In the Matter of:

ROBERT K. BRUCKER,	**ARB CASE NO. 14-071**
COMPLAINANT,	**ALJ CASE NO. 2013-FRS-070**
v	**DATE: July 29, 2016**
BNSF RAILWAY, CO.,	
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Joseph L. Bauer, Jr., Esq.; *Bauer & Baebler, PC*; Saint Louis, Missouri

For the Respondent:
Jacqueline M. Holmes, Esq. and Nikki L. McArthur, Esq.; *Jones Day*; Washington, District of Columbia

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

DECISION AND ORDER OF REMAND

Complainant Robert Brucker, filed a complaint under the Federal Rail Safety Act,[1] claiming that his employer, Respondent BNSF Railway Company, fired him in violation of the FRSA's whistleblower provisions because he reported work-related injuries to his shoulders. A

[1] 49 U.S.C.A. § 20109 (Thomson Reuters Supp. 2015)(FRSA). The FRSA's implementing regulations are found at 29 C.F.R. Part 1982 (2015).

Department of Labor Administrative Law Judge (ALJ) granted BNSF's Motion for Summary Decision.[2] The ALJ also issued an Order Denying Motion for Reconsideration in response to Brucker's request that the ALJ re-open the record to allow him to supplement it with an additional deposition.[3] For the following reasons, we vacate the ALJ's Order Granting Motion for Summary Decision and remand the case for further adjudication consistent with this decision. Given our decision to remand this case for a hearing, the issue whether the ALJ properly denied Brucker's Motion for Reconsideration is now moot.

BACKGROUND[4]

On June 24, 1993, Brucker applied for employment as a machinist with BNSF. On his employment application, he checked the box stating "no" in response to the question, "Other than traffic violations, have you ever been convicted of a crime?" He began working for BNSF shortly after submitting his application.

In a letter dated December 10, 2009, Brucker's attorney informed BNSF that Brucker retained him to represent Brucker in a claim for injuries to both of his shoulders that he had sustained over his career with BNSF and that have required surgery. On January 26, 2010, Brucker filed an Employee Personal Injury/Occupational Illness Report with BNSF.

Brucker testified that after he filed his injury report, his supervisors changed their behavior towards him.[5] He stated that that they intensified their scrutiny of his work (but not other employees' work) on every shift until BNSF terminated his employment.[6]

Disciplinary History

Brucker "received counseling" for unauthorized absenteeism ten times between February 2005 and February 2012.[7] The ALJ noted that the only formal discipline Brucker received in

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2 *Brucker v. BNSF Ry. Co.*, ALJ No. 2013-FRS-070 (May 1, 2014)(Order Granting Motion for Summary Decision (ALJ Ord.)).

3 Order Denying Motion for Reconsideration (June 20, 2014)(O.D.M.R.).

4 Unless otherwise noted, this decision relies on the ALJ's statement of "Undisputed Facts" at pages 2-4 of the ALJ Ord. for this Background section.

5 ALJ Ord. at 7.

6 *Id.*

7 Per BNSF policy, when an employee is absent without leave three times in a calendar year, the employee's immediate supervisor must review BNSF attendance policy with the employee. If an employee is absent without leave for a fourth, fifth, or sixth time in a calendar year, the general

connection with his absenteeism was a record suspension (i.e., one that is recorded, but not actually served) on December 16, 2005, for "being absent without authority and failure to follow instructions between November 30, 2005 and December 15, 2005." ALJ Ord. at 2. Brucker signed his February 2012 counseling notice under protest, and testified at his deposition that he did not believe counseling was warranted (because, in his view, a day of absence without leave is not counted after a year passes); that he asked for but was not permitted to have union representation at the counseling session; and that he was told to sign the counseling notice or be charged with insubordination.

Brucker's most significant discipline was a 30-day suspension and a three-year probationary period on June 29, 2010, after BNSF investigated him for driving a yard truck without wearing a seat belt on May 4, 2010. Brucker testified at his deposition that he was, in fact, wearing a seat belt at the time. The ALJ also noted that Brucker was not permitted during the investigation to introduce a statement from a co-worker who was in the truck with him and said that Brucker was wearing a seat belt, and that the view of the person who said Brucker was not wearing one was obscured.

Brucker also received a 30-day record suspension and three-year review period on August 27, 2011, after a BNSF investigation into a charge that he had reset an "open PCS" on a "three-locomotive consist," which released the brakes and allowed the locomotives to move while they were being serviced, resulting in damage to a fuel stanchion. Brucker denied the charge, and a co-worker testified at the investigation that the co-worker had, in fact, failed to set the brakes on the consist. Nevertheless, BNSF disciplined Brucker.

Termination

In July 2012, BNSF learned that Brucker had been convicted of assault in the third degree—a misdemeanor—in 1985, and was incarcerated for two years. BNSF Claims Manager Joe Fultz testified that in the course of his investigation into Brucker's injury claim, he received a medical record dated July 1997 from North Kansas City Hospital that contained information about a possible third-degree assault conviction and incarceration.[8] After receiving this information, BNSF asked a company called Factual Photo to conduct an investigation, and it provided BNSF with a record documenting the conviction.[9]

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foreman must counsel the employee about the attendance policy. Even more absences can result in formal discipline, although Brucker's absences never got to that point; seven of his counseling sessions were for first, second, or third instances of absenteeism in a calendar year, and three were for fourth, fifth, or sixth instances.

[8] Deposition of Joe Fultz at 36-37. Pages from Fultz's deposition were attached as an Exhibit to Respondent BNSF Railway Company's Response to Complainant's Motion to Reconsider and to Supplement the Record.

[9] *Id.*

On July 19, 2012, BNSF notified Brucker that it was charging him with violating BNSF's Mechanical Safety Rule 28.2.7, for failing to furnish information, and Mechanical Safety Rule 28.6, for dishonesty in stating on his job application in 1993 that he had never been convicted of a crime other than a traffic violation. BNSF held Brucker out of service pending its investigation into the charges, and BNSF managers walked Brucker off BNSF property on July 19, in front of co-workers. He was walked on and off BNSF property before co-workers a second time in August, so that he could retrieve personal items from his lockers. BNSF held the investigation on August 8, 2012. Brucker maintained that he did not intentionally withhold information or make a false statement on his application because he reported his misdemeanor assault conviction to Mr. Underwood, the BNSF assistant superintendent at the time, who told him that BNSF only needed information about felony convictions. The application that Brucker signed stated, "I have answered all questions to the best of my ability. If employed, I realize false information will be grounds for dismissal at any time, regardless when such information is discovered."[10] On August 16, 2012, BNSF fired Brucker for violating the two Mechanical Safety Rules. In determining the discipline to be imposed, BNSF considered Brucker's personnel record.[11]

Proceedings Below

Brucker filed a discrimination complaint with OSHA on January 9, 2013. OSHA dismissed Brucker's complaint, and Brucker timely filed objections to OSHA's findings and requested a hearing before the ALJ. The ALJ issued a Notice of Docketing on August 6, 2013, and ordered the parties to meet and confer about proposed hearing dates and a deadline for the completion of discovery, among other things. The parties filed a joint report with the ALJ on August 30 proposing a hearing date between May 19-30, 2014, and a discovery deadline of February 28, 2014. Joint Report of Conference at 1. In an order issued September 10, 2013, the ALJ approved the parties' proposed schedule, ordering that discovery be completed by February 28, 2014; dispositive motions be filed no later than April 4, 2014; and setting the hearing for May 20, 2014. Notice of Hearing, Scheduling Order, and Pre-Hearing Order at 1. Later in the same document, however, under a section titled "Pre-Hearing Order," the ALJ ordered that "[a]ll parties shall complete discovery no later than 10 days before the hearing[.]" *Id*. at 1. Ten days before the hearing was May 10, 2014, which conflicted with the previous statement that

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[10] The employment application also states, "I also understand that any employment relationship I may have with Santa Fe will be solely on an 'at will' basis and . . . Santa Fe may terminate any employment relationship with me, at any time for any reason or no reason at all." This statement appears inconsistent with the FRSA protections to which Brucker is entitled.

[11] Plaintiff's Ex. 2 (attached to Complainant's Opposition to BNSF's Motion for Summary Decision).

discovery must be completed by February 28, 2014. The May 10th discovery deadline also appeared inconsistent with the April 4th deadline for dispositive motions.

Brucker avers that BNSF's counsel noted the discrepancy in an e-mail to him on January 10, 2014, and that after an exchange of e-mails, the parties agreed to close discovery on May 10, 2014, ten days before the hearing. Complainant's Brief at 24-25; Complainant's Exhibits 6, 7. Brucker notes that, "[n]either party felt the necessity to involve the ALJ in this agreement." *Id*. at 25. BNSF does not deny Brucker's contention that the parties agreed to close discovery on May 10th.

BNSF filed a Motion for Summary Decision with the ALJ on April 2, 2014. Brucker requested and received an unopposed one-week extension to respond, and eventually filed his opposition to BNSF's motion for summary decision on April 25.

The ALJ made three findings in his May 1, 2014 Order Granting Summary Decision: 1) Brucker's initial OSHA complaint was untimely to the extent it sought to hold BNSF liable for actions that occurred more than 180 days before Brucker filed his OSHA complaint; 2) Brucker's injury report was a protected activity, and his termination was an adverse employment action, but the injury report did not contribute to BNSF's decision to fire him; and 3) assuming the injury report did contribute to BNSF's decision to fire Brucker, BNSF showed by clear and convincing evidence that it would have fired Brucker even if he had not reported his injury.[12] ALJ Ord. at 8.

Specifically in considering the contribution element, the ALJ concluded that that "no reasonable factfinder could find that the injury report contributed in any way to his termination." *Id.* at 7. The ALJ noted that the events leading to termination began in July of 2012, two and a half years after Brucker reported his injury, and concluded that the interval "argues against any contribution by the injury report to the ultimate termination." *Id.* Instead, the ALJ reasoned that BNSF's discovery in July of 2012 that Brucker had not disclosed a criminal conviction on his job application had triggered the termination. Moreover, the ALJ found no evidence of any connection between Brucker's injury report and BNSF's investigation into Brucker's criminal record, and found that his supervisors' constant observation of Brucker as he worked played no part in discovering Brucker's conviction. *Id*. Finally, the ALJ noted that the BNSF's discipline of Brucker occurred four months and 16 months after his injury report, respectively, and concluded that "[t]wo isolated incidents in the 30-month period between the injury report and the termination do not suffice to show that the injury report played a part in the termination." *Id*.

Brucker then filed a Motion to Re-Consider and to Supplement the Record, urging the ALJ to consider the deposition testimony of BNSF employee John Reppond, who was the

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[12] The ALJ considered the "clearing and convincing element" sua sponte. BNSF neither raised this defense in its Motion for Summary Decision nor did it advance any argument that it was entitled to such defense.

superintendent of the shops where Brucker worked. Brucker contended that Reppond's testimony was new evidence establishing a material difference in fact from the facts previously presented to the ALJ, and that Brucker could not have known previously of Reppond's testimony through reasonable diligence. Therefore, Brucker argued that the ALJ should grant his motion for reconsideration and consider the new evidence.[13]

Applying the standard for motions for reconsideration under Federal Rule of Civil Procedure 59, the ALJ rejected Brucker's contention in an order issued June 20, 2014, concluding that the record "is devoid of any evidence that Complainant exercised reasonable diligence in obtaining Reppond's testimony in spite of ample time to do so." Order Denying Motion for Reconsideration at 2. The ALJ pointed out that the Notice of Hearing was issued on September 10, 2013, adopted the parties' proposed schedule, and required all discovery to be completed by February 28, 2014. *Id*. The ALJ noted further that Brucker did not request an extension of time to complete discovery, and "made no showing that he could not have taken Mr. Reppond's deposition by that time." *Id*. The ALJ found that, even though BNSF did not hold Brucker to the February 28 deadline, Brucker's motion for reconsideration "makes only a bald statement that he was 'unable' to take Mr. Reppond's deposition until May 1, 2014, thereby delaying receipt of the transcript until after his opposition to the motion for summary judgment was due." *Id*. The ALJ found that Brucker failed to demonstrate that he tried to depose Reppond in time, and noted that Brucker only noticed Reppond's deposition on April 17, 2014, a month and a half after discovery was supposed to have closed. *Id*. Accordingly, the ALJ denied Brucker's motion for reconsideration. *Id*.

The ALJ, however, extended his analysis "[f]or the sake of reviewing authorities," and concluded that if he had considered Reppond's deposition testimony, he would have found that Brucker's injury report contributed to BNSF's decision to fire him, because Reppond's testimony created a dispute of material fact as to whether the injury report "was the catalyst for the background check that revealed Mr. Brucker's earlier conviction." *Id.* at 2-3. But the ALJ also found that Reppond's testimony would not have changed his conclusion that BNSF proved by clear and convincing evidence that it would have fired Brucker even if he had not reported his injury. *Id*. at 3.

Brucker filed a timely petition with the Board seeking review of the ALJ's Orders.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to adjudicate appeals of ALJs' decisions in cases arising under the FRSA's whistleblower provisions.[14] We review a

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[13] Complainant's Motion to Re-consider and to Supplement the Record (May 7, 2014).

[14] 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).

grant of summary decision de novo under the same standard that ALJ's must apply.[15] Under 29 C.F.R. § 18.40(d), an ALJ may "enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."[16]

DISCUSSION

The FRSA prohibits a rail carrier engaged in interstate commerce from discharging, demoting, suspending, reprimanding, or in any other way retaliating against an employee who engages in certain protected activity, such as reporting a work-related injury or illness.[17] To prevail, a 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; and (3) the protected activity was a contributing factor in the unfavorable personnel action.[18] 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 a complainant's protected behavior.[19]

The ALJ determined that Brucker's January 10, 2010 injury report to BNSF constituted protected activity and that BNSF's action of walking Brucker on an off the property before his co-workers causing him humiliation and embarrassment and its termination of Brucker's employment were adverse actions. ALJ Ord. at 5-6. BNSF has not petitioned for review of either of these determinations. Accordingly we turn to the ALJ's determination that Brucker failed to raise genuine issues of material fact concerning whether his protected activity contributed to the adverse action BNSF took and, if so, whether BNSF showed by clear and convincing evidence that it would have taken the same action absent the protected activity.

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[15] *Franchini v. Argonne Nat'l Lab.*, ARB No. 11-006, ALJ No. 2009-ERA-014, slip op. at 5 (ARB Sept. 26, 2012).

[16] 29 C.F.R. § 18.40(d) (2014). This is the version of the summary decision regulations in effect when the ALJ issued his decisions. The ALJ's procedural regulations have since been amended. The amended regulation governing summary decision, effective June 18, 2015 similarly provides, "The judge shall grant summary decision if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to decision as a matter of law. The judge should state on the record the reasons for granting or denying the motion." 29 C.F.R. § 18.72(a) (2015).

[17] 49 U.S.C.A. § 20109(a)(4).

[18] *Seay v. Norfolk S. Ry. Co.*, ARB Nos. 14-022, 14-034; ALJ No. 2013-FRS-034, slip op. at 6 (ARB Oct. 27, 2015).

[19] *Id.*

In response to a motion for summary decision, the decision-maker must examine the elements of a complainant's claims and determine which facts are material to deciding those claims. "[A] 'genuine issue' exists if a fair-minded fact-finder (the ALJ in whistleblower cases) could rule for the nonmoving party after hearing all the evidence, recognizing that in hearings, testimony is tested by cross-examination and amplified by exhibits and presumably more context."[20] The ALJ must review the evidence the parties submitted in the light most favorable to the non-moving party, the complainant, in this case.[21]

The moving party must come forward with an initial showing that it is entitled to summary decision.[22] Where a respondent seeks summary decision, as here, it may assert that the complainant lacks evidence to substantiate a critical element of his case.[23] In that case, the complainant must identify specific facts, which if verified, could meet his burden of proof at an evidentiary hearing on the merits.[24] Alternatively, the respondent may submit affidavits or other documents and evidence, which allegedly state the undisputed facts, and challenge the complainant to produce admissible, opposing evidence that creates a genuine issue of fact.[25] As we held in *Franchini*:

> Stated more simply, the complainant must identify the specific facts and/or evidence he will bring to trial and such facts and evidence, if believed at trial, must be enough to allow for a ruling in his favor on the issue in question. The burden of producing evidence "is not onerous and should preclude [an evidentiary hearing] only where the record is devoid of evidence that could reasonably be construed to support the [complainant's] claim." *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252.[26]

In ruling on a motion for summary decision, neither the ALJ nor the Board weighs the

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20 *Franchini,* ARB No. 11-006, slip op. at 6 (citations omitted).

21 *Id.*

22 29 C.F.R. § 18.40(d).

23 *Franchini,* ARB No. 11-006, slip op. at 6 (citations omitted).

24 *Id.*

25 *Id.* at 6-7.

26 *Id.* at 7.

evidence or determines the truth of the matters asserted.[27] Denying summary decision because there is a genuine issue of material fact simply means that an evidentiary hearing is required to resolve some factual questions; it is not an assessment on the merits of any particular claim or defense.[28]

The parties' contentions

BNSF initially argued to the ALJ that the ALJ should dismiss Brucker's complaint because two and one-half years passed between the date on which Brucker reported his injury and his dismissal.[29] BNSF contended that "the passage of time of more than a few months between protected activity and an adverse employment action negates any inference of causal connection."[30] BNSF also argued that the incidents of alleged retaliation that Brucker points to between the injury report and his dismissal, are too sporadic and separated by too much time to establish that Brucker's protected activity contributed to the termination of his employment.[31] Finally BNSF argued that Brucker could not use the FELA complaint to shorten the temporal gap because the filing of a FELA complaint is not a protected activity and filing such a complaint "does not insulate an employee from the consequences of violating BNSF policy."[32]

Brucker countered BNSF's argument regarding proximity with a showing that during the time between the date on which he filed his injury report and the date on which BNSF terminated his employment, at which time the ramifications of the report had not yet been resolved, BNSF supervisors exhibited a change in their attitude towards him. This changed attitude, Brucker argued, demonstrated an intent to retaliate against him because he filed the injury report. In support of this showing, Brucker alleged that following his injury report, BNSF supervisors began closely observing him while he worked. He testified that they had not done this in the past, and did not do this with other employees.[33]

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27 *Id.*

28 *Id.*

29 Respondent BNSF Railway Company's Motion for Summary Decision and Motion in Limine Regarding the Same Claims or Evidence and Memorandum in Support (Mot. for Sum. Dec.) at 9-10.

30 *Id.* at 10.

31 *Id.* at 11.

32 *Id.*

33 Complainant's Opposition to Respondent BNSF Railway Company's Motion for Summary Decision and Motion In Limine Regarding the Same Claims or Evidence and Memorandum in Support. (Brucker's Resp. to Mot. For Sum. Dec.) at 16-23 (citing Complainant's Deposition (Exhibit 6)).

Brucker also relied on several instances of, what he asserted, were unfairly assessed disciplinary actions to show a continuing pattern of retaliation from the time he reported his injury until BNSF terminated his employment. Brucker testified to an incident in May 2010, in which BNSF charged Brucker with violating company rules for not wearing a seatbelt. Although witnesses were permitted in other investigative hearings, Brucker testified that BNSF would not allow Brucker to present a statement from an individual who was sitting next to him and who stated that Brucker was, in fact, wearing a seat belt.[34]

He also averred that in June 2011, he was unfairly disciplined for releasing an air brake on a locomotive, even though at an investigative hearing, his co-worker, Larry Smith, testified it was Smith's fault that the locomotive moved after Brucker released the air brake because Smith had failed to set the hand brake, as the regulations required, when the locomotive was brought into the shop. Brucker stated that his union representative testified that BNSF targeted Brucker and that ordinarily the investigation should have ended when Smith accepted responsibility. Instead, BNSF assessed discipline against Brucker.[35]

Finally, Brucker averred that BNSF disciplined him for absenteeism without allowing him to have union representation, as it should have permitted, and that the assessment of discipline was inconsistent with the rules governing the attendance policy. He stated that he signed the disciplinary notice under protest, only after BNSF threatened him with an insubordination charge if he did not.[36] Brucker argued that because BNSF's notice of termination stated that the company considered his personnel record in deciding to terminate his employment, that these three incidents, which Brucker contended were pretextual and retaliatory contributed to his termination. Thus although these incidents were not chargeable as individual adverse actions because they fell outside the limitations period for filing a complaint, Brucker argued that they demonstrated a pattern of retaliation from the date of protected activity to the date of the adverse action.[37]

In response to BNSF's contention that it fired Brucker because he untruthfully checked a box regarding prior criminal convictions on his employment application, Brucker countered that he sought the advice of BNSF's Assistant Superintendent at that time, who told him to check

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[34] *Id.* at 23-28 (citing Complainant's Deposition (Exhibit 6)).

[35] *Id.* at 28-29 (a copy of the union representative's deposition was not available when Brucker filed his response).

[36] *Id.* at 29-32 (citing Complainant's Deposition (Exhibit 6)).

[37] *Id.* at 32-33, 44.

"no" because he had not been convicted of a felony, only a misdemeanor.[38]

The ALJ's ruling

"Contributing factor" includes 'any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.[39] Ultimately the ALJ concluded that, "no reasonable finder of fact could find that Mr. Brucker's injury report contributed in any way to his termination."[40] We disagree. Evaluating the issue anew as we are required to do, we find that Brucker did, in fact, a raise a genuine issue of material fact regarding whether his injury report contributed to the adverse actions BNSF took.

Consideration of the summary decision motion de novo

A complainant may establish the contributing factor element of a complaint by direct evidence or indirectly by circumstantial evidence.[41] Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant's protected activity, the falsity of an employer's explanation for the adverse action taken, and a change in the employer's attitude toward the complainant after he or she engages in protected activity.[42]

Nevertheless, even where a respondent asserts legitimate, non-discriminatory reasons for its actions, a complainant can create a genuine issue of material fact by pointing to specific facts or evidence that, if believed, could (1) discredit the respondent's reasons or (2) show that the protected activity was also a contributing factor even if the respondent's reasons are true.[43] Summary decisions are difficult in "employment discrimination cases, where intent and credibility are crucial issues."[44] The issue of causation in discrimination cases involves

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38 *Id.* at 33-38.

39 *Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13 (ARB June 24, 2011).

40 ALJ Ord. at 7.

41 *Cain v. BNSF RY. Co.*, ARB No. 13-006, ALJ No. 2012-FRS-019, slip op. at 6 (ARB Sept. 18, 2014).

42 *Id.*

43 *Franchini,* ARB No. 11-006, slip op. at 9.

44 *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1038 (7th Cir. 1993) (summary judgment standard "is applied with added rigor in employment discrimination cases, where intent and

questions of intent and motivation when the complainant argues, as he does here, that the employer's asserted reasons were not the real reasons for its actions.[45]

In discussing the use of temporal proximity to establish causation, the Board wrote in *Franchini*,

> Determining what, if any, logical inference may be drawn from the temporal relationship between the protected activity and the unfavorable employment action is not a simple and exact science but requires a "fact-intensive" analysis. It involves more than determining the length of the temporal gap and comparing it to other cases. Previous case law can be used as a guideline to determine some general parameters of strong and weak temporal relationships, but context matters. Before granting summary decision on the issue of causation, the ALJ must evaluate the temporal proximity evidence presented by the complainant on the record as a whole, including the nature of the protected activity and the evolution of the unfavorable personnel action.[46]

Here, the ALJ's assessment of the temporal proximity evidence was flawed because the focus of his consideration of the temporal proximity context was far too narrow. On December 10, 2009, Brucker filed his first report of injury when his attorney informed BNSF that Brucker had retained him to represent Brucker in a claim for injuries to his shoulders that he sustained over his career with BNSF. In January 2010, Brucker filed a second report—his Employee Personal Injury/Occupational Illness Report. While it is true that Brucker reported his injury some two and one-half years before BNSF fired him, the ramifications of that report were most certainly not resolved on the day that it was filed and in fact, were still ongoing when BNSF fired Brucker.[47] As the Board held in *Carter v. BNSF Railway Company*,[48] "while apparently

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credibility are crucial issues"). In revisiting its use of the phrase "added rigor," the court of appeals explained that it applies the same summary judgment standard in employment cases as any other case but reaffirmed that its caution in *Sarsha* meant "to stress the fact that employment discrimination cases typically involve questions of intent and credibility, issues not appropriate for this court to decide on a review of a grant of summary judgment." *Bagley v. Blagojevich*, 646 F.3d 378, 389 (7th Cir. 2011) (quoting *Alexander v. Wisconsin Dep't of Health & Family Servs.*, 263 F.3d 673, 681 (7th Cir.))); *see also Conneen v. MBNA Am. Bank*, 334 F.3d 318, 325 n.9 (3d Cir. 2003).

45 *Franchini*, ARB No. 11-006, slip op. at 8-9.

46 *Id.* at 10 (citations omitted).

47 *See Bobreski*, ARB No. 09-057, slip op. at 12 (ALJ erred when she failed to see the protected activity and adverse actions as overlapping events rather than seven years apart).

not alleged as protected activity in its own right, the FELA litigation undisputedly involved the 2007 injury and kept Carter's protected report of injury fresh as the events in the case unfolded."[49] The continuing fallout from the injury report is a factor to be considered in determining whether Brucker has raised a question of material fact regarding the contribution of the report to the adverse action BNSF took.

Another relevant consideration in determining causation is whether there was "a change in the employer's attitude toward the complainant after he . . . engages in protected activity."[50] Brucker testified that the employer's attitude did change after he filed his injury complaint. He stated that his supervisors intensified their scrutiny of his work (but not other employees' work) on every shift until BNSF terminated his employment. Contrary to the ALJ's assumption, the fact that the scrutiny of Brucker's work, itself, did not lead to the discovery of the misdemeanor offense is irrelevant. The relevant question is whether the unexplained scrutiny, if proven, indicated a retaliatory intent by BNSF supervisors. Thus, the employer's change in attitude is a factor to be considered in determining whether Brucker has raised a material fact question.

In addition, Brucker testified to three incidents following the injury report that he believes demonstrate retaliatory animus because BNSF treated him unfairly in investigating and assessing discipline. Given that these incidents happened during the time when the consequences of Brucker's injury report were unresolved, if proven, they also may demonstrate a change in employer attitude toward Brucker, as well as retaliatory motivation.

Finally, Brucker testified that a BNSF Assistant Superintendent instructed him not to check the box indicating that he had been convicted of a crime because BNSF was only interested in felony convictions. BNSF did not deny that this was its policy, nor did BNSF proffer any non-retaliatory reason for its investigation into the accuracy of Brucker's employment application after 19 years of employment. Further BNSF cited to no other similar cases in which an employee failed to truthfully complete the application, had not filed an injury report, and was, nevertheless, fired after a similar number of years' employment. If Brucker proved that BNSF's policy was that applicants only need to report felony convictions, then Brucker could raise a material question whether BNSF fired him, not because he incorrectly filled in the application, but because he reported an injury. In that case, the ALJ could find that BNSF's stated reason for firing Brucker (lying) was a pretext for retaliation (in response to his ongoing injury claim).

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[48] ARB Nos. 14-089, 15-016, 15-022; ALJ No. 2013-FRS-082, slip op. at 4 (June 21, 2016).

[49] *Compare LeDure v. BNSF Ry. Co.*, ARB No. 13-044, ALJ No. 2012-FRS-020, slip op. at 5 (June 2, 2015), in which the Board held that under the facts of that case, in which a more specific notification of the injury was provided during the FELA claim, the FELA claim was protected.

[50] *Cain.*, ARB No. 13-006, slip op. at 6.

If as a result of a hearing with the calling of witnesses and production of evidence, an ALJ determined that while the consequences of Brucker's injury report were ongoing, BNSF changed its attitude towards Brucker, unfairly brought disciplinary actions against him, and used Brucker's failure to check the previous criminal conviction box as a pretext for retaliating against him for reporting an injury, Brucker could prevail on the issue whether his injury report contributed to the adverse action BNSF took against him. Therefore, we find that Brucker has raised a genuine issue as to material facts regarding the contribution requirement and that, on remand, he is entitled to a hearing on this issue.

The ALJ's alternative clear and convincing finding

BNSF did not argue in its Motion for Summary Decision and Motion in Limine Regarding the Same Claims or Evidence and Memorandum in Support that it was entitled to summary decision on the issue whether it proved by clear and convincing evidence that it would have terminated Brucker's employment even if he had not filed his injury notice. Nevertheless, the ALJ, sua sponte, without notice to the parties, first raised and then decided this issue in BNSF's favor. Had Brucker argued that he was prejudiced by the ALJ's failure to give him notice of his intention to consider the clear and convincing issue, we might well have agreed.[51] But, Brucker did not raise this issue either in its motion for reconsideration to the ALJ or on appeal to the Board, so we will not consider it here.[52]

Nevertheless, Brucker did challenge the merits of the ALJ's finding that Brucker failed to raise a substantial question of material fact regarding whether BNSF established by clear and convincing evidence that it would have fired Brucker in the absence of his protected activity. Considering this issue de novo, we disagree with the ALJ's finding and conclude instead, that Brucker did raise such an issue.

To successfully establish its affirmative defense to liability in this case, BNSF must prove by "clear and convincing evidence," that it "would have" (not could have) terminated Brucker's employment in the "absence of protected activity."[53] In *Speegle v. Stone and Webster*

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[51] *See Gupta v. WIPRO, Ltd.*, ALJ No. 2010-LCA-024, slip op. at 10 (Mar. 28, 2011)(when an ALJ considers summary judgment sua sponte, he must provide notice and an opportunity to be heard to the parties); 29 C.F.R. § 18.72(f)(2)(2015)("**After giving notice and a reasonable time to respond**, the judge may: . . . (2) Grant the motion on grounds not raised by a party; . . . ." (emphasis added).

[52] *Mawhinney v. Transportation Workers Union*, ARB No. 12-108, ALJ No. 2012-AIR-014, slip op. at 4 (ARB Sept. 18, 2014).

[53] 49 U.S.C.A. §§ 20109(d)(2)(A)(i); 42121(b)(2)(B)(iv)(Thomson/West 2007)("Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.").

Construction Company, the Board wrote:

> "Clear" evidence means the employer has presented evidence of unambiguous explanations for the adverse actions in question. "Convincing" evidence has been defined as evidence demonstrating that a proposed fact is "highly probable." The burden of proof under the "clear and convincing" standard is more rigorous than the "preponderance of the evidence" standard and denotes a conclusive demonstration, i.e., that the thing to be proved is highly probable or reasonably certain.[54]

To prove what BNSF **would** have done, it is not sufficient for it to establish that it had an honesty policy in place under which it **could** have terminated Brucker's employment. Instead it must convincingly demonstrate that it was highly probable that it **would** have terminated Brucker's employment for failing to check the correct box on his employment application, after nineteen years of employment. The employer may have direct or circumstantial evidence of what it "would have done." In *Speegle*, the Board held;

> The circumstantial evidence can include, among other things: (1) evidence of the temporal proximity between the non-protected conduct and the adverse actions; (2) the employee's work record; (3) statements contained in relevant office policies; (4) evidence of other similarly situated employees who suffered the same fate; and (5) the proportional relationship between the adverse actions and the bases for the actions.[55]

Of course, we must consider these factors as adjudicators of whistleblower cases and not as adjudicators of employment personnel appeals. Accordingly, our role is not to question whether BNSF's decision to fire Brucker was wise or based on sufficient "cause" under BNSF's personnel policies, but only whether the evidence considered in its entirety makes it "highly probable" that BNSF "would have" fired Brucker.[56]

Here, as we noted above, BNSF did not rely on any of these factors to establish what it would have done before the ALJ, because BNSF did not raise the affirmative defense in its motion for summary decision. In considering whether BNSF was entitled to summary decision

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54 ARB No. 13-074, ALJ No. 2005-ERA-006, slip op. at 11 (Apr. 25, 2014)(citations omitted).

55 ARB No. 13-074, slip op. at 11 (citation omitted).

56 *Id.* at 12 n.67.

on the issue, sua sponte, the ALJ noted that Brucker checked the "no" box for the question on his job application that asked whether he had been convicted of a crime other than a traffic violation; that the application required applicants to acknowledge that false information would be grounds for dismissal at any time, whenever it was discovered; and that BNSF had company policies against withholding information and dishonesty.[57] Because BNSF clearly stated its policies, specifically warned applicants to be truthful or face termination at any time, and fired Brucker immediately upon receiving his conviction report, the ALJ found that BNSF showed "by clear and convincing evidence that it would have terminated Mr. Brucker whether or not he made his injury report."[58] Although Brucker testified in his deposition that he checked "no" on the application on the instruction of Mr. Underwood, a BNSF assistant superintendent, who told him that the company only needed information about felony convictions, the ALJ was not persuaded. He reasoned that "it is clearly company policy that Mr. Underwood was wrong in so telling Mr. Brucker" and that because "the application has a space to explain any conviction, there can be no doubt that BNSF expected a truthful answer to the question."[59]

Although the ALJ made a strong case for what BNSF could have done, we find no clear and convincing evidence of what it would have done. The ALJ once again overlooked evidence from Brucker—this time, evidence that creates a material issue of fact as to whether BNSF would have fired him even if he had not reported his injuries. The ALJ did not find that Brucker's testimony that Underwood told him to check the "no" box on his job application was inadmissible; instead, the ALJ appears to have simply concluded that it was irrelevant. But if credited, Brucker's testimony that Underwood told him to check the "no" box because BNSF was only concerned about felony convictions could reasonably support an inference that, regardless of its official policies, BNSF, in practice, would not ordinarily dismiss employees who had prior convictions for misdemeanors, or care very much if employees failed to disclose them.

Such an inference would, in turn, call into question the ALJ's conclusion that BNSF would have fired Brucker regardless of his protected injury report—particularly at this stage of the case, where Brucker would have necessarily established that his injury report was a contributing factor in his firing. Moreover, Brucker's testimony was not speculative or conclusory, but was, in fact, based on his personal knowledge of his conversation with Underwood, and thus is sufficient to create a genuine issue of fact.[60] Further, the ALJ did not point to any evidence establishing that BNSF routinely fired employees who did not report injuries, but who were found, after 19 years' employment, to have lied on their employment

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57 ALJ Ord. at 8.

58 *Id*.

59 *Id*. at 8 n.9.

60 *See* Fed. R. Civ. P. 56(c); *Payne v. Pauley*, 337 F.3d 767, 770-73 (7th Cir. 2003).

applications or who were charged with dishonesty, of a similar severity.[61] Accordingly, we vacate the ALJ's finding that Brucker failed to raise a genuine dispute of material fact regarding whether BNSF established by clear and convincing evidence that it would have fired Brucker absent his protected activity.

As noted above, given our remand of this case for a hearing, we find the issue whether the ALJ properly denied Brucker's motion for reconsideration is moot. But in his order denying reconsideration, the ALJ announced a test for establishing an employer's "clear and convincing" affirmative defense that is not in accordance with law or precedent. Because the ALJ may need to revisit this issue to decide this case on remand, in the interest of judicial economy, we will discuss it here.

In his decision denying reconsideration, the ALJ wrote, "[T]he statute appears to me to mean, under the circumstances of this case, that I must consider whether BNSF would have terminated Mr. Brucker based on non-disclosure of his conviction regardless how BNSF learned of it. In this case, I find . . . that BNSF has met its burden to show by clear and convincing evidence that it would have."[62] As explained above, we disagree that Brucker failed to raise a genuine issue of material fact regarding whether BNSF established by clear and convincing evidence what it would have done, regardless how it learned about the incorrect statement. But, the ALJ's "regardless how BNSF learned of it" standard is not consistent with our decision in *Benjamin v. Citation Shares Management, LLC*, in which we explained, "if the employer raises the 'same decision' defense, we mean that the factfinder must determine as best as possible, which material facts necessarily would have changed in the absence of protected activity, meaning facts directly connected to the protected activity, not every fact that hypothetically might change or facts tangentially connected to the protected activity."[63] Therefore, should Brucker prove by a preponderance of the evidence that BNSF would not have discovered that he checked the "no" box, if BNSF had not launched an investigation because Brucker filed a protected injury report, the fact that BNSF would not have made the discovery had Brucker not reported an injury is most definitely a material fact, that cannot be ignored, as the ALJ seems to suggest. Rather, the facts relevant to the discovery most certainly must be considered in determining whether BNSF would have fired Brucker had he not filed his protected injury report.

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[61] In evaluating the evidence on which the ALJ relies, we note that during the 19 years Brucker worked for BNSF, BNSF does not contend that Brucker ever engaged in any criminal activity that might have concerned BNSF when it included the question regarding the commission of crimes on its employment application.

[62] *Id.* at 3.

[63] ARB No. 14-039, ALJ No. 2010-AIR-001, slip op. at 3 (ARB July 28, 2014).

CONCLUSION

Because we have determined on de novo review of BNSF's motion for summary decision that Brucker has raised genuine issues of material facts regarding whether his protected injury report contributed to BNSF's decision to fire him and whether BNSF proved by clear and convincing evidence that it would have fired him in the absence of the protected report, we **VACATE** the ALJ's decision in this case and **REMAND** the case to the ALJ for further proceedings consistent with this decision.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge