In the Matter of:

LAWRENCE J. RUDOLPH,

COMPLAINANT,

v.

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

RESPONDENT.

ARB CASE NO. 14-053
14-056

ALJ CASE NO. 2009-FRS-015

DATE: April 5, 2016

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

***For the Complainant*:**
James C. Zalewski, Esq.; ***DeMars, Gordon, Olson, Zalewski, Wynner & Tollefsen;*** **Lincoln, Nebraska**

***For the Respondent*:**
Chad P. Richter, Esq.; ***Jackson Lewis LLP;*** **Omaha, Nebraska**

Before: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; E. Cooper Brown,** ***Administrative Appeals Judge*****; and Luis A. Corchado,** ***Administrative Appeals Judge*****. Judge Corchado, concurring.**

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provisions of the Federal Rail Safety Act of 1982 (FRSA).[1] Lawrence J. Rudolph complained that his employer, National Railroad Passenger Corporation (Amtrak), violated the FRSA when, among other claims, it medically disqualified him from working as a conductor. A Department of Labor (DOL) Administrative Law Judge (ALJ) concluded that Amtrak had violated the FRSA on one of Rudolph's whistleblower retaliation claims and awarded Rudolph $5,000.00 in punitive damages. The ALJ concluded that reinstatement and the award of back pay were inappropriate. Rudolph appealed to the Administrative Review Board (ARB), which affirmed in part, reversed in part, and remanded for further proceedings.

On remand, the ALJ reviewed the entire record to determine whether Rudolph had proved that any of his protected activities was a contributing factor to any of Amtrak's adverse actions. The ALJ again found for Rudolph, awarded back pay and $25,000.00 in compensatory damages, but did not increase the $5,000.00 punitive damages. The ALJ ordered reinstatement and awarded $94,312.00 in back pay plus $80,900.00 annually for 2011, 2012, and 2013 until reinstatement, minus the amount of disability benefits Rudolph received.

Rudolph appealed the ALJ's findings under 49 U.S.C.A. § 20109(a), challenged his punitive and compensatory damages awards, and claimed error in calculating his back pay and attorney's fees. Amtrak cross-appealed on the grounds that the ALJ failed to issue a briefing order on remand, improperly shifted Rudolph's burden of proof on contributory causation, applied the wrong burden of proof under 49 U.S.C.A. § 20109(c)(2), and contradicted his initial legal conclusions and factual findings. We have consolidated the appeals for disposition and will address the parties' arguments in turn.

BACKGROUND

The ARB fully detailed the facts in this case in its remand decision.[2] To reiterate in summary, Rudolph, an assistant conductor with Amtrak since 1999, took time off for work-related stress several times during the period leading up to the events relevant to this case. In early 2008, following several altercations with a supervisor over alleged violations of company policy, he took sick leave after his treating physician diagnosed him with increased anxiety due to the workplace incidents.

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[1] 49 U.S.C.A. § 20109 (Thomson/West 2007), 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 (2015) and 29 C.F.R. Part 18, Subpart A (2015).

[2] *Rudolph v. Nat'l RR Passenger Corp.*, ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 2-9 (ARB Mar. 29, 2013).

Prior to his return to work on June 6, 2008, Rudolph applied for reasonable accommodations under the Americans with Disabilities Act (ADA),[3] which Amtrak later denied on the grounds that the medical information from his treating physician, Dr. Michael J. Sedlacek, was inadequate and that the requested accommodations were incompatible with his duties as a conductor.[4]

At 1:00 p.m. on July 19, 2008, Rudolph reported for duty aboard the California *Zephyr* passenger train running between Omaha and Chicago. Later, conductor Mary Cannon and the train engineer advised the Amtrak crew dispatcher that Rudolph would not have enough hours of service to reach Chicago and would need a relief. Shortly after midnight on July 20, Rudolph informed his supervisor, Jack Krueger, that he would exceed his 12-hours-of-service limit at Naperville, about an hour out of Chicago. At 12:57 a.m. Krueger advised Rudolph that no relief conductor was available.

Consequently, Rudolph continued as the train's conductor into Chicago and faxed a train-delay report to Krueger and Amtrak, noting that his shift ended at 1:48 a.m. and that he was "forced to violate FRA Hour [sic] of Service Law."[5] However, at 1:03 a.m. Krueger had e-mailed his supervisor, assistant superintendent Gary Israelson, that Rudolph's hours-of-service report showed that he had worked from 1:00 p.m. on July 19 to 1:00 a.m. on July 20, 2008.

Mid-morning on July 20, Rudolph advised Krueger that he was going to take sick leave due to the stress associated with the hours-of-service violation. Rudolph went to a hospital where a doctor diagnosed Rudolph with acute anxiety and found him unable to return to work until evaluated by a primary care physician. While waiting to dead-head back to Omaha, Rudolph met Israelson who told him it would not look good if Rudolph reported an on-duty injury every time he felt stressed.[6]

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[3] 42 U.S.C.A. § 12101, *et seq*. (Thomson West 2005).

[4] On July 22, 2008, Dr. Michael J. Sedlacek sent a letter to the Amtrak ADA panel indicating that Rudolph had received medical treatment for his mental condition since April 2006, that his diagnosed anxiety became "quite severe" at times and might "interfere with his ability to handle excessive, unexpected stress," and that Rudolph had requested accommodations because of his condition. Complainant's Exhibit (CX) 5, 10. *See* CX 11, Respondent's Exhibit (RX) 86, 89.

[5] This report was submitted on a Personal Time Ticket (PTT), on which the employee records his hours of service (beginning and ending times). CX 43, RX 43.

[6] CX 24 at 6.

Rudolph subsequently filed a report with Krueger, in which he detailed the events of July 19 and 20, claimed that the anxiety/distress that he experienced as a result of the July 19-20 incident exacerbated an existing medical condition, and asserted that Amtrak caused him to violate his hours-of-service limitation the morning of July 20 by forcing him to choose between insubordination and violation of the hours-of-service rule.[7]

In preparing his monthly hours-of-service report on August 1, Krueger asked Israelson whether to record the July 19-20 incident as an hours-of-service violation. Israelson indicated that if Rudolph was claiming he violated his hours of service, Amtrak needed to charge him because, Israelson asserted, no one had ordered Rudolph to do so. On August 7, Krueger telephoned Rudolph and told him that he had been instructed to charge him with violating his hours of service if Rudolph performed services after the train left Naperville at 1:00 a.m. on July 20. Krueger then advised Israelson that Rudolph insisted that his hours were accurately reported, and Israelson told Krueger to prepare disciplinary charges against Rudolph, who received a Notice of Investigation the next day.[8]

After applying for sick benefits, Rudolph saw Dr. Sedlacek on August 11, 2008. On August 13 he completed a disability statement, indicating that Rudolph was totally temporarily disabled from July 20 to September 2 2008, due to severe anxiety. The doctor stated that Rudolph was "very overwhelmed, anxious, fearful" with "low stress tolerance" exacerbated by the recent conflict at work over violation of the hours-of-service rule. Dr. Sedlacek opined that Rudolph's mental limitation would interfere with his work because he was currently "too anxious and overwhelmed to focus and concentrate sufficiently." On August 25, Dr. Sedlacek revised his statement to indicate that Rudolph had stabilized as of August 21 and no longer had any mental limitation that would interfere with his returning to work; Rudolph was capable of performing his job with the previously listed restrictions.[9]

Notwithstanding Dr. Sedlacek's medical release Amtrak refused to permit Rudolph to return. Rudolph called Amtrak's health services unit three times between

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[7] CX 24, 26.

[8] Amtrak did not investigate the charge further due to Rudolph's continued sick leave and eventual disability. The charge stated that on July 20 Rudolph "allegedly failed to receive proper authority to violate the federal hours-of-service law." RX 2. The FRA determined on October 2, 2008, that Amtrak "did allow or require an employee to violate" section 21103 and recommended civil penalties for Amtrak's non-compliance. RX 17.

[9] Subsequently, Dr. Sedlacek clarified his August 25 release to indicate that as of August 21 Rudolph was released to full-time duties "restricted to train operations that do not violate FRA regulations or compromise safety." CX 7-10.

August 29 and September 18 about Dr. Sedlacek's recommendation. Amtrak's legal counsel advised the health services and Dr. Timothy Pinsky, Amtrak's medical director, that if Rudolph wanted to return to work without restrictions, he would need a psychiatric return-to-work evaluation. If Rudolph wanted to return to work with restrictions, he would be medically disqualified because the disability panel had decided that Rudolph's initial requests for accommodations were not compatible with his job duties.

On September 18, Dr. Sedlacek told Dr. Pinsky that Rudolph was cleared to return to his regular duties without restrictions except for activities that would violate federal regulations.[10] Based on this information, Dr. Pinsky consulted Amtrak legal counsel, who again advised that a return-to-work psychiatric evaluation was necessary. Counsel cited Rudolph's supervisors' concerns, including his "marking off" on July 20 and Israelson's discomfort about returning Rudolph to work without a medical assessment. Counsel also advised Dr. Pinsky not to respond any further to Rudolph's inquiries.

On October 2, 2008, Amtrak advised Rudolph that he must undergo a return-to-work psychiatric evaluation. Several days later, Dr. Pinsky received a letter from Rudolph that he had sent prior to October 2, in which Rudolph inquired why Amtrak was preventing him from returning to work and noted that his sick benefits had stopped as of August 29. Rudolph asked for a statement of why Amtrak refused to return him to work, but Dr. Pinsky, on the advice of Amtrak's counsel, did not respond.

On October 27, 2008, Dr. Dennis R. Wilson, chairman of the psychiatry department at Creighton University, submitted his return-to-work psychiatric assessment of Rudolph to Dr. Pinsky, noting that he had no reservations about communicating his findings to relevant parties including Rudolph.[11] Dr. Wilson diagnosed generalized anxiety disorder and panic disorder. He explained that Rudolph suffered from work-place stress but that his symptoms were fairly well controlled. However, he was "caught between a wish to resume work [and] a fear of what such a return would entail."

Dr. Wilson indicated that Rudolph would have "quite sensitized reactions to any perceived threat, retaliation, or hostility at work" and indicated that administrative clarification and correction of his concerns regarding work was "an essential step toward his fuller recovery and return to work." Dr. Wilson concluded that Rudolph's "condition is under satisfactory control but for unresolved fears engendered by the work place. Until these issues are resolved, he is not able to perform his duties on a full-time basis without restriction or limitation."[12]

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[10] CX 9.

[11] CX 10, 12; RX 80.

[12] CX 10, 12; RX 10, 12, 80.

Asked by Dr. Pinsky to clarify his opinion, Dr. Wilson responded that Rudolph was not capable of functioning in the workplace even if his perceived hostilities and job demand issues were resolved. Accordingly, Dr. Pinsky concluded that Rudolph was medically unfit for duty and directed Amtrak's health services unit to notify Rudolph.

On November 5, 2008, the health services unit sent Rudolph a notice that Dr. Pinsky had medically disqualified him as a conductor and offered four options: Rudolph could (1) submit medical documentation establishing that his condition had improved sufficiently so he could perform his duties safely; (2) apply for permanent disability; (3) seek ADA accommodations; or (4) seek an alternative position with Amtrak.[13]

On November 20, Rudolph consulted Dr. Sedlacek who advised Dr. Pinsky that he found "no contra-indications" preventing Rudolph from returning to work as an assistant conductor. Dr. Sedlacek opined that if Rudolph was "allowed to work within the confines of his assigned hours, he would be able to do his job without difficulty." Dr. Sedlacek requested a copy of Dr. Wilson's psychiatric evaluation and recommendations, but, based on advice from Amtrak's legal department, Dr. Pinsky declined to provide Dr. Wilson's evaluation to either Dr. Sedlacek or Rudolph.[14]

Absent any further response from Amtrak regarding his request to return to work, Rudolph filed a complaint with DOL's Occupational Safety and Health Administration (OSHA) on January 12, 2009, alleging that his disqualification as an assistant conductor and his termination from employment with Amtrak constituted retaliation in violation of the FRSA. While his complaint was pending before OSHA, Dr. Sedlacek advised Amtrak in April that, contrary to his November 20 assessment, Rudolph was no longer able to return to work due to the elapsed time and fear of retaliation for his whistleblower activities. The doctor added that a return to work was unrealistic.[15]

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[13] CX 36. Rudolph objected to Amtrak's notice, arguing that Dr. Sedlacek had submitted the requested additional medical documentation showing that he could perform his duties. He also requested certification that the workplace issues about which he complained had been resolved. CX 40.

[14] CX 39. In mid-November, Rudolph began receiving sick benefits after missing work for 79 days from mid-August to mid-November because Amtrak's health unit and Dr. Pinsky had failed to provide documentation regarding his employment status, despite repeated requests. CX 54.

[15] By September 2009, Dr. Sedlacek opined that Rudolph was capable of returning to work, although the doctor felt that a return was not in Rudolph's best interests due to possible exacerbation of his condition. In December 2009, Dr. Sedlacek again opined that Rudolph

OSHA dismissed Rudolph's complaint against Amtrak on July 27, 2009. Following an evidentiary hearing on April 6-7, 2010, the ALJ concluded on March 14, 2011, that Amtrak had violated the FRSA in part, but denied Rudolph's request for reinstatement and the award of back pay, while awarding $5,000.00 in punitive damages. Rudolph timely appealed the ALJ's decision to the ARB, which reversed and remanded. We will first address Rudolph's arguments challenging the ALJ's remand decision.[16]

JURISDICTION AND STANDARD OF REVIEW

The Secretary has delegated authority and assigned responsibility to the ARB to act for the Secretary of Labor in review of an appeal of an ALJ's decision pursuant to the RSA.[17] We review the ALJ's factual findings to determine whether they are supported by substantial evidence.[18] The ARB reviews the ALJ's conclusions of law de novo.[19]

DISCUSSION

The FRSA prohibits a railroad carrier engaged in interstate commerce or its officers or employees from discharging, demoting, suspending, reprimanding, or in any other way retaliating against an employee because the employee engages in any of the protected activities identified under 49 U.S.C.A. § 20109(a), including *inter alia*:

> (1) to provide information, directly cause information to be provided, or otherwise directly assist in any investigation regarding any conduct which the employee reasonably believes constitutes a violation of any Federal law, rule, or regulation relating to railroad safety or

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was willing and able to return to work. In January 2010, Rudolph again asked Amtrak that he be permitted to come back to work. CX 68.

[16] *Rudolph v. Nat'l RR Passenger Corp*., ALJ No. 2009-FRS-015 (ALJ Apr. 24, 2014).

[17] Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 24.110(a)(2015).

[18] 29 C.F.R. § 1982.110.

[19] *Kruse v. Norfolk S. Ry. Co.*, ARB No. 12-081, ALJ No. 2011-FRS- 022, slip op. at 3 (ARB Jan. 28, 2014).

> security, or gross fraud, waste, or abuse of Federal grants or other public funds intended to be used for railroad safety or security, if the information or assistance is provided to or an investigation stemming from the provided information is conducted by—
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> (A) a Federal, State, or local regulatory or law enforcement agency (including an office of the Inspector General under the Inspector General Act of 1978; . . . .
>
> (C) a person with supervisory authority over the employee or such other person who has the authority to investigate, discover, or terminate the misconduct; . . . .
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> (4) to notify, or attempt to notify, the railroad carrier or the Secretary of Transportation of a work-related personal injury or work-related illness of an employee;
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> (5) to cooperate with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; . . . .
>
> (7) to accurately report hours on duty pursuant to chapter 211.

49 U.S.C.A. § 20109(a).

Section 20109 incorporates the procedures enacted by the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), which contains whistleblower protections for employees in the aviation industry.[20] To prevail, an FRSA complainant must establish by a preponderance of the evidence that: (1) he engaged in a protected activity, as statutorily defined; (2) he suffered an unfavorable personnel action; (3) and the protected activity was a contributing factor in the unfavorable personnel action.[21] If a complainant meets his burden of proof, the employer may avoid liability only if it proves by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity.[22]

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[20] 49 U.S.C.A. § 42121(b), see 49 U.S.C.A. § 20109(d)(2)(A).

[21] 49 U.S.C.A. § 42121(b)(2)(B)(iii); *Luder v. Continental Airlines, Inc.*, ARB No. 10-026, ALJ No. 2008-AIR-009, slip op. at 6-7 (ARB Jan. 31, 2012); *see Brune v. Horizon Air Industr., Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-008, slip op. at 13 (ARB Jan. 31, 2006) (defining preponderance of the evidence as superior evidentiary weight).

[22] 49 U.S.C.A. §§ 20109(d)(2)(A)(i), 42121(b)(2)(B)(iii)(iv). *Menefee v. Tandem Transp. Corp.*, ARB No. 09-046, ALJ No. 2008-STA-055, slip op. at 6 (ARB Apr. 30, 2010) (citing *Brune*, ARB No. 04-037, slip op. at 13).

Substantial evidence supports a finding of contributory causation

In its remand order, the ARB instructed the ALJ to reconsider whether Rudolph has met his initial burden of proving that any of his protected activities under section 20109(a) was a contributing factor in any or all of the adverse personnel actions that the ALJ found that Amtrak took against him.[23]

The ALJ found that subsection (a)(1)(reporting violation of hours of service) and subsection (a)(7)(reporting accurate hours of service), which occurred on July 20, contributed to Krueger's warning to Rudolph on August 7 that Krueger had been told to prepare charges against Rudolph if he had reported hours of service beyond 1:00 a.m. on July 20. The ALJ also found that subsections (a)(1) and (a)(7)(reporting accurate hours of service) contributed to the August 7 disciplinary charge that Israelson imposed.

However, the ALJ reasoned that subsection (a)(4)(reporting the work-related injury) did not contribute to the disciplinary charge because the e-mail exchanges between Krueger and Israelson on August 7 addressed only the hours-of-service violation on July 20 and not the work injury report. The ALJ also found that subsections (a)(1), (a)(4), (a)(5), and (a)(7) did not contribute to the loss of sick benefits, psychiatric referral, medical disqualification, and return-to-work refusals. The ALJ stated that, while temporal proximity provided some circumstantial evidence that these protected activities were contributing factors, "the actual sequence of events . . . significantly diminishes the probative force of such circumstantial evidence."[24]

On appeal, Rudolph argues that the ALJ should have found that all of his protected activities contributed to Amtrak's adverse actions because they were inherently intertwined in causing the chain of events that resulted in Amtrak refusing his repeated requests to return to work. Rudolph notes that Israelson "influenced" medical director Dr. Pinsky's decision to order a psychiatric evaluation, which was used to disqualify him from working, because Dr. Pinsky's medical notes state: "My discussion with Gary Israelson on 9/2/08 when he was uncomfortable allowing Mr. Rudolph back without an appropriate medical assessment, a return-to-work psychiatric exam is now appropriate."[25]

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[23] *Rudolph v. Nat'l RR Passenger Corp*., ARB No. 11-037, ALJ No. 2009-FRS-015, slip op. at 28 (ARB Mar. 29, 2013).

[24] *Rudolph*, ALJ No. 2009-FRS-015, slip op. at 27-30.

[25] Complainant's Brief at 2-5. Rudolph also argues that Amtrak unlawfully prohibited him from returning to work by refusing to disclose medical information to which he was entitled under the Health Insurance Portability and Accountability Act of 1996, 29 U.S.C.A. § 1181 et seq. *Id*. at 5. The ARB has no jurisdiction under the HIPPA.

The ARB has repeatedly ruled that under certain circumstances, a "chain of events" or events that are "inextricably intertwined" may substantiate a finding of causation.[26] In *Hutton v. Union Pac. RR Co*., the ARB reiterated this principle that "under certain circumstances, a chain of events may substantiate a finding of contributing factor."[27] Further, in *DeFrancesco v. Union RR Co*., the ARB used the chain-of-events premise to find causation as a matter of law and remanded for the ALJ to consider the employer's affirmative defense. The facts in those cases provided a clear picture of one protected activity—the reporting—leading to another—the investigation—resulting in the adverse action.

In this case, Rudolph's multiple protected activities were "inextricably intertwined" in a chain of events that began with his notification of a violation of his hours of service and his accurate reporting of that violation and resulted in Amtrak's adverse actions starting with Krueger's warning of a possible violation of hours-of-service charge, continuing through the disciplinary charge, and ultimately ending with Amtrak's November 5 notice of medical disqualification. In other words, if Rudolph had not accurately reported his violation of the hours-of-service limit on July 20, Krueger would have had no reason to question Israelson, who would then have had no reason to order an investigation.

While we do not necessarily endorse the ALJ's piecemeal parsing of protected activities leading to adverse actions to determine contributory causation in this case, the complainant's burden to establish contributory causation under the FRSA requires only one violation of section 20109(a). To prevail, Rudolph need only have proven, for instance, that his accurate reporting of his hours of service contributed to Krueger's telephone warning and Israelson's disciplinary charge. Thus, we need not consider whether the ALJ erred in finding that Rudolph's reporting of a work injury on July 20 did not contribute to the warning and disciplinary charge.[28]

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[26] *Maddin v. Tramsam Trucking, Inc*., ARB No. 13-031, ALJ No. 2010-STA-020, slip op. at 10 (ARB Nov. 24, 2014) (citing *Smith v. Duke Energy Carolinas, LLC,* ARB No. 11-003, ALJ No. 2009-ERA-007 (ARB June 20, 2012) (holding that a complainant's disclosures were "inextricably intertwined" with the investigations that resulted in his discharge because the content of those disclosures gave the company the reasons for the adverse action it took, thus establishing a contributing factor under the Energy Reorganization Act)).

[27] ARB No. 11-091, ALJ No. 2010-FRS-020, slip op. at 6-7 (ARB May 31, 2012). *See also Petersen v. Union Pac. RR Co*., ARB No. 13-090, ALJ No. 2011-FRS-017 (ARB Nov. 20, 2014).

[28] D. & O. on Remand at 26-27.

Substantial evidence supports the ALJ's conclusion that Rudolph met his burden to prove that his reporting of a violation of the hours-of-service limit and accurately reporting his hours of service on July 20 contributed to Kreuger's telephone warning and Israelson's disciplinary charge. The ALJ relied on the e-mail exchanges between Krueger and Israelson on August 4, which included a copy of Rudolph's time sheet for July 19-20 in which he claimed he was forced to violate the hours-of-service limit.[29]

The ALJ also concluded that Amtrak failed to establish that absent these protected activities it would have initiated the disciplinary charge. The ALJ reasoned that absent Rudolph's accurate log entry of 48 minutes of service beyond the 12-hour limit and his assertion that he had been forced to violate the limit, Krueger would have had no reason to question Israelson about the entry and he would then have had no reason to order an investigation and initiate a disciplinary charge alleging an hours-of-service violation.[30] Consequently, Amtrak cannot establish that absent Rudolph's hours-of-service protected activities, Israelson would have brought a disciplinary charge. Accordingly, we affirm the ALJ's determination that Amtrak violated the FRSA.

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[29] Amtrak argues that in applying the cat's-paw theory of liability to determine contributory causation, the ALJ improperly shifted Rudolph's burden of proof to Amtrak because there is no evidence in the record that Dr. Pinsky acted as a conduit for another person's discriminatory motives. Respondent's Brief at 16-17. In its remand order, the ARB stated that Rudolph would meet his burden to prove contributory causation under the FRSA if the circumstantial evidence of record, including the knowledge of those advising the ultimate decision-makers regardless of their motivation, established that his protected activities (any or all) contributed to the adverse personnel actions Amtrak took against him. D. & O. on Remand at 17-18. The ARB added that ". . . in each instance [of adverse action] one or more company officials who were aware of Rudolph's protected activity advised the decision-maker *or were otherwise involved in the decision-making process*." *Id*. at 18 (emphasis added).

The record shows that on September 9, 2008, Dr. Pinsky, who was aware of Rudolph's protected activities on July 20, talked with Israelson who indicated that he was uncomfortable allowing Rudolph to return to work without "an appropriate medical assessment." Dr. Pinsky was also aware of advice from Amtrak legal counsel (Karen Rabin) that if Rudolph requested a return to work, he would need a psychiatric examination and if he had physical restrictions he would be medically disqualified because the ADA panel had already determined that his requested restrictions were not compatible with his job. RX 61. In sum, each of the decision-makers had some knowledge of one or more of Rudolph's protected activities.

[30] D. & O. on Remand at 27. *See BNSF Ry. Co. v. U.S. Dept. of Labor,* __ F.3d __, 2016 WL 861101 14-9602, slip. op at 18-19 (10th Cir. Mar. 7, 2016)(supervisors' interactions with complainant "directly undermine" BNSF's argument that it would have fired complainant absent his filing a report of injury).

Reinstatement and damages

As with other whistleblower statutes, the FRSA's remedial purpose is to make the successful complainant whole. The goal is to compensate the wronged whistleblower for losses caused by the employer's unlawful conduct and restore him to the terms, conditions, and privileges of his former position that existed prior to the employer's adverse action. Section 20109(e)(2)(3) provides:

> (e) Remedies.—(1) In general.--An employee prevailing in any action under subsection (d) shall be entitled to all relief necessary to make the employee whole.
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> (2) Damages.—Relief in an action under subsection (d) (including an action described in subsection (d)(3)) shall include—
> (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;[31]
> (B) any back pay, with interest; and
> (C) compensatory damages, including compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.
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> (3) Possible relief.—Relief in any action under subsection (d) may include punitive damages in an amount not to exceed $250,000.[32]

Back pay

In determining an award of back pay, the ALJ picked August 29, 2008, as the starting date because Rudolph called Amtrak on that day about returning to work, based

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[31] The ALJ conditioned reinstatement on a medical determination that Rudolph meets the FRA physical and mental standards for fitness of duty. He ordered Amtrak to provide an independent psychiatric evaluation within 60 days and to relay the fitness standards it used to a mental health provider of Rudolph's choice for an evaluation. D. & O. on Remand at 34-35. Since neither party appealed this determination, we need not address the issue. *See Port Auth. Trans-Hudson Corp. v. Sec'y, U.S. Dep't of Labor*, 776 F.3d 157, 162 n.7 (3d Cir. 2015) (refusal to permit an employee to return to work if he does not meet applicable medical standards is permissible only until the employee meets those standards, at which point he is entitled to return to work).

[32] 49 U.S.C.A. § 20109(e)(2)(3).

on Dr. Sedlacek's August 25, 2008 recommendation. The ALJ then separated back pay into four time frames:

(1) August 29, 2008, to September 30, 2009: a total of $73,000 earnings minus $9,600 sick benefits, minus $3,307.97 disability benefits, minus $7,000 working part-time for a total offset of $29,831. Back pay for this period is $43,169, which is not disputed.
(2) October 1 to December 31, 2009: following a raise, earnings were $21,900, minus $9,912 disability benefits, and a quarter of potential part-time earning capacity or $1,750, leaving $10,238 for these three months. Rudolph disputes this figure. Correct total is $11,988. *See* discussion below.
(3) 2010: yearly wages were $87,600 minus $39,695 disability and a $7,000 deduction, which Rudolph challenges. The correct award is $47,905.
(4) January 2011 to reinstatement: yearly back pay award is $87,600 minus non-permanent disability benefits Rudolph received each year and the annual $7,000.00.

The ALJ concluded that Rudolph was entitled to $94,312, plus the appropriate yearly amounts for 2011, 2012, and 2013 until reinstatement or removal from employment as unfit, minus the annual disability benefits he received and the $7,000 annual part-time earning.[33]

Rudolph appeals only the ALJ's deduction of the $7,000 offset during the years that he was receiving disability benefits. Rudolph argues that the ALJ erred in finding that he voluntarily stopped working part-time after May 2009 and thus failed to mitigate his damages. He notes that he had to stop working when he began receiving disability benefits on May 1, 2009, because he could not benefit from both sources of income.[34]

While a non-working employee has the duty to mitigate his damages by seeking suitable employment,[35] it is well established that the employer has the burden of establishing that the back-pay award should be reduced because the employee did not exercise diligence in seeking and obtaining other employment.[36] Further, an employee

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[33] *Rudolph*, ALJ No. 2009-FRS-015, slip op. at 37-38 ns. 27-32.

[34] Complainant's Brief at 21-22.

[35] *Abdur-Rahman v. DeKalb Cty*, ARB Nos. 12-064, -067; ALJ Nos. 2006-WPC-002, slip op. at 2 (ARB Oct. 9, 2014).

[36] *Johnson v. Roadway Express, Inc.*, ARB No. 99-111, ALJ No. 1999-STA-005, slip op. at 14 (ARB Mar. 29, 2000).

cannot legally "double dip" by earning wages while receiving disability retirement or benefits.[37]

Here, Rudolph properly stopped working on May 1, 2009, when he began receiving disability benefits. He had no other earnings from that point on. Also, the record contains no evidence that Amtrak even attempted to establish that comparable jobs were available and that Rudolph did not seek them. Accordingly, the ALJ clearly erred in deducting from the back pay award $1,750 prior to December 31, 2009; $7,000 in 2010; and an annual $7,000 in 2011 and thereafter. Recalculating, the back pay award until 2011 is $103,062. After that, the annual calculations until reinstatement shall not include any $7,000 offset.

Compensatory damages

The ALJ found that Rudolph presented "credible testimony" at the hearing that he suffered emotional distress, anxiety, sleep disruption, and loss of appetite due to Amtrak's adverse actions. He also testified that those actions contributed to his divorce in November 2009.[38] However, the ALJ found insufficient probative evidence demonstrating that the duration and severity of Rudolph's mental anguish warranted claimed compensatory damages of $325,000 to $500,000. He awarded $25,000 instead.[39]

Rudolph argues that the record contains evidence of "intentional infliction of emotional distress." He contends that various Amtrak statements demonstrate that Amtrak "did all it could to break" him financially and emotionally. He also cites three ARB cases awarding compensatory damages of $4,000, $20,000, and $75,000, and requests a minimum of $250,000, or a monetary assessment for each FRSA violation.[40]

Any award of compensatory damages must be supported by substantial evidence. Rudolph's testimony at the hearing, especially his statements about his divorce, amply supports the ALJ's award for the mental distress and turmoil that Rudolph experienced because of Amtrak's adverse actions—the warning threat, disciplinary charge, loss of income, temporary loss of sickness benefits, and a psychiatric evaluation reference—

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37 *Berkman v. U.S. Coast Guard Acad.*, ARB No. 98-056, ALJ No. 1997-CAA-002, slip op. at 28 (ARB Feb. 29, 2000).

38 Hearing transcript at 146-48.

39 *Rudolph*, ALJ No. 2009-FRS-015, slip op. at 38-39.

40 Complainant's Brief at 18-21.

which caused his financial and personal life to be "turned upside down." Nothing in the record supports Rudolph's assertion that he is entitled to more than $25,000.

Punitive damages

While Rudolph sought the maximum $250,000 award under the FRSA based on "Amtrak's culture of retaliation and collusion among its various departments," the ALJ concluded that the $5,000.00 punitive damage award in his initial decision "remains effective." He reasoned that Israelson's action in bringing a disciplinary charge against Rudolph was based on the dispute between Kruegar and Rudolph over whether he was "forced" to violate his hours of service or whether he had not received permission to work extra hours. The ALJ found that this action did not rise to the level of wanton disregard for FRSA protection. Similarly, the ALJ found that Dr. Pinsky's actions did not constitute wanton disregard because he was attempting to assess the conflicting medical opinions to determine whether Rudolph could continue or return to work. His reliance on Dr. Wilson's opinion over Dr. Sedlacek's was not reckless disregard of FRSA.[41]

On appeal, Rudolph argues that he is entitled to the maximum $250,000 "in order to punish Respondent for its blatant disregard of the law." He notes that amount was awarded only for Krueger's threat of discipline which was found to be a protected activity in the initial decision. Since then, the ALJ found five additional adverse actions, all of which warrant additional punitive damages because, otherwise, there would be no consequences for violating the FRSA.[42]

Substantial evidence supports the ALJ's award of $5,000.00 as punishment for Krueger's threat to Rudolph that he faced discipline if he continued to insist he was forced to work over his hours-of-service limit. In his initial decision, the ALJ found that the warning was made "in deliberate and reckless disregard of Rudolph's right under the FRSA."[43] Substantial evidence also supports the ALJ's reasoning that the disciplinary charge and Dr. Pinsky's subsequent actions in referring Rudolph for a psychiatric evaluation and relying on Dr. Wilson's report did not constitute reckless indifference or callous disregard of the FRSA's protection provisions.[44] The six "aggravating factors"

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41 *Rudolph*, ALJ No. 2009-FRS-015, slip op. at 39-40.

42 Complainant's Brief at 6-7.

43 *Rudolph*, ALJ No. 2009-FRS-015, slip op. at 94-95.

44 *See Bailey v. Consolidated Rail. Corp.,* ARB Nos. 13-030,-033; ALJ No. 2012-FRS-012, slip op. at 2-3 (ARB Apr. 22, 2013)(evidence of record fails to support award of punitive damages for alleged severe harm or reprehensible conduct).

Rudolph described in his brief are merely allegations which the record evidence fails to prove. Rudolph presented no persuasive evidence for increasing the award and the damages are within the amount allowable by law. Thus, there is no reason to disturb the ALJ's award of punitive damages.[45]

Amtrak failed to prevail under section 20109(c)(2).

Amtrak argues that the ALJ improperly interpreted Amtrak's defense under section 20109(c)(2)[46] as a "special affirmative defense" and applied the wrong burden of proof because subsection (d)(2) specifically provides that any action brought under subsection (d)(1) shall be governed by AIR 21's burdens of proof, which permit the employer to prove by clear and convincing evidence that it would have taken the same adverse action absent the complainant's protected activity. Amtrak states that nothing in subsection (c)(2) indicates that its fitness-for-duty exception is a special or affirmative defense.[47]

In its remand order, the ARB ruled that section 20109(c)(2) did not afford an employer defenses to a charge of unlawful discipline beyond those the section expressly identifies. Thus, the employer must establish by clear and convincing evidence that its refusal to permit Rudolph's return to work was based on FRA medical standards for fitness for duty or, absent those, on the employer's fitness-for-duty standards. The ARB

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[45] *Griebel v. Union Pac. RR Co.*, ARB No. 13-038, ALJ No. 2011-FRS-011, slip op. at 3 (ARB Mar. 18, 2014).

[46] Section 20109(c)(2) provides:

> 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.

[47] Respondent's Brief at 19-20.

ordered the ALJ to consider whether Amtrak's refusal to allow Rudolph to return to work constituted discipline in violation of section 20109(c)(2) and whether Amtrak could prove by clear and convincing evidence that it would have refused Rudolph's request to return to work even if he had not engaged in protected activity.[48]

On remand, the ALJ did not address whether Amtrak's denial of Rudolph's return-to-work request constituted discipline under subsection (c)(2). Instead, the ALJ found that Rudolph engaged in protected activity when he requested a return to work and that his request was a contributing factor in Dr. Pinsky's actions referring him for a psychiatric examination and medically disqualifying him. The ALJ then found that the exception in subsection (c)(2) was not available to Amtrak because the record contained no evidence of either the FRA or Amtrak's fitness-for-work standards.[49]

In *Ledure v. BNSF Ry. Co.*, which the Board issued after the ALJ's remand decision, we detailed the legislative history of section 20109(c)(2) and held that subsection (c)(2) "carves out an exception" that permits an employer to refuse an employee's return-to-work request if the employee fails to meet FRA medical standards or the employer's standards for fitness for duty. The ARB added that subsection (c)(2) "literally exempts fitness-for-duty situations from coverage" by creating a "safe harbor," defined as "the provision in a law or agreement that will protect from any liability or penalty as long as set conditions have been met."[50] The ARB concluded that the employer bears the burden of proving both elements of the subsection—establishing the relevant fitness-for-duty standards and demonstrating how the employee failed to meet them.[51]

In this case, while the ALJ erred in terming Rudolph's request to return to work a protected activity, the error is harmless[52] because Amtrak failed to offer into evidence

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48 *Rudolph*, ARB No. 11-037, slip op. at 26-28.

49 *Rudolph*, ALJ No. 2009-FRS-015, slip op. at 32-33, n.84.

50 BLACK'S LAW DICTIONARY (9th ed. 2009). An employer's refusal to permit an employee's return to work is permissible only until he or she does not meet the applicable fitness-for-duty standards; once the standards are met, the employee is entitled to return to work. *Port Auth. Trans-Hudson Corp. v. Sec'y, U.S. Dep't of Labor (Bala)*, 776 F.3d 157, 162, n.7 (3d Cir. 2015).

51 *Ledure*, ARB No. 13-044, ALJ No. 2012-FRS-020, slip op. at 6-8 (ARB June 2, 2015).

52 In requesting a return to work, Rudolph was following Dr. Sedlacek's treatment plan that included his opinion that Rudolph had recovered from his generalized anxiety disorder well enough mentally to work as a conductor. But following a physician's treatment plan is

either the FRA or Amtrak's medical standards for fitness for duty. Therefore, the ALJ properly concluded that Amtrak was not entitled to the safe-harbor exemption.

Amtrak's other arguments on appeal

First, Amtrak contends that the ALJ denied it an opportunity to be heard on remand because he failed to issue a briefing order, thus depriving Amtrak of its right to submit additional evidence and argument to supplement the record. Amtrak contends that the ALJ's failure was "highly prejudicial" because Amtrak had no opportunity to present testimony and evidence on its fitness-for-duty standards for conductors or to argue that Rudolph's complaint must be dismissed under the FRSA's election-of-remedies provision.[53]

In a July 1, 2013 teleconference with the parties' attorneys, the ALJ stated that he had not received the case record from the ARB but would then provide a further teleconference to discuss scheduling on remand. Subsequently, the ALJ issued his remand decision on April 24, 2014.

The ALJ regulation governing re-opening of the record states: "When there is a hearing, the record shall be closed at the conclusion of the hearing *unless the administrative law judge directs otherwise*." This section affords the ALJ discretion to reopen the record on remand.[54] For eight months Amtrak never filed a motion to submit additional evidence on its fitness-for-duty standards or to offer argument on the issue of contributory causation. The ALJ obviously found no need to issue a scheduling order. His decision was well within his discretion.

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not one of the enumerated protected activities under § 20109(a) and (b). Subsection (c)(2) also defines specific forms of discipline but does not include a return-to-work request. However, Amtrak's refusal to allow Rudolph to return to work, despite the lack of fitness-for-duty standards, effectively terminated his employment.

[53] Respondent's Brief at 12-15.

[54] 29 C.F.R. § 18.54(c)("Once the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." *Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 1995-CAA-010, slip op. at 6-7 (ARB Jan. 31, 2001).

Equally unavailing is Amtrak's election-of-remedies argument.[55] Amtrak argued that Rudolph alleged claims under the Americans with Disabilities Act, Title VII of the Civil Rights Act, and the Rehabilitation Act,[56] relying on the same facts, protected activities, and adverse actions as in his complaint. Further, Amtrak averred that because Rudolph is seeking protection under the FRSA and three other federal statutes, his complaint must be dismissed in its entirety.[57]

Both the ARB and the federal courts have weighed in on this issue.[58] In *Reed v. Norfolk S. Ry. Co*,[59] the court indicated, for instance, that if the complainant brought a claim under OSHA, which extends whistleblower protection to employees who filed a workplace safety complaint or took other protected action, the election-of-remedies provision would bar a successive FRSA claim. Here, however, Rudolph's complaint was filed initially under the FRSA.

Further, Rudolph did elect his remedies. He filed his FRSA complaint on January 12, 2009, the hearing was held on April 6-7, 2010, he filed his lawsuit on December 22, 2010, seeking recovery under the ADA, Title VII, and the RA, and dismissed that lawsuit on April 29, 2011, after the ALJ issued his March 14, 2011 decision. Again, Amtrak filed no motion before the ALJ or the ARB about this federal complaint. Nor did Amtrak argue the issue before the ALJ or the ARB or the Eighth Circuit, which denied Amtrak's motion for a stay to submit an interlocutory appeal. Amtrak has completely waived any argument before the ARB.

Finally, Amtrak argues that the ALJ made several conclusions of law on remand that directly contradict his legal conclusions and factual determinations in his first decision. Amtrak reasons that the ALJ adopted his credibility determinations from his initial decision, including his finding that none of Rudolph's protected activities was a contributing factor to Dr. Pinsky's medical decisions. Yet on remand, the ALJ

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55 *See* 49 U.S.C.A. § 20109(f)("Election of remedies.—An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.").

56 42 U.S.C.A. § 12101 *et seq.*; 42 U.S.C.A. § 2000e, *et seq.*; and 29 U.S.C.A. § 601, *et seq.*, respectively.

57 Respondent's Brief at 13-15.

58 *Kruse v. Norfolk S. Ry. Co.*, ARB Nos. 12-081, -106; ALJ No. 2011-FRS-022 (ARB Jan. 28, 2014); *Mercier v. Union Pac. R.R. Co.*, ARB Nos. 09-101, -121; ALJ Nos. 2008-FRS-003, -004 (ARB Sept. 29, 2011).

59 740 F.3d 420, 425-26 (7th Cir. 2014).

inexplicably and without supporting evidence reversed his position and found that Rudolph's request to return to work was a contributing factor. Amtrak contends that the ALJ's previous credibility findings are "unassailable" on appeal and support only a decision of no causation.[60]

In effect, Amtrak's arguments ask the ARB to engage in fact-finding and provide legal conclusions more favorable to its view of the record. On remand, the ALJ properly stated that since the ARB did not reverse any of his credibility determinations he would adopt his findings "regarding conflicts in testimony and other inconsistencies." The ALJ noted that although Dr. Pinsky did not testify, his progress notes, summaries, and statements were consistent and probative based on substantial evidence.[61]

Amtrak's argument mixes credibility determinations with findings of fact. The ALJ's initial credibility determinations are not the same as his legal conclusions on remand regarding contributory causation. In accord with the ARB's remand order, the ALJ stated that he would consider the circumstantial evidence of record to determine whether any of Rudolph's protected activities contributed to any of Amtrak's adverse actions. He then proceeded to make those determinations and concluded that Amtrak had violated the FRSA under subsections (a)(1) and (7), and (c)(2). While the ALJ did connect one protected activity with an adverse action and found that certain protected activities did not contribute to certain adverse actions, in the end substantial evidence supports the ALJ's conclusion that Amtrak violated the FRSA.

CONCLUSION

Based on the above analysis, we affirm the ALJ's determination that Amtrak violated the FRSA under sections 20109(a)(1), (a)(7), and (c)(2). We also affirm the ALJ's conclusion that Amtrak failed to establish fitness-for-duty standards under section 20109(c)(2). Finally, we affirm the ALJ's reinstatement order and his damages awards with the modification of his back-pay calculation.

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60 Respondent's Brief at 17-30.

61 *Rudolph,* ALJ No. 2009-FRS-015 at 7.

Rudolph's attorney has 30 days in which to submit a petition for attorney's fees and other litigation expenses for work done before the ARB. He is to serve any such petition on Amtrak, which will have 30 days in which to file objections to the petition.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

Judge Corchado, concurring:

I concur with some of the ALJ's findings of whistleblower violations and award of some damages for those violations. I do not agree that substantial evidence supports the ALJ's finding that protected activity was a contributing factor in Amtrak finding him medically unfit to return to work. The reason that he was not returned to work resulted from a complex maze of events, which included his pre-existing medical issues as well as the fundamentally equivocal and confusing medical findings by Rudolph's own treating physician.

The concept of "inextricably intertwined" seems overextended in this case. I understand how suspending an employee for reporting a work injury late is inextricably connected to the protected report. But I do not agree that the same inseparable fusion exists between an employee's loss of a job for failing to secure a proper "return to work" release months after reporting a work injury and receiving months of medical treatment.

Lastly, in my view, the "chain of events" theory of contributing factor in this case seems to go beyond the bounds of the FRSA whistleblower protections. See supra at 9. I understand the whistleblower statutes to prohibit unlawful decisions and compensate for foreseeable consequences of those unlawful decisions. The statute's use of the words "may not," "discriminate," "shall not," and provision for "punitive" damage awards, among other words, reinforces the idea that the FRSA whistleblower statute prohibits unlawful employment decisions as analyzed under a lower level causation standard.[62] See 49 U.S.C.A. § 20109(a), (b)(1), (c)(1), (e)(2)(3). Therefore, awarding compensation based on a "chain of events" running its own unforeseeable course without the employer's unlawful influence falls beyond the protections of the whistleblower protections. These are complex concepts that warrant more explanation but the age of

[62] *See, e.g., Addis v. Dep't of Labor*, 575 F.3d 688, 691 (7th Cir. 2009)(recognized contributing factor simply as "something less than a substantial or motivating" factor).

this case requires that I summarily note my concurrence and allow this case to move forward.

LUIS A. CORCHADO
Administrative Appeals Judge