In the Matter of:

ANTHONY SANTIAGO, **ARB CASE NO. 2013-0062**

COMPLAINANT, **ALJ CASE NO. 2009-FRS-011**

v. **DATE: June 12, 2015**

METRO-NORTH COMMUTER RAILROAD COMPANY, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
Charles C. Goetsch, Esq.; ***Cahill, Goetsch & Perry PC;*** **New Haven, Connecticut**

***For the Respondent*:**
Beck S. Fineman, Esq.; ***Ryan, Ryan, Deluca, LLP;*** **Stamford, Connecticut**

Before: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; Luis A. Corchado,** ***Administrative Appeals Judge*****; and Joanne Royce,** ***Administrative Appeals Judge***

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).[1] Anthony Santiago claimed that his employer, Metro-North

[1] 49 U.S.C.A. § 20109 (Thomson/West 2012), as amended by Section 1521 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Act), Pub. L. No. 110-53, and as implemented by federal regulations at 29 C.F.R. Part 1982 and 29 C.F.R.

Commuter Railroad Company, Inc. (Metro-North), violated the FRSA when it reclassified his back injury as non-occupational and ceased paying for medical treatment. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed his complaint after a hearing. Santiago appealed to the Administrative Review Board (ARB or Board), which reversed, in part, and remanded this case for further proceedings.

On remand, the ALJ found that Metro-North's reclassification interfered with Santiago's medical treatment under 49 U.S.C.A. § 20109(c)(1), and concluded that Metro-North did not prove its affirmative defense that the reclassification would have been the same "without the railroad carrier's interference."[2] The ALJ awarded compensatory and punitive damages and Metro-North appealed.[3] We incorporate our previous decision and summarily affirm the ALJ's decision on remand, except as to one evidentiary issue discussed below.

We review the ALJ's factual findings to determine whether they are supported by substantial evidence.[4] The ARB generally reviews the ALJ's conclusions of law under the de novo standard.[5]

DISCUSSION

The ARB previously remanded this matter because the ALJ erroneously limited FRSA's protection under 49 U.S.C.A. § 20109(c)(1) to medical treatment *immediately* following a work injury rather than all medical treatment connected to a work injury. The ARB remanded this matter for the ALJ to determine whether Metro-North violated 49 U.S.C.A. § 20109(c)(1) with respect to any medical treatment connected to his work injury. That section provides that a railroad carrier "may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment." The ALJ found that Metro-North delayed and interfered with Santiago's medical treatment, rejected Metro-North's affirmative defense, and awarded

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Part 18, Subpart A. The Secretary delegated to the Board his jurisdiction over these appeals. Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

[2] *Santiago v. Metro-North Commuter R.R. Co.*, ARB No. 10-147, ALJ No. 2009-FRS-011 (ARB July 25, 2012).

[3] *Santiago v. Metro-North Commuter R.R. Co.*, ALJ No. 2009-FRS-011 (July 16, 2013)(D. & O).

[4] 29 C.F.R. § 1982.110 (2014).

compensatory and punitive damages. Except as to the single evidentiary issue discussed below, we summarily affirm and rely on the ALJ's excellently explained decision as substantial evidence supports her findings of fact and her legal conclusions are in accordance with the law.

Understandably, the ALJ found "perplexing" our condensed discussion of evidentiary issues that potentially could arise under the affirmative defense. We stated that the ALJ did not *need to* decide one way or the other whether the treatment was medically necessary. Also, hypothetically we guessed Metro-North "might" argue that "any reasonable doctor" might have found that Santiago's injury had clearly resolved or that the requested Manipulation Under Anesthesia (MUA) treatment was medically unreasonable.[6] Our unexplained comments misled the ALJ into thinking that we predetermined as irrelevant any medical evidence related to the issue of medical reasonableness. Consequently, the ALJ denied Metro-North's request to offer medical expert testimony on the question of medical reasonableness, and Metro-North argues this was error.[7] In a different vein, Metro-North misunderstood us to pronounce that the testimony of "any reasonable doctor" only meant that testimony from "another reasonable doctor" would constitute clear and convincing evidence of what would have occurred without Metro-North's interference.[8] We find that these misunderstandings led to an erroneous evidentiary ruling.

In our remand, the most critical point we made about Metro-North's affirmative defense was that the ALJ must look at all the direct and circumstantial evidence, as a whole, to determine whether Metro-North met its burden to prove its affirmative defense. More specifically, Metro-North was required to prove by clear and convincing evidence that the result would have been the same without Metro-North's interference with Santiago's medical treatment. We have described "clear and convincing" evidence as evidence that suggests a fact is "highly probable" and "immediately tilts" the evidentiary scales in one direction.[9]

To determine what might have occurred, the ultimate question is whether Metro-North's evidence is so strong that it was highly probable that a reasonable doctor acting

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6 *Santiago*, ARB No. 10-147, slip op. at 18.

7 *Id*. at 17-25.

8 *Brief of the Respondent Metro-North Commuter Railroad Co.* at 21-22.

9 *See Speegle v. Stone & Webster Constr., Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (Apr. 25, 2014) (citing *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)).

independently, without Metro-North's involvement, would have determined that the MUA was medically unreasonable. The ultimate question is not whether the MUA was medically reasonable treatment; it is only a factor that could be considered. This is what we meant when we said the ALJ did not necessarily need to get bogged down in *specifically* deciding, like an insurance carrier or insurance review board, whether the treatment should have been provided and paid for.

Independent medical opinions about "reasonably necessary" treatment could provide circumstantial evidence of what would have occurred without Metro-North's involvement. Such testimony could bolster Dr. Hildebrand's decision and, depending on the evidence, possibly demonstrate why the same outcome was highly probable without Metro-North's involvement. We did not intend to predetermine that additional medical testimony as to medical reasonableness was per se irrelevant.[10] We only meant to emphasize that it was only a factor to consider in analyzing what the outcome might have been. It seems the ALJ excluded Metro-North's additional medical testimony because she understood our remand order to say it was per se irrelevant; that ruling was an abuse of discretion and therefore erroneous. But, as we explain below, it was harmless error in this case.

Metro-North's offer of proof demonstrates that its proffered evidence would show only that the issue of medical reasonableness was debatable. Showing that "any" reasonable doctor out of a pool of doctors would have led to the same conclusion (the treatment was medically unreasonable) could have weighed heavily in Metro-North's favor. But Metro-North offered to show only that another doctor agreed with Metro-North and disagreed with Dr. Thomas Drag. What "another doctor" might testify is not the same as showing that "any doctor" would agree with Dr. Lynne Hildebrand. This does not mean that every reasonable doctor has to testify, but certainly stronger evidence is needed in this case beyond competing medical opinions.

In this case, the ALJ ruled that Dr. Hildebrand's opinion "flies in the face" of the medical evidence in the record and substantial evidence supports her findings. Plus, the medical treatment actually worked. Metro-North's proffered testimony, if believed, may have generated a debatable point as to medical reasonableness, but we are not persuaded that it had the potential of satisfying Metro-North's "clear and convincing" burden of proof. "Debatable" falls below the "clear and convincing" burden of proof.

Lastly, we respond briefly to Metro-North's disagreement with the ARB's interpretation and application of section 20109(c). Metro-North argues that, under the

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[10] "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 29 C.F.R. § 18.401.

ARB's view of the statute, a railroad would be required to pay for all treatment recommended by any health care provider for any procedure, thus creating potentially limitless liability for the railroad.[11] This exaggerates and misstates the Board's ruling and ignores the ALJ's finding based on the specific facts in this case that Metro-North interfered with Santiago's medical treatment. If Metro-North's Occupational Health Services department (OHS) was truly acting independently of Metro-North, then Metro-North could have denied paying for the MUA upon OHS's decision. But the ALJ carefully explained why she found that OHS's opinion was not entirely independent and that Metro-North influenced to some degree the medical decisions. For example, among several findings, the ALJ determined that Metro-North's power to end the contract with OHS and hire and fire medical personnel at will created a powerful influence over the medical facility.[12] If Metro-North had sent injured employees to a health care service that operated completely independently of Metro-North's influence, then Metro-North would have had a basis to argue that it did not interfere with medical treatment.

Metro-North misses the significance of the phrase "contributing factor" in FRSA,[13] a point evident by its reliance on *IBP, Inc. v. Herman*.[14] In that case, the question was whether IBP's ability to cancel a contract with a sanitation company established sufficient "control" over the sanitation company to penalize IBP for that other company's safety violations.[15] Here, the question is whether the ALJ's reliance on many factors permitted the ALJ to determine that Metro-North's influence over OHS was a contributing factor in OHS decision to determine that Santiago's work injury had resolved.

Again, the record supports this finding, especially where OHS's physician's assistant rejected the recommendation of Santiago's treating doctor without even consulting either of Santiago's treating physicians as required by OHS policy.[16] As we have previously explained in our remand order, Congress has made it clear that it wants railroad companies to completely stop interfering with the railroad worker's ability to seek proper medical treatment for work injuries.

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11 *Response Brief* at 28-29.

12 D. & O. at 3, 10.

13 49 U.S.C.A. § 20109(d)(1)(incorporating the "contributing factor" standard from 49 U.S.C.A. § 42121(b)).

14 144 F.3d 861 (D.C. Cir. 1998).

15 *Id. at* 864.

16 D. & O. at 5.

CONCLUSION

The ALJ's Decision and Order on Remand concluding that Santiago is entitled to relief under the FRSA and awarding damages is **AFFIRMED.**

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge