In the Matter of:

JEFF YOWELL, **ARB CASE NO. 2019-0039**

COMPLAINANT, **ALJ CASE NO. 2018-FRS-00009**

v. **DATE: February 5, 2020**

FORT WORTH & WESTERN RAILROAD,

RESPONDENT.

Appearances:

***For the Complainant*:**
Corey Kronzer, Esq.; *Rome, Arata, & Baxley LLC*; Pearland, Texas

***For the Respondent*:**
Rory Divin, Esq.; Brittani Wilmore Rollen, Esq.; *McDonald Sanders*; Fort Worth, Texas

Before: Thomas H. Burrell, *Acting Chief Administrative Appeals Judge* and James A. Haynes and Heather C. Leslie, *Administrative Appeals Judges*

FINAL DECISION AND ORDER

PER CURIAM. The Complainant, Jeff Yowell, filed a retaliation complaint under the employee protection provision of the Federal Rail Safety Act of 1982 (FRSA), as amended,[1] with the Department of Labor's Occupational Safety and

[1] 49 U.S.C. § 20109 (2008), as implemented at 29 C.F.R. Part 1982 (2018) and 29 C.F.R. Part 18, Subpart A (2018).

Health Administration (OSHA). Yowell alleged that he was a victim of retaliation by Fort Worth & Western Railroad (FWWR), his employer, for reporting a workplace injury. OSHA determined that the evidence did not support a finding that FWWR violated the FRSA. Yowell objected to OSHA's determination and requested a hearing before the Office of Administrative Law Judges (OALJ).

The Administrative Law Judge (ALJ) found that Yowell engaged in protected activity and that that activity was a contributing factor in the discipline he received. The ALJ further found that FWWR failed to establish by clear and convincing evidence that it would have disciplined Yowell even if he had not engaged in protected activity. The ALJ awarded Yowell remedies and relief. For the following reasons, we reverse the ALJ's findings, vacate the ALJ's award of remedies, and dismiss the complaint.

BACKGROUND[2]

Jeff Yowell was employed by FWWR from May 2017 to September 13, 2017. On August 28, 2017, Yowell reported for duty at 11:00 p.m. During his overnight shift, Yowell testified that he injured his knee going into Westrock when he slipped on mud or on a slippery substance after climbing out of a boxcar. Decision and Order (D. & O.) at 3. He noticed pain immediately but continued to work despite having problems bending his knee and climbing stairs. His pain worsened during the day until he was no longer able to work. He reported his injury. The trainmaster called Jared Steinkamp, Chief Transportation Officer, and James (Chance) Gibson, General Director of Operating Policies, to report the incident. Both came in to discuss the matter with Yowell.

Yowell provided Gibson with one location where the injury occurred. When Gibson challenged the accuracy of that information based on inconsistencies, Yowell provided a second location where the injury could have happened. Gibson asked Yowell to write a statement. *Id.* at 9. Yowell also claimed that he may have been injured while lacing up air hoses. Thereafter, Steinkamp arrived on the scene and asked Yowell to explain what happened to him from the beginning.

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[2] This background follows the ALJ's Decision and Order and undisputed facts. In reciting these background facts, we make no findings of fact.

Upon further discussion, Yowell disclosed that he injured his knee the week before but did not report the injury at that time. *Id.* at 4. Yowell experienced pain and swelling and wore a brace. *Id.* at 7. Yowell considered this a minor injury. Yowell does not believe that he violated FWWR's rule because he reported the injury when he felt pain. *Id.* at 8.

Yowell claims that about halfway through his first statement, Steinkamp told him to write down that he was injured a week before. *Id.* at 8, 16-17. Steinkamp testified that he asked Yowell to write a second statement in light of his conflicting statements and disclosure of a prior injury. *Id.* at 16-17, 23-25. Yowell testified that neither Steinkamp nor Gibson told him to write anything that was false. Tr. 80. Gibson believed that Yowell was injured the week before but felt the injury on the morning of August 29, during activities. D. & O. at 9-10. Yowell sought medical treatment for the injury.

FWWR has a very strict policy to timely report injuries. Injuries should be reported "immediately, no matter how small." *Id.* at 6, 10-11. Gibson testified that employees are to report injuries even if no pain is experienced so that the employer may investigate the scene for safety. *Id.* at 10. Gibson testified that he would personally walk an employee off grounds for failing to timely file an injury report. *Id.* at 11. Exhibit JX-9 lists FWWR's progressive discipline policy, and provides that discipline is decided on a case-by-case basis. Gibson recommended that Yowell be terminated. *Id.* at 14, 24. Termination at FWWR requires a supervisor above the supervisor to concur and the matter must be discussed with the president, CEO, and human resources. *Id.* at 21.

Steinkamp terminated Yowell on September 13, 2017. *Id.* at 5, 18. Steinkamp testified that Yowell's actions of untimely reporting an injury warranted termination rather than the other options available to FWWR because FWWR was not able to investigate the scene of the first injury to make sure that it was safe. *Id.* at 24. Yowell testified that the only stated reason that he was fired was because of the late reporting. Tr. 80; *id.* at 41; D. & O. at 5, 7.

Yowell filed a complaint on September 15, 2017, with the OSHA. OSHA determined that the evidence did not support a finding that FWWR violated the FRSA. Yowell objected to OSHA's determination and requested a hearing. The ALJ assigned to the case held hearing and found that FWWR violated the Act. The

ALJ ordered that FWWR offer reinstatement to Yowell. The ALJ ordered backpay plus interest. The ALJ also ordered that FWWR expunge any negative references associated with the termination and injury report.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB or Board) authority to review ALJ decisions and issue final agency decisions in cases arising under the FRSA. Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (April 3, 2019); 29 C.F.R. § 1982.110(a). The ARB will affirm the ALJ's factual findings if supported by substantial evidence but reviews all conclusions of law de novo. *Austin v. BNSF Ry. Co.*, ARB No. 17-024, ALJ No. 2016-FRS-013, slip op. at 7 (ARB Mar. 11, 2019). As the United States Supreme Court has recently noted, "[t]he threshold for such evidentiary sufficiency is not high." *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019). Substantial evidence is "'more than a mere scintilla.' It means—and means only—'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (citing and quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). We generally defer to an ALJ's credibility findings unless they are "inherently incredible or patently unreasonable." *Mizusawa v. United Parcel Serv.*, ARB No. 11-009, ALJ No. 2010-AIR-011, slip op. at 3 (ARB June 15, 2012).

DISCUSSION

The FRSA prohibits a railroad carrier engaged in interstate or foreign commerce from discharging, demoting, suspending, reprimanding, or in any other way discriminating against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith protected activity. 49 U.S.C. § 20109(a). The FRSA protects employees who report work-related injuries to the railroad carrier or to the Secretary of Transpiration.[3] The FRSA also protects employees

[3] 49 U.S.C. § 20109(a):

> (a) In general.--A railroad carrier engaged in interstate or foreign commerce, a contractor or a subcontractor of such a railroad carrier, or an officer or employee of such a railroad carrier, may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith

following the medical plan of a treating physician.[4]

To prevail, an FRSA complainant must establish by a preponderance of the evidence[5] 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 whole or in part, in the unfavorable personnel action. If a complainant meets this 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 absent the complainant's protected activity. 49 U.S.C. § 20109(d)(2)(A)(i), incorporating the burdens found in 49 U.S.C. § 42121(b)(2)(B)(i)(2000).

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act done, or perceived by the employer to have been done or about to be done-

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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

[4] 49 U.S.C. § 20109(c)(2):

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

[5] We note that the ALJ referred to the complainant's burden to establish contributing factor causation "prima facie" through knowledge and temporal proximity, citing the Whistle Blower Protection Act and its case law. D. & O. at 44. *But see id.* at 35 n.14 (noting ARB case law on "prima facie" case). After a hearing, a "prima facie case" or inference is no longer the standard as the complainant must prove causation by a preponderance of the evidence. *Acosta v. Union Pac. R.R. Co.*, ARB No. 2018-020, ALJ No. 2016-FRS-00082 (ARB Jan. 22, 2020); *Brune v. Horizon Air Indus.*, ARB No. 04-037, ALJ No. 2002-AIR-008 (ARB Jan. 31, 2006).

1. The ALJ found Yowell not credible and FWWR's witnesses credible

The ALJ found that Yowell's testimony was inconsistent, contradictory, and unpersuasive. D. & O. at 31. Yowell testified inconsistently concerning his July 2017 bruised shin and the August 21, 2017 incident. For his August 29 injury, Yowell provided at least three locations to FWWR where that injury may have occurred. *Id.* at 31. The ALJ credited Yowell's testimony only to the extent that he suffered a work-related injury on or around August 21. *Id.* at 32.

To the contrary, the ALJ found Gibson and Steinkamp sincere and credible, especially on the critical fact as to the specific instruction given to new hires to timely report injuries. *Id.* The ALJ credited Steinkamp's testimony that he did not direct Yowell as to what to write concerning when and where the injury took place. *Id.* These credibility findings are not challenged on appeal.

2. Yowell engaged in protected activity and his termination constitutes an adverse action

The ALJ found that Yowell engaged in protected activity by filing a report of injury on August 29, 2017, and by following the medical advice of a treating physician. D. & O. at 37-38. FWWR argues that the ALJ erred in failing to find that Yowell's dishonesty in reporting the location of the injury precluded a finding that his report of work-related injury was protected. We disagree and conclude that the ALJ's findings are supported by substantial evidence. There is no dispute that Yowell reported an injury. In fact, FWWR does not dispute Yowell's claim that FWWR reported Yowell's work-related injury to the Federal Rail Authority as such. *Id.* at 36. FWWR terminated Yowell for late reporting that injury. It is difficult to see FWWR prevailing on a claim that Yowell did not report a work-related injury.

Yowell was terminated on September 13, 2017, which, as the ALJ found, constitutes an adverse action. D. & O. at 39. We affirm this finding as it is unchallenged on appeal.

3. The ALJ erred in his contributing factor analysis

To establish a violation under the FRSA, a complainant must show that the protected activity was a "contributing factor" in the adverse employment action. 49 U.S.C. § 20109(d)(2)(A), referring to 49 U.S.C. § 42121(b)(2)(B)(i). "A 'contributing factor' includes 'any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision.'" *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 461-62 (9th Cir. 2018), *quoting Gunderson v. BNSF Ry. Co.*, 850 F.3d 962, 969 (8th Cir. 2017). "[T]he contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity."

Kuduk v. BNSF Ry. Co., 768 F.3d 786, 791 (8th Cir. 2014). In satisfying this statutory standard, a complainant need not prove a retaliatory motive beyond showing that the employee's protected activity was a contributing factor in the adverse action. *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013).

While making findings that FWWR terminated Yowell solely for late reporting, the ALJ nonetheless concluded that the ARB's inextricably intertwined "rule" required a finding for Yowell because FWWR learned of the late reporting through an initiating event of filing a protected report.[6] Had there been no protected report, there would have been no discipline for untimely filing it. Through this reasoning, the ALJ found that Yowell met his burden to prove contributing factor causation by a preponderance of the evidence. The ALJ wrote:

> Here, it is undisputed that Complainant was terminated because he did not promptly or immediately report his right knee injury, occurring sometime between August 21, 2017 and August 23, 2017, but which he did not report until August 29, 2017. Mr. Steinkamp, the ultimate decision-maker in this case, testified he would not have terminated Complainant had Complainant never told him about his knee injury occurring one week prior to August 29, 2017, because there would have been no violation of Respondent's rule concerning prompt reporting of work injuries. Indeed, Complainant was terminated on September 13, 2017, for failure to comply with Respondent's "Employee Handbook Work and Safety Rules, Reporting of Accidents/Incidents/Impacts," because he waited until August 29, 2017, to report his right knee injury which had occurred one week prior. On this basis, I find Complainant's protected activity and his September 13, 2017 termination are inextricably intertwined as his late report of injury directly led to his discharge, and his termination cannot be explained without discussing Complainant's report of injury. Benjamin, supra, slip op. at 12. Consequently, I find where protected activity and adverse employment actions are inextricably intertwined, as is the case here, Complainant has established a presumptive inference of causation. *Id.*

D. & O. at 43.

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[6] *See, e.g.*, *DeFrancesco v. Union R.R. Co.*, ARB No. 10-114, ALJ No. 2009-FRS-009, slip op. at 6 (ARB Feb. 29, 2012); *Henderson v. Wheeling & Lake Erie Ry.*, ARB No. 11-013, ALJ No. 2010-FRS-012, slip op. at 13 (ARB Oct. 26, 2012).

On appeal, FWWR contends that the ALJ erred in finding that Yowell's report of an injury contributed to his discipline through chain-of-events causation. FWWR Br. at 21. We agree. As we explained in *Thorstenson*, the ARB no longer requires that ALJs apply the "inextricably intertwined" or "chain of events" analysis. *Thorstenson v. BNSF Ry. Co.*, ARB Nos. 18-059, -060, ALJ No. 2015-FRS-052, slip op. at 10 (ARB Nov. 25, 2019) ("We note that the plain language of the statute does not include the term "inextricably intertwined." Rather, this is a construction that substitutes for, and in some cases circumvents, the ALJ's contributing factor or affirmative defense analyses."). By placing the focus on how the employer came to learn of the employee's wrongdoing rather than the employer's actions based on that wrongdoing or protected activity, "chain of events" causation departs from the statute's "contributing factor" text. *Id.* at 10.

4. The ALJ erred in his same-action defense standard

If a complainant meets his or her burden of proof that he or she engaged in protected activity and that protected activity contributed to an adverse action, 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.[7]

While the ALJ found favorably for FWWR, he ultimately concluded, through "inextricably intertwined" reasoning, that FWWR could not prevail in its same-action defense. The ALJ wrote:

> As discussed above, the direct evidence, demonstrably shows Complainant was terminated for the sole reason that he reported his work-related knee injury on August 29, 2017, one week after it occurred and as a result, Respondent terminated Complainant for violating its employee handbook work and safety rule, which requires an injury to be accurately and promptly reported to a supervisor. Nevertheless, I find that Respondent has failed to show by clear and convincing evidence that it would have terminated Complainant on September 13, 2017, if Complainant had not reported his injury on August 29, 2017. Mr. Steinkamp, the ultimate decision-maker, even testified that had not Complainant reported his injury, albeit late, he

[7] "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." *See* 49 U.S.C. § 20109 (incorporating the burdens of proof found in 49 U.S.C. § 42121(b)(2)(B)(iv)); *cf. Clem v. Comput. Scis. Corp.*, ARB No. 16-096, ALJ No. 2015-ERA-003, -004, slip op. at 18 n.8 (ARB Sept. 17, 2019) (discussing the clear and convincing standard in context of statutory requirements).

> would not have terminated Complainant because there would have been no violation. (Tr. 212). Mr. Steinkamp testified that prior to Complainant's late report of his injury, Mr. Steinkamp had no plans to terminate Complainant. (Tr. 249). Thus, arguably, Respondent cannot demonstrate it would have terminated Complainant absent his late report of injury because without his report of injury Mr. Steinkamp would not have terminated Complainant. See *DeFrancesco*, supra, slip op. at 8; see also *Fricka*, supra, slip op. at 5.

D. & O. at 60 (footnote omitted). This analysis presents the same error discussed above.

5. The ALJ's error does not require remand for additional fact-finding

While finding in favor of Yowell and against FWWR through the rule of inextricably intertwined, the ALJ made several subordinate findings to the effect that FWWR terminated Yowell solely for late reporting. Below are examples of the ALJ's findings:

> "Here, it is undisputed that Complainant was terminated because he did not promptly or immediately report his right knee injury, occurring sometime between August 21, 2017 and August 23, 2017, but which he did not report until August 29, 2017." D. & O. at 43.

> "[The ALJ found] and conclude[d] Complainant has failed to present any circumstantial evidence that Respondent used Complainant's report of injury, or his medical treatment as a pretext to his discharge. . . ." D. & O. at 48.

> "[FWWR] has not inconsistently applied its discipline policy," D. & O. at 55, and "Steinkamp, along with Respondent's CEO, President, and Human Resources Department, acted within Respondent's policies, which provide for deviation from its discipline policy when Respondent deems appropriate, and in doing so, they agreed Complaint's employment should be terminated for failing to promptly report his knee injury." D. & O. at 56

> "As discussed above, Respondent clearly set forth in its employee handbook that an employee must accurately and promptly report all injuries to his or her supervisor. In the instant case, Complainant violated Respondent's policy and did not promptly report his right knee injury, occurring sometime between August 21, 2017 and August 23, 2017." D. & O. at 57.

> "As discussed above, the direct evidence, demonstrably shows Complainant was terminated for the sole reason that he reported his work-related knee

> injury on August 29, 2017, one week after it occurred and as a result, Respondent terminated Complainant for violating its employee handbook work and safety rule, which requires an injury to be accurately and promptly reported to a supervisor. . . ." D. & O. at 60.

The ALJ also made credibility findings favorable to Gibson and Steinkamp, and Steinkamp testified that the only reason that Yowell was fired was for late reporting and would not have been fired but for that fact.

Having rejected the inextricably intertwined rule, the remaining question is whether the ALJ's thorough fact-finding connecting FWWR's termination "solely" to late reporting compels a finding in favor of FWWR once the erroneous "inextricably intertwined" barrier is lifted. We conclude in the affirmative. It is undisputed that Yowell was fired solely for late reporting. Given the ALJ's underlying fact-finding and credibility determinations, we do not find that remand for additional fact-finding is required to conclude that FWWR, at the least, has proven its affirmative defense—that it would have fired Yowell for late reporting even in the absence of Yowell having engaged in protected activity. In *Samson v. U.S. Dep't of Labor*, 732 Fed. Appx. 444 (7th Cir. 2018), the 7th Circuit determined that the ALJ's error on the element of protected activity did not require remand and that remand would be "pointless" because the issue of causation permitted only one result; this is so because of the deference given to the ALJ's credibility findings. *Id.* at 446-47; *see also Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 338 (2d Cir.2006) ("[A]n error does not require a remand if the remand would be pointless because it is clear that the agency would adhere to its prior decision in the absence of error."); *id.* at 322 ("Finally, we conclude that although the IJ's decision denying petitioner's application for withholding of removal contains errors, remand nevertheless would be futile because the decision is supported by substantial evidence and it is clear that the same decision would be made in the absence of the noted deficiencies. We therefore deny that portion of the petition."); *Zhao v. Gonzales*, 404 F.3d 295, 310-11 (5th Cir. 2005) (reversing Board of Immigration Appeals but concluding that remand for fact-finding not necessary under "rare circumstance" or occurrence where remand would be futile).

CONCLUSION

We **REVERSE** the ALJ's findings concerning contributing factor causation and FWWR's affirmative defense, **VACATE** the ALJ's award of relief, and **DISMISS** Yowell's complaint.

SO ORDERED.