The Federal Employees' Compensation Act ("FECA"), 5 U.S.C. § 8101 et seq., provides that federal employees and postal workers who suffer on-the-job compensable injuries enjoy certain rights to be restored to their previous or comparable positions. An agency's obligation to restore an injured employee to his former position or an equivalent position is codified at 5 U.S.C. § 8151 and its corresponding regulations at 5 C.F.R. Part 353. Generally, the recovery period and the extent of recovery determine the type of restoration to which the employee is entitled. The regulations describe restoration rights for two categories of fully-recovered individuals: those who fully recover within one year and those who fully recover after one year. Specifically, 5 C.F.R. § 353.301(a) provides employees who fully recover within one year immediate and unconditional restoration; whereas, 5 C.F.R. § 353.301(b) provides employees who take longer than one year to recover priority consideration for restoration to his or her former position or an equivalent one. In contrast, partially-recovered employees are entitled to have the agency “make every effort” to restore them to “suitable” jobs in the local commuting area. See 5 C.F.R. § 353.301(d); Walley v. Department Of Veterans Affairs, 279 F.3d 1010, 1015 -1016 (Fed. Cir. 2002).

To have any restoration rights under 5 C.F.R. part 353 based on a compensable injury, an individual must first establish that he was “separated or furloughed from an appointment without time limitation ... as a result of a compensable injury....” 5 C.F.R. § 353.103(b) (emphasis added). Mobley v. U.S. Postal Service, 86 M.S.P.R. 161, 164 -165 (2000). “Injury” means a compensable injury sustained under the provisions of 5 U.S.C. chapter 81, subchapter 1, and includes, in addition to accidental injury, a disease proximately caused by the employment. 5 CFR § 353.102; and a “compensable injury” is a medical condition accepted by the Office of Workers' Compensation Programs (OWCP) to be job-related and for which medical or monetary benefits are payable from the Employees' Compensation Fund. See Bartol v. U.S. Postal Service, 69 M.S.P.R. 106, 108-09 (1995); Brumley v. Department of Transportation, 46 M.S.P.R. 666, 670 (1991), overruled in part on other grounds; Hasler v. Department of Air Force, 79 M.S.P.R. 415 (1998). The phrase “as a result of a compensable injury” has been interpreted by the Merit Systems Protection Board (Board) to mean that the separation (or furlough) was “substantially related to” the compensable injury. Wright v. U.S. Postal Service, 62 M.S.P.R. 122, 128, aff’d, 42 F.3d 1410 (Fed.Cir.1994) (Table); Ruppert v. U.S. Postal Service, 8 MSPB 256, 8 M.S.P.R. 593, 596 (1981). The Board’s reviewing court, the Federal Circuit Court of Appeals, “accept[ed]” this interpretation for the case before it, but declined to “hold[ ] definitively that it is a proper gloss” on the regulatory language. New v. Department of Veterans Affairs, 142 F.3d 1259, 1261 (Fed.Cir.1998), citing Minor v. Merit Systems Protection Board, 819 F.2d 280, 282 n. 3 (Fed.Cir.1987).

Achtung! This article contains no legal advice. You should not rely on anything said herein to make decisions affecting your legal rights. If you need legal advice, you should get it from someone qualified to dispense it.
I have drawn a process tree below to help you navigate the restoration-rights labyrinth. This trip (chapter) ends at the second stop: Was the employee separated as a result of a compensable injury? Trust me: you will be too exhausted to travel an inch further. We will make other stops in subsequent trips.
Stop #1: Did the employee sustain a compensable injury.

This is a quick stop for “the determination of whether an individual suffers from a medical condition that is compensable under the Federal Employees Compensation Act is within the exclusive purview of OWCP (subject to review by ECAB) and that neither the employing agency nor the Board has the authority to make such a determination.” Chen v. U.S. Postal Service, 97 M.S.P.R. 527, 534 (2004). I don’t want to get ahead of myself but in future trips you will see that OWCP’s determinations on whether the employee has fully or partially recovered are also not reviewable on appeal to the Board. Steinmetz v. U.S. Postal Service, 106 M.S.P.R. 277, 281 -282 (2007) (OWCP did not regard the employee as fully recovered). Gilbert v. Department of Justice, 100 M.S.P.R. 375, 383 (2005) (OWCP reduction in compensation benefits conclusively established that the employee had partially recovered.) The Board will also give retroactive effect to an OWCP determination as to when the compensable injury occurred. See, e.g., Mendenhall v. U.S. Postal Service, 74 M.S.P.R. 430, 437 (1997). This could wreak havoc on an agency which learned from OWCP several years after the fact that its employee had sustained a compensable injury, had recovered in one year, and therefore should have been restored immediately and unconditionally to his former position. Chen, supra. For now, it is sufficient that you know that what OWCP says goes.

Stop # 2: Was the employee separated or furloughed as a result of a compensable injury?

The Kitchen Sink

Put yourself in the shoes of a postmaster faced with the prospect of rehiring a gimpy letter carrier, at whom he is already pissed because he thinks he has seen him reshingling his roof while collecting tax-free FECA support benefits. The postmaster knows that the Board says that he must restore this slacker if his separation was “substantially related” to his compensable injury whereas the Federal Circuit says that he must only if the employee’s compensable injury was the “sole cause” of his separation. If you were the postmaster what would you do before you separated the gimp? Find another reason to fire him. That’s exactly what is at stake in the tug-of-war between MSPB and the Federal Circuit about which test of causation should be used. The Board is all too aware that agencies will throw the kitchen sink at an employee in the hopes of removing him on a charge unrelated to his compensable injury. The Federal Circuit seems unaware of this mischief, or just doesn’t care. Before discussing the points at which the Board and the Federal Circuit’s causation tests collide, I will show how OPM’s sloppy drafting of its regulations created the opening for the Board and the Federal Circuit to become creative in.

OPM’s Regulations

I proceed from the general to the specific.

5 CFR § 353.103 describes the persons covered by OPM’s restoration regulations and at subsection (b) provides as follows:
The provisions of this part concerning employee injury cover a civil officer or employee in any branch of the Government of the United States, including an officer or employee of an instrumentally wholly owned by the United States, who was separated or furloughed from an appointment without time limitation, or from a temporary appointment pending establishment of a register (TAPER) as a result of a compensable injury… (emphasis supplied).

Why not leave the causation test at that? If the employee was not separated as a result of a compensable injury, he is not covered by OPM’s restoration regulations. End of story, right? Not so fast. When it remembers, OPM rewords its causation test for each type of restoration, thus giving the Board and the Federal Circuit additional opportunities to paint their own glosses on OPM’s tests.

OPM starts out sensibly enough in describing the restoration rights of an employee who fully recovers from a compensable injury within a year:

An employee who fully recovers from a compensable injury within 1 year from the date eligibility for compensation began (or from the time compensable disability recurs if the recurrence begins after the employee resumes regular full-time employment with the United States), is entitled to be restored immediately and unconditionally to his or her former position or an equivalent one.

5 C.F.R. § 353.301(a). No additional causation test in there; 5 CFR § 353.103(b) applies. But then OPM gets chatty in 5 C.F.R. § 353.301(b):

Fully recovered after 1 year. An employee who separated because of a compensable injury and whose full recovery takes longer than 1 year from the date eligibility for compensation began (or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States), is entitled to priority consideration, agency wide, for restoration to the position he or she left or an equivalent one provided he or she applies for reappointment within 30 days of the cessation of compensation. (Emphasis supplied.)

Seizing upon the non-existent difference in the tests of causation in subsections 103(b) & 301(b), the Federal Circuit invented out of whole cloth the “sole cause” test in New v. Dep’t of Veterans Affairs, supra, but I digress. Mercifully, OPM relapses into terseness in describing the rights of partially-recovered employees:

Partially recovered. Agencies must make every effort to restore in the local commuting area, according to the circumstances in each
case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty.

5 CFR § 353.103(d) Not content to allow section 103(b) to do its work undisturbed, the Federal Circuit superimposed its “sole-cause” test on the restoration rights of employees who had only partially recovered from compensable injuries. *Walley, supra.*

To the causation hodge-podge, OPM adds 5 C.F.R. § 353.108, which provides:

> The laws covered by this part do not permit an agency to circumvent the protections afforded by other laws to employees who face the involuntary loss of their positions. Thus, an employee may not be denied restoration rights because of poor performance or conduct that occurred prior to the employee's departure for compensable injury or uniformed service. However, separation for cause that is substantially unrelated to the injury or to the performance of uniformed service negates restoration rights. Additionally, if during the period of injury or uniformed service the employee's conduct is such that it would disqualify him or her for employment under OPM or agency regulations, restoration rights may be denied.

I cannot make sense of this regulation from beginning to end, but I can make sense of some of it. It appears that OPM is saying that an employee whose performance or conduct was unacceptable before the compensable injury occurred can be denied restoration if the unacceptable performance or conduct was so bad that the agency would have fired him anyway. If however the unacceptable performance or conduct was so bad that the agency would have fired him anyway. If however the unacceptable performance or conduct that antedated the injury warranted discipline or corrective act short of removal, then, upon recovery, the employee is entitled to be restored.

When I merge sections 103(b) and 108, I arrive at the following principle of law: upon recovery a compensable, an employee who was separated as a result of that injury is entitled to be restored unless the agency would have removed him anyway for a cause unrelated to that injury. I think you will find that this formulation of the test of causation holds up under the results of the cases I discuss below.

**Federal Circuit Cases**

Remember the old saw, “Do as I say; not as I do”? The opposite is true in reading cases: “Ignore what the court says and do as they do with the facts.” Legal reasoning is reasoning by analogy. *See, e.g. Pabst Brewing Co., Inc. v. Corrao, 161 F.3d 434, 441 (7th Cir. 1998).* Find the case with the facts most analogous to yours and apply the result in that case to yours. You won’t go wrong doing that, and that’s what I’ll do as I go through the cases of the Federal Circuit and the Board. I’ll pay attention to the facts and the results and then we will see if their apparently contradictory causation tests actually result in contradictory results on analogous facts.
Jim Cox has balls. The FAA removed Cox, an Air Traffic Controller, for striking in 1981; MSPB affirmed his removal because he had struck; at sometime, he filed a FECA claim that OWCP approved; and then Fox requested to be restored to his position. FAA denied his request to be restored; Fox appealed the refusal to restore to MSPB; MSPB affirmed the refusal; and Fox appealed to the Federal Circuit. In affirming the Board, the Federal Circuit held that because Fox had been removed because he struck and not because of his compensable injury, he had failed “to show that his separation resulted from or was substantially related to his compensable injury.” Cox v. Merit Systems Protection Bd., 817 F.2d 100, 101 (Fed. Cir. 1987) Earlier in its decision, the Federal Circuit noted that, “Be [sic] definition, separation as a result of a compensable injury excludes a valid removal for cause unrelated to the employee's compensable injury.” Id. Does it really? Why cannot separation result from two or more causes? The decision to separate an employee, like most all other decisions, is frequently multifarious. So long as the consequences of the compensable injury provided some impetus to the decision to separate, why should the employee lose his right to reclaim his position? I am not saying that an employee should be allowed to escape the consequences of his misconduct by hiding behind his compensable injury. That’s what Jim Fox attempted; and that’s why the result in the Board and Federal Circuit’s cases on his appeals is non-controversial.

Deonne New, a GS-03 secretary with the Veterans Administration (“VA”), suffered a temporary aggravation of a pre-existing occupational disease in May 1987, which prevented her from working. In July 1987, she filed a claim for FECA benefits. In August 1987, her physician informed the VA that she could return to work for four hours per day provided that she was given a parking space nearer to her work area than her existing space, and that her work space was redesigned to prevent a recurrence of her injury. On September 30, 1987, the VA shortened Ms. New's work day to four hours, made changes to her work station, and provided her with a handicapped parking space and a wheelchair to travel from her car to the door of the building. Based on these changes, the VA ordered her to return to work by October 7, 1987. She refused, claiming that the VA’s accommodations did not sufficiently comport with the recommendations of her physician, and that working under these conditions could endanger her health. On February 11, 1988, the VA removed Ms. New for two reasons: (1) her refusal to return to work for four hours per day after October 7, 1987 and (2) her poor attendance record dating from May 29, 1984, which was an indicator that she was unreliable, undependable, and of marginal value to the agency.

More than a year after her removal, in December 1989, OWCP awarded Ms. New retroactive benefits which covered the period between July 1987, when she filed her workers' compensation claim, and October 14, 1987. Claiming that her injury persisted, Ms. New later sought further benefits from the OWCP for the period from October 15, 1987 to October 2, 1990. OWCP denied this claim on January 22, 1991, because it found that Ms. New had refused the VA's offer of suitable work. OWCP further found that Ms. New was fully recovered as of October 2, 1990.

On February 15, 1991, Ms. New asked the Department of Veterans Affairs (“DVA”), which had a name change in the interim, to restore her to her former position. Ms. New claimed that she was entitled to priority consideration for restoration under 5 C.F.R. § 353.303, because she was separated as a result of her compensable injury. Contending that Ms. New was removed for cause, the DVA refused to restore her. Ms. New appealed the DVA's refusal of her restoration
request to the Board, and on August 12, 1991, the AJ affirmed the DVA’s denial of her restoration. The AJ’s initial decision became the Board’s final decision on April 10, 1992, when the full Board denied Ms. New's petition for review. *New v. Department of Veterans Affairs*, 142 F.3d 1259-1261 (Fed. Cir. 1998). She then petitioned the Federal Circuit for review and that court held that Ms. New was within her rights not to report until OWCP had approved her limited duty assignment, but remanded the appeal to determine whether the second reason for her removal—poor attendance—nonetheless constituted “a valid removal for cause unrelated to her compensable injury.” *Id.* at 1265

After setting forth the obligatory statutory and regulatory authorities, the Federal Circuit immediately took a shot across the Board’s bough:

> Priority consideration is accorded by entering the individual on the agency’s reemployment priority list for the competitive service. However, according to the regulations, this agency duty only arises when the employee is separated “because of a compensable injury.” 5 C.F.R. § 353.303. Reading the regulation rather broadly, the Board has opined that an employee is entitled to priority consideration for restoration when her removal is the “result of her compensable injury or for reasons substantially related to her compensable injury.” *Wright v. United States Postal Serv.*, 62 M.S.P.R. 122, 128, *aff’d*, 42 F.3d 1410 (Fed.Cir.1994) (table).

Although we will accept this definition for the present case, we decline to hold definitively that it is a proper gloss on the regulation. *See Minor v. Merit Sys. Protection Bd.*, 819 F.2d 280, 282 n. 3 (Fed.Cir.1987).

*Id.* at 1261.

Although the Federal Circuit held off spraying on its own gloss, it certainly foreshadowed what the gloss would look like when applied. For remanding the case to the Board to determine if Ms. New’s alleged poor attendance was a valid cause for removal beggars the question: why did the VA wait until Ms. New was insubordinate before they took any action against her for poor attendance? See 5 C.F.R. § 353.108. Although the VA may very well have had the right to remove or otherwise discipline her for poor attendance, the fact remains they did not. Do you see how the Federal Circuit is inviting agencies to concoct *theoretical* grounds to remove employees so as to avoid the duty to restore? Plain and simple, the VA removed Ms. New because of insubordination related to her compensable injury because before she refused to accept the VA’s accommodations; they never even warned her about her attendance. That the VA could have and probably should have removed her for poor attendance before her insubordination is immaterial because under OPM’s multiple causation tests, the question is not whether the agency could have validly removed the employee in theory (for a reason unrelated to her compensable injury), but whether did in fact remove her for a valid reason. The FAA fired Mr. Cox for striking, and his compensable injury is not a “Get out of Jail” card that he can turn in to get his job back. If Ms. New’s compensable injury was immaterial to her removal, if the agency would have removed
her any way for poor attendance, then principles of progressive discipline should have resulted in the agency sending her at least one letter of warning and it did not.

The Board took the court’s hint and on remand found that Ms. New’s “prolonged absence had no foreseeable end and that, even without considering the AWOL and insubordination charge, the sustained charge of poor overall attendance warrants removal.” *New v. Department of Veterans Affairs*, 82 M.S.P.R. 609, 615-616 (1999). The Board then next found that Ms. New’s removal for poor overall attendance was “unrelated to her compensable injury.” *Id.* In reaching that conclusion, the Board noted that out “of the 28 months of absences included in the poor overall attendance charge, 16 1/2 months, or 59% of those absences were found compensable by OWCP and 11 1/2 months or 41% of those absences were found not compensable by OWCP.” *Id.*

Ms. New then sued DVA in federal district on discrimination and other claims. That court discovered that, on remand from the Federal Circuit, the Board had not reviewed the settlement agreement of Ms. News’ removal that wiped out a huge chunk of her absence unrelated to her compensable injury. With its tail between its legs, the Board on remand from the district court corrected its error. Using reconstructed attendance records, the Board found that, “during the 3 1/2 year period charged (i.e., May 29, 1984, through December 4, 1987), the appellant was absent 889 noncontinuous hours, or approximately 5 months.” The Board determined that an absence rate of 12% was “not sufficient to sustain an excessive absence or poor overall attendance charge.” *New v. Department of Veterans Affairs*, 99 M.S.P.R. 404, 417-418 (2005). Accordingly, the Board ordered DVA to grant Ms. New priority consideration for “restoration retroactive to February 15, 1991, the date she requested restoration to her former position following her full recovery from her compensable injury, because her separation resulted from or was substantially related to her compensable injury.” *Id.* at 418.

In discussing *Cox* in *New*, the Federal Circuit said that it had required former ATC Cox “to demonstrate that no cause aside from his compensable injury precipitated his removal. The petitioner failed to make this showing, of course, because he was removed for striking.” *New*, *supra.* As you know, the Federal Circuit made no such demand on Cox, requiring him only “to show that his separation resulted from or was substantially related to his compensable injury.” *Cox* at 101. Because courts are loath to snatch principles of law out of thin air, it is understandable that the Federal Circuit would cast about to locate the origin for the “sole-cause” test which it first announced in *Walley*. So the court said the test had in fact originated in *Cox* although it had not. Worse still, it insinuated in *Walley* that it had applied the sole-cause test in *New* when the Court had specifically (albeit begrudgingly) applied the Board’s substantially-related test. To confuse matters even more hopelessly the *Walley* Court announced the sole-cause test and then said again it was applying---again begrudgingly---the substantially-related test. Whatever. On to the facts of *Walley*.

On April 16, 1995, Ms. Cynthia Walley was hired by DVA as a Licensed Practical Nurse (“LPN”), subject to completion of a one-year probationary period. On June 3, 1995, she filed a notice of traumatic injury and claim for continuation of pay with OWCP claiming that on June 1, 1995, she suffered a back injury while moving a patient. Dr. Yocum, Walley’s physician, evaluated Walley’s back injury on June 8, 1995, and concluded that she had “low back pain on
[a] mechanical basis due to strain” and should remain off of work for two weeks. She apparently returned to work part-time in June or July.

OWCP accepted Walley’s claim on July 18, 1995, and she received continuation of pay benefits from OWCP for 45 days. On July 21, 1995, Dr. Yocum completed a Duty of Status Report for OWCP indicating that Walley could return to work and perform limited LPN duties for four hours per day. She was assigned to work four hours per day based on her physician's recommendation. In October 1995, Walley received a second opinion from Dr. Smith who also recommended that Walley continue to work part-time for the medical center. Based on Dr. Smith's evaluation Walley's immediate supervisor, completed a Temporary Position Description identifying duties for Walley. On January 5, 1996, Dr. Smith concluded that Walley could gradually increase her workday from four hours to six hours and eventually to eight hours per day, subject to restrictions on her duties.

Effective March 8, 1996, before completion of the one-year probationary period, Walley was terminated from her position. The agency terminated her on the ground that she was frequently absent over the course of her employment. The DVA noted that “[b]ecause of [her] unsatisfactory attendance, [she] ha[d] not shown the dependability required of a healthcare professional at this medical center.” Walley claimed that the absences, which formed the basis of her termination, were “for the most part” connected with her compensable injury. Walley at 1012 -1013. Walley appealed her termination during probation to the Board field office and the administrative judge properly dismissed it for lack of jurisdiction. Walley petitioned the Board to review the AJ’s decision and because Ms. Walley had mentioned that she had been separated in part because of her compensable injury the Board remanded the appeal back to the AJ and ordered him to adjudicate it as a denial-of-restoration appeal. Walley filed two more petitions for review with the Board and its third decision the Board found on its own motion that she had failed to establish Board jurisdiction because she had failed to prove that she had been “terminated because of her compensable injury rather than for an unrelated valid reason.” Walley v. Department of Veterans Affairs, 87 M.S.P.R. 236, 242 (2000).

In particular, the Board found that the agency terminated Walley because of her frequent absences over the course of her employment. Walley asserted that the absences which formed the basis of the agency's termination were “for the most part” related to her compensable injury. Although she testified that, as far as she knew, she was compensated by OWCP for all of her absences, the Board dismissed her assertion as uncorroborated. Moreover, she did not show that she claimed OWCP benefits for her absences after the agency returned her to full-time accommodated duties, and admitted that some of her absences were unrelated to her compensable injury. Id. at 242 -243.

Walley appealed the Board’s third decision to the Federal Circuit. The Court affirmed but noted that the Board should have found that Walley had failed to satisfy her burden of proving that she was terminated due to a compensable injury, rather than dismissing her appeal for lack of jurisdiction. Years later, the Federal Circuit would reverse itself and hold that Walley had not pled sufficient facts to establish Board jurisdiction. More on that later.

Walley qualified as a partially recovered employee; and you will recall that under 5 CFR § 353.103(d), OPM did not insert a specific test of causation between the compensable injury and
the partially recovered employee’s separation. Rather than opting to use 5 CFR § 353.103(a)’s “as a result of test,” the Federal Circuit imported into 5 CFR § 353.103(d) the “because of a compensable injury” test from 5 CFR § 353.103(b), which applies to employees who fully recover after more than one year. Walley at 279 F.3d 1010, 1017. Then out of the blue, the Federal Circuit announced that “because of a compensable injury” actually means that the compensable injury must be the sole cause of the employee’s separation when that phrase does not mean that at all. Recall that Walley was terminated during probation because of a combination of absences, some related to her compensable injury and some not, which I have represented diagrammatically below:

Because both the compensable and non-compensable absences exerted some force on the agency’s decision to terminate Walley, one could fairly state that Ms. Walley was terminated because of a compensable injury. But was her compensable injuries the “sole cause” of her termination? Clearly, it was not. The Federal Circuit did not just paint a translucent gloss over OPM’s regulation; it hid it entirely to create its own, flagrantly anti-employee test of causation.

If Walley had proven that her compensable injury was the sole cause of her termination, then as a partially recovered employee, she should have been treated “substantially the same as [other qualified individuals with a disability] under the Rehabilitation Act of 1973.” 5 C.F.R. § 353.301(d). The Federal Circuit pointed out that under the Rehabilitation Act, no otherwise qualified individual with a disability “shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.” 29 U.S.C. § 794(a) (emphasis supplied). Now follow this “close” reasoning if you can: Since an agency could discriminate against an employee with a disability if the agency’s sole motive was not the employee’s disability, then it necessarily follows that a federal agency does not have to restore an employee whose separation was not solely caused by a compensable injury. Got that? I kid you not; that’s how the Federal Circuit justified the imposition of the “sole-cause” test----across the board of all types of restoration. It’s not my place here to convince you that this test is fatuous; let’s see if Walley would have done any better under 5 CFR § 353.103(a)’s “as a result of test.”

Like Ms. Walley, Ms. New (ultimately) was separated because of a combination of compensable and non-compensable absences. What did Ms. New do that Ms. Walley did not do? Simple: she introduced attendance records into evidence to show that the percentage of her non-compensable absences was too small to justify removal. By contrast, Ms. Walley did not present any evidence to show what percentage of her total absences was comprised of non-compensable absences. This would not have been an onerous task. She could have gathered her pay stubs, figured out the total number of hours she was absent during the period cited in the notice of proposed
removal, and deducted from those hours the number of hours of compensable leave. If the remainder—the number of hours of non-compensable absences—was too small a percentage of the total hours of leave to justify her removal, she would have been entitled to have been restored as a partially recovered employee. The social value to be promoted by the restoration regulations is straightforward: An employee who is separated as a result of his compensable injury should be restored following full or partially recovery unless the agency was going to remove him anyway for a valid reason unrelated to his compensable injury. Walley fell short of proving the jurisdictional negative: “but for my compensable injury the agency would not have removed me for a valid reason.” So regardless of the test of causation used, the same result would have obtained in Walley. Oh, yes, because Walley was a probationer, the agency could have removed her for next to no reason; so Walley would be wasting her time citing Board precedent to the effect that X% of non-compensable absences does not constitute a valid reason for removal because those cases all relate to non-probationers.

After Walley, the Federal Circuit went silent; well, not exactly silent, but the court did not publish any more precedential restoration decisions. The non-precedential decisions are worth reviewing however to get a glimpse of how the court is thinking on the causation issue.

Tommie L. Kennedy, Jr., began working for Postal Service as a part-time flexible letter carrier in Milwaukee, Wisconsin, on August 1, 1987, subject to completion of a ninety-day probationary period. In his first Employee Probationary Period Evaluation Report (“Evaluation Report”), on September 10, 1987, Kennedy received the lowest rating possible for every factor for which he was evaluated. The following day, Kennedy injured his back falling off a porch while on his postal route. He applied to OWCP for workers' compensation benefits on September 14, 1987. In his second Evaluation Report, dated September 21, 1987, he received the same low ratings in all categories. Due to his poor ratings during the probationary period, he was terminated for unsatisfactory work performance effective September 26, 1987. On September 3, 1997, the OWCP disallowed Kennedy's claim for continuing compensation benefits, which he had been receiving for almost ten years. Kennedy subsequently requested restoration to a limited-duty assignment at the Postal Service in Milwaukee. In response, the Postal Service advised Kennedy to take a qualifying examination for reinstatement. On December 2, 1997, Kennedy appealed to the Board claiming that the Postal Service denied his restoration right to priority consideration under 5 C.F.R. § 353.301(b) to which he was allegedly entitled because he was separated as a result of his compensable back injury. In an initial decision issued on April 20, 1998, the AJ determined that Kennedy's termination was not substantially related to his compensable back injury. The AJ determined that Kennedy's termination was for cause, resulting from the unsatisfactory work performance documented on his first Evaluation Report on the day before the injury. Kennedy's petition for review to the full Board was denied. He then appealed to the Federal Circuit, which affirmed. Kennedy v. U.S. Postal Service, 215 F.3d 1347 (Fed. Cir. 1999) (Table).

I discuss Kennedy not because the result is unwarranted, but because this is the first of only two times in which the court cited 5 C.F.R. § 353.108 to justify its decision:

Priority consideration is accorded by entering the individual on the agency's reemployment priority list. However, “separation for
cause that is substantially unrelated to the injury ... negates restoration rights.” 5 C.F.R. § 353.108 (1999). Consequently, “[a]n employee who has been removed for cause rather than a compensable injury is not entitled to restoration and cannot appeal to the Board.” *Minor v. Merit Sys. Protection Bd.*, 819 F.2d 280, 282 (Fed.Cir.1987) (citing *Cox v. Merit Sys. Protection Bd.*, 817 F.2d 100, 101 (Fed.Cir.1987)).

*Id. Kennedy* also supports my interpretation of section 108 that an agency can deny restoration to an employee whose unacceptable performance antedates the compensable injury if the agency would have removed him for that performance anyway.

Jim Smith worked as a letter carrier from August 8, 1981, to June 17, 1993, when he resigned when he was caught stealing mail that day. On May 12, 1994, Smith filed a claim for post-traumatic stress disorder (“PTSD”) with OWCP, alleging that exposure to tuberculosis from a co-worker caused his illness. His claim was approved on January 20, 1998, retroactive to June 17, 1993. Smith's OWCP benefits ended on July 5, 2000, after which Smith applied for restoration to the Postal Service. On February 21, 2001, the Postal Service denied Smith restoration. Smith appealed the agency's decision to the Board on March 14, 2001, alleging that the agency had improperly failed to restore him after his recovery from a compensable illness. The AJ dismissed his appeal for lack of jurisdiction, finding that Smith had resigned because he had gotten caught stealing the mail and not because of his compensable injury. The AJ’s decision became final and Smith appealed to the Federal Circuit which affirmed. *Smith v. U.S. Postal Service*, 81 Fed.Appx. 338, 339 (Fed Cir.2003) (non-precedential).

Before the Board, Smith provided letters from OWCP approving benefits retroactive to his separation date and doctor’s testimony that he was experiencing PTSD before his separation date. The Federal Circuit determined that, “This is insufficient, however, to carry Smith's burden of proof to show that his separation resulted from or was substantially related to his compensable injury.” *Id.* 340. The Court went on to note that, “Further, much of the evidence submitted cuts the other way. Smith himself stated at his July 5, 2001 oral deposition that he resigned because of ‘bad choices’ he had made and because of his theft of mail.” *Id.*

*Smith* is an easy case because as a letter carrier, Smith “was under a special duty to protect the sanctity of the mail. Taking materials from the mail and using them for personal gain in this situation is a gravely serious charge.” *Johnson v. U.S. Postal Service*, 92 M.S.P.R. 677, 681(2002) (citations omitted). In other words, the Postal Service was going to remove Smith whether he resigned or not. As I have emphasized earlier, those sustaining compensable injuries do not, as a result of those injuries, enjoy a special immunity from being disciplined for cause unrelated to those injuries. *Smith* is worthwhile remembering because, even though he voluntarily resigned from the Postal Service, Smith was entitled to be restored if he resigned as a result of the compensable injury. He did not.

*Daniels v. U.S. Postal Service*, 119 Fed.Appx. 280 (Fed. Cir. 2005) is a sequel to *New*, but with a different result.
Letter Carrier Alan Daniels sustained a compensable injury in 1997; he accepted a schedule award in August 2000, and, thereafter, in June 2001, he ceased receiving compensation from OWCP. In November 2001, the Postal Service sought to reassign Daniels to a modified position consisting of only clerk craft duties. The agency offered Daniels this new position in a letter dated November 13, 2001. Daniels refused to even read the letter. He complained that the modified position had not been certified by the OWCP as within his physical limitations. The Postal Service then sought an OWCP ruling on the suitability of the modified position. OWCP refused to make any ruling on suitability, stating that, because Daniels was no longer in receipt of compensation, it was OWCP policy not to make suitability determinations in such circumstances. The Postal Service then issued a letter on March 26, 2002, instructing Daniels “to immediately report to work, accepting the job offer that was presented ... in November 2001, or provide ... acceptable medical documentation” to substantiate his absence. The Postal Service further warned that failure to comply would result in Daniels being charged AWOL and action would be taken to remove him from the Postal Service. Daniels failed to respond to this letter.

On May 28, 2002, the Postal Service proposed Daniels' removal on a charge of being AWOL. Daniels did not make any written reply to the proposed removal but met with the deciding official, to whom he stated his continued refusal to accept the modified position until his claims had been adjudicated by the OWCP. The deciding official found that Daniels had no pending claims before OWCP, that he was AWOL, and that his removal promoted the efficiency of the service. The removal therefore became effective on July 12, 2002.

Daniels appealed his removal to the Board. The AJ found that Daniels had been AWOL; that his removal promoted the efficiency of the service; and that the penalty was reasonable. The AJ also dismissed Daniels' claim that he was not obliged to accept the modified position until a OWCP suitability determination had been made, finding that the agency had no obligation to clear the assignment of new duties with OWCP after Daniels accepted the schedule award. The AJ therefore upheld the removal. The full Board affirmed. *281.

On appeal to the Federal Circuit, Daniels argued that since the agency never secured an OWCP ruling on the suitability of the modified position, he could not be compelled to accept the modified position without such a ruling. In effect, Daniels argued that he was separated because of compensable injury and that he is being deprived of his restoration rights under 5 U.S.C. § 8151. The Federal Circuit rejected the argument and distinguished Daniels’ facts from *New’s:*

We held in *New v. Dep't of Veterans Affairs,* 142 F.3d 1259, 1265 (Fed.Cir.1998), that “when an agency removes an employee who has a compensable injury solely for refusal to return to work in the absence of a suitability determination by the OWCP, a sufficient nexus exists between the compensable injury” to give the employee restoration rights. However, “[s]uch nexus ... depends upon the employee's continuing compensable injury at the time of ... removal.” *Id.* Once the employee ceases receiving compensation, OWCP no longer has any role to play. *282 Thereafter, for an employee to prove that he was discharged because of compensable injury, the employee must establish the
unsuitability of the offered position through medical evidence. See Walley v. Dep't of Veterans Affairs, 279 F.3d 1010, 1018-20 (Fed.Cir.2002) (employee bears burden of proving that absence was due to compensable injury). Daniels has not presented any evidence that the position was unsuitable.

Id. at 281-282.

What did Daniels do wrong? He should have presented the Postal Service with medical documentation showing why sequelae of his compensable injury prevented him from performing the essential functions of the position that was offered to him in November, 2001. That he accepted a scheduled award did not deprive him of the right to prove that he was separated as a result of a compensable injury. It did however take OWCP out of the mix.

Pedro Bagunas was hired as a Letter Carrier at the Livermore, California Post Office on April 24, 1999, subject to a 90-day probationary period. On May 7, 1999, his first day delivering mail, he complained to his trainer, Christine Warner, about discomfort in his eye. Bagunas was absent from work for several full days and several partial days. He was terminated from by letter on May 19, 1999, which explained that “[i]n light of events that have taken place during [Bagunas’] probationary period, there is a question as to [his] work ethics,” and that “there will not be sufficient time in order to properly evaluate [his] performance.” Bagunas filed a claim for benefits with OWCP on September 2, 1999. His claim was accepted for corneal abrasion of the right eye. He was granted FECA benefits from May 8, 1999, through May 23, 1999.

Bagunas requested restoration to his City Carrier position in letters dated August 7, 2002 and May 2, 2003, on the theory that he was entitled to restoration rights pursuant to 5 U.S.C. § 8151(b). The agency denied these requests in letters dated June 11, 2003 and September 30, 2003. In the September 30, 2003, letter, the Postal Service explained that Bagunas was ineligible for reinstatement because he did not request reinstatement until more than three years after his termination.

Bagunas appealed the agency's denial of reinstatement to MSPB. As stated above, the Postal Service terminated Bagunas for two reasons: first, because of his work ethics and second, because there was insufficient time to evaluate his performance. Although the lack of time to evaluate Bagunas' performance may have been substantially related to his compensable injury, the AJ concluded that Bagunas’s questionable work ethics, a reason unrelated to his injury, and thus he had “failed to show that there was no valid cause aside from the injury that precipitated the agency's action.” Specifically, the AJ found that “Ms. Smith terminated the appellant, in part, because he did not report the injury immediately and because she believed he may have been making a false claim for an on-the-job injury.” Accordingly, in a March 5, 2004, decision, the AJ denied Bagunas' request for restoration because he had failed to show that the termination was substantially related to his compensable injury, and concluded that there was no need to address the question of timeliness. That decision became final on May 3, 2005. Bagunas appealed to the Federal Circuit. Bagunas v. U.S. Postal Service, 174 Fed.Appx. 555 (Fed. Cir. 2006)(non-precedential). The Federal Circuit affirmed.
The AJ’s initial decision is contradictory. First, he asserted that it was not within his province to determine whether in fact Bagunas had waited three days to report the alleged on-the-job injury, but then he did just that, finding that Smith was more credible than Bagunas on this issue. The Federal Circuit affirmed the AJ because the court won’t second-guess an AJ’s credibility determinations.

What’s most troubling for an appellant about the decision is figuring out how to plead enough facts, which if true, would invoke Board jurisdiction. Hickok v. U.S. Postal Service, 180 Fed.Appx. 971, 973 (Fed. Cir. 2006) (non-precedential). Bagunas was terminated because of his work ethics and because there was insufficient time to evaluate his performance. Id. at 557. Questionable “work ethics” certainly constitutes a valid reason for a probationary termination, which is unrelated to a compensable injury. How does an appellant plead around that? At a minimum, the appellant must deny the facts on which the questionable work ethics charge is based, but, beyond that, he must allege facts to show why the agency could not have reasonably held the belief that his work ethics were questionable. In that regard, the court sustained the AJ’s finding that the deciding official reasonably believed that Bagunas had failed to report the injury for three days:

Accordingly, the AJ found that “Ms. Smith had reason to believe that the appellant had not followed her instructions to report an injury immediately....” R.A. at 21 (emphasis added). No case law has been called to our attention suggesting that a “reasonable belief” standard is inappropriate. Moreover, a contrary rule would require evaluation of decisions on the merits of the removal action during restoration proceedings. We therefore conclude that Bagunas is not entitled to restoration if the agency reasonably believed it was discharging Bagunas for a cause unrelated to the injury.

Id. at 557-8

For those waiting breathlessly for an update on the skirmish between the Board and the Federal Circuit on the wording of the causation test, your wait is over. For in an act of verbal sleight of hand that would make Chriss Angel blush, the Federal Circuit said both tests mean the same thing:

In order to show that termination was substantially related to his compensable injury, the petitioner must show that the separation was solely attributable to the compensable injury. See Walley, 279 F.3d at 1016; New v. Dep’t of Veterans Affairs, 142 F.3d 1259, 1264 (Fed.Cir.1998).

Id. at 557. Once again, I implore you to ignore the verbiage and pay attention only to the result. The Bagunas result is perfectly fine because the appellant failed to show the work ethics charge was invalid or bogus or trumped up.
Mail Handler Paula Lua suffered a work-related injury in 1993, as a result which she was “placed in a rehabilitation position” as a letter repairer consistent with her physical restrictions. Lua v. U.S. Postal Service, 181 Fed.Appx. 995 (Fed. Cir. 2006) (non-precedential).

In December of 1999, Lua allegedly committed serial acts of misconduct. First, on December 23, Lua left work to take a co-worker to the hospital, without “clocking out” and without filling out the appropriate leave forms, despite being asked to do so. Then, on December 28, during a meeting about the December 23 incident, Lua failed to follow instructions, interrupted the meeting by praying on the floor, yelled, and “slammed” a notebook on the table which slid across the table and struck another employee. Finally, while being escorted by postal police from the December 28 meeting, Lua made threatening remarks to a postal police officer. On March 3, 2000, the agency issued a notice of emergency suspension and thirty day notice of removal. The removal notice contained three charges based on the aforementioned incidents. On April 8, 2000, the agency terminated Lua. Lua challenged her termination but that appeal was dismissed by the Board.

On September 20, 2000, Lua's OWCP claim for depression, which had been apparently had been filed before the acts of misconduct, was accepted. However, further treatment for Lua's condition was denied because OWCP determined that there was “no longer any evidence of a connection between the condition and factors of federal employment.”

On February 14, 2005, Lua filed a petition with the Board alleging that the agency violated her restoration rights when it refused to restore her to her former position. She alleged that she had fully recovered from a compensable injury (the depression) and that the agency had removed her based on that injury. In an initial decision, the AJ dismissed the appeal for lack of jurisdiction. The AJ characterized the only issue as being whether Lua “has made a nonfrivolous allegation that her separation was ‘solely attributable’ to her major depression.”

The AJ found that the three December incidents were intervening actions that formed the basis of the agency's three charges which led to the termination, and that Lua was not terminated solely because of a compensable injury. The AJ thus dismissed the appeal for lack of jurisdiction. The full Board denied review. Lua petitioned the Federal Circuit for review and the court affirmed the Board. Id. at 996.

The court’s decision to affirm the Board is non-controversial and easy to discern. I discuss Lua only because the court put down the AJ for saying that even if Lua had shown that her compensable depression had caused her to commit the acts of misconduct, she would still not have proven that her removal resulted from a compensable injury:

The AJ properly found that Lua failed to establish that no cause aside from her compensable injury caused the termination. Lua's intervening conduct provided the agency with a sufficient basis for its termination action. We note that we are skeptical that the AJ is correct in stating that “[e]ven assuming that [Lua’s] condition contributed to, or even caused, the behavior that led to her termination ... it cannot be said that no cause aside from her
compensable injury led to her termination.” However, there is no medical evidence in the record suggesting the conclusion that Lua's depression, or the medication she was taking to combat the depression, caused her misconduct.

Id. at 997

Lua reminds me of the case in which I was consulted by a professional employee of a DoD agency, whose suspension was being proposed because he was persistently tardy.

I asked him, “[name withheld], why are you reporting to work late?”

Name withheld replied, “Because I am trying to get back at them.”

Right then and there, I was positive beyond peradventure that I was going to retire him on a psychiatric disability, and I did just that.

I will grant you that as a fifty-nine year old from Brownsville Brooklyn, NY whose older brother is a psychoanalyst, I am always on the look out for a psychological explanation for maladaptive behavior. But if you, dear reader, represent employees against whom discipline has been proposed or taken, please suppress any instinct you may have to label the employee as a sinner and seriously consider that the employee might be suffering from an Axis II personality disorder. Rather than wasting your time and the union’s money in arbitration, you might recommend he apply for a disability retirement. I have won psychiatric disability retirements for a postal worker and a Department of Agriculture employee whose unacceptable performance was determined by objective psychological testing to be rooted in severe psychiatric disabilities of which both workers had been entirely unaware. I have no idea whether Ms. Lua’s misconduct was linked to her compensable depression, but the Federal Circuit left the door open for her to prove by medical evidence that it had been.


On October 13, 2004, Erica Nelson began duty as a Part-Time Flexible City Carrier, subject to completion a 90-day probationary period, during which she would receive periodic performance evaluations. On November 19, 2004, Nelson received a 30-day evaluation in which her supervisor, Ms. Hardee, rated Ms. Nelson as “satisfactory” in five of six categories, but deemed her performance as “unsatisfactory” in the category of “Work Quantity.” On December 9, 2004, Nelson was involved in a motor vehicle accident with another postal vehicle and sustained an injury to her right hand. Nelson was granted two days off and returned on December 13, 2004. The following day, Nelson received her 60-day evaluation. In that second evaluation, Hardee rated Nelson “unsatisfactory” in four categories, including “Work Quantity,” “Dependability,” “Work Relations,” and “Personal Conduct.” Concluding that Ms. Nelson had “Fail[ed] to Meet Probation Standards,” Hardee issued a notice of termination, effective December 14, 2004.

Nelson subsequently filed an appeal with the Board, alleging that the agency had denied her request for restoration to duty following her full recovery from a compensable injury. The AJ
assigned to the case conducted a hearing and concluded that Nelson failed to show that she is entitled to restoration to duty. The AJ stated that he found Nelson’s testimony to be “less than credible” because her responses were “rambling,” “evasive,” “inconsistent,” and “self-serving.” In particular, he noted that her “constant evasiveness detracted from her credibility” and that “her bias ... similarly detracted from her credibility.” In contrast, the administrative judge found Hardee’s testimony to be “completely consistent with the record and credible.” He explained that he did not discern, and Nelson “failed to establish[,] any motive for Ms. Hardee to fabricate her testimony with respect to her treatment of [Ms. Nelson] ... or in terms of the nature of [Ms. Nelson’s] performance and conduct problems.”

As a result, the AJ concluded that the agency had clearly established a basis for its termination action “that was rooted in [Ms. Nelson’s] performance long before [her] compensable injury occurred.” Because Nelson had “failed to show that there was no valid cause aside from the injury that precipitated the agency's action,” the administrative judge ruled that she was not entitled to restoration to duty. When the full Board denied Nelson’s petition for review, the AJ’s initial decision became the final decision of the Board. Nelson then sought review by the Federal Circuit. *Id.* at 983-985.

To her credit, Ms. Nelson tried to distinguish her facts from those in *Walley* and *New* on which the AJ relied in applying the sole-cause test, arguing that in those cases the employee had not fully recovered or had fully recovered more than one year of becoming eligible to receive FECA benefits whereas she had fully recovered in one year. To its credit, the Federal Circuit whipped out section 108 to defeat her argument:

> In making that argument, Ms. Nelson overlooks the fact that an employee, who recovers from a compensable injury, whether partially or fully, within one year or after one year, is not immune from separation for cause. Under 5 C.F.R. § 353.108 , “separation for cause that is substantially unrelated to the injury ... negates restoration rights.” Moreover, as we explained in *Cox v. Merit Systems Protection Board*, and as noted by the administrative judge, “[by] definition, separation as a result of a compensable injury excludes a valid removal for cause unrelated to the employee's compensable injury.” 817 F.2d 100, 101 (Fed.Cir.1987). Consequently, the administrative judge appropriately required Ms. Nelson to establish that she was not terminated for a reason substantially unrelated to her injury. Because the administrative judge found that the termination action “was rooted in [Ms. Nelson's] performance long before [her] compensable injury occurred,” the administrative judge did not err in denying her request for restoration.

*Id.* at 985. They key word here is “immune.” For sustaining a compensable injury does not immunize an employee from facing the consequences of a removal for cause unrelated to the compensable injury. And, under section 108, one of those consequences is forfeiture of the right to be restored following recovery from a compensable injury.
MSPB Cases

Have you noticed that the restoration appeals filed by former Postal Service workers are mainly from those who did not pass probation? This trend continues in the MSPB cases.

Walt Buscher was hired by the Postal Service a part-time Rural Carrier Associate effective May 26, 1990, subject to completion of a probationary period. Between May 26 and July 5, 1990, the date of his termination, he was in a duty status for approximately 64 hours, of which approximately fifty were characterized as “training.” The July 5, 1990 termination letter stated that Buscher had frequently forgotten instructions, had not been able to deliver a mail route in a reasonable time, and had not shown significant improvement during his training period. The letter of termination referred particularly to Buscher's performance on June 29, 1990, and noted that the rest of his work had to be done by someone else because he had failed to complete all the sorting and delivering that was necessary on that day. On August 15, 1990, the Buscher filed a benefits claim with OWCP for a back injury he allegedly sustained on his last day of work; OWCP accepted the claim. In 1993, Buscher applied for restoration, but the agency declined to reemploy him. The appeal to MSPB followed. *Buscher v. U.S. Postal Service*, 69 M.S.P.R. 204, 206 -207 (1995).

The AJ ordered Buscher to show cause why his appeal should not be dismissed for lack of jurisdiction. Subsequently, the AJ held a telephonic conference to clarify the nature of the jurisdictional question, as follows: whether Buscher had been “separated ... as a result of a compensable injury” in order to have a right to restoration to duty under 5 C.F.R. § 353.103(b). After that conference, both parties made further submissions on the issue of jurisdiction. The AJ found that, under 5 C.F.R. § 353.103(b), an appellant must show that his removal resulted from or was reasonably related to a compensable injury. The AJ credited the agency's evidence that the Buscher’s inability to perform was demonstrated throughout his employment, and did not suddenly appear at the time of his injury and dismissed the appeal for lack of jurisdiction. *Id.* at 207-8. Buscher petitioned the Board for review and the Board affirmed although the Board chided the AJ for not allowing Buscher to rebut the evidence the agency submitted at the last minute.

Have you also noticed that sometimes AJs hold hearings on these appeals and sometimes they don’t? Why do you think that is? The reason is that the Federal Circuit cannot make up its mind when the Board has jurisdiction and when it does not; and, more to the point, the court has sent mixed-up messages when the Board must hold a hearing and when it doesn’t have to. And when the Board is required to hold a hearing, does it hold it to determine jurisdiction, the merits, both, or are they one and the same? I am going to leave those questions for my erudite legal hobbyists to figure out. You are going to have to pay me to answer them.

After docketing the two matters as separate appeals, the AJ joined the two appeals for consideration. The AJ then held a hearing, before issuing the initial decision dismissing the appeals. I will discuss only the restoration claim, which the AJ dismissed for lack of jurisdiction because, although Mobley established that he retired on disability as a result of a compensable injury, he failed to establish that he was “partially recovered.” Mobley then petitioned the Board for review; the Board affirmed but found, contrary to the AJ, that Mobley had failed to establish that he had retired as a result of a compensable injury. *Mobley v. U.S. Postal Service*, 86 M.S.P.R. 161, 162 -163 (2000).

Unlike the Board, I am not going to discuss the minutiae of the dozen or so OWCP claims Mobley filed between 1982 and 1994. It’s just not necessary. Instead I am going to briefly discuss SF-3112A, “Applicant’s Statement of Disability.” This is a form that must accompany all applications for disability retirement, FERS or CSRS. So Mobley filled it out. Boxes 4, 5, & 6 read as follows: “Fully describe your disease(s) or injury(ies.) We consider only the diseases and/or injuries you discuss in this application,” “Describe how your disease(s) or injury(ies) interferes with performance of your duties, your attendance, or your conduct,” and “Describe any other restrictions of your activities imposed by your disease or injury.” Although Mobley did submit into evidence the letter from OPM approving his disability-retirement application, he did not submit the SF-3112A. And because OPM never states the grounds on which it approves an application and because Mobley did not submit the SF-3112A, the Board could not ascertain whether there was any connection between Mobley’s accepted OTJ injuries and the medical conditions that led to his disability retirement. Notwithstanding Mobley’s inexplicable failure to introduce the SF-3112A into evidence, the AJ and the Board wildly scurried about trying to speculate about the medical conditions that led OPM to approve Mobley’s disability retirement. I regard that speculation as *dicta* unnecessary to understanding the correct result in *Mobley*.

Assume that OPM had not approved Mobley’s application for disability retirement. Would he still have been retired? Obviously not. If Mobley had the years of service and age to be eligible for an immediate retirement, he would have had no reason to go through the trouble of applying for a disability retirement. Therefore it is OPM who decides whether an employee retires or not on disability, just as it is the employing agency who decides whether to remove the employee or not. If the Postal Service had removed Mobley for being physically or mentally unable to perform the duties of his position and if Mobley believed the medical or psychological conditions underlying that action were related to compensable injuries, one would assume that Mobley would have had the sense to introduce the proposal and removal notices in evidence in an MSPB appeal if the agency had denied his request for restoration. The SF-3112A and the OPM approval letter would have served the exact same evidentiary function in Mobley’s appeal. Just as MSPB would need to know the reasons why the employing agency had removed the employee to determine if his compensable injury was “substantially related” to those reasons, the Board would also need to know the reason that OPM retired an applicant on disability. The SF-3112A, quite literally, is the only document from which those reasons can be deduced since the OPM form letter approving the application is silent on that reason. Representing himself, Mobley just did not grasp what evidence he needed to introduce to establish Board jurisdiction. 5 CFR § 1201.56(a)(2)(i)(appellants have the burden of proving board jurisdiction by a preponderance of the evidence.)
Indubitably, *Mobley* is known as the first case in which the Board attempted to reconcile its “substantially-related” test of causation with the Federal Circuit’s “sole-cause” test and we will take a peak at its discussion next, but I am forlorn that the Board did not realize that it could have disposed of the appeal with dispatch because it did not realize that Mobley’s failure to submit SF-3112A required it to dismiss his appeal for failure to prove jurisdiction. Referring to 5 CFR § 353.103(b), the Board said:

The phrase “as a result of a compensable injury” has been interpreted by the Board to mean that the separation (or furlough) was “substantially related to” the compensable injury. *Wright v. U.S. Postal Service*, 62 M.S.P.R. 122, 128, *aff’d*, 42 F.3d 1410 (Fed.Cir.1994) (Table); *Ruppert v. U.S. Postal Service*, 8 MSPB 256, 8 M.S.P.R. 593, 596 (1981).

Our reviewing court “accept[ed]” this interpretation for the case before it, but declined to “hold[ ] definitively that it is a proper gloss” on the regulatory language. *New v. Department of Veterans Affairs*, 142 F.3d 1259, 1261 (Fed.Cir.1998), citing *Minor v. Merit Systems Protection Board*, 819 F.2d 280, 282 n. 3 (Fed.Cir.1987). Regarding the meaning of “substantially related,” the court in *New* described *Cox*, 817 F.2d at 101, as standing for the proposition that an employee's “receipt of workers' compensation benefits is not conclusive proof that [his] removal is substantially related to his compensable injury” and that the employee must “demonstrate that no cause aside from his compensable injury precipitated his removal.” *New*, 142 F.3d at 1264. The court held in *New* that the existence of a valid reason for separation, unrelated to a compensable injury, precludes restoration rights, even if the separation was also related to a compensable injury. *Id.* at 1265

*Mobley, supra*, at 164 -165. To beat the dead horse for the last time, because Mobley had not established the reason that OPM retired him on disability, he had no hope to link his compensable injuries to that reason.

After *Mobley*, the Board had to remand five straight appeals back to AJs who had failed to give appellants an opportunity to prove jurisdiction, which goes to show just how confounding restoration appeals are to grasp. More than six years after the Board adjudicated *Mobley*, the Board got its next chance to decide a restoration appeal on the merits in *Frye v. U.S. Postal Service*, 102 M.S.P.R. 695 (2006)

Melody Frye was appointed to Part Time Flexible Carrier (City) at the Piedmont Post Office in Portland, Oregon, effective January 8, 2005, subject to a 90-day probationary period ending on April 7, 2005. On February 14, 2005, she fractured her right ankle after falling on a driveway while delivering mail. In a March 24, 2005 Letter of Separation, the agency notified Frye that it was terminating her employment effective March 25, 2005, for: working in an unsafe manner on February 14, 2005; failing to provide medical documentation to support her prolonged absence
due to her injury; and not following instructions to contact the Piedmont Post Office with medical updates. The Letter of Separation stated that on March 2 and 7, 2005, the agency contacted Frye and asked her for updated medical information, but that the agency did not receive any updated medical information until March 10, 2005. The Letter of Separation further stated that on March 17, 2005, the agency instructed Frye to call the Piedmont Post Office and mail in or provide by facsimile a copy of her most recent medical information after her doctor's appointment on March 18, 2005, but that she had failed to do so.

In an August 11, 2005 interview with the agency, Frye stated that she called a friend on March 7, 2005, who drove her to the Piedmont Post Office where she delivered the medical documentation requested by the agency. She further explained in the interview that on March 21, 2005, she spoke on the telephone with Marta Hartman, one of her supervisors, and Customer Service Supervisor at the Piedmont Post Office. According to Frye, the supervisors informed her during the telephone call that they needed medical documentation after every one of her medical appointments. Frye stated that she told the supervisors that she would send the information to them, but that it was 3:30 p.m. and her doctor's office stops taking telephone calls at 3:00 p.m. Frye said that she left a message for her physician to telephone her.

In the interview, Frye also stated that her telephone was disconnected on March 22, 2005, due to nonpayment of her telephone bill, but that she spoke to Hartman that afternoon over a telephone at approximately 4:30 p.m. after “someone had stopped by,” and during that call she informed Hartman that her doctor had been unable to contact her because her telephone had been disconnected, but that she would have her physician send the requested medical information to the agency as soon as she could speak with him. Frye stated that she telephoned Hartman on March 24, 2005, because the appellant's telephone service had been restored by that date, and that she spoke with Hartman about getting the requested medical documentation. According to Frye, Hartman told her to wait for the mail, and when her mail arrived on or after March 24, 2005, the appellant stated that it contained the March 24, 2005 Letter of Separation.

By letter dated May 27, 2005, OWCP informed Frye that it had accepted her February 14, 2005 ankle injury as job-related. On July 21, 2005, Frye requested restoration to her former position. Her treating physician signed an OWCP work capacity evaluation form on July 22, 2005, stating that she was “released to full duty” as of that date with no medical limitations in working eight-hour days. In a July 29, 2005 letter to Frye, the agency declined to restore her on the ground that it had previously terminated her for failing to follow the instructions of her supervisor and because her 30-day evaluation completed on February 7, 2005, rated her as being unsatisfactory in five out of six evaluated areas. Frye filed a Board appeal from the agency's decision not to restore her, and she requested a hearing.

Other than issuing an acknowledgment order, which did not discuss the jurisdictional issue in detail and issuing her initial decision, the AJ did not, as far as the written record reflects, notify Frye of what she must submit to establish Board jurisdiction over her restoration appeal. In her initial decision, the AJ denied Frye’s request for a hearing and dismissed her restoration appeal for lack of jurisdiction upon finding that she did not make a nonfrivolous allegation that her March 24, 2005 separation “resulted from or was substantially related to her compensable injury.” Rather, the AJ found that the agency terminated Frye during her probationary period for
cause because she did not provide the medical documentation requested by the agency in a
timely manner before OWCP accepted her workers' compensation claim and because she worked
in an unsafe manner, and that she had performance problems before she was terminated.

On petition for review, Frye asserted that she made a nonfrivolous allegation that her termination
was substantially related to a compensable injury, the administrative judge improperly held her
to a “higher standard” on the jurisdictional issue, and the AJ improperly denied her request for a
hearing. The Board reversed and remanded, finding that Frye “made nonfrivolous assertions of
fact that her termination was substantially related to her compensable injury.” Id. at 699. The
Board then revealed an important practice pointer so please pay attention; the Board said:

In an Agency Narrative Response to the appeal filed by the
agency's representative, the agency attempts to contradict the
appellant's statement that she delivered the requested medical
documentation to the agency on March 7, 2005, and maintains that
she did not comply with the agency's March 17, 2005 instruction to
provide updated medical information on or before some
unspecified date after her appointment with her doctor on March
18, 2005. However, the statements of a party's representative in a
pleading are not evidence. Hendricks v. Department of the Navy,
69 M.S.P.R. 163, 168 (1995). Further, to the extent that the
agency's allegations constitute mere contradiction of the appellant's
otherwise adequate prima facie showing of jurisdiction, we may
not resolve the conflicting assertions of the parties, and the
agency's allegations are not dispositive. See Ferdon v. U.S. Postal
Service, 60 M.S.P.R. 325, 329 (1994). These issues are ones for the
administrative judge to decide on remand after a merits hearing, if
the appellant still requests a hearing.

Id. at 699 -700. Because Frye’s lawyer refuted, point-by-point, the accusations in the letter of
termination, she established that the agency’s proffered reasons for firing Frye were bogus and
thereby she got Frye a hearing on the merits. Even if the agency’s representative had submitted
declarations from Frye’s supervisors, the Board held that the AJ could not resolve factual
conflicts on the papers, but had to resolve them in a hearing. So appellants’ representatives
should follow the lead of Frye’s attorney and file a particularized demurrer to the reasons for
their clients' separations.

Alas, what the Board giveth in Frye, the Board taketh something else away. To wit:

We note that in Wright v. U.S. Postal Service, 11 MSPB 595, 13
M.S.P.R. 353 (1982), the Board, relying on Raicovich v. U.S.
Postal Service, 675 F.2d 417, 424 (D.C.Cir.1982), found that it
would be inconsistent with the purpose of the workers'
compensation statute “for an agency to refuse to rehire a recovered
former employee on the basis of prior conduct for which he was
not dismissed.” Wright, 11 MSPB 595, 13 M.S.P.R. at 355.
Nonetheless, the Board pointed out that “a former employee may be disqualified for restoration by having engaged in conduct shortly before his injury which would have resulted in dismissal but for the intervening injury.” *Id.* at 356; see *Raicovich*, 675 F.2d at 424.

The agency's July 29, 2005 letter denying the appellant's request for restoration in effect incorporated its March 25, 2005 Letter of Separation by stating that the reason for not restoring the appellant was her alleged failure to follow instructions by not providing updated medical information. The July 29, 2005 letter adds that the appellant also was not entitled to restoration because her February 7, 2005 30-day performance evaluation was issued a week before her injury and rated her unsatisfactory in five out of six evaluated areas.

*Id.* at 700 (citations to the record omitted). The Board ordered the AJ to keep this mind in hearing the appeal on remand.

Let’s assume that at the hearing Supervisor Hartman testified that she was getting around to removing Frye for bad performance during probation when Frye sustained the compensable injury. Let’s further assume that the AJ found that in fact this was true. Could Frye dispute that her performance was unacceptable? What about the Board’s *ratio decidendi* strongly implies that she could dispute the merits of her dismissal? If you were the Postal Service what argument would you make that, as a probationary employee, Frye should not be permitted to dispute the merits of her termination? What non-precedential decision of the Federal Circuit would you cite for the proposition that the AJ cannot decide the merits of the separation?

And that’s it; we have reached the end of the Board and Federal Circuit’s cases on the causation test and neither body has tackled the really tough case, the one in which the agency was motivated to separate an employee on the basis of a mixture of compensable and non-compensable reasons where *no one reason standing alone provided an independent reason for the separation*. Let’s modify the reasons in *Frye* to see how a mixed-motive separation might be adjudicated. Let’s first look at a diagram of the stated reasons for which the Postal Service terminated Frye:
What is immediately obvious from looking at this diagram? Correct: where is there *any* termination reason related to the compensable injury? Just because Frye was able to put into doubt that the agency’s stated reasons were true, it hardly follows that she made out a prima facie case that Frye was separated “as a result of a compensable injury” as she must under 5 CFR § 353.103(b). Does *Frye* therefore stand for the proposition that where the appellant raises doubt whether any of the agency’s putative reasons for removing him are valid, the Board will imply that he was removed as a result of the compensable injury? But I digress. Let’s insert some termination reasons related to the compensable injury. Assume that the Postal Service also terminated Frye because she failed to demonstrate acceptable performance during the trial period and because they needed someone to deliver her route.
Above the line are causes unrelated to the compensable injury and below the line are those related. Can one say that Frye was terminated “as a result of a compensable injury”? Sure. Under this hypothetical, we are assuming that a mixture of reasons caused the agency to terminate Frye. The decision to terminate was based on the cumulative effective of all reasons, two of which related to the compensable injuries. One can absolutely say that her termination was “substantially related” to her compensable injuries, provided that each reason weighed the same in Supervisor Hartman’s mind. But in this hypothetical the different tests that the Federal Circuit and Board use to determine causation come face to face with each other. Because in no way can one reasonably say that Frye’s compensable injury was the “sole cause” of her termination under the facts represented diagrammatically. For under those facts, she wins only if the “substantially-related” test is used. What to do? At hearing, knock out a few above line reasons and use 5 C.F.R. § 353.108 to prove that she was not separated “for cause that is substantially unrelated to the injury.” In other words, 5 C.F.R. § 353.108 contemplates the possibility that an employee might be separated because of a mixture of compensable and non-compensable reasons and he is entitled to be restored so long as the compensable reasons predominate. No one has argued to the Federal Circuit that its “sole-cause” test, as applied to a mixed-motive separation, might be inconsistent with 5 C.F.R. § 353.108, but I am champing at the bit to do so if the opportunity presents itself.

About the author

Mitchell Kastner served as an Administrative Judge with the United States Merit Systems Protection Board and its predecessor, the United States Civil Service Commission, for ten years. During the last three years of his tenure, he was the Deputy Regional Director of the Board's New York Regional Office. As an Administrative Judge, he conducted hearings and wrote decisions on all of the appeals over which the Board's Regional Offices had jurisdiction, including adverse actions (removals, demotions, and suspensions for more than 14-days);
reductions in force; denials of within-grade salary increases; disability retirement reconsideration decisions; legal retirement reconsideration decisions; performance-based removals or reductions in grade; OPM suitability determinations; denials of restoration of reemployment rights, and certain terminations of probationary employees.

Since returning to private practice in 1985, he has represented employees before the Board on all of these types of appeals and several others which were added after he left, most notably, representing whistleblowers in Independent Right of Action appeals under the Whistleblower Protection Act of 1989. He has also represented federal employees and postal workers before EEOC and in federal court on claims under all of the federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, and the Age Discrimination in Employment Act. With the exception of the National Treasury Employees Union (which employs its own attorneys), he has represented bargaining unit members of every major federal employee and postal service worker union in arbitrations. He is featured with former MSPB Chairman Daniel Levinson on Dewey Publication’s compact disc *MSPB LITIGATION TECHNIQUES*

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¹ Please assume that all personal pronouns are gender neutral unless the context suggests otherwise.