In the Matter of:

JOHN WEVERS,

COMPLAINANT,

v.

MONTANA RAIL LINK, INC.,

RESPONDENT.

ARB CASE NO. 2016-0088

ALJ CASE NO. 2014-FRS-00062

DATE: June 17, 2019

Appearances:

***For the Complainant*:**
James T. Towe, Esq.; *Towe & Fitzpatrick, PLLC*; Missoula, Montana

***For the Respondent*:**
Jeffrey A. Jackson, Esq.; *Burns White LLC*; Pittsburgh, Pennsylvania

Before: William T. Barto, *Chief Administrative Appeals Judge*; James A. Haynes and Daniel T. Gresh, *Administrative Appeals Judges.*

FINAL DECISION AND ORDER

PER CURIAM. This case arises under the employee protection provisions of the Federal Rail Safety Act of 1982 (FRSA).[1] John Wevers claimed that his employer, Montana Rail Link (MRL), violated the FRSA when it censured him for improper use of work time and interfered with his medical treatment following workplace injuries. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed his complaint after a hearing, and Wevers appealed the case to the Administrative Review Board (ARB or Board). For the reasons stated below, we affirm.

BACKGROUND[2]

Wevers began working for MRL in December 2007 as part of MRL's communications department. The communications technicians manage large areas and travel significant distances to check on equipment. At MRL, Wevers was supervised by Dan Johnson, who in turn reported to Gary Loeffler, Director of MRL's Signal and Communication Department, who reported to Randy Gustin, Chief Engineer. Decision and Order (D. & O.) at 5.

MRL provides a Wellness Program for employees injured on duty. *Id*. To receive benefits, the employee must report the injury and accept alternate work prescribed by a treating physician. D. & O. at 6. MRL's Plan Administrator makes a determination as to whether medical treatment is necessary but may delegate that decision to another. The Wellness Program is voluntary but necessary for Wevers to receive short-term disability benefits. *Id*. The Plan Administrator reviews billing authorizations and makes final determinations as to whether to authorize the treatment. D. & O. at 7. The Plan Administrator relies on medical providers to make medical recommendations and referrals. MRL also uses a nurse case-manager to assist in administering the Wellness Program. The nurse management service also has a separate agreement and participation form.

---

[1] 49 U.S.C. § 20109 (2008), 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 (2014).

[2] We adopt the ALJ's findings and restate them in relevant part. In reciting the ALJ's findings, we make no independent findings of fact.

1. Wevers's December 5, 2012 Injury and Treatment

On December 5, 2012, Wevers was working on communications equipment in Clark Fork, Idaho, when he slipped while climbing down and struck the ground. His right knee locked up and jammed his leg, hip, and right spine area. D. & O. at 9. The equipment was in good working shape and no discipline was issued. Wevers attempted to self-treat overnight, but the next day he asked to be taken to the emergency room. Johnson drove him to the emergency room and waited with him. Physicians diagnosed Wevers with a fractured transverse processor, gave him pain killers and muscle relaxers, and sent him home with instructions for rest. D. & O. at 10. After leaving the emergency room, Wevers then returned to MRL and filled out an injury form. *Id.*; CX-47. MRL reported the injury to the Federal Railroad Administration. Over the next several days, Wevers received information on MRL's Wellness Program and signed a release. D. & O. at 10. In order for MRL to provide benefits and wage continuation, they required access to Wevers's medical information.

The Plan Administrator, on or around December 14, set up an appointment for Wevers with Dr. Dana Headapohl from PMG MT Occupational Health clinic, which is affiliated with St. Patrick Hospital where Wevers sought treatment. Wevers did not pick Headapohl and was not consulted concerning the selection of his treating physician. *Id.*; Hearing Transcript (Tr.) 70-73. Most of Wevers's visits with Headapohl were actually with Dr. Headapohl's physician's assistant.

MRL arranged for a nurse manager from Stevenson Consulting to assist in the management of Wevers's care. The nurse case-manager at Stevenson Consulting contacted Wevers on December 19, 2012. As part of her management duties, the nurse case-manager frequently consulted with Wevers, arranged appointments, and sat in on appointments and discussions with the physicians. The nurse case-manager received requests from the other providers and submitted them to the treating physicians, and upon approval there, forwarded them along to MRL for approval. D. & O. at 12.

Headapohl and the physician's assistant first treated Wevers on December 14, 2012, and continued to treat him throughout his treatment plan. The physician's assistant gave Wevers trigger point (steroid) injections throughout his treatment. Wevers returned to modified duty on December 18, 2012. D. & O. at 11. Modified duty involved working around the office and doing what he could do remotely.

Wevers's treatment included physical therapy and sports rehabilitation, which MRL approved. *Id.* Wevers was to receive treatment from a local physical therapist. *Id.* The Plan Administrator authorized four to six weeks of physical therapy with three therapy sessions weekly. D. & O. at 13.

The nurse case-manager attended a meeting with Wevers and Dr. Headapohl on February 20, 2013. Headapohl and the physician's assistant decided on conservative treatment as Wevers would reach maximum medical improvement (MMI) in the near future. The physical therapist requested six weeks of therapy for Wevers but Headapohl and the physician's assistant approved only one week given the determination for conservative care on February 20. *Id.*

Wevers complained to the Plan Administrator that the nurse case-manager was contacting him too much and he was being "mother-hen'd." *Id.*; Tr. 75-76; CX-9 (Feb. 25, 2013 e-mail). Wevers felt that the caregivers were pushing him to heal too quickly and not giving him enough time.

Because Wevers had reported that his pain had flared up on February 25, 2013, the physical therapist recommended that Wevers receive additional physical therapy for four to six weeks. CX-10. But the physician's assistant denied the request and cancelled further physical therapy. D. & O. at 14. On February 27, 2013, the physician's assistant referred Wevers to a spine and pain clinic for facet and joint injections. CX-11. The physician's assistant also recommended specialized work-hardening physical therapy, which was approved.

Wevers began the specialized physical therapy. The treatment was to consist of three weekly sessions with home physical therapy in between. D. & O. at 14. Physical therapy continued through March and April. On April 16, the therapist recommended two to three more weeks of physical therapy, after which time Wevers would be MMI and ready to return to work full time. D. & O. at 15. The therapist also recommended a chiropractor for Wevers if needed. D. & O. at 14; CX-16; Tr. 79.

Wevers kept Johnson, his supervisor, abreast of his schedule. Johnson kept Loeffler and Gustin informed of Wevers's progress. On average, Wevers was going to the physician's office once a week and getting physical therapy for three hours, three times a week from the date of the injury until April 2013. Wevers's medical treatment was considered work time. On February 5, 2013, Johnson forwarded Wevers's schedule to Loeffler who expressed surprise at Wevers's light schedule ("I

need that schedule"). D. & O. at 15; CX-58-1, 5. There were more comments again on February 13. Loeffler referred to Wevers as the "six million dollar man" who might implode. D. & O. at 15; CX-58-3; Tr. 85. Since it was an on-duty injury, it was determined that the best course was to continue with his treatment as is.

Wevers worked sedentary duty in the morning, went home for lunch, switched to his personal vehicle, and then attended physical therapy in the afternoon. D. & O. at 16; Tr. 92-95. On April 19, 2013, Wevers was assigned to a 2:00 pm physical therapy appointment, which was approved as paid work time. Wevers did not attend the meeting. Wevers testified that he took a pain pill at lunch and fell asleep. Wevers slept through the appointment, did not call the office and did not speak with anyone from the office until the next week. D. & O. at 16; Tr. 98-99.

Johnson suspected Wevers was wasting time based on comments that a co-worker overheard. D. & O. at 16; Tr. 212-213. Johnson decided to drive to Wevers's house on April 19 to see if he was at home or at the physical therapy appointment. Two cars were there. Johnson returned to MRL and spoke with Gustin. They pulled Wevers's physical therapy attendance records to see if he had been attending. MRL learned that he had not attended and gave the office a false excuse about having a work conflict. Having caught Wevers in an apparent lie, Gustin decided to issue Wevers a censure letter for not attending physical therapy when he had been excused from work to attend physical therapy. D. & O. at 16-17. The charge was failing to follow instructions, but the censure did not involve any loss of time or pay. D. & O. at 17. The April 24 censure was to be removed after two years if there were no further incidents.

2. Wevers Continued Treatment and Returned to Normal Duty in the Summer of 2013

Wevers or his medical providers requested a magnetic resonance imaging (MRI) test, which was performed on April 26. The physician's assistant recommended more treatment, injections and pain management. D. & O. at 18. Physical therapy continued, and Wevers remained on light duty through June. Wevers experienced flare-ups and continued to receive injections. Headapohl suggested that Wevers meet with a behavioral psychologist to work through his pain issues, which Wevers did on June 28. D. & O. at 19.

On July 11, Headapohl determined that Wevers had reached MMI and was released for full duty. Wevers testified that he did not agree with the determination. *Id*.

To help with Wevers's discomfort, MRL procured a new chair, new monitor, new keyboard, and new docking station for Wevers. D. & O. at 13. Wevers informed MRL that his personal truck seat was better for his back pain. MRL asked for the seat type to see if they could accommodate his request. Wevers asked if he could be moved from a Chevy to a Dodge or Ford. MRL arranged for a different truck for Wevers. D. & O. at 13, 14, 19-20, 36.

3. Wevers Requested Additional Injections

Wevers asked for additional injections on or about August 30, 2013. D. & O. at 86-87; Tr. 491-492; CX-35. The nurse case-manager passed this request on to medical providers and MRL. Wevers changed his mind on or around September 5, 2013, when he conveyed to the nurse case-manager that his condition had improved and indicated that he no longer needed additional injections. D. & O. at 87. During follow up conversations with the nurse case-manager in early and mid-September, Wevers did not repeat his request for more injections. D. & O. at 88. Wevers reinitiated his request for injections on or about September 30, 2013. The nurse case-manager followed up with MRL and with Headapohl, but Headapohl was out of the country in early October. D. & O. at 87. Wevers again requested injections on October 16, 2013. Headapohl recommended conservative care given his high level of function and active routine.

4. September Performance Review

In September 2013, Johnson became concerned that Wevers was not performing his duties. Johnson received complaints from co-workers that Wevers would drive to a site and enter and exit without performing any work. D. & O. at 20; Tr. 291-292. The entry and exit alarms were triggered, but the alarms that would show actual work being performed were not triggered. D. & O. at 20; Tr. 291-293. Johnson also felt that Wevers's report of work accomplished should have taken less time than he accounted for in his records. Tr. 221-222. During the time when Wevers was supposed to be at a work site, Johnson observed that his truck was not there.

Johnson informed Gustin of his concerns and the co-workers' complaints. Gustin decided that the complaints needed to be verified and recommended that Johnson conduct operations testing. Johnson and another supervisor conducted an unobserved operations test on Wevers and other employees. They rented a car and followed Wevers's activities on September 25 and 26. On September 26, they observed Wevers taking a long lunch with a co-worker and stopping at a boat dealer and other places that did not have a clear work purpose. D. & O. at 21.

Wevers submitted time sheets for full days worked for both observation days. D. & O. at 22. Johnson reported his observations to Gustin. When questioned about the specifics of his activities during the two days, Wevers provided alternate work reasons for his visits to the shops. *Id*. at 22; Tr. 109. On September 27 and 30, Wevers submitted documents purporting to justify his whereabouts and the proper use of company time.

MRL has three categories of violations: minor, major, and serious. D. & O. at 7. Discipline can range from censure to termination. MRL has an internal grievance procedure through a collective bargaining agreement as well as a process for escalating complaints through supervisors and human resources. D. & O. at 8. Gustin testified that MRL's rules on abusing work time and dishonest time accounting are serious and subject to the heaviest discipline. *Id.*; Tr. 520. MRL has terminated individuals for stealing as little as fifteen minutes of company time under certain circumstances. Gustin decided to issue an efficiency failure. On September 27, Gustin issued Wevers a letter of discipline and a notice of a fact-finding hearing for misusing company time. On October 18, 2013, Wevers waived his hearing and signed a statement acknowledging that he conducted personal business on company time on September 25 and September 26. Wevers received a ten-day suspension that was waived so long as no other violations occurred in eighteen months. D. & O. at 24.

5. <u>Wevers's Second Injury on October 22 and Request for Referral to Neurosurgeon</u>

On October 22, 2013, Wevers reinjured his back. While at work, he stepped down from a trailer at a gas station and heard two pops. He continued to do some work, did some stretching, and then took some pain pills. Later, Johnson drove Wevers to the emergency room (ER). The x-rays showed some degenerative disc disease but no fracture, subluxation, or dislocation. *Id.* The ER physician's

discharge order instructed Wevers to follow-up with his regular provider or see a neurosurgeon. Tr. 366; CX-42.

Wevers filed an injury report with MRL on October 23, and the Wellness Program and associated process with Headapohl, the physician's assistant and the nurse case-manager began anew. Wevers began physical therapy again. Following Wevers's discharge from the hospital, the nurse case-manager set up an appointment with Headapohl and noted that a neurosurgeon or neurologist consultation was requested. In November 2013, a neuro-electrophysiological (EMG) test for Wevers was approved and performed. D. & O. at 25; Tr. 404. The EMG is a diagnostic test for back and spine matters. Dr. Headapohl did not refer Wevers to a neurosurgeon because the EMG test did not indicate that such treatment was necessary. D. & O. at 26.

In the fall and winter, Wevers saw medical providers numerous times and received additional steroid and facet injections. The physician's assistant recommended that the physician administering the program of injections take over as treating physician, but the physician declined the recommendation. *Id*.

Wevers attempted to seek additional care at the U.S. Department of Veterans Affairs (VA). The treating doctor at the VA agreed to have an MRI performed, but no referral to a neurosurgeon was produced. D. & O. at 33; Tr. 482-83. The nurse case-manager testified that referrals to neurosurgeons may be appropriate when an MRI shows a disc problem. Tr. 437.

Wevers wanted a neurosurgeon to look at his MRIs and to inform him if there were other treatments that could be more effective than injections. D. & O. at 30. Wevers could not see the neurosurgeon on his own because the neurosurgeon would not treat him without a referral because of workers' compensation requirements. Tr. 425-26, 492; D. & O. at 29, 90.

Neither Wevers's treating physician Headapohl nor the physician's assistant approved Wevers's requests to see a neurosurgeon. Tr. 426; D. & O. at 29. MRL never received a request for authorization to send Wevers to a neurosurgeon or neurologist. Tr. 119, 367. The nurse case-manager testified that every authorization MRL received was approved. Tr. 470, 476-477. In April 2014, Headapohl and the physician's assistant determined that Wevers had reached MMI and was fit to return to work without restrictions. D. & O. at 28.

6. Wevers's Complaint and the ALJ's Order

Wevers filed his complaint with the Occupational Safety and Health Administration (OSHA) on October 22, 2013. Wevers alleged that MRL interfered with his medical treatment and retaliated against him for reporting his injuries and making a safety complaint. Wevers also alleges retaliation against him for following a doctor-prescribed course of treatment.

On February 6, 2014, OSHA dismissed Wevers's complaint, and Wevers requested a hearing before an ALJ. The case was assigned to an ALJ for a hearing, which was held beginning on September 9, 2014. After making specific credibility findings, the ALJ concluded that Wevers engaged in protected activity when he reported his injuries in December 2012 and October 2013. The ALJ further concluded that Wevers engaged in protected activity when he requested medical treatment and followed the treatment plan of a treating physician. The ALJ also concluded that Wevers's censures in April and October 2013 and his ten-day waived suspension constituted adverse actions, but that MRL did not create a hostile work environment. The ALJ found that Wevers had not established that his reports of injuries contributed to the censures and waived suspension. The ALJ found that Wevers's censures and waived suspension were related to events surrounding his treatment plan, but found that MRL would have censured Wevers and given him a waived suspension even if he had not been injured and followed the treatment plan of a physician because he violated company policy concerning personal use of work time. Finally, the ALJ found that MRL did not delay, deny, or interfere with Wevers's requested medical treatment concerning referrals to a neurosurgeon or chiropractor or for general care. The ALJ concluded that MRL's initial selection of a clinic and physician was an interference with Wevers's medical treatment but that Wevers's ultimate care would have been the same even if MRL did not select the physician as many others concurred with Headapohl and the physician's assistant concerning Wevers's treatment. Wevers appealed the ALJ's decision to the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to review ALJ decisions in cases arising under the FRSA and to issue final agency decisions in these matters. *See* Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg.

13,072 (Apr. 3, 2019); 29 C.F.R. § 1982.110(a). The ARB reviews questions of law presented on appeal de novo but is bound by the ALJ's factual determinations as long as they are supported by substantial evidence. 29 C.F.R. § 1982.110(b); *Kruse v. Norfolk S. Ry. Co.*, ARB Nos. 12-081, 12-106; ALJ No. 2011-FRS-022, at 3 (ARB Jan. 28, 2014). Under this standard, we look to the existing administrative record and ask whether it contains sufficient evidence to support the ALJ's findings of fact. *See Biestek v. Berryhill*, 587 U.S. ___, ___ (2019) (slip op. at 5) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The evidence will be sufficient if it is "more than a mere scintilla," *Biestek*, 587 U.S. ___, slip op. at 5, and need not amount to a preponderance. *See Fund for Animals v. Kempthorne*, 538 F.3d 124, 132 (2d Cir. 2008). "It means—and means only—'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Biestek*, 587 U.S. ___, slip op. at 5 (quoting *Consolidated Edison*, 305 U.S. at 229).

DISCUSSION

The FRSA, as amended, prohibits a railroad company, a contractor, officer, or employee of a railroad company from retaliating against an employee because the employee engaged in activity protected by the FRSA.[3]

A successful FRSA complainant must prove the following: (1) that s/he engaged in protected activity; (2) suffered an adverse action; and (3) that the protected activity was a contributing factor in the unfavorable employment action. 49 U.S.C. § 42121(b)(2)(B)(iii) (2000); *Luder v. Cont'l Airlines, Inc.,* ARB No. 10-026, ALJ No. 2008-AIR-009, slip op at 6-7 (ARB Jan. 31, 2012). If the employee prevails on the elements of the complaint, s/he may receive remedies. To avoid liability for remedies, the employer must prove by clear and convincing evidence that it would have taken the same action absent the employee's protected activity. Clear and convincing evidence is "[e]vidence indicating that the thing to be proved is highly

[3] 49 U.S.C. § 20109. The FRSA incorporates the procedures found in the whistleblower protection section of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, commonly known as "AIR 21." *See* 49 U.S.C. § 20109(d)(2)(A) ("Any [enforcement] action [under the substantive prohibitions on retaliation for whistleblowing] shall be governed under the rules and procedures set forth in [the AIR-21 whistleblower protection provision].").

probable or reasonably certain." *Williams v. Domino's Pizza*, ARB No. 09-092, ALJ No. 2008-STA-052, slip op. at 6, 9 n.6 (ARB Jan. 31, 2011).

1. Wevers Alleges that MRL Retaliated against Him for Reporting his Workplace Injuries

The FRSA prohibits a railroad carrier engaged in interstate commerce or its officers or employees from discriminating against an employee because the employee engages in any of the protected activities identified under 49 U.S.C. § 20109(a). The relevant provisions of the FRSA protect an employee from retaliation if the retaliation is "in whole or in part" due to the employee's "lawful, good faith" effort to do one or more of the following:

> (a)(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 . . .
> …
> (a)(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.

49 U.S.C. § 20109(a).

A. Wevers's Report of Injuries did not Contribute to his Adverse Actions

Wevers filed an injury report on December 5, 2012, when he slipped on a top step and his right foot hit the ground in a jarring manner affecting his hip and lower back. Wevers also filed an injury report on October 22, 2013, when he stepped down off a fuel trailer again jarring his lower back area. It is undisputed that these injury reports constitute protected activity under the FRSA.

On April 24, 2013, MRL issued Wevers a censure for violating MRL policy for failing to inform a supervisor that he was going to be absent from a scheduled physical therapy appointment. On October 18, 2013, Wevers signed an acknowledgement and waiver and received a censure letter and ten-day waived suspension for misuse of company time. Wevers did not lose any pay or time because of the censures. The ALJ determined that Wevers's censure letters were

adverse actions. D. & O. at 46. MRL does not dispute the ALJ's finding that the censures were adverse actions on appeal.

The ALJ determined that Wevers's reports of injuries were a causal "dead end" that did not contribute in any way to his censures. D. & O. at 60. We conclude that the ALJ's findings on this point are supported by substantial evidence.[4] Wevers reported his initial injury in December 2012. On April 19, 2013, Wevers missed the physical therapy session that he said that he would attend during paid work time. D. & O. at 61. MRL censured Wevers on or about April 24, 2013, within a week of discovering Wevers's abuse of company time. The ALJ found that the span of four months between his injury report and his censure lacked a strong temporal connection. *Id.* We concur. A short duration between adverse action and protected activity can constitute circumstantial evidence of causation but is not necessarily dispositive of contributing factor causation. *Barker v. Ameristar Airways, Inc.*, ARB 05-058, ALJ No. 2004-AIR-012, slip op. at 7 (ARB Dec. 31, 2007). Johnson's receiving a complaint about Wevers and discovering his abuse of work time served as intervening events that diminished any causal inference from temporal proximity with the December report of an injury. *Id.* The investigation into Wevers's conduct was reasonable and unrelated to the injury report except for the incidental point that he should have been at a physical therapy appointment as part of his treatment stemming from the injury report.

The ALJ also found that Wevers's injury report did not contribute to his discipline in October. The temporal proximity of nine to ten months between the October discipline and the December 2012 injury report is minimal. D. & O. at 64. The ALJ determined that non-retaliatory reasons accounted for the October discipline. We conclude that the ALJ's findings are supported by substantial

---

[4] The ALJ factored in Wevers's lack of credibility in her assessment of causation. D. & O. at 60. The ARB accords special weight to an ALJ's credibility findings that "rest explicitly on the evaluation of the demeanor of witnesses." *Litt v. Republic Serv. of S. Nev.*, ARB No. 08-130, ALJ No. 2006-STA-014, slip op. at 8 (ARB Aug. 31, 2010). Lesser weight is accorded to a credibility finding based on other aspects of a witness's testimony, such as internal discrepancies or witness self-interest. *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 2001-STA-022, -029, slip op. at 16 (ARB Oct. 31, 2003). The ALJ noted Wevers's inconsistent conduct and observed his convenient and self-serving explanations and justifications following the discovery of his wrongdoing. D. & O. at 31-33. We conclude that the ALJ's credibility findings are supported by substantial evidence.

evidence. The late September investigation into Wevers's work was brought about in part from his co-workers' complaints. The ALJ found that these complaints were reasonable. One co-worker was worried about work not being completed and the danger to the overall rail system. D. & O. at 62. Another co-worker was hostile toward Wevers because of the increased work load. The ALJ considered the covert performance surveillance as a routine response to the co-workers' complaints and corroborating circumstances. *Id*. MRL's investigation and discovery of Wevers's wrongdoing constituted intervening events leading to the October censure and ten-day waived suspension. We note that Wevers's letter of discipline was issued one day after the discovery of his wrongdoing.

The ALJ observed that Wevers's evidence of contribution stems mainly from MRL's inability to prove the appropriateness of its disciplinary charge. But the ALJ correctly concluded that MRL was not burdened with proving the correctness of its disciplinary charge, but only that Wevers's injury report or other protected activity did not cause its disciplinary charge in whole or in part. *Id*. The ALJ also discounted contribution in part because of the light discipline Wevers actually received for his misuse of company time, which included censure letters, a waived suspension and notations in his personal file that would be removed if he had no further problems. D. & O. at 63.

B. Wevers did not Suffer a Hostile Work Environment

Wevers also claims that he suffered a hostile work environment based upon co-workers' and management's attitude toward his injury and MRL's investigations into Wevers's use of company time. The ALJ found that Wevers did not suffer a hostile work environment. D. & O. at 47-48. On appeal, Wevers complains that the ALJ erred and raises comments by co-workers and MRL supervisors concerning his light-duty status following his injury. For example, a co-worker told him to "man up" and called him a "wuss," and Loeffler mocked his injuries by calling him a "six million dollar man" and suggested that he might implode. Wevers Br. at 6-7, 24-25. Wevers further claims that MRL secretly followed him, which provides evidence of harassment.

We affirm the ALJ's conclusion that Wevers did not suffer an actionable hostile work environment. To constitute an actionable hostile work environment, that environment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Williams v.*

Nat'l R.R. Passenger Corp., ARB No. 12-068, ALJ No. 2012-FRS-016, slip op. at 6-7 (ARB Dec. 19, 2013), citing *Harris v. Forklift Sys.*, 510 U.S. 17, 21-23 (1993). The record supports the ALJ's finding that the actions of Loeffler and Gustin did not create a sufficiently severe abusive work environment for Wevers. Loeffler's and Gustin's comments were exchanged by e-mail and were not known to Wevers except through discovery during litigation. The ALJ noted that Loeffler had no decision-making role in the censures. D. & O. at 47, 64. Co-workers expressed negative views of Wevers's work status but the ALJ's conclusion that these were insufficiently severe or pervasive to create a hostile work environment is correct. Co-workers' concerns with Wevers's work status arose out of safety concerns and increased work load. D. & O. at 47-48, 62.

Finally, we affirm the ALJ's conclusion that Johnson's investigation into Wevers's performance was not evidence of harassment or a hostile work environment. Although Johnson received information about Wevers's abuse of work time from another employee before his investigation, Johnson supported his assessment of Wevers's abuse of work time through an independent inquiry without relying on information from others. The ALJ correctly reasoned that these performance investigations were standard and routine. D. & O. at 47.

2. Wevers Alleges that MRL Interfered with his Medical Treatment and Disciplined him for Following a Physician's Treatment Plan

A. MRL did not Deny, Delay, or Interfere with Wevers's Medical or First Aid Treatment

i. Subsection 20109(c)(1) prohibits an Employer from interfering with Prompt Medical Attention

The FRSA prohibits employers from denying prompt medical treatment and disciplining employees for following the treatment plan of a treating physician:

> (c) Prompt Medical Attention.—
>
> (1)Prohibition.—
>
> A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is

> injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.
>
> (2) Discipline.—
>
> A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term "discipline" means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

49 U.S.C. § 20109(c)(1)-(2).

Wevers alleges that MRL interfered with his medical treatment. As the ALJ observed, subsection (c)(1) is not a typical whistleblower protection provision but is instead a direct prohibition of certain conduct. D. & O. at 77. Likening subsection (c)(1) to an anti-retaliation provision, the ALJ reasoned that a request for medical treatment would constitute the protected activity under this subsection and the employer's adverse action would be the denial, delay, or interference with medical treatment. Extending this analysis, the ALJ concluded that subsections 20109(c) and (d) would implicitly incorporate the typical requirement of contributing factor causation and thereby provide the employer with an affirmative defense that its

action is not a prohibited interference or denial of treatment but a reasonable course of action.[5]

Both parties cite to and rely upon in their arguments this Board's prior decision in *Santiago v. Metro-North Commuter R.R. Co., Inc.*, ARB No. 10-147, ALJ No. 2009-FRS-011 (ARB July 25, 2012). In that case, Santiago hurt his back when he fell from a broken chair while working for Metro-North Commuter Railroad. Santiago was taken to the hospital in distress. After his hospital visit, Santiago went to the Occupational Health Services Clinic (OHS) for treatment. The OHS treated Santiago but discontinued his treatment after Santiago's condition improved. Santiago desired additional treatment. Metro North had so far paid Santiago's treatment costs for three months, but the resolution of the occupational injury meant that Metro-North would no longer be paying for treatment. Because Metro-North was no longer paying Santiago's treatment costs, Santiago's additional treatments were to be paid out of private insurance. Private insurance covered most of Santiago's additional treatments but Santiago had to pay for other treatment out of pocket.

Santiago filed a complaint with OSHA, which concluded that Metro-North had unlawfully interfered with his treatment. Metro-North objected and requested a hearing with an ALJ who, after a hearing, concluded to the contrary. The ALJ noted that subsection 20109(c)(1) was effectively comprised of a title and two sentences. While the first sentence was ambiguous, when it is read in conjunction with subsection (c)'s title, the second sentence of subsection (c)(1), and the entirety of subsection (c)(2), the ALJ concluded that the reasonable construction of subsection (c)(1) is limited to the period immediately following a workplace injury. Congress included broader language such as "treatment plan of a treating physician" in subsection (c)(2) but did not include that phrase in subsection (c)(1). *Santiago*, ALJ No. 2009-FRS-011, slip op. at 21-22 (ALJ Sept. 14, 2010) (footnotes omitted). The ALJ also examined comparable legislation in Illinois' and Minnesota's rail safety legislation to find references to "immediate medical attention" for employees injured

---

[5] 49 U.S.C. § 20109(d)(1) ("In general.--An employee who alleges discharge, discipline, or other discrimination in violation of subsection (a), (b), or (c) of this section, may seek relief in accordance with the provisions of this section, with any petition or other request for relief under this section to be initiated by filing a complaint with the Secretary of Labor."); *id.* at § (d)(2)(i) ("Burdens of proof.--Any action brought under (d)(1) shall be governed by the legal burdens of proof set forth in section 42121(b)").

on the job. *Id.* at 22. Finally, the ALJ observed that the Federal Employers Liability Act, 45 U.S.C. § 51 (1939), provides the traditional route for employees to recover medical expenses for on-the-job injuries. *Id.* at 9, 12-13, 23-26. Because subsection 20109(c)(1) was limited to a temporal period following a workplace injury, the ALJ concluded that Metro-North's refusal to pay for Santiago's post-OHS medical treatment was not a denial, delay, or interference with medical treatment. *Id.* at 24-25.

Santiago appealed the ALJ's decision to the ARB, which vacated the ALJ's opinion and remanded in light of its contrary interpretation of subsection (c)(1). Reviewing the language of the first sentence of subsection (c)(1), the ARB observed that nothing in the text referred to a temporal limitation: "A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first-aid treatment of an employee who is injured during the course of employment." The ARB went on to hold the following:

> [S]ubsection 20109(c)(1) bars a railroad from denying, delaying, or interfering with an employee's medical treatment throughout the period of treatment and recovery from a work injury. Because the language is clear, reference to other statutes or legislative history to determine its meaning is unnecessary. Nevertheless, the legislative history of the statute supports our broad interpretation of section 20109(c)(2).

Santiago, ARB No. 10-147, slip op. at 12. On remand, the ALJ found for Santiago and ordered remedies; the ARB affirmed the ALJ's finding on appeal.

Metro-North appealed the ARB's opinion to the United States Court of Appeals for the Second Circuit. In *Metro-North Commuter R.R. Co. v. U.S. Dep't of Labor*, the Second Circuit vacated the ARB's *Santiago* opinion. 886 F.3d 97 (2d Cir. 2018). The Second Circuit examined the ARB's *Santiago* approach to subsection (c)(1) and found several problems. As the ALJ and ARB had noted, subsection (c)(1)'s prohibition is awkwardly nestled within the other protected activities which more easily fit within AIR 21's whistleblower protections. The court of appeals

suggested that the DOL reconsider its interpretation of subsection (c)(1),[6] and suggested a much simpler interpretation of § 20109(c):

> The statutory language and overall scheme and context of § 20109 suggest that subsection (c)(1)'s purpose "is to ensure employees receive prompt medical attention if they are injured on the job," while subsection (c)(2), "the antiretaliation provision, ... effectuates that purpose" by prohibiting employers from disciplining or otherwise retaliating against employees who request medical assistance or follow a treatment plan.

Id. at 108 (*citing Grand Trunk W. R.R. Co. v. U.S. Dep't of Labor*, 875 F.3d 821, 827 (6th Cir. 2017)). Notwithstanding this critical observation, the court of appeals declined to overturn the ARB's interpretation of the subsection at that time because the court concluded instead that the ALJ's decision was simply not supported by substantial evidence, even under that interpretation.

Before the ALJ and now on appeal before the Board, Wevers argues that the ARB's interpretation of subsection 20109(c)(1) in *Santiago* controls his complaint. But in light of the court of appeals' suggestion, we take this opportunity to reconsider our previous interpretation of subsection 20109(c)(1) and now conclude that this subsection, when read in conjunction with the remainder of the section, prohibits an employer from denying, delaying, or interfering with prompt medical treatment or first aid only during the time period immediately following a workplace injury.

When the applicability of subsection (c)(1) is limited to the immediate temporal period following a workplace injury, subsection (c)(1)'s purpose to ensure prompt medical attention for the injury and subsection (c)(2)'s additional purpose to ensure the injured employee can follow an ongoing treatment plan for the injury complement each other. *Cody v. Hillard,* 304 F.3d 767, 776 (8th Cir. 2002) ("Statutes are to be interpreted as a whole . . . . In particular, courts should not interpret one provision in a manner that renders other sections of the same statute inconsistent, meaningless, or superfluous.") (citations omitted). The prohibition at

---

[6] The court of appeals made the following suggestion: "We suggest that the Board might reexamine and further explicate its reasoning regarding § 20109(c)'s interpretation in the future. Having so advised, we now turn to the lack of substantial evidence to support the ALJ's decision." 886 F.3d at 108.

subsection (c)(1) against denying, delaying, or interfering with "prompt medical attention" operates to ensure an injured employee's immediate care, as it prohibits denying or refusing medical treatment or first aid following a workplace injury. While nothing in subsection (c)(1)'s first sentence indicates a limitation of the temporal period regarding when the treatment is received, the text of subsection (c)(1) as a whole indicates that it was intended to be limited to first aid treatment immediately following a workplace injury. We note that the title of § 20109(c) is "Prompt Medical Attention," and while "the title of a statute and the heading of a section cannot limit the plain meaning of the text," *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947), it can "assist in clarifying ambiguity," *Minn. Transp. Reg. Bd. v. United States*, 966 F.2d 335, 339 (8th Cir. 1992); *see also Grand Trunk Western R.R. Co. v. United States Dep't of Labor*, 875 F.3d 821, 826 & n.6 (6th Cir. 2017). The text of the second sentence of subsection (c)(1) also provides examples of such "prompt medical attention," referring to an employee's request for an ambulance or ride to a hospital, both of which are events that typically occur in the immediate aftermath of an injury. "Prompt medical attention" in (c)'s title, in conjunction with the second sentence of subsection (c)(1) providing that employers promptly transport injured employees to a hospital if needed or requested, supports our interpretation that subsection (c)(1) operates to ensure prompt or immediate first aid medical treatment.

The language of subsections (c)(1) and (c)(2), when considered together, also supports the conclusion that subsection (c)(1) is limited to the period of time immediately following a workplace injury. The phrase "treatment plan of a treating physician" is not used in subsection (c)(1), but only in subsection (c)(2). If Congress had intended the prohibition at subsection (c)(1) to also include a "treatment plan of a treating physician," it would have included that language in subsection (c)(1) as well. "'[W]here Congress includes particular language in one section of a statute but omits it in another. . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983). Furthermore, if the phrase "medical or first aid treatment" from subsection (c)(1) did also encompass a "treatment plan of a treating physician," there would be no need to refer to a "treatment plan of a treating physician" in subsection (c)(2), as (c)(2) also again would include protection for requesting "medical or first aid treatment." Because the phrases were used disjunctively in subsection (c)(2), the inclusion of just one of the phrases in subsection (c)(1) should not be construed to include both phrases. A court should "give effect, if possible, to

every clause and word of a statute." *Moskal v. United States*, 498 U.S. 103, 109-10 (1990).

Accordingly, we will no longer adhere to the interpretation of subsection (c)(1) that the Board had previously set forth in *Santiago*.[7] Instead, we hold that subsection 20109(c)(1) prohibits an employer from denying, delaying, or interfering with medical treatment or first aid only in the temporal period immediately following a workplace injury.[8] Subsection 20109(c)(1)'s provision for prompt "medical or first aid treatment" does not create a statutory right to ongoing or unlimited medical treatment of choice over the entire course of a treatment plan or recovery period for a workplace injury. As Wevers does not complain of his medical or first aid treatment immediately following his workplace injuries, the only question that remains before us is whether MRL disciplined or threatened to discipline Wevers for following the treatment plan of a treating physician.[9]

B. *MRL would have Censured Wevers even if He were not Following the Treatment Plan of Physicians*

i. Wevers's Censures arose from Misconduct that took place while He was still following His Treatment Plan

The FRSA prohibits employers from retaliating against or disciplining an employee for following the treatment plan of a treating physician. 49 U.S.C. § 20109(c)(2). Once Wevers entered the Wellness Program, he received several

---

[7] In overturning *Santiago*'s interpretation of (c)(1), we provide detailed reasons for construing the ambiguity of (c)(1) in a manner consistent with the remainder of (c)(1), the title of (c), and consistent with the overall language of subsection (c) including (c)(2). *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

[8] The determination as to what constitutes an appropriately limited temporal period will necessarily be fact-driven and so we decline to set forth any specific temporal limits or boundaries.

[9] Even if we were to follow the Board's previous decision in *Santiago* interpreting subsection (c)(1), we would nevertheless conclude that the ALJ's findings that MRL did not deny or delay Wevers's medical or first aid treatment are supported by substantial evidence cited in her decision. In light of our disposition of this matter, we need not address the ALJ's efforts to apply the burdens of proof prescribed in 49 U.S.C. § 42121(b) to a purported violation of subsection 20109(c)(1) or the possible limits of our previous decision in *Rudolph v. Nat'l R.R. Passenger Co.*, ARB No. 11-037, ALJ No. 2009-FRS-015 (ARB Mar. 29, 2013).

prescribed treatments from Headapohl and the physician's assistant, one of which was light-duty work status. Wevers claims that his following his physicians' treatment plan was a contributing factor in his April and October 2013 disciplines.

The ALJ found that there was temporal proximity between the treatment plan and the April and October disciplines because Wevers's treatment and light-duty work status were ongoing dating from his injury through to when he received his censures. D. & O. at 67-68. The ALJ also found that Wevers's treatment plan and the censures were inextricably intertwined and satisfied the contributing-factor standard. D. & O. at 67. Co-workers were upset, specifically about Wevers's light duty and nonwork, and a co-worker was likely the source behind the complaint about Wevers's wasting work time. This animosity formed the reason for the co-worker's complaints to Johnson about Wevers. Co-workers' complaints, in addition to corroborating circumstances, formed the reasons for the investigations, which turned up a violation of company time.[10]

ii. MRL would have Censured Wevers even if He had not been following the Treatment Plan

Because the ALJ found that Wevers's medical treatment plan, including light-duty status, contributed to his censures, the ALJ also examined MRL's affirmative defense. Despite any co-workers' bias toward Wevers because of his light-duty status, the ALJ determined that MRL had carried its burden to prove by clear and convincing evidence that it would have censured Wevers for violating company use of time policy even if Wevers had not been following the treatment plan of a treating physician. D. & O. at 74, 76. The ALJ properly discounted the fact

---

[10] D. & O. at 64-69. We do not necessarily endorse the chain of causation upon which the ALJ relied. *See BNSF Ry. Co. v. U.S. Dep't of Labor*, 867 F.3d 942, 946-49 (8th Cir. 2017) (examining chain-of-causation analysis in FRSA cases); *Koziara v. BNSF Ry. Co.*, 840 F.3d 873, 877 (7th Cir. 2016) ("[The ALJ] failed to distinguish between causation and proximate causation. The former term embraces causes that have no legal significance. Had the plaintiff never been born or never worked for BNSF he would neither have been hurt by the plank flung at him by the energetic front-end loader nor have stolen railroad ties from the railroad. But that doesn't mean that his being born or his being employed by the railroad were legally cognizable causes of his being fired."); *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786 (8th Cir. 2014) (evaluating temporal proximity and causation in the context of intervening events). In this case, however, we need not resolve any potential differences because the ALJ went on to find that MRL had satisfied its affirmative defense, which we affirm as supported by substantial evidence.

that MRL learned of Wevers's wrongdoing through an investigation stemming from Wevers's light-duty status and treatment plan as a means for Wevers to avoid all accountability for his wrongdoing. D. & O. at 70. The ALJ found that monitoring employee performance and use of time were normal and routine actions, and MRL would have censured Wevers if it had learned of his wrongdoing without reference to his injury and treatment plan.

We conclude that the ALJ's findings in this regard are supported by substantial evidence. MRL submitted a tabular exhibit with information about all the other employees that it disciplined over a particular time frame. The ALJ found that MRL's history of disciplining other employees was not itself conclusive, as it could not accurately isolate for injuries, but when considered in conjunction with Gustin's testimony, the exhibit supported MRL's affirmative defense. D. & O. at 71-72. The ALJ reasoned that co-workers' frustrations were not due to Wevers's work-related injury or treatment plan but rather it was the fact that his work was not being completed and work time was being wasted. D. & O. at 74-75. The co-workers' bias and hostility generated the complaint, which in turn triggered an independent investigation. This investigation revealed a violation of company policy independent of Wevers's protected activity. The proximate cause of the April censure letter was Wevers's failing to attend the medical appointment; the proximate cause of the October censure was Wevers's abusing company time during a performance review. D. & O. at 76. We affirm the ALJ's finding that MRL would have censured Wevers for abuse of company time because he was not doing his job even if he had not engaged in protected activity by following the treatment plan of a treating physician.

CONCLUSION

Consequently, we **HOLD** that the employee protections provided at 42 U.S.C. § 20109(c)(1) are limited to the temporal period immediately following a workplace injury. Except as noted above, the ALJ's findings and conclusions concerning credibility, protected activity, contributing factor causation, and affirmative defenses are **AFFIRMED** as legally correct and supported by substantial evidence. Accordingly, this complaint is **DISMISSED**.

SO ORDERED.