U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

TRAVIS KLINGER, **ARB CASE NO. 2019-0013**

COMPLAINANT, **ALJ CASE NO. 2016-FRS-00062**

v. **DATE: March 18, 2021**

BNSF RAILWAY COMPANY,

RESPONDENT.

Appearances:

For the Complainant:
Matthew L. Rabb, Esq. and Lloyd L. Rabb, III, Esq.; *Rabb & Rabb, PLLC*; Tucson, Arizona

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

Before: James D. McGinley, Chief Administrative Appeals Judge; Thomas H. Burrell and Randel K. Johnson, Administrative Appeals Judges; Judge Randel K. Johnson, dissenting

ORDER REVERSING AND REMANDING

This case arises under the whistleblower protection provisions of the Federal Railroad Safety Act of 1982 (FRSA).[1] Complainant Travis Klinger filed a complaint with the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that Respondent BNSF Railway Company (BNSF) violated the FRSA by suspending him for reporting a workplace injury. OSHA dismissed Klinger's complaint upon finding that his allegations did not support a

[1] 49 U.S.C. § 20109 (2008), as implemented by 29 C.F.R. Part 1982 (2020) and 29 C.F.R. Part 18, Subpart A (2020).

claim of retaliation under the FRSA. Klinger objected to OSHA's determination and the case was assigned to an Administrative Law Judge (ALJ).

The ALJ decided the case on the record. In a Decision and Order (D. & O.) issued on November 30, 2018, the ALJ entered judgment in Klinger's favor and awarded Klinger monetary and non-monetary relief. For the following reasons, we reverse and remand for further proceedings consistent with this order.

BACKGROUND[2]

On August 9, 2015, Klinger injured his shoulder while working for BNSF in its Southwest Division.[3] Klinger reported his injury to his supervisor before leaving work to visit the emergency room.[4] Klinger later submitted a letter signed by his doctor, dated August 13, 2015, stating that he should remain off work until September 25, 2015. The letter included a two-page medical evaluation, in which Klinger's physician concluded "I do believe it is likely the patient should be able to return to work in approximately 6 weeks."[5] BNSF granted Klinger's request for leave.[6]

Over the ensuing months, Klinger submitted three requests from his doctor to extend his medical leave by approximately a month each.[7] The extension requests did not include any additional information regarding Klinger's condition or treatment.[8] Even so, BNSF granted each extension.[9]

After Klinger reported his work-related injury, BNSF automatically enrolled him in its Medical Care Management Program (MCMP).[10] BNSF's website stated that the MCMP was available to "all on-the-job injured employees" to "progress a safe return to gainful employment."[11] According to program documents, the MCMP included a medical care management component to help employees obtain and

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[2] This background follows the ALJ's findings of fact and the record below. In reciting this background, we make no independent findings of fact.

[3] D. & O. at 2.

[4] *Id.* at 2, 9.

[5] *Id.* at 2-3; Complainant's Exhibit (CX) 5.

[6] D. & O. at 3.

[7] *Id.*

[8] *See* CX 8, 12, 16.

[9] D. & O. at 3.

[10] *Id.* at 4.

[11] *Id.* at 14.

coordinate care, and a return-to-work component to plan out and implement the employee's return to work from injury.[12] Kevin Vaudt served as a field manager for BNSF's Southwest Division and coordinated the MCMP for Klinger.[13]

Although employees injured on the job were automatically enrolled in the MCMP, the program was voluntary.[14] Program documents indicated that, to remain in the program, employees were required to meet certain conditions, including actively and responsibly participating in physician-recommended care, signing a medical release form, participating in second opinion medical evaluations, participating in transitional work when medically approved, and having treating physicians provide medical information, including diagnoses, objective test results, prognoses, restrictions, and recommended treatment plans.[15] Program documents also indicated that an employee who did not meet these conditions or voluntarily participate should be disqualified from the program, although Vaudt testified that it was not his practice to disqualify non-complying employees.[16]

Vaudt initially contacted Klinger by phone on or about August 10, 2015.[17] Vaudt then followed the call with a letter to Klinger on August 11, 2015. The letter outlined the ways Vaudt could help Klinger under the MCMP, including by helping to coordinate or plan medical care and to plan Klinger's return to work. Vaudt also asked Klinger to have his doctor provide Klinger's diagnosis, treatment plan, work restrictions, and expected timeframe for Klinger's ability to return to regular duty, after each visit.[18]

Klinger did not respond to Vaudt's August 11 letter. Consequently, Vaudt sent Klinger additional letters on or about September 11, October 1, and November 11, 2015.[19] The letters asked for Klinger's medical information, asked him to sign a medical release, and emphasized the opportunity Klinger had to participate in a transitional work assignment.[20] Vaudt also sent a letter directly to Klinger's doctor on September 9, 2015, asking for an update on Klinger's status, what functional limitations he might have, and whether a transitional assignment would be

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12 CX 24; *see* D. & O. at 8-9, 14-15.

13 D. & O. at 4, 8.

14 *Id.* at 9, 15.

15 *Id.* at 15.

16 *Id.* at 15; CX 37 at 35-36.

17 D. & O. at 4.

18 *Id.* at 4-5.

19 *Id.* at 5-6.

20 *Id.*

appropriate for him.[21] The record also indicates that Vaudt called Klinger and left him messages on multiple occasions.[22]

Klinger did not respond to any of Vaudt's communications and his doctor did not respond with medical records.[23] Klinger testified that he was "turned off" by Vaudt and believed Vaudt's conduct, particularly his effort to contact Klinger's doctor directly, was "very shady."[24]

Having not heard from Klinger, Vaudt passed the matter to Steve Curtright, the General Manager of the Southwest Division.[25] Curtright sent Klinger a certified letter on October 14, 2015, which ordered Klinger to have his doctor provide medical information to Vaudt. The letter stated "I understand from our medical and environmental health (MEH) group that you have not voluntarily provided them with the requested medical information. AT [sic] this juncture, however, please understand that as your employer the BNSF now requires the medical information regarding your injury for the following reason(s) . . ." The reasons given by Curtright were that the information provided by Klinger to that point indicated that his absence was beyond a reasonable duration according to national disability guidelines; that BNSF needed to know when and in what capacity Klinger would be able to return to work so it could meet its manpower planning responsibilities; and to allow BNSF to identify appropriate existing vocational or developmental opportunities to assist Klinger in locating alternative work. Curtright ordered Klinger to have his doctor provide his diagnosis, treatment plan, approximate length his treatment would continue, and current functional level and restrictions, to Vaudt within ten days of delivery of the letter. The letter warned that Klinger's failure to comply with Curtright's instruction would be considered misconduct and could subject Klinger to discipline.[26]

On October 21, 2015, Klinger asked his doctor to send the requested records to BNSF, but the doctor's office forgot to send them.[27] Klinger did not notify anyone at BNSF that he had asked his doctor's office to comply with Curtright's letter or confirm with BNSF that it had received the information.[28]

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21 *Id.* at 5.

22 Respondent's Exhibit (RX) Q; CX 36 at 98.

23 *See* D. & O. at 8; *see also* RX Q; CX 36 at 98-100; CX 37 at 45, 47, 50-51 55-56.

24 D. & O. at 8.

25 *Id.* at 10.

26 *Id.* at 7; CX 14.

27 D. & O. at 12.

28 *Id.*

BNSF issued Klinger a notice of investigation on November 2, 2015, stating that BNSF would conduct a hearing regarding Klinger's "alleged misconduct when [he] allegedly failed to comply with instructions specifically, when [he was] notified to contact Medical Care Manager Kevin Vaudt on numerous occasions, most recently in certified letter [sic] from General Managers [sic] Office dated October 14, 2015, requiring information from [his] Physician."[29] After receiving the notice of investigation, Klinger called Vaudt on November 9, 2015, and supplied him with a medical release on November 11.[30]

BNSF conducted a hearing on November 23, 2015.[31] Curtright did not attend the investigation, but reviewed the transcript and exhibits and found that Klinger had violated multiple of BNSF's General Code of Operating Rules regarding furnishing information, conduct, and reporting and complying with instructions.[32] Curtright assessed Klinger a level S serious, 30-day record suspension.[33] Klinger did not lose any pay as a result of the suspension, but was placed on a three year review period and was notified that any rules violations during that three year period could result in further discipline.[34]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board (ARB or the Board) the authority to review ALJ decisions under the FRSA.[35] The ARB will affirm the ALJ's factual findings if they are supported by substantial evidence, but reviews all conclusions of law de novo.[36] As the United States Supreme Court has noted, "the threshold for such evidentiary sufficiency is not high."[37] 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

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29 *Id.* at 7.

30 *Id.* at 12.

31 *Id.* at 11.

32 *Id.*

33 *Id.* at 7.

34 *Id.* at 2, 7.

35 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 85 Fed. Reg. 13186 (Mar. 6, 2020); *see* 29 C.F.R. § 1982.110(a).

36 *Yowell v. Fort Worth & W. R.R.*, ARB No. 2019-0039, ALJ No. 2018-FRS-00009, slip op. at 4 (ARB Feb. 5, 2020).

37 *Biestek v. Berryhill*, 139 S.Ct. 1148, 1154 (2019).

support a conclusion.'"[38] In addition, we generally defer to an ALJ's credibility findings unless they are inherently incredible or patently unreasonable.[39]

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.[40] To prevail on an FRSA claim, a complainant must establish by a preponderance of the evidence that (1) he engaged in protected activity, (2) he suffered an unfavorable personnel action, and (3) the protected activity was a contributing factor in the unfavorable personnel action.[41] If a complainant meets his burden of proof, the employee 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.[42]

The ALJ concluded that Klinger engaged in protected activity when he reported that he suffered a work-related injury in August 2015, that Klinger's record suspension constituted adverse action, and that Klinger proved by a preponderance of the evidence that Klinger's injury report contributed to his suspension.[43] The ALJ also held that BNSF did not prove by clear and convincing evidence that it would have suspended Klinger in the absence of his protected activity. Accordingly, the ALJ entered judgment in Klinger's favor and awarded Klinger $100,000 in punitive damages,[44] other non-monetary relief, and reasonable attorney's fees and costs.

BNSF argues on appeal that Klinger's protected activity did not contribute to his suspension and, alternatively, that it proved by clear and convincing evidence that it would have suspended Klinger even in the absence of his protected activity due to his failure to follow Curtright's instructions in the October 14, 2015 letter.

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38 *Id.* (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

39 *Mizusawa v. United Parcel Serv.*, ARB No. 2011-0009, ALJ No. 2010-AIR-00011, slip op. at 3 (ARB June 15, 2012).

40 49 U.S.C. § 20109(a)(4).

41 *Brucker v. BNSF Ry. Co.*, ARB Nos. 2018-0067, -0068, ALJ No. 2013-FRS-00070, slip op. at 6 (ARB Nov. 5, 2020); *see* 49 U.S.C. § 20109(d)(2)(A)(i) (incorporating 49 U.S.C. § 42121(b)(2)(B)(i)).

42 *Brucker*, ARB Nos. 2018-0067, -0068, slip op. at 6; *see* 49 U.S.C. § 42121(b)(2)(B)(ii).

43 BNSF did not dispute below or on appeal that Klinger engaged in protected activity or that the suspension constituted adverse action.

44 Klinger did not request any compensatory damages.

BNSF also appeals the remedies imposed by the ALJ, arguing that the punitive damages were unwarranted and excessive and that the non-monetary relief exceeded the scope of permissible remedies under the FRSA.

We find that the ALJ committed legal error which requires the Board to remand this matter to the ALJ. As detailed below, the ALJ cited and applied the "inextricably intertwined" analysis that the Board rejected in *Thorstenson v. BNSF Ry. Co.*[45] We remand to the ALJ to evaluate the case free of the inextricably intertwined analysis and in accordance with the guidance offered below.

1. Contributing Factor

As set forth above, to establish a violation under the FRSA, a complainant must show that his protected activity was a "contributing factor" in the adverse employment action.[46] A "contributing factor" is "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision."[47] "[T]he contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity."[48] 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.[49]

The focus of the ALJ's contribution analysis is his finding that BNSF unreasonably and unfairly disregarded the MCMP policy, which led to or created the grounds for Klinger's eventual discipline. The ALJ found that participation in the MCMP, in which Klinger was automatically enrolled after reporting a workplace injury, was voluntary and that disinterested or non-participating employees should be disqualified from the program.[50] Yet, when Klinger "was not forthcoming and did not voluntarily participate in the program," the ALJ found that

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45 ARB Nos. 2018-0059, -0060, ALJ No. 2015-FRS-00052 (ARB Nov. 25, 2019).

46 49 U.S.C. § 42121(b)(2)(B)(i).

47 *Acosta v. Union Pac. R.R. Co.*, ARB No. 2018-0020, ALJ No. 2016-FRS-00082, slip op. at 6 (ARB Jan. 22, 2020) (quoting *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 461-62 (9th Cir. 2018)).

48 *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014).

49 *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013); *see Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1195 (9th Cir. 2019) ("Showing that an employer acted *in retaliation for* protected activity *is* the required showing of intentional discrimination; there is no requirement that FRSA plaintiffs separately prove discriminatory intent." (emphasis original)).

50 D. & O. at 9.

Vaudt reported him to Curtright instead of disqualifying him.[51] Curtright also "ignored the voluntary nature of the program and interjected his view into the process" by ordering Klinger to produce his medical information.[52] Ultimately, the ALJ found that Curtright disciplined Klinger for failing to produce his medical records, despite and in contravention of the supposedly voluntary nature of the MCMP.[53]

These findings led the ALJ to conclude that Klinger's protected activity contributed to his suspension through use of an "inextricably intertwined" analysis. At the outset of his contribution analysis, the ALJ stated:

> The protected activity here is inextricably intertwined with Respondent's confused notion that it enrolled Complainant in what it describes as a voluntary program, but in application and practice is a mandatory program. As the ARB explained, Complainant's discipline cannot be explained or discussed without mentioning his protected activity.[54]

From the foregoing, it appears that the ALJ determined that Klinger's reporting of an injury contributed to his suspension because it prompted his enrollment in the MCMP, which, in turn and as unfairly applied, resulted in Klinger's discipline. Stated another way, the ALJ appears to have found that the MCMP never would have been invoked, and Klinger therefore never would have been unreasonably disciplined for his refusal to provide his medical information as part of that program, but for his reporting of a workplace injury.[55]

The D. & O. issued on November 30, 2018, before the Board decided *Thorstenson v. BNSF Ry. Co.* the following year. As we explained in that case, the "inextricably intertwined" and "chain of events" analyses, which to that point had been frequently applied by ALJs and approved by the Board, departed from the plain text of the FRSA. The Board observed that these analyses often substituted for, and in some cases circumvented, the appropriate, statutory contributing factor

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51 *Id.* at 22.

52 *Id.*

53 *Id.* at 26 ("Respondent confabulates the facts here; Complainant was not required to participate in the medical program or even cooperate, yet Respondent disciplined him for his failure to participate and comply with the company program.").

54 *Id.* at 22.

55 *See id.* at 25-26 ("Mr. Curtright was only involved in the case because Complainant reported a work-related injury and took time off work for the same injury, but did not provide a complete release of medical files.").

or affirmative defense analyses.[56] As a result, since *Thorstenson*, the Board has repeatedly held that applying the inextricably intertwined or chain of events analyses constitutes reversible legal error.[57, 58] Even in situations in which both the protected activity and the employer's non-protected reason for adverse action arise from the same bundle of events or situations in which the protected activity incidentally initiated the sequence that resulted in the adverse action, the ALJ, as the fact-finder, must still decide whether the protected activity "contributed to" the adverse decision.[59]

We cannot ascertain whether the ALJ would have concluded that Klinger's protected activity contributed to his suspension had he not applied the inextricably intertwined analysis to link BNSF's objectionable conduct to Klinger's reporting of a workplace injury. The ALJ began his contribution analysis by relying on the inextricably intertwined nature of the protected activity with the events that

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[56] *Thorstenson*, ARB Nos. 2018-0059, -0060, slip op. at 10.

[57] *Rothschild v. BNSF Ry. Co.*, ARB No. 2019-0022, ALJ No. 2017-FRS-00003, slip op. at 2-3 (ARB Nov. 30, 2020); *Colley v. Union Pac. R.R. Co.*, ARB No. 2018-0063, ALJ No. 2017-FRS-00071, slip op. at 2-3 (ARB Nov. 6, 2020); *Perez v. BNSF Ry. Co.*, ARB Nos. 2017-0014, -0040, ALJ No. 2014-FRS-00043, slip op. at 10 (ARB Sept. 24, 2020).

[58] We recognize that the Ninth Circuit Court of Appeals, which would have jurisdiction over this case, recently reversed the Board's decision in *Thorstenson*. *Thorstenson v. U.S. Dep't of Labor*, 831 F. App'x 842 (9th Cir. 2020) (unpublished). The Ninth Circuit, in an abbreviated and unpublished decision, rejected the Board's holding in *Thorstenson* that, rather than applying an inextricably intertwined or chain of causation analysis, the ALJ must instead determine whether the protected activity was the "proximate cause" of the adverse action. *Id.* at 843-44 ("A proximate cause standard is inconsistent with this circuit's law regarding the requirements of the FRSA, which requires plaintiffs to prove only that their protected conduct was 'a factor, which alone or in connection with other factors, tend[ed] to affect in any way the outcome of the decision.'"). Although the Ninth Circuit stated that a proximate cause standard was inconsistent with circuit law, it appears to have relied upon a more rigorous definition of "proximate cause" than the ARB's citation, which distinguished legal causation from mere factual causation. The Ninth Circuit did not discuss the Board's principal holding in *Thorstenson* that the inextricably intertwined and chain of events analyses were improper substitutes for the statutory causation and same-action defense analyses. Absent elaboration or further guidance from the Ninth Circuit, and in light of the unpublished nature of the Ninth Circuit's reversal, we continue to adhere to our opinion that applying an inextricably intertwined or chain of events analysis for the issues of causation and the same-action defense is reversible error. *See Hart v. Massanari*, 266 F.3d 1155, 1177-78 (9th Cir. 2001) (stating that in an unpublished decision "the rule of law is not announced in a way that makes it suitable for governing future cases" and that "[a]n unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision").

[59] *See Riddell v. CSX Transp., Inc.*, ARB No. 2019-0016, ALJ No. 2014-FRS-00054, slip op. at 21 n.13 (ARB May 19, 2020).

transpired here, and throughout the analysis he appeared to return to the notion that Klinger's protected activity was, at a basic level, at least factually connected to his discipline via a direct sequence of events.[60] The ALJ also suggested alternative motives for BNSF's conduct, potentially incidental or tangential to Klinger's reporting of an injury, that are not inherently violations of the FRSA. For example, the ALJ suggested that BNSF's response may have been driven by Klinger contumaciously ignoring BNSF's communications.[61] The ALJ also repeatedly asserted that BNSF was driven by a singular desire to secure Klinger's medical information.[62]

It is apparent that the driving force behind the ALJ's contribution analysis was his determination that BNSF's decision to discipline Klinger for refusing to produce his medical records under the MCMP was egregious and unfair. The ALJ criticized BNSF's conduct as a misleading,[63] heavy-handed,[64] and unfair departure

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[60] D. & O. at 25-26 ("Mr. Curtright was only involved in the case because Complainant reported a work-related injury and took time off work for the same injury, but did not provide a complete release of his medical files."), 26 ("In this matter, Complainant did not participate in a voluntary program related to his work related injury. There was no separation and there was no independent or intervening cause."). Our dissenting colleague suggests that the ALJ's analysis of "intervening events" renders his use of "inextricably intertwined" harmless. We note that the "inextricably intertwined" problem and causal concept of "intervening events" are not mutually exclusive. An ALJ could apply the problematic rule but yet recognize the possibility of intervening events with no connection whatsoever to the protected activity. The problem here is that the ALJ's "inextricably intertwined" application tainted his analysis of intervening events.

[61] *Id.* at 22 ("Complainant did not respond to Mr. Vaudt, which both Mr. Vaudt and Mr. Curtright appeared to find particularly aggravating while ignoring that providing information was allegedly not required and supposed to be voluntary.")

[62] *Id.* at 20 (stating that Vaudt's "true motive [ ] was to obtain Complainant's medical information regardless of how"), 24 ("It was clear that Respondent intended to get the private medical records and information one way or another, regardless of whether Complainant willing[ly] complied or not.").

[63] *Id.* at 20 ("Respondent's website notes that the program is voluntary, but you would not have known that from Mr. Vaudt's communications."), 23 ("Mr. Vaudt also never told Complainant that his failure to provide the information or participate in the voluntary program could lead to discipline."), 24 ("Mr. Curtright disciplined Complainant even though it had never been made clear to Complainant that Mr. Vaudt's requests were not voluntary as the program states, but in fact mandatory.").

[64] *Id.* at 21 ("Mr. Curtright appeared heavy handed in his handling of the matter."), 28 ("While the program looks good on paper, Respondent's heavy-handed implementation leaves much to be desired.")

from stated company policy.[65] The ALJ also regarded BNSF's conduct as an unreasonable invasion of Klinger's medical privacy.[66]

Even if supported by substantial evidence, the ALJ's findings and conclusions that Klinger's suspension was the byproduct of BNSF's unfair and unreasonable conduct and departure from policy[67] do not necessarily establish that Klinger's protected activity contributed to his suspension, in the absence of the "inextricably intertwined" analysis. As the ALJ recognized in his recitation of applicable law, the ALJ and the ARB should not sit as a super-personnel department evaluating the wisdom of BNSF's business judgments. "An employer's actions can be harsh, faulty, and unjustified, but this does not establish that the employer retaliated for FRSA whistleblowing activity."[68] Our task is not to evaluate whether an employer overstepped, made erroneous or even arbitrary decisions, or did as we would have

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[65] *Id.* at 20 ("Mr. Vaudt also did not follow company procedure and protocols for injured workers who do not voluntarily participate in the program, and he did not explain why he chose to approach the general manager over using the process that he said was in place for non-participating injured workers."), 21 ("Both Mr. Curtright and Mr. Vaudt's conduct was contrary to the policy and direction from the program."), 23 ("If he was in a voluntary program and did not participate, Respondent should have followed its protocol and taken him out of the program, not disciplined him."), 24 ("When Complainant decided not to participate in the program, Respondent's literature said that he would be disenrolled in the program until he decided to participate. In practice, the exact opposite happened.").

[66] *Id.* at 23 n.15 ("Respondent did not explain how its conduct comports with patient privacy rules.").

[67] Although the ALJ cited evidence for the proposition that an employee who does not voluntarily participate in the MCMP should be disqualified, at least one policy document upon which the ALJ relied suggests that BNSF may still have required disqualified employees to produce medical information similar to that which Vaudt and Curtright requested:

> If an injured employee does not comply with any of the above five-enrollment criterion [for the MCMP], the employee will be disqualified from the program. **The must [sic] provide medical information to MEH that includes [current medical conditions, treatment plan, approximate length of treatment, and functional level and restrictions].**

D. & O. at 15 (emphasis added) (citing CX 24, 27) (emphasis added). Although the ALJ quotes this language, neither the ALJ nor the parties discuss the import of the language. On remand, the ALJ may choose to revisit this document and analyze what "disqualification" from the MCMP means and what impact, if any, this language has on the ALJ's conclusion that BNSF departed from policy by demanding Klinger's medical information even when he declined to voluntarily participate in the MCMP.

[68] *Acosta*, ARB No. 2018-0020, slip op. at 11.

done.[69] Rather, the ALJ and the ARB must scrutinize the record for evidence that the employer's proffered explanations and actions are false and pretextual or otherwise evidence of unlawful discrimination.[70] Although BNSF may have engaged in objectionable conduct, and although that objectionable conduct may be sequentially linked to Klinger's reporting of a workplace injury, the ALJ must nevertheless assess whether Klinger's protected activity, alone or with other factors, actually influenced BNSF's conduct.[71]

We do not discount the possibility that the ALJ may appropriately find on remand that the way BNSF treated Klinger in the context of the MCMP and its demands for his medical records constitutes circumstantial evidence that Klinger's reporting of a workplace injury contributed to BNSF's decision to suspend him. As the Board has repeatedly emphasized, a complainant's protected activity need only be one, even insubstantial, factor in the employer's adverse action, and may still "contribute" to the adverse action even if other factors also influenced the decision.[72] We have also often stated that inconsistent application of a company's policies could be circumstantial evidence of retaliation.[73] The ALJ may also consider other circumstantial evidence, including temporal proximity, shifting explanations for BNSF's actions, antagonism or hostility towards Klinger's protected activity, the falsity of BNSF's explanation for the adverse action taken, or a change in BNSF's attitude towards Klinger after he engaged in protected activity.[74]

However, it is crucial on remand that the ALJ not simply evaluate the merits of the MCMP, BNSF's deviations from the MCMP policy as described on paper, or the fairness of BNSF's conduct in its interactions with Klinger in the abstract, independent of whether the reporting of Klinger's workplace injury itself influenced that conduct in some way. Similarly, the ALJ should not merely assess the general propriety or validity of BNSF's demands for Klinger's medical records and the potential invasion of his privacy rights that may come from requesting medical

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[69] *Berg v. S & H Express*, ARB No. 2017-0075, ALJ No. 2015-STA-00014, slip op. at 9 (ARB June 4, 2020); *Jenkins v. U.S. Envt. Prot. Agency*, ARB No. 1998-0146, ALJ No. 1988-SWD-00002, slip op. at 39 (ARB Feb. 28, 2003).

[70] *Jenkins*, ARB No. 1998-0146, slip op. at 39.

[71] *Palmer v. Canadian Nat'l Ry./Ill. C. R.R. Co.*, ARB No. 2016-0035, ALJ No. 2014-FRS-00154, slip op. at 64 (ARB Sept. 30, 2016) (reissued with full dissent Jan. 4, 2017) (J. Corchado, concurring) ("[C]ontributing factor means protected activity was an actual factor (influence) in the employer's unfavorable employment action.")

[72] *Id.* at 53 ("'Any' factor really means *any* factor. It need not be 'significant, motivating, substantial or predominant'—it just needs to be *a* factor.").

[73] *Id.* at 59-60.

[74] *Lancaster v. Norfolk S. Ry. Co.*, ARB No. 2019-0048, ALJ No. 2018-FRS-00032, slip op. at 7 (ARB Feb. 25, 2021).

records. It is not enough that the reporting of a workplace injury may have been the incidental factual or initiating predicate for the unfair, unreasonable, or objectionable conduct that followed with the MCMP. If the ALJ reaches the same outcome on remand, he should explain how these findings, or others, support the ultimate conclusion that Klinger's reporting of an injury contributed to his suspension, without utilizing the inextricably intertwined analysis and without casting it as a mere sequential link to Klinger's protected activity.

2. **Same-Action Defense**

If a complainant proves that his protected activity contributed to an adverse action, the employer may nevertheless avoid liability if it proves by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the complainant's protected activity.[75] BNSF's same-action defense in this case is based on Klinger's refusal to follow Curtright's October 14 order to produce his medical information. According to BNSF, it needed Klinger's updated medical information because Klinger's absence exceeded that which would be expected for his injury, based on the limited information Klinger had provided to that point. Relatedly, BNSF also claimed it needed Klinger's medical information for manpower planning purposes. BNSF argues that it issued Klinger the "standard" discipline of a record suspension because he disobeyed Curtright's valid instruction.[76]

The above-cited errors in the ALJ's causation analysis carried over to the ALJ's analysis of BNSF's same-action defense. Once again, the ALJ appears to have assessed BNSF's defense, at least in part, through the lens of the inextricably intertwined analysis. The ALJ stated:

> To contend, as Mr. Vaudt and Mr. Curtright did, that the only reason they suspended Complainant was because he did not comply with a direct order from the general manager belies what occurred in this matter. I do not find Mr. Curtright credible on this point and do not believe his explanation that he would have taken the same action independent of the medical leave. **There would have been no reason for Mr. Curtright to take any action**

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[75] 49 U.S.C. § 20109(d)(2)(A)(i) (incorporating 49 U.S.C. § 42121(b)(2)(B)(iv) ("Relief may not be ordered . . . 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.")).

[76] D. & O. at 11

> **against Complainant but for the work-related injury**.[77]

BNSF may be able to prove its affirmative defense even though Curtright may have only been involved in the matter because Klinger reported a workplace injury.[78]

In addition, as with the ALJ's causation analysis, the ALJ's same-action defense analysis appeared to turn, at least in part, on the ALJ's assessment that BNSF's conduct and application of the MCMP was unfair and unreasonable. For example, the ALJ explained that he was "unmoved" by BNSF's proffered reason and rationale for the MCMP, stating that although the MCMP "looks good on paper," BNSF's "heavy-handed implementation leaves much to be desired."[79] Similarly, the ALJ criticized BNSF for overstepping in its requests for Klinger's medical information. The ALJ observed that BNSF requested medical information from workers injured on the job "beyond that which is needed to approve a medical leave of absence,"[80] and found that Curtright and Vaudt acted together to get medical information that it "was not entitled to have without Complainant's consent."[81]

As we explained with respect to the causation analysis, the manner in which BNSF applied the MCMP and treated Klinger may be evidence of unlawful conduct and may undermine BNSF's explanations for its conduct. However, the fact that BNSF's conduct may have been misguided, or that BNSF may have infringed on

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77 *Id.* at 28 (emphasis added).

78 *See Yowell*, ARB No. 2019-0039, slip op. at 7-8 (finding legal error where ALJ discounted possibility that employer could prove its same-action defense because of inextricably intertwined analysis); *cf. Speegle v. Stone & Webster Constr., Inc.*, ARB No. 2014-0079, ALJ No. 2005-ERA-00006, slip op. at 6-7 (ARB Dec. 15, 2014) (affirming an ALJ's finding that the employer proved the same-action defense, despite previously finding that the complainant's protected activity and the non-protected activity forming the basis of the employer's decision to terminate the employee were inextricably intertwined).

79 D. & O. at 28.

80 *Id.*

81 *Id.* at 27. It is not clear to the Board why the ALJ reached the conclusion that BNSF was not entitled to Klinger's medical information without his consent. Although the parties disagreed as to when, and the manner in which, BNSF might demand medical information, there does not appear to be any debate that an employer like BNSF may be entitled to some medical information from its employees, especially for employees injured on the job who may receive certain disability, worker's compensation, or other benefits. Moreover, although the ALJ questioned how BNSF's actions comported with HIPAA, he did not explore the contours of that law or how it applied in the circumstances of this case. To the extent these findings are material to the ALJ's decision on remand, he should clarify the factual bases for them and how the findings connect to his judgment that BNSF's conduct indicated that Klinger's protected activity contributed to his suspension.

Klinger's privacy rights, does not necessarily preclude the possibility that BNSF could establish its same-action defense.[82] To the extent the ALJ reaches the same result on remand, he should explain, without reference to the inextricably intertwined or chain of events analyses and without merely critiquing or second-guessing the virtue of BNSF's business judgments in their own right, how these findings support the conclusion that Klinger's protected activity contributed to his suspension or undermine BNSF's stated reasons for its actions.

3. Damages

As the ALJ correctly observed, punitive damages may be awarded in cases in which a respondent acted with reckless or callous disregard for the complainant's rights under the FRSA or intentionally violated the law. In addition, when an ALJ determines an award of punitive damages is appropriate, he or she may consider the reprehensibility or culpability of the respondent's conduct, the relationship between the penalty and the harm to the victim caused by the respondent's actions, and the sanctions imposed in other cases for comparable misconduct when determining the amount of punitive damages that should be awarded.[83]

Because we vacate the ALJ's decision with respect to BNSF's liability, we also vacate the ALJ's award of damages. If the ALJ reaches the same outcome as to BNSF's liability on remand, we will review that decision and any award of damages in due course. Just as our holding today does not preclude the possibility that the ALJ may appropriately find BNSF liable on remand, we also do not discount the possibility that the ALJ may appropriately find that punitive damages are warranted under the standard articulated above. However, we observe that as with the liability analysis, it appears that the ALJ's punitive damages analysis may have veered towards a skewed judgment of the merits of the MCMP and BNSF's conduct in the abstract and may have been premised, at least in part, on the ALJ's assessment that BNSF violated Klinger's privacy rights.[84] We repeat again that a significant, intentional, or reckless departure from law may offer evidence not only of BNSF's liability, but also its culpability for purposes of awarding punitive

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[82] *Culver v. Gorman & Co.*, 416 F.3d 540, 547 (7th Cir. 2005) ("An employer's explanation can be foolish or trivial or even baseless so long as it honestly believed the proffered reason for the adverse employment action." (internal citations and quotations omitted)).

[83] D. & O. at 29-30; *Raye v. Pan Am Rys., Inc.*, ARB No. 2014-0074, ALJ No. 2013-FRS-00084, slip op. at 8-10 (ARB Sept. 8, 2016).

[84] D. & O. at 31 ("Respondent did not care about federal law or worker privacy, and in practice submitted letters to medical providers in the name of the company seeking information for which it had not been given permission to seek because 'sometimes they get it' . . . . There was no attempt to follow the law or company policy and they did not respect the injured worker/Complainant's medical privacy. . . .").

damages. However, the ALJ must assess BNSF's liability and culpability for a violation of the FRSA, rather than BNSF's liability or culpability for other misconduct.

CONCLUSION[85]

For the foregoing reasons, we **REVERSE** and **REMAND** for proceedings consistent with this opinion.

SO ORDERED.

Randel K. Johnson, *Administrative Appeals Judge*, dissenting:

I respectfully dissent from my colleagues' decision to remand this case for further consideration.

Many statements of apparent truth become hackneyed over time because perhaps they were never established on a proper basis to begin with, or simply became outdated and irrelevant as society changed. However, while its historical roots may be unclear, the statement that "justice delayed, is justice denied," and its meaning that lengthy delays in a judicial system effectively gut a remedy to a proven wrong remains as powerful as ever. "Justice delayed, is justice denied is a maxim which means that even if remedy against an illegal injury caused is available but not executed in due time, such a situation is comparable to having no remedy at all."[86] It is also clear that inordinate delays can debase the judicial system and the confidence of the public in that system.[87] Lastly, I believe that one can take judicial notice of the fact that delays are often used by parties to grind down the ability of the opposing parties to continue to maintain their cases in court, or the relevant administrative bodies, regardless of merit, and increase leverage for settlements. One might question whether judicial, or administrative, bodies should enable such a tactic—even if the solution is unclear.

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[85] Our holding renders moot BNSF's Motion to Reopen the Record to add a decision of the Public Law Board to the record. The ALJ may elect to consider the issue raised in that motion, to the extent BNSF raises it on remand.

[86] *Justice Delayed is Justice Denied*, Study Today, https://www.studytoday.net/justice-delayed-is-justice-denied/ (last visited Mar. 17, 2021).

[87] William E. Burger, *The State of the Judiciary—1970*, 56 ABA J. 929, 934 (1970) ("A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people, and three things could destroy that confidence and do incalculable damage to society [including] [t]hat people come to believe that inefficiency and delay will drain even a just judgment of its value . . . .").

While it can hardly be argued that the wheels of justice often grind too slowly in much of the judicial system, this unfortunate fact does not preclude, I believe, decision makers from taking into consideration what the effects of additional delays might be when evaluating the appropriateness of a remand in a particular case. Phrased another way, the fact that a problem is nearly ubiquitous does not require that we turn a blind eye to its potential in an individual case.

Procedurally, this case dates back to at least December 2015 when the subject complaint was submitted to OSHA for evaluation and objections were filed in June 2016. A former ALJ on the case issued an order that the case be submitted and decided on the record. The case was subsequently transferred to another ALJ when the original judge moved to a different agency. On November 30, 2018, the decision before us was issued. It is now March 2021. For some six years this case has lingered within the Department of Labor.

Of course, it is the role of the ARB, and similar reviewing courts and appellate bodies, to remand decisions rendered below if there has been, typically, an error of law or lack of substantial evidence in support of factual findings, depending on the exact nature of the review set out in the applicable statute. But, I believe that it is appropriate to evaluate these issues partially through the prism of the delays which would necessarily result in a further remand, balancing the equities.[88]

Here the Majority believes that the ALJ erred by applying the "inextricably intertwined" standard of earlier ARB case law, noting that this standard was reversed, after the ALJ rendered the decision before us, in the *Thorstenson* case. However, I believe that one fair reading of the D. & O. indicates that the ALJ did not strictly or exclusively apply an inextricably intertwined or chain of events causation analysis, and instead conducted an analysis consistent with the principles expressed by the Board in *Thorstenson*.[89] Phrased another way, although the ALJ

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[88] *See Conley v. U.S.*, 323 F.3d 7, 18 (1st Cir. 2003) (Bownes, J., dissenting) ("My final comment is a direct reply to the majority's discussion of justice. Simply put, 'Justice delayed is Justice denied.' I think this court has a duty to decide this case and that a remand is unnecessary."); *Foulks v. Oh. Dep't of Rehab. & Corr.*, 713 F.2d 1229, 1234 (6th Cir. 1983) (Keith, J., dissenting) ("Over ten years ago, the plaintiff Curtis Foulks was the victim of racial discrimination. . . . Today, the majority remands the case for reconsideration of the findings of fact and conclusions of law with respect to the individual defendants, thus further delaying redress of the wrongs plaintiff has suffered. To deny prompt relief gives credence to the age-old maxim, justice delayed is justice denied.").

[89] As the Majority notes, the Ninth Circuit rejected the Board's holding in *Thorstenson* that, in lieu of conducting a strict inextricably intertwined or chain of events analysis, ALJs should instead resolve whether a complainant's protected activity was a "proximate cause" of the adverse action. The Majority notes that scope of the Ninth Circuit's disagreement with the *Thorstenson* case is unclear. The disagreement is easy to understand, as the

did set the table with references to the "inextricably intertwined" framework, his analysis also referred to concepts indicating that he was open to and did consider whether or not intervening events could have broken the chain of causation, in contrast to the "inextricably intertwined" approach to examining causation which accepts that one domino fells the next and that any domino is a "contributing factor." Granted, the analysis is not crystal clear, but the ALJ did state that "not all connection via a chain of events establishes contribution" and that "[w]hen there are intervening events that might explain the adverse action, the question is whether the intervening events negate a finding that the complainant's protected activity was a contributory factor in the respondent's adverse action." Ultimately, the ALJ concluded based on his weighing of the evidence that he could not find that Klinger's "failure to comply with Mr. Curtright's letter was an intervening act sufficient to sever the connection between the protected activity and the discipline."[90]

While not using other concepts such as superseding events or extreme remoteness[91] which can be part of a traditional causation analysis, the ALJ did acknowledge that intervening events could break a causal chain of events and thus did not adhere to the "inextricably intertwined" analysis which was rejected in *Thorstenson*. We, as reviewers, may not agree with his conclusion that there was no intervening event in this case, but I believe that the ALJ used a proper analytical framework.

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phrase "proximate cause," is a vessel into which so much has been poured and from which so much confusion has arisen. "There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion" than the issue of "proximate cause." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 263 (5th ed. 1984); *accord CSX Transp. Inc. v. McBride*, 564 U.S. 685, 701 (2011) (stating that the term "proximate cause" is "notoriously confusing" and "the lack of consensus on any one definition of 'proximate cause' is manifest.") Thus, two intelligent individuals could be using the same two words when talking to each other, but mean completely different things, as the proverbial two ships passing in the night. However defined or labeled, though, the fundamental principle behind imposing any limitation on a causation analysis—whether the potential misnomer "proximate cause" is attached to that limitation or not—is that not all factual causes predating an injury should be considered legally cognizable causes of it. PROSSER AND KEETON, at 264; *Archer v. Warner*, 538 U.S. 314, 326 (2003). Even if an event would not have occurred "but for" some factual precursor, "it still does not follow that there is liability, since other considerations remain to be discussed and may prevent liability." PROSSER AND KEETON, at 266. Those other considerations include, for example, intervening events, as considered by the ALJ here. Absent such limitations, liability could be extended ad absurdum. *Koziara v. BNSF Ry. Co.*, 840 F.3d 873, 877-78 (7th Cir. 2017). Surely, the Ninth Circuit could not have intended such a result.

90 D. & O. at 25-26 (internal citations and quotations omitted).

91 PROSSER AND KEETON, at 264, 301-02.

This conclusion is buttressed by the fact that a review of past ARB cases applying the "inextricably intertwined" analytical principles finds very little reference to factors such as intervening events in the causation analysis. Indeed, in the *Speegle* case, the ARB specifically remanded the case back to the ALJ upon finding that the ALJ improperly looked at the concept of an intervening event in the context of the "contributing factor" analysis and should have looked at it in the context of the defendant's rebuttal under the "clear and convincing" affirmative defense analytical prong.[92]

In sum, I would hold that the ALJ did not commit a legal error here. Further, given his analysis, it seems highly unlikely that the ALJ would find a different result even under a strict application of the *Thorstenson* case. This probability is one which we can legitimately weigh in considering whether a remand is appropriate.[93]

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[92] *Speegle v. Stone & Webster Constr., Inc.*, ALJ No. 2005-ERA-00006, slip op. at 37-38 (ALJ Jan. 9, 2006) (ALJ holding that there was no causation based, in part, on finding that Speegle's profane comment connected to his protected activity "was an intervening event of significant weight" and that "Respondent reasonably could have terminated Speegle for the legitimate reason of insubordination arising out of this comment."); *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 2011-0029-A, ALJ No. 2005-ERA-00006, slip op. at 10-12 (ARB Jan. 31, 2013) (ARB reversing ALJ upon applying the inextricably intertwined analysis to hold "there is no evidence of unprofessional conduct or insubordinate conduct by Speegle that is unrelated to his protected activity," but remanding to the ALJ to determine whether the respondent could prove its same-action affirmative defense); *Speegle v. Stone & Webster Constr., Inc.*, ARB No. 2014-0079, ALJ No. 2005-ERA-00006, slip op. at 6-7 (ARB Dec. 15, 2014) (ARB affirming the ALJ's subsequent determination that the respondent proved it would have terminated Speegle in the absence of his protected activity based on his profanity and insubordinate conduct).

[93] *See Yowell v. Fort Worth W. R.R.*, ARB No. 2019-0039, ALJ No. 2018-FRS-00009, slip op. at 9-10 (ARB Feb. 5, 2020) (finding legal error because of application of inextricably intertwined analysis, but declining to remand because case could be resolved on proper standards without additional fact-finding); *see also Helvering v. Gowran*, 302 U.S. 238, 245 (1937) ("In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."); *Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 338 (2d Cir. 2006) ("Accordingly, although we certainly retain our ability to *remand* where appropriate, we also retain our ability to *affirm* an IJ's' [Immigration Judge's] factual findings—including an adverse credibility determination—despite error, where that analysis is otherwise supported by substantial evidence and we can state with confidence that the same decision would be made on remand."); *Dema v. Gonzales*, 193 F. App'x 109, 110 (2d Cir. 2006) ("Although we do not agree with all of the [factual findings], remand is not required because we can confidently predict that the decision-maker would reach the same conclusion on remand."); *Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir. 1998) (finding that a reviewing court need not "remand to the agency if it is clear that the agency would have reached the

Moving beyond the argument of a possible legal error committed here by the ALJ, I believe that substantial evidence supports the ALJ's factual findings. In this regard, it is worth reiterating just how deferential the ARB has traditionally seen its role in reviewing substantial evidence.[94]

In summary, I would affirm the decision below in that the legal analysis was within the framework of the *Thorstenson* case, albeit that the D. & O. here preceded that case, and that substantial evidence supports the ALJ's other conclusions. Further, the ALJ's reasoning is not in conflict with the Ninth Circuit's rejection of "proximate cause," as it is unclear what the Ninth Circuit intended by rejecting that phrase, as the Majority Opinion points out. It seems probable that the Ninth Circuit was rejecting that part of proximate cause case law which requires that a cause be a "substantial factor," rather than merely a contributing factor, which would be contrary to the statutory language governing herein.[95] The ALJ here focused on the concept of an intervening factor, not whether or not the protected conduct was a "substantial factor."

I understand that this is a close case, but believe given the delays that have already characterized the process of the Department of Labor's consideration of the complainant's allegations, simple concepts of equity argue towards bringing this

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same ultimate result had it considered the new ground." (internal quotations and citations omitted)).

[94] *Sharpe v. Supreme Auto Transp.*, ARB No. 2017-0077, ALJ No. 2016-STA-00073, slip op. at 5 (ARB Dec. 23, 2019) ("We must uphold an ALJ's factual finding that is supported by substantial evidence even if there is also substantial evidence for the other party, and even if we would justifiably have made a different choice had the matter been before us de novo." (internal citations and quotations omitted)); *Atkins v. The Salvation Army*, ARB No. 2000-0047, ALJ No. 2000-STA-00019, slip op. at 2 (ARB Dec. 11, 2001) ("[Substantial evidence] is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence."); *see also Biestek v. Berryhill*, 139 S.Ct. 1148, 1154 (2019) ("The threshold for such evidentiary sufficiency [substantial evidence] is not high. . . . It means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (internal citations and quotations omitted)); *Bonet ex rel. T.B. v. Colvin,* 523 F. App'x 58, 59 (2d Cir. 2013) (unpublished) ("It may well be that reasonable minds would disagree as to [the finding], but it is clear from the record that the ALJ . . . simply reached a conclusion, supported by substantial evidence . . . .").

[95] *See McBride*, 564 U.S. at 696. *McBride* provides a detailed discussion by the Supreme Court about proximate cause and why a test requiring a factor to be a "substantial" cause of harm is too high a burden in the context of the Federal Employer's Liability Act. The 5-4 decision provides a useful template against which much of these issues can be measured.

case to closure rather than remanding it for refinement of the opinion with the references to "inextricably intertwined" excised. Indeed, I believe that such refinement could have been done in an affirmance, eliminating further procedural complexities. The ALJ determined that certain remedies were appropriate for Complainant and it is time to no longer suspend those remedies.