warns that if an absence is denied FMLA leave and the employee still takes the day off of work CN considers the absence unauthorized and may subject the employee to disciplinary action. *Ibid*. The letter notes two days of approved leave on July 29 and 30, 2011. *Ibid.*

JX 12

JX 12 is a letter from CN, dated December 5, 2011, informing Williams that his requested absence dates "exceed the frequency and/or duration of intermittent time off work provided on your certification." JX 12 at 594. The letter asks Williams to provide more information to CN to support his need for continued FMLA leave. *Ibid*.

The letter lists November 20, 21, 22, and 25, 2011 as "Pending" determination of FMLA status because Williams elected FMLA leave on those dates. *Ibid*. The letter warns Williams that if he does not provide the necessary paperwork from his medical provider for authorization, the pending days will convert to unauthorized absences. *Id.* at 594-95.

JX 12 also includes a letter to Williams from CN's HR Department. *Id.* at 596. The letter lists all the days from July 29, 2011 to November 25, 2011 that Williams used FMLA leave. *Ibid*. It then asks Williams to obtain his physician's signature to authorize FMLA leave on the days in which he exceeded his FMLA leave. *Ibid*.

JX 13

JX 13 is a letter to Williams from CN's HR Department on December 14, 2011. JX 13 at 93. It states that Williams is not eligible for FMLA leave starting January 1, 2012. *Ibid*. It states that an employee must work at least 1,250 hours in the previous 12 months in order to be eligible for FMLA leave. *Ibid*. As Williams had not met the minimum threshold of hours worked, he was not eligible for FMLA leave. *Ibid*. Williams may become eligible for FMLA leave once he works the requisite hours. *Ibid*. The letter warns that further leave days taken before reaching the requirement will be designated as "unauthorized" and "could result in disciplinary action." *Ibid.*

JX 14

JX 14 is a letter to Williams from CN's HR Department on December 28, 2011, stating that the HR Department had not received the required documentation to certify and approve Williams' November 20, 2011 request for FMLA leave. JX 14 at 94.

JX 15

JX 15 is a letter to Williams from CN's HR Department on August 1, 2011, stating that the FMLA leave he requested on July 29 and July 30, 2011 fall outside of the certified period of his leave request. JX 15 at 95, GTW 603. As such, CN requested additional paperwork from Williams' physician in order to approve the leave request. *Ibid*.

JX 16

JX 16 is a letter to Williams from CN's HR Department on March 8, 2011. JX 16 at 97, GTW 605. The letter notifies Williams that he has been approved to receive FMLA leave from December 24, 2010 to June 24, 2011 for up to 4 occurrences per month and up to 5 days per occurrence. *Ibid*. The HR department reminds Williams if he wants to use FMLA leave he must designate an absence as such through the normal time report and mark-off procedures. *Ibid.* Twelve absences preceding the date of the letter show approval for FMLA leave.

JX 17

JX 17 is a letter from CN to Williams dated February 28, 2011. JX 17 at 99, GTW 607. The letter states that Williams must have his doctor sign off on certain leave days taken in late 2010 and early 2011 in order for Williams to have FMLA leave for those days. JX 17 at 99-100, GTW 607-08. The letter shows that Dr. Bernick signed off on the leave taken on March 4, 2011. JX 17 at 100, GTW 608.

JX 18

JX 18 is a note from Dr. Bernick, dated January 6, 2012. JX 18 at 101. Dr. Bernick states, "Mr. Williams has been under my care for a medical condition in December 9-10, 12-16, 18-19, and 21-22." *Ibid*.

JX 19

JX 19 is a Work Attendance Review chart from November 28, 2011 to December 29, 2011 for Webster Williams. JX 19 at 102. It shows that Williams marked off sick on December 12, 13, 18, 21, 27, 28. *Ibid*. Williams used leave on December 9 and 16. *Ibid*. Williams had rest days on November 30 and December 1, 7, 8, 14, 15, 22, 23, and 29. *Ibid*.

JX 20

JX 20 is a copy of the Dr. Bernick's deposition. The deposition was taken on February 12, 2014 in Dearborn, Michigan. JX 20. The summary of his testimony is detailed in its entirety in this decision, *supra* Part II. A.

Complainant's Exhibits

Complainant submitted the following exhibits ("CX") that were admitted into evidence:

CX 1 and CX 2

CX 1 and CX 2 are copies of Williams' medical records.

CX 3

CX 3 is a copy of the hospital treatment records for Williams' son, Wesley Watt, in May of 2012. CX 3. The amount due for treatment is $3,047.50. CX 3.

CX 7

CX 7 is a copy of Williams' psychiatric records with Dr. Ghulam Qadir. CX 7.

CX 8

CX 8 is a copy of JX 12 at 596, except that it shows Dr. Bernick signed off on leave days from July 29, 2011 to November 25, 2011. CX 8.

CX 9

CX 9 is a duplicate of JX 10. CX 9.

CX 10

CX 10 is a duplicate of JX 12 at 90-92, GTW 594-95. CX 10.

CX 11

CX 11 is a duplicate of CX 8. CX 11.

Respondent's Exhibits

Respondent submitted the following exhibits ("RX") which were admitted into evidence:

RX 1

RX 1 is an OSHA Case Activity Worksheet dated March 7, 2012. RX 1. The worksheet describes Williams' complaint against Grand Trunk. *Ibid*.

RX 3

RX 3 is a Medical Status Report form for Webster Williams, completed by Dr. Bernick on January 29, 2007. RX 3. Dr. Bernick diagnosed Williams with depression/anxiety and refers him to a psychiatrist. *Ibid*.

RX 4

RX 4 is a Medical Status Report form for Webster Williams, completed by Dr. Bernick on May 7, 2007. RX 4. Dr. Bernick diagnoses Williams with depression and refers Williams to a psychiatrist. *Ibid*.

RX 5

RX 5 is a Medical Status Report form for Webster Williams, completed by Dr. Bernick on March 8, 2008. RX 5. Dr. Bernick diagnosed Williams with anxiety/depression and prescribes Xanax. *Ibid*.

RX 6

RX 6 is a Medical Status Report form for Webster Williams, completed by Dr. Bernick on April 25, 2008. RX 6. Dr. Bernick diagnosed Williams with depression/anxiety and prescribes Xanax. *Ibid*.

RX 7

RX 7 is a Medical Status Report form for Webster Williams, completed by Dr. Bernick on June 4, 2008. RX 7. Dr. Bernick notes that Williams is no longer taking any medications. *Ibid*. Dr. Bernick clears Williams to work without any restrictions. *Ibid*.

RX 8

RX 8 is a copy of Williams' disciplinary record at Grand Trunk.

RX 10

RX 10 is a copy of OSHA's findings letter in this case.

RX 11

RX 11 is Grand Trunk's FMLA policy for U.S. employees.

RX 12

RX 12 is a copy of Grand Trunk's procedures for implementing its FMLA leave policy for U.S. employees. RX 12. The document states, "In order to have a day away from work designated as FMLA leave employees must identify the day as such through their normal time reporting/mark-off procedures." *Ibid.*

RX 13

RX 13 is a revised copy of Dr. Bernick's medical file consistent with my December 17, 2013 Order. RX 13.

RX 14

RX 14 consists of the February 22, 2012 treatment records for Webster Williams from Oakwood Heritage Hospital in Taylor, Michigan. RX 14.

RX 15

RX 15 contains Williams' medical records from Dr. Tae W. Parks at Apex Behavioral Health Western Wayne, PLLC. RX 15.

RX 16

RX 16 contains Williams' medical records from his treatment with Dr. Ghulam Qadir at Apex Behavioral Health Western Wayne, PLLC. RX 16.

RX 17

RX 17 consists of blank calendar print-outs for the months of November 2011, December 2011, and January 2012 submitted for demonstrative purposes at the hearing. RX 17

RX 18[7]

RX 18 is an Hours of Service Log for Webster Williams showing his start and finish times at work for December 2011. RX 18.

II. LAW

The FRSA whistleblower provision prohibits covered rail carriers from retaliating against an employee who engages in certain protected activities. 49 U.S.C. § 20109(a). The FRSA incorporates the burden shifting and levels of proof procedures enacted under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). 49 U.S.C. §

[7] The transcript refers to this document as exhibit 477; for purposes of clarity, this decision lists the document as exhibit 18. Tr. 57.

20109(d)(2)(A); *Santiago v. Metro-North Commuter Railroad Company, Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-11, at 11 (ARB July 25, 2012); *see also* AIR 21, 49 U.S.C. 42121(b)(2)(B)(iii). In order to prevail, a complainant must prove by a preponderance of evidence that he or she (1) engaged in protected activity, (2) suffered an unfavorable personnel action, and (3) the protected activity was a "contributing factor" in the unfavorable personnel action.[8] *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-9, at 4-5 (ARB Feb. 29, 2012) (applying AIR21's legal burdens of proof found at 49 U.S.C. § 42121(b)(2)(B)(iii)). Contributing factor means "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Id.* at 6; *see also Hutton v. Union Pac. R.R. Co.*, ARB No. 11-091, ALJ No. 2010-FRS-20, at 12 (ARB May 31, 2013). The burden then shifts to the employer to prove "by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(B)(2)(B)(ii).

The regulations governing cases brought under the FRSA are found at 29 C.F.R. Part 1982. They incorporate the General Rules of Practice and Procedure before the OALJ, which are found at 29 C.F.R. Part 18.

IV. DISCUSSION

A. WHETHER RESPONDENT IS A COVERED RAIL ROAD COMPANY AND COMPLAINANT IS AN EMPLOYEE UNDER THE FLSA

The FRSA applies to any "railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier." 49 U.S.C. § 20109(a).

Grand Trunk is a "Class 1 freight railroad" engaged in interstate or foreign commerce employing several thousand employees and operating a rail network throughout Michigan, Indiana, Illinois and Ohio. OFL at 2, Tr. 19. Accordingly, Grand Trunk qualifies as a railroad carrier within the meaning of the FRSA. 29 U.S.C. § 20109 (a). Williams was employed as a locomotive engineer at all relevant times, Tr. 109, and he is thus classified as an "employee" of a covered railroad carrier.

B. WHETHER WILLIAMS ENGAGED IN PROTECTED ACTIVITY

1. Applicable Law Regarding Protected Activity under the FRSA

As noted above, the FRSA, 49 U.S.C. § 20109, prohibits railroads from discriminating against their employees for reporting safety and security issues to the company, a regulatory body, or a law enforcement agency. *See* 49 U.S.C. §§ 20109(a), (b). Importantly for this case, the FRSA expressly provides:

[8] Because the parties agree that his termination constituted adverse action, I need not discuss that issue. *See generally*, Respondent's Post-Hearing Brief ("RPHB") and Complainant's Post-Hearing Brief ("CPHB").

(c) Prompt Medical Attention.—

. . . . .

> **(2) Discipline.—** A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or *for following orders or a treatment plan of a treating physician*, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

49 U.S.C. § 20109(c) (2) (emphasis added).

In my August 6, 2013 Order Denying Respondent's Motion to Dismiss, based on the evidence then before me, I decided that Complainant had sufficiently alleged a work-related injury to survive a motion to dismiss. Order Denying Respondent's Motion to Dismiss at 4. I also held, in the alternative, that even if Williams' injury was not work-related[9], he had sufficiently alleged that he was following the orders or treatment plan of his treating physician, Dr. Bernick, to come within the plain language of the statute and its overall purposes. *Id.* at 4-6.

Respondent, continues to argue: (1) that Dr. Bernick only provided "advice" to complainant to "not work" under certain conditions, and, that such "advice" did not constitute "orders or a treatment plan" within the meaning of the FRSA, Respondent's Post-Hearing Brief ("RPHB") at 15; (2) the only actual order or treatment plan given by Dr. Bernick was that complainant visit a psychiatrist, and, since he only visited a psychiatrist once prior to filing the instant case, he is not entitled to relief because the FRSA does not protect employees "for following only that portion of his orders or treatment plan that he chooses to follow," *id.* at 19; and (3) inasmuch as Complainant only notified his employer of the medical treatment plan and orders *after* his December 2011 absences, he could not have been following his doctor's treatment plan or orders for those absences, *id.* at 17-19. Respondent also asserts that Williams' claim was not made in "good faith" as required by 49 U.S.C. § 20109(a). *Id.* at 19-22. In addition, Respondent argues that it has proven by clear and convincing evidence that it would have terminated complainant even in the absence of his protected activity. *Id.* at 24-26. Finally, with regard to the merits of the action, Respondent claims that Complainant's alleged illnesses are not protected under FRSA because they are not work-related injuries. *Id.* at 21-22. Respondent also raises various arguments with regard to damages. *Id.* at 26-32.

[9] During the hearing and in Post-Hearing Briefs, Complainant seemed to abandon any argument that his condition was work-related. *See* Complainant's Post-Hearing Brief ("CPHB") (stating, "Since birth, Williams has suffered from anxiety, migraine headaches, and depression."). Rather, he simply argued that he engaged in protected activity by following the orders or treatment plan of his treating physician.

Respondent's penultimate argument raised above, i.e., that Complainant's absences from his illness cannot be protected activity within the meaning of FRSA because those illnesses were not work-related, is easily disposed of. *See id.* at 21-22. In *Bala v. Port Authority Trans-Hudson Corp.*, ARB No. 12-048, ALJ No. 2010-FRS-26 (ARB Sept. 27, 2013), the Administrative Review Board ("ARB") determined that 49 U.S.C. § 20109(c)(2) applies to orders and treatment plans arising "out of on-duty *and* off-duty injuries." *Id.* at 14 n.9 (emphasis added). "The express statutory language set out in Sections 20109(c)(1) and (2), as well as the legislative history reflecting Congress's broad concern over safety in the railroad industry and protection of injured railroad workers, make clear that Congress did not intend to foreclose from protection railroad workers who 'follow[] orders or a treatment plan of a treating physician" even when the injury they are being treated for occurred off-duty." *Id.* at 14. As the ARB has noted, Congress's passage of amendments to the FRSA represents a "progressive expansion of anti-retaliation measures in an effort to address continuing concerns about railroad safety and injury reporting." *Santiago*, ARB No. 10-147, at 15, *cited in* Bala, ARB No. 12-048, at 14. .

2. Williams engaged in protected activity by following Dr. Bernick's advice, orders and treatment plan.

Neither the FRSA nor its regulations define "orders" or "medical treatment plan." Similarly, the term "advice" appears in neither the statute nor the regulation. Respondent argues that, as Dr. Bernick is a trained physician and complainant's treating doctor, his definition of these terms should apply. It then proceeds to portray Dr. Bernick's usage of these terms when discussing various aspects of his recommended treatment as inconsistent with the statutory coverage of "medical treatment." I reject Respondent's argument.[10]

The ordinary meaning of "advice" is "an opinion or suggestion about what someone should do" or a "recommendation regarding a decision or course of conduct." *See* www.merriam-webster.com/dictionary/advice (last visited July 31, 2014). The ARB has interpreted the words "medical treatment plan":

> Medical treatment is generally defined as the management and care of a patient to combat disease or injury. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (28th ed. 1994) at 999, 1736. It is understood to include more than first aid treatment and may be provided in the immediate aftermath of a work injury and over a period of time following an injury depending on the severity of the injury. *Santiago*, 2009-FRS-11, at 20-21 (Sept. 14, 2010). When defining the words of a statute, they are presumed to be used in their ordinary and usual sense. *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The ordinary meaning of "medical treatment" refers to the management and care of a patient over a period of time beyond initial injury and is dictated by the severity of the injury or disease.

[10] Defining the words of a statute is, in the first instance, the role of the Congress. *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If Congress is silent on a specific issue, the judiciary is the final authority on issues of statutory construction. *Ibid*. The judicial branch accords the executive department's statutory construction "considerable weight" when Congress is silent on a specific issue and charges federal agencies with implementing and enforcing a statute. *Id.* at 844.

Santiago, ARB No. 10-147 at 10-11. In that same decision, the ARB further wrote:

> "treatment plan" is commonly used to include not only medical visits and medical treatment, but also physical therapy and daily medication, among other things. A treatment plan may require the employee to engage in daily exercises during the work day. The fact that (c)(1) protects the employee's actions and extends beyond medical visits does not limit the medical treatment protected in (c)(1).

Id. at 11.

The ARB noted in *Bala* that an employee could "be disciplined when absences are not associated with a medical treatment plan." *Bala*, ARB. 12-048, at 14 n. 9. In any case, given the "broad concerns of the Congress over railroad employee safety," *Bala*, ARB No. 12-048, at 12, these references to medical care must be liberally construed consistent with the Act's remedial nature to ensure that railroad employees under a physician's care are not punished by their employing companies when following a treating doctor's instructions.

Dr. Bernick has treated Williams for six to eight years for both on-duty and off-duty health issues; he has provided regular diagnoses, prescriptions, and advice to him throughout that period. JX 20 at 8; Tr. 11-12. He diagnosed Williams with a lifelong history of depression, anxiety, and migraines, JX 20 at 9-11, 66, and prescribed Xanax for Williams to take when experiencing one of his depression or anxiety episodes. JX 20 at 14, 16-19, 21. As early as January 2007, RX 3, Dr. Bernick provided Medical Status Report forms to Respondent for Complainant documenting his depression and anxiety diagnoses. Similarly, as early as March 2008, RX 5, Dr. Bernick specifically notified Grand Trunk of Williams' prescription for Xanax. RX 6. Dr. Bernick continued to provided Certifications of Health care Provider for Employee's Serious Health Condition, which Williams provided to Grand Trunk to accompany FMLA requests in October 2010, JX 6; JX 20 at 221, again in February 2011, JX 7 and 8, and yet again in August 2011. JX 9; JX 20 at 25-26.

As a medical professional, Dr. Bernick was knowledgeable of the side effects Xanax can have, such as poor concentration, and that reactions to the drug varies from patient to patient. *Id.* 17-18. He also knew that the migraine headaches such as those experienced by Complainant caused episodic head pain and nausea. *Id.* at 22. Thus, he knew that both anxiety and depression, when treated by appropriate medication, *e.g.*, Xanax, were likely to result in poor concentration and cause other side effects, *id.* at 17-18, 109; and migraine headaches resulted in Williams' inability to concentrate, focus, and perform well. *Id.* at 30. Dr. Bernick understood that either condition would be a cause of concern for the operation of railroad equipment as required by Complainant's engineer position, and as a board certified occupational medicine practitioner and "regular doctor for Grand Trunk employees starting a number of years ago," he was particularly knowledgeable about Complainant's work requirements as an engineer. JX 20 at 8, 9. Dr. Bernick knew, for example, that the position requires concentration, alertness, and good vision. *Id.* at 15. His "advice" to Williams not to work if he felt he could not do so safely

because he was having an episode, s*ee, e.g.*, JX 20 at 6, 15-16, 17, 29, 43, was thus no different than the advice he gives his other patients. *Id.* at 15-16, 123.[11]

When Dr. Bernick completed Williams' FMLA paperwork in February 2011, his medical opinion, advice, and orders remained the same. *See generally* JX 8. Williams suffered from migraine headaches with symptoms including "headache[s], nausea, dizziness, vision change, and poor concentration." JX 8 at 79, GTW 614. Based on Williams' medical condition, Dr. Bernick provided leave as much as "two times per month for 4 – 5 days per episode." JX 8 at 80. Dr. Bernick listed Williams' condition as "life long." JX 8 at 79. Grand Trunk continued to approve Complainant's requests for FMLA leave; in September 2011, Respondent notified complainant that he was entitled to take up to two times per month of leave and up to four days per occurrence for the period of June 29, 2011 to January 29, 2012. JX 11.

Dr. Bernick reiterated his instructions in January of 2012. JX 20 at 41. He testified that Williams acted upon the medical advice to take off work if he could not "function safely" after they spoke about how he was feeling in December 2011. *Id.* at 43. In January 2012, concerned over Williams' reports to him about how he had had been feeling, Dr. Bernick also advised Williams that he should see a psychiatrist to get a more definitive diagnosis. *Id.* at 50.

In its closing brief, Respondent attempts to distinguish this case from the situation presented in *Bala*, ARB No. 12-048. First, Respondent argues that since Williams submitted Dr. Bernick's FMLA leave approval paperwork retrospectively to excuse his December 2011 absences, Williams' could not possibly have been following existing medical orders when he was off work. RPHB 18-19; see also *Bala*, ARB No. 12-048, at 14 n. 9 (articulating the limits on following a doctor's orders). Essentially, this is an argument that Williams' following Dr. Bernick's medical advice was not done in good faith. As noted above, however, Dr. Bernick instructed Williams *on multiple occasions prior to the specific absences in December* that if Williams could not perform his duties safely then he should not work. S*ee, e.g.*, *id.* at 15-16, 17, 29, 30, 36, 41, 43. In light of the consistency of Dr. Bernick's advice to Williams regarding the circumstances surrounding *when* he should take Xanax and *how* he should evaluate his ability to work when under the influence of that medication, as well as Dr. Bernick's familiarity with Williams' work environment both from caring for Williams and from having worked as a physician for Respondent, I find that Dr. Bernick's "advice" constituted a "medical treatment plan," and that Williams' compliance with those instructions was done in "good faith." See *Santiago,* ARB No. 10-147; Tr. 69. As Dr. Bernick himself explained: "You can give a lot of advice about this, that and the other thing that may or may not reach significance, but the treatment plan should be based on something that is of medical significance." Tr. 69. Clearly, the nature of the symptoms suffered by Williams when he was experiencing an anxiety episode or migraine headaches, as well as the potential side effects caused by his prescribed medication,

[11] When asked if an employee such as Williams should go to work if he is taking Xanax and suffers side effects that could affect his or her safety, Dr. Bernick said, "I would have given the advice if you can't function safely then you shouldn't be at work." Id. at 17. With regard to taking medication such as Xanax, he stated: "If in his or her determination they do not feel safe at work, they should not be at work." Id. at 18. Dr. Bernick considered complainant to be honest and took him at his word with regard to his symptoms. Id. at 18-19.

were medically significant, and those symptoms and side effects were the basis for Dr. Bernick's treatment plan.[12]

Respondent further argues that Dr. Bernick's recommendation that Williams see a psychiatrist was part of his "treatment plan," and, as such, Williams' failure to receive ongoing psychological treatment constitutes a lack of good faith, which should void any finding of otherwise statutorily-protected activity. Respondent's argument, however, is wrong both as a matter of fact and of law. First, Williams had seen a psychologist in 2007 at or around the time Dr. Bernick made his referral. RX 3 and RX 4. Second, Williams provided a reasonable explanation as to his reluctance to speak with anyone about his personal problems. Tr. 115. Dr. Bernick testified that "there are many factors as to why people see or do not see psychiatrists, probably if we all saw them, then it would be generally acceptable." JX 20 at 51. Such reluctance is not uncommon. While Complainant's failure to continue following up with psychiatric treatment may have been ill-advised from a mental health perspective, it does not, under the facts of this case, constitute a lack of "good faith."

Finally, I find that the evidence as a whole supports Williams' claim that he followed Dr. Bernick's treatment plan in good faith. Dr. Bernick not only testified that he found Complainant honest and reliable with regard to his reporting of symptoms but testified that Complainant was neither a "seeker of drugs nor an abuser of drugs." JX 20 at 27. He clearly considered Williams to be "up-front" with him, JX 20 at 58, and Dr. Bernick had no qualms about certifying Williams' December absences retrospectively because he "trusted in Mr. Williams to do what he had to do. If he didn't feel he was safe, he should not be functioning in the workplace." JX 20 at 36. In other words, Dr. Bernick believed that Williams was responding to the medical advice he was given in good faith.

During the hearing, Respondent's attorney directed much of her cross-examination to Williams' inability to recall exactly what he did on each of his December sick days, *see* Tr. 171-82; Williams testified repeatedly, however, that he took Xanax on the days he called in sick in December 2011 and that he did not feel he could work safely. *See tr.* 121, 171, 173, 177-82. Williams also testified that he did not "suffer any illnesses other than the illnesses that [he] was being treated for by Dr. Bernick." Tr. 223. Williams fully understood Dr. Bernick's instructions: "[j]ust about every time I come in his office – or when I'm in his office and we're discussing my condition." *Ibid.* Williams followed his doctor's instructions when he was absent from work during the month of December. *Id.* at 115, 121.

I find Williams' testimony that he was sick on the days he was absent from work in December to be credible. He quite candidly acknowledged that he could not remember much of what he did on the particular days that he was absent, but clearly remembered that he was taking Xanax and experiencing anxiety attacks and episodes of depression on the days he called in sick. One could hardly expect Williams to recall his exact activities during a handful of sick days over

[12] Respondent's attempted distinctions between "advice" and "treatment plan" are also, in any case, not only strained and arbitrary, but meaningless. When Dr. Bernick was asked whether Williams' failure to see a psychiatrist in January 2012 as he urged would have changed his recommendation as to whether Williams should work or not work when experiencing symptoms of migraine headaches, depression or anxiety, Dr. Bernick specifically responded: "no." JX 20 at 49.

two years ago. At the same time, it is reasonable to believe that someone would remember calling off sick during a certain period of time because they felt they were incapable of working safely because of their symptoms and use of prescribed medication. The credibility of Williams' claim that he was truly sick when he took off in December is further supported by Tassin's determination to not charge Williams with a false claim of sickness or missing a call when he was on-call. *Id*. at 24, 67. Tassin specifically testified that the record did not show that Williams engaged in any activities raising a suspicion that he was *not* sick on the days he was absent. *Id.* at 46 (emphasis added).

Accordingly, I find that when Williams marked off sick on several days in December 2011, he was acting in good faith and following the orders or treatment plan of his treating physician. Respondent's arguments notwithstanding, I find that Dr. Bernick's "advice" to Williams constitutes "medical orders or a treatment plan" within the meaning of the FRSA. I thus find that Williams was engaged in protected activity when he followed that advice and was absent from work during December 2011.

B. WILLIAMS' PROTECTED ACTIVITY WAS A CONTRIBUTING FACTOR TO RESPONDENT'S ADVERSE ACTION.

1. Applicable Law Regarding Contributing Factor

Complainant bears the burden of proving by a preponderance of the evidence that his protected activity was a contributing factor in the adverse action he suffered. *DeFrancesco,* ARB No. 10-114, at 8. All that Complainant must prove is that his protected activity was "any factor, which alone or in connection with other factors, tend[ed] to affect in any way the outcome of the [Respondent's] decision" to terminate him. *DeFrancesco,* ARB No. 10-114, at 6 (quoting language from *Sievers v. Alaska Airlines, Inc.*, 2004-AIR-00028, at 26 (ALJ May 23, 2005)). "[A]ny weight given to the protected [activity], either alone or in combination with other factors, can satisfy the 'contributing factor' test." *Smith v., LLC, et al.,* ARB No. 11-003 (ARB June 20, 2012) (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). Complainant may establish that his protected activity was a contributing factor either directly or indirectly through circumstantial evidence. *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, at 6 (ARB Jan 31, 2011). Circumstantial evidence may include, *inter alia*, temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, or the falsity of an employer's explanation for taking adverse action. *Sievers*, at 26. Neither motive nor animus is a requisite element of causation as long as the protected activity contributed in any way – even as a necessary link in a chain of events leading to adverse activity. *Hutton*, ARB No. 11-091, at 7.

2. Williams' protected activity contributed to Grand Trunk's decision to terminate him.

The statute does not prevent employers from disciplining employees for excessive absences, nor does the statute prevent employers for disciplining employees for absences *not*

associated with a treatment plan or for falsely claiming to be sick. *See* Bala, ARB No. 12-048, at 14-15 (stating that nothing in the FRSA interferes with a railroad company's ability to discipline employees for absenteeism associate with unprotected absences). But this is not such a case.

"The ARB has repeatedly ruled that under certain circumstances a 'chain of events' may substantiate a finding of a contributory factor." *Hutton*, ARB No. 11-091, at 6-7. If Williams had not been following Dr. Bernick's orders and been absent in December 2011, he would not have been targeted for his absences during that month. *Id.* at 9; *Tr*. 195. As Complainant points out, "Williams is not claiming adverse personnel action under the statute for [Respondent's] initiating the disciplinary process, but is claiming adverse action for his termination." Complainant's Reply Post Hearing Brief ("CRPHB") at 9.

Williams marked off "sick" after experiencing flare-ups of anxiety and depression and concluding that he could not work safely after taking medication pursuant to medical orders and a course of treatment prescribed by Dr. Bernick. Tr. 171-173.[13] But for Williams' absences on December 12, 13, 18, 21, 27, and 28, Tr. 121; JX 19, Grand Trunk would not have held and investigatory hearing and terminated him.

It is immaterial that Williams had FMLA leave days available or that several, but not all, days were covered by subsequently approved FMLA leave. The FRSA is clear that an employee cannot be disciplined for following the orders or treatment plan of a treating doctor. Williams took off work because he was ordered to do so whenever he could not work safely.

Respondent argues that Grand Trunk lacked concurrent knowledge that Williams' absences constituted a protected activity. CRPHB at 22. Respondent cites Williams' own testimony to confirm that he did not tell anyone at Grand Trunk prior to his investigatory hearing about his lifelong illness. CRPHB at 22, Tr. 156-7, JX 20 at 22, 83. Respondent further argues that the January 6, 2012 note and Williams' FMLA paperwork notification Grand Trunk received regarding Williams' condition, was nonspecific, failed to indicate that Williams was unable to work, did not constitute a treatment plan or medical order, and did not support the actual dates of Williams' absences, requiring Grand Trunk to make an unreasonable inference that all absences taken in December were FMLA leave. CRPHB at 22-23. Respondent also argues that FMLA leave does not qualify as following a treatment plan or order. *Ibid*.

Respondent is correct that "[c]omplainants must generally go beyond establishing that the employer, as an entity, was aware of the protected activity, and must instead show that the *decision-maker* who carried out the alleged adverse action was aware of the protected activity. *Bala v. Port Authority Trans-Hudson Corporation*, OALJ no. 2010-FRS-26, slip op. at 12 (Feb. 10, 2012) *aff'd* ARB No. 12-048 (ARB Sept. 27, 2013) (emphasis added). Tassin testified that he was aware at the time of the investigatory hearing that Williams was following the advice of

[13] Neither the testimony at the hearing nor the documentary evidence make clear exactly what dates Williams called in to mark off as sick. It is unclear, for example, whether Williams actually called in sick on both December 12 and 13. *Tr.* 176; JX 19. Williams may have called in sick on both days, but it appears that he called on December 12 at 6:29 pm, and his sick day may have then carried over into December 13. JX 19. Similarly, he may have called in sick on both December 27th and 28th, but it appears he called in sick only on December 27 at 2:13 pm, and his sick day may have carried over into December 28. *Tr.* 182-83; JX 19.

Dr. Bernick. Tassin knew that Dr. Bernick had prescribed medication other than over-the-counter medication for his condition. Tr. 48. As early as August 2011 "updated FMLA forms were completed by Dr. Bernick which told Respondent directly that Williams could not work when suffering symptoms related to his anxiety." CRPHB at 4 (citing JX 20 at 31 and JX 9). Complainant highlights that "[t]he August 2011 FMLA paperwork was created to be valid through January 2012, covering the time period in question when GTW disciplined Williams for making off sick." CRPHB at 4.

As determined above, Williams was following Dr. Bernick's orders and treatment plan on the days he was absent from work during December. Furthermore, it is undisputed that Grand Trunk was aware of the reason for Williams' absences at the time Respondent terminated Williams' employment.

Although Tassin claims he was not aware of Williams' medical condition in December 2011, he clearly learned the details of Williams' condition and Dr. Bernick's advice during the investigatory hearing. "The regulation does not require that an employee make his or her employer aware of all the details of the medical treatment or compliance with the plan." *Bala*, 2010-FRS-26 (ALJ Feb. 10, 2012), slip op. at 12. And while the December 2011 FMLA approval was not obtained until January 6, 2012, Grand Trunk was generally aware of Williams' medical condition and specifically aware at the time termination occurred that Dr. Bernick had confirmed his ongoing course of treatment for his patient.

Respondent incorrectly relies on § 20109 (c) of the FRSA for the proposition that an employer must know of a treatment plan or physician's order in advance of the days taken off by an employee. RPHB at 23-24. Specifically, Respondent argues that the provision "clearly prohibits employees from seeking protection pursuant to the FRSA based upon a medical excuse obtained after-the-fact …." RPHB at 24. Section 20109 (c), however, simply allows an employer to refuse "to permit an employee to return to work following medical treatment … if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness of duty." The provision is intended as a defense for employers who do not permit an employee to return to work when he or she cannot meet certain medical standards. As noted above, the ARB has determined that prior knowledge by the employer is not a requisite for relief under the FRSA. *See* Hutton, ARB No. 11-091, at 7 (stating that knowledge was not a requisite element for protection under the FRSA). As also discussed above, although Grand Trunk may not have been aware of all the details surrounding Williams' December 2011 absences at the time, Respondent was well aware of his life-long medical conditions and Dr. Bernick's medical treatment plan at the time it terminated his employment. *See* Bala, 2010-FRS-26, at 12 (stating that an employee need not disclose the complete details of his medical treatment plan or advice); *see also* Tr. 48 (Tassin testifying to his knowledge of Williams condition and Dr. Bernick's medical advice).

B. WHETHER GRAND TRUNK WOULD HAVE FIRED WILLIAMS HAD HE NOT ENGAGED IN PROTECTED ACTIVITY.

Respondent argues that even if the December 2011 FMLA leave days are treated as excused absences, Complainant was absent a total of nine work days in December (RPHB at 24-25), two of which (December 28 and 29) were considered unexcused by Grand Trunk. According to Respondent, Williams was thus available only seven of nine days, an 82% availability rate in December, and places William below Grand Trunk's prescribed attendance level. *Ibid.* Respondent claims the statute "requires the employee to notify the employer of the need for accommodation or leave and provide required documentation," RPHB at 24-26, and concludes, "[t]he FRSA does not give railroad employees free reign to determine their own schedule and take off work at their pleasure based on their own representation that they are following a doctor's orders or treatment plan." RPHB at 26.

The record establishes that Grand Trunk initiated an investigative hearing based on Williams' alleged violation of the USOR provision governing "excessive" or "pattern" absenteeism. *Id.* at 79. Specifically, Tassin determined that Williams' December absences violated Grand Trunk's absenteeism rule. *Id.* at 52.

As noted above, I "must look at all the direct and circumstantial evidence, as a whole, to determine whether the Respondent clearly and convincingly proved that the outcome would have been the same without [the protected activity]." *Santiago*, ARB. No. 10-147, at 19. Although the record indicates that Complainant had been disciplined once for excessive absences during the three years preceding his termination (a "missed call" which Tassin admitted was not considered when deciding how to discipline Williams for the December absences), and Grand Trunk had previously disciplined Complainant for various other infractions in 2010 and 2011, Respondent has offered no evidence, let alone clear and convincing evidence, suggesting that Grand Trunk was preparing to discipline Complainant prior to deciding to fire him for absences which I have determined to be protected under the FRSA. Accordingly, Respondent has not established through clear and convincing evidence that it would have terminated Complainant had he not followed the medical treatment orders of Dr. Bernick

C. DAMAGES

A successful complainant is entitled to be made whole under the FRSA. 49 U.S.C. § 20109(e)(1). If an employee prevails in a claim under the FRSA, remedies available include "all relief necessary to make the employee whole," including reinstatement with the same seniority status the employee would have had if the discrimination had not occurred, back pay with interest, and compensatory damages including litigation costs, expert witness fees, reasonable attorney fees, and compensation for any "special damages sustained as a result of the discrimination." 49 U.S.C. § 20109(e). Though not explicitly stated in the FRSA, the ARB has found that damages for emotional distress are available under language identical to § 20109(3)(2)(c). *See Ferguson v. New Prime, Inc.*, ARB No. 10-075, ALJ No. 2009-STA-0047, at 7-8 (ARB Aug. 21, 2011)(interpreting 49 U.S.C. § 341105(b)(3)(A)(iii); *see also Mercier v. Union Pac. R.R. Co.*, ARB Nos. 09-101, -121, ALJ Nos. 2008-FRS-3, 3, at 8 (ARB Sept. 29,

2011)(complainant may seek damages for mental hardship under the Act). Punitive damages may also be granted in an amount not to exceed $250,000. 49 U.S.C. § 20109(e)(3).

Complainant seeks: (1) back wages with interest from January 24, 2012, until August 16, 2012, an amount of $43,290.84;[14] (2) compensatory damages of $13,047.50, an amount of $10,000 to compensate for the "pain, suffering and emotional toll taken upon [Williams] as result [sic] of being terminated from a job he had held since 1994," CPHB at 19, and $3,047.50 for a medical bill incurred following his termination when he was without medical insurance; (3) $150,000.00 in punitive damages; and (5) attorney costs and fees. *Id.* at 19-20.

Seniority Status

To make Complainant whole, he is entitled to have his disciplinary record expunged of any reference to the charges outlined in the December 29, 2011 investigation notice, including all references to his suspension and termination. While Complainant has already been reinstated into his position at Grand Trunk under the August 2012 letter of leniency, Tr. 217, such letter was based on Grand Trunk's erroneous conclusion that his absences in December 2011 were unauthorized and he was not following the orders of his treating physician, and the letter and any reference to it must also be expunged from Williams' personnel records. Given the FRSA requirement that reinstatement must be with the same seniority status that a complainant would have had but for the discrimination, if Williams is not currently at the same seniority status he occupied as of December 2011, Grand Trunk must immediately elevate Williams to that status.

Back-Pay

Complainant is also entitled to back pay with interest under the FRSA. 49 U.S.C. § 20109(e)(2)(B). Complainant testified that he was not paid between January 2012 and August 2012. He submitted his 2011 W-2 Form which shows earnings of $77,456.22 in 2011. Tr. 142; JX 3 at 66.

Respondent argues that the figure does not account for nine weeks during the period of unemployment that "Williams was unable to work." RPHB at 27 (citing Tr. 207-208). Complainant submits that the figure provided – Williams' 2011 earnings – takes into account FMLA and other absences.

While a complainant has a duty to mitigate damages, respondents bear the burden of proving comparable jobs were available and the employee failed to make reasonable efforts to find substantially equivalent or otherwise suitable employment. *Bailey v. Consolidated Rail Corporation*, ARB Nos. 13-030, -13, ALJ no. 2012-FRS-012, at 33, n. 24 (ARB Apr. 22, 2013) (citing *Douglas v. Skywest Airlines, Inc.*, ARB Nos. 08-070, -074, ALJ No. 2006-AIR-14, at 20 (ARB Sept. 30, 2009)).

While Respondent asserted that it "can prove that Williams did not mitigate damages by establishing comparable jobs were available and that he failed to make reasonable efforts to find

[14] Complainant calculated the amount of back wages by dividing William's total wages in 2011 ($77,456.22) by 365 days and multiplied it by the number of total days Williams was off of work in 2012 (204). CPHB at 19.

substantially equivalent and otherwise suitable employment," Respondent has failed to offer any evidence to support its claim. RPHB at 26.

Williams testified that he was "actively trying to get [his] job back." Tr. 216. During his period of unemployment, Williams remained in constant contact with union representatives who worked actively to secure Williams' reinstatement. *Ibid*. He testified that he did not seek other employment because he wanted to be ready to return to work at Grand Trunk at a moment's notice. *Id*. at 205. Williams received a letter of leniency in August 2012, and he returned to work shortly thereafter. *Id*. at 217.

I find Respondent has failed to carry its burden to show that comparable jobs were available and Complainant failed to make reasonable efforts to secure employment. *See Douglas,* ARB Nos. 08-070, -074, at 20 (Respondent bears burden of showing available comparable jobs). In contrast, Williams reasonably explained that following, his dismissal he actively worked with his labor union representatives to secure reinstatement to his position with Grand Trunk. *See* tr. 206.

Respondent also argues that Williams should not be paid for the first several weeks of 2012, RPHB at 29, and cites *Hatton v. Ford Motor Co.*, 508 F. Supp. 620 (E.D. Mich. 1981) for the proposition that a complainant cannot recover for any period in which he was medically unable to work. However, *Hatton* provides that "[e]xactitude in computing back pay is not required and uncertainty in determining what the claimant would have earned but for the unlawful employment practice should be resolved against the discriminating employer." *Hatton* at 639 (citing *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 at 260-261 (5th Cir. 1974)). While Williams testified that he was unable to work because of his condition for about two months, Tr. 207-208, Dr. Bernick testified that Williams' inability to work was due to depression caused by his being fired. Tr. 137; CX 9. Respondent clearly cannot profit from its wrongful termination by a reduction in any back pay award.

I find the wages earned by Complainant in 2011, the last full year he worked prior to being fired, is the most reasonable basis for calculating the amount of back pay to which Williams is entitled. According to Phillip Tassin, engineers like Williams employed by Grand Trunk work five days and rest two days, and work between ten and twelve hours a day, often exceeding ten hours a day. Tr. 35. Williams W-2 for 2011 reflects total earnings of $77,456.22 that year. He was not paid from January 24, 2012 through August 16, 2012, and based on an average daily pay of $202.21, thus lost a total of $41,655.26 for the 206 days he was off during that period.

The ARB has noted that, in light of the remedial nature of whistleblower statutes and the "make whole" goal of back pay, prejudgment interest on back pay should ordinarily be compounded quarterly using the rate charged on the underpayment of Federal income taxes, which consists of the Federal short-term rate determined under 26 U.S.C. §6621(b)(3) plus three percentage points. *Doyle v. Hydro Nuclear Services,* ARB Nos. 99-041, 99-042 and 00-012, ALJ No. 1989-ERA- 22 (ARB May 17, 2000), slip op. at 18. Williams is thus entitled to prejudgment interested, compounded quarterly, on the $41,655.26 due him in back wages.

Compensatory Damages

A complainant must prove compensatory damages by a preponderance of the evidence. *Ferguson*, ARB No. 10-075, at 7. An award is "warranted only when a sufficient causal connection exists between the statutory violation and the alleged injury." *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938 (5th Cir. 1996). 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, -88, ALJ No. 2005-STA-40 (ARB Nov. 30, 2007). Complainant "must show by a preponderance of the evidence that the *unfavorable personnel action* caused the harm." *Luder v. Cont'l Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-9 (ARB Jan. 31, 2012) (emphasis added) (internal quotation marks and citations omitted).

The current amount due for treatment for Williams' son is based on Complainant's testimony alone; nonetheless I find that $3,047.50 is appropriate because, but for the discriminatory action, Williams would not have been fired and would have retained his health insurance. Tr. 140, CX 3. "[A]ny uncertainty in the exact dollar amount of fringe benefits must be resolved in favor of [Complainant] and against [] the discriminating party." *Tipton v. Ind. Mich. Power Co.*, ARB No. 04-147, ALJ No. 2002-ERA-30, at 9 (ARB Sept. 29, 2006), (citing *McCafferty v. Centerior Energy*, 96-ERA-6, slip op. at 7 (ARB Sept 24, 1997)); *see also Jackson v. Butler & Co.*, ARB Nos. 03-115,-144, ALJ No. 2003-STA-26, at 9 (ARB Aug. 31, 2004) (granting the actual and direct expenses resulting from the loss of Complainant's health plan).

"In seeking an award for compensatory damages, a complainant need not present medical or psychological evidence to prevail." *Calhoun v. United Parcel* Service, 2002-STA-31, HTML at 39, (ALJ June 2, 2004) (citing *Busche v. Burkee*, 649 F.2d 509, 519 n. 2 (7th Cir. 1981)). The ARB has affirmed reasonable compensatory damages awards for emotional distress based solely on an employee's testimony. *See, e.g., Jackson v. Butler & Co*., ARB Nos. 03-116, 03-144, ALJ No. 2003-STA-026, slip op. at 9 (ARB Aug. 31, 2004); *Roberts v. Marshall Durbin Co*., ARB Nos. 03-071, 03-095, ALJ No. 2002-STA-035, slip op. at 17 (ARB Aug. 6, 2004).

Complainant seeks $10,000 to compensate him for "the pain, suffering, and emotional toll taken upon him as result [sic] of being terminated from the job he had held since 1994." CPHB at 19. Williams testified that he thought the dismissal made things worse in terms of his condition. Tr. 143. He similarly testified that his current anxiety and depression symptoms are caused by a combination of his preexisting anxiety and depression and the stress caused by the loss of his job. *Id.* at 212-13. Dr. Bernick concluded that Williams could not work on January 25, 2012, because he was too depressed about being terminated. Tr. 137; CX 9.

In this case, Complainant has presented both his own credible testimony and medical evidence from Dr. Bernick, his treating physician, that he became too depressed to work after he was fired by Grand Trunk. However, the evidence of record also shows that Complainant has suffered from anxiety and depression throughout his life, and the emotional distress suffered by Williams after his termination thus constitutes only an exacerbation of his pre-existing condition. Awards for emotional distress in whistleblower cases have typically ranged from $4,000 to $10,000. *See Bailey v. Consolidated Rail Corp*., ALJ No. 2012-FRS-00012 (ALJ Dec. 31, 2012), slip op. 34 n. 25 (providing survey of decisions awarding compensatory damages in

whistleblower cases). Based on the foregoing, I find an award of $5,000 for emotional distress under the circumstances of this case is reasonable.

Punitive Damages

Complainant seeks punitive damages as permitted by the FRSA. Punitive damages are intended 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 respondent'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). 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, at 8-9. The ARB 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, at 8.

Complainant suggests that punitive damages are appropriate in this case because Phillip Tassin was "inattentive" to details surrounding Williams' absence and because Respondent "fabricated" a new theory for its actions for the sole purpose of litigation. CPHB at 11. Complainant further argues that Grand Trunk's policy "directly contradicts the purpose of the FRSA," and asserts that: "Employees should not have to choose between their careers and their own safety, as well as the safety of their co-workers and the public at large. Forcing employees to work sick or exposing them to discipline for 'unexcused' absences should be stopped. The only means of doing so is a significant punitive damages award." CPHB at 20.

Respondent argues that "[t]here is no evidence that the policy [regarding absenteeism] was applied to Williams differently than it was to any other employee. There was no evidence of conspiracy to target Williams … ." RPHB at 30. Grand Trunk notes that Tassin did not know Williams, and the termination was consistent with Williams' prior disciplinary history. *Ibid, see also* Tr. 20. Respondent further argues that Williams did not follow Grand Trunk's proper procedures with regard to obtaining FMLA approval and marking off, and he was disciplined accordingly. According to Grand Trunk, there was "nothing 'reprehensible' or 'culpable' in attempting in good faith to punish or deter conduct by railroad employees that violates legitimate work rules." RPHB at 30. Respondent contends that Grand Trunk has always been supportive of Williams' need for medical leave as long as he followed the proper procedures for requesting it. *Ibid*, (referencing *Bailey*, ALJ Case No. 2012-FRS-12 (arguing that the facts in the present case are less egregious than the facts in *Bailey*, in which the ALJ did not order any punitive damages)).

Although I have found Respondent's actions in this case were sufficient to establish a violation of the FRSA, under the circumstances presented here, I do not find the harm to Complainant so severe, or Respondent's actions so reprehensible or culpable, as to warrant punitive damages.

Finally, I find that Complainant's counsel is entitled to recovery of reasonable attorney fees and costs for his work before the Office of Administrative Law Judges. Any petition seeking such an award must be filed within 20 days of receipt of this Decision and Order. Respondent has 20 days from its receipt of the fee petition to file a response.

V. ORDER

For the foregoing reasons, I find that Complainant has established that Respondent retaliated against him in violation of the Federal Rail Safety Act under 49 U.S.C. § 20109(c)(2). Therefore, it is hereby ORDERED:

1. Respondent shall expunge Complainant's personnel file of any references related to the charges and disciplinary action arising out of Williams' absences during December 2011;

2. Respondent shall reinstate Complainant to his former position with the same seniority status that he would have had if he had not been wrongfully discharged for excessive absenteeism during December 2011;

3. Respondent shall pay Complainant back wages in the amount of $41,655.26 plus interest. 49 U.S.C. § 20109(e)(2)(B). Prejudgment interest is to be paid for the period beginning January 24, 2012, until the date of this Decision and Order. Post judgment interest is to be paid thereafter, until payment of back pay is made;

4. Respondent shall also pay compensatory damages to Complainant of $3,047.50 for medical bills relating to treatment of Williams' son following Complainant's termination and loss of medical insurance, and $5,000 for Complainant's pain and suffering as a result of being fired; and

5. Respondent shall pay Complainant's reasonable attorney's fees and costs. Complainant shall file a fee application within **20 days** of the date on which this order is issued. Should 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, Respondent's objections shall be filed not later than **20 days** following service of 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 Complainant's attorney prior to the filing of the objections.**

SO ORDERED.

Digitally signed by STEPHEN PURCELL
DN: CN=STEPHEN PURCELL, OU=ADMINISTRATIVE LAW JUDGE, O=Office of Administrative Law Judges, L=Washington, S=DC, C=US
Location: Washington DC

STEPHEN L. PURCELL
Chief 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 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).