

2024 WL 1110786 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: THE STOP & SHOP SUPERMARKET CO

Case No. G286 1526

Carrier ID No. 001000037437701 W112502

March 1, 2024

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Date of Accident 2/19/2021

The Full Board, at its meeting held on February 13, 2024, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed on November 20, 2023.

ISSUE

The issue presented for Mandatory Full Board Review is whether claimant violated [Workers' Compensation Law \(WCL\) § 114-a](#) and whether mandatory and discretionary penalties should be assessed.

The Workers' Compensation Law Judge (WCLJ) found that claimant did not violate [WCL § 114-a](#).

The Board Panel majority affirmed, finding that the claimant did not “knowingly make a false statement or representation of a material fact for the purpose of obtaining compensation or influencing any determination regarding payment of compensation.”

The dissenting Board Panel member would find that claimant violated [WCL § 114-a](#) and would assess at least a mandatory penalty.

The carrier filed an application for Mandatory Full Board Review arguing that there is clear evidence that the claimant deliberately lied about his prior neck injury, which caused similar symptoms to his established work injury. As such, the Full Board should find that the claimant violated [WCL § 114-a](#), and should assess a mandatory penalty for the period from February 19, 2021 (the date he provided false information to the medical provider), to January 24, 2023 (when he last testified), as well as a discretionary penalty that permanently bars him from any and all future wage replacement benefits.

In rebuttal, the claimant argues that the Board Panel majority properly found that he did not knowingly make a false statement or representation of a material fact for the purpose of obtaining compensation or influencing any determination regarding payment

of compensation. Rather, he credibly testified that he did not recall the prior injury to his neck on February 14, 2017, when he testified five years later on March 14, 2022.

Upon review, the Full Board votes to adopt the following findings and conclusions.

FACTS

In a decision filed on September 8, 2021, this claim was established for a neck injury that resulted from an accident on February 19, 2021; awards were held in abeyance for the period from February 20, 2021, to September 2, 2021; and the carrier was directed to continue awards at the tentative rate of \$150.00 per week for dates subsequent to September 2, 2021.

On September 16, 2021, the employer notified the Board that the claimant had returned to work on September 16, 2021.

In a Notice of Proposed Conciliation Decision (PD-NSL), which became final on November 17, 2021, the claim was established for a [cervical spine injury](#).

*2 In a decision filed on December 14, 2021, the WCLJ directed the parties to obtain medical expert testimony on the need for cervical surgery. After depositions were completed, a hearing was scheduled to occur on March 14, 2022. At the hearing, the WCLJ denied the request to authorize the surgery. Thereafter, the carrier sought claimant's testimony on any prior neck injuries that would warrant a HIPAA release. The carrier asked the claimant if he had any prior neck injuries or conditions, and the claimant testified, "No. I've never hurt myself before in my life before this injury. I've never broken a bone. I've had never had a [torn muscle](#). I've never been hurt in my life before" (Hearing Transcript, 3/14/22, p. 9). Noting the reference in the 2021 MRI report to a cervical spine [radiograph](#) from 2019, the carrier requested a HIPAA release. The claimant then explained that he had been "checked out" after a car accident; it "was just an x-ray" (id., p. 10). The WCLJ directed the HIPAA release within 30 days.

On September 2, 2022, the Board received evidence of claimant's treatment of various injuries prior to the accident of record. Specifically, on February 14, 2017, the claimant received treatment from the emergency room at Winthrop University Hospital (ECF Doc ID #380372189). The nursing triage note indicates that the claimant reported that he fell down some stairs and hit his head, and complained of neck pain radiating into the right shoulder and back (id., p. 16). An [x-ray of the cervical spine](#) was normal and unremarkable, revealing no fracture or subluxation (id., p. 45). Upon discharge, his diagnosis was [contusion of shoulder region](#) (id., p. 33). On September 6, 2018, the claimant went to Winthrop emergency room for pain in his right shoulder that started after he lifted a 50-pound sack of oats and heard a pop; he had immediate swelling and had decreased range of motion. On November 18, 2018, the claimant went to Winthrop emergency room and reported that while bowling the night before, he was swinging his arm back and felt a pop; he woke up in the morning with edema and pain, and had limited range of motion. On June 1, 2019, the claimant went to Winthrop emergency room and reported that he rolled his ankle while playing soccer one week ago, and the pain has progressed and traveled to his foot. The claimant was diagnosed with a [right ankle sprain](#), was placed in an air cast and given a cane, and was directed to follow-up with an orthopedist in one week. On November 25, 2019, the claimant went to the emergency room and reported that while driving the day before, he stopped short and felt a pop over his ankle. He reported that he believed he sprained his ankle because he has had similar symptoms in the past. X-rays done on September 6, 2018, November 18, 2018, and June 1, 2019, showed no fracture or dislocation. No x-ray was reported on November 25, 2019.

On September 8, 2022, the carrier filed a form RFA-2 (Request for Further Action by Insurer/Employer) requesting suspension of awards as of February 19, 2021, due to disqualification pursuant to [WCL § 114-a](#). The carrier argued that at the hearing on March 14, 2022, the claimant lied about prior injuries because the records of prior medical treatment show that he had a prior injury to his neck. The carrier requested a hearing to consider the [WCL § 114-a](#) violation and assessment of mandatory and discretionary penalties.

*3 At the hearing held on January 24, 2023, the claimant's attorney noted the report of the claimant's emergency room treatment on February 14, 2017, and asked the claimant to explain his testimony from March 14, 2022, when he stated that he never hurt himself prior to this work injury. The claimant testified that he did not miss any time from work after his fall in February of 2017. The claimant did not have to follow-up with any doctors, it was just general soreness, and the pain went away. The claimant testified that "I didn't think anything of it, and time passed and I just forgot about it" (Hearing Transcript, 1/24/23, p. 5). When asked why he could not remember the injury, the claimant stated that there was no serious injury; he did not consider it to be a significant event and it was not his intent to deceive the carrier. On cross-examination, the claimant acknowledged that in 2017, he had similar symptoms to what he felt after his work injury in 2021 (i.e. pain radiating into his right shoulder), but explained that the pain from 2017 was different than the pain from his work injury. The claimant stated that the doctors asked if he had any prior injuries not issues with his neck or right shoulder. The claimant testified that in 2018 his right shoulder popped out while bowling, and that in September 2018, he hurt his shoulder lifting a 50-pound sack. The claimant stated that between 2017 and the work injury of record, he had no other treatment for his neck; he did state that he had an x-ray done after a car accident, as a precaution. The parties provided summations and the WCLJ made findings on the record. The WCLJ found that, although there was a prior injury, there was no intentional misrepresentation for the purpose of obtaining benefits. Rather, the claimant misremembered a similar event. The WCLJ's finding was set forth in a decision filed on January 27, 2023, and the carrier filed an Application for Board Review.

In the application for review, the carrier requested that the decision be reversed with a finding that the claimant violated [WCL § 114-a](#). The carrier asserted that the claimant deliberately lied about his prior neck injury, which caused similar symptoms to his established work injury. If the claimant had disclosed his prior injuries to the carrier, it would have at least obtained the claimant's prior records for review by an IME to comment on causation before accepting the claim. However, the carrier was denied this opportunity because the claimant was untruthful. The carrier argued that mandatory and discretionary penalties should be assessed.

In rebuttal, the claimant requested that the WCLJ decision be affirmed because the WCLJ correctly concluded that the claimant simply misremembered and that [WCL § 114-a](#) did not apply. The claimant argued that he credibly testified on January 24, 2023, that he did not recall the prior injury to his neck on February 14, 2017, because he had no follow-up care after he went to the emergency room, and he did not lose any time from work. He simply did not remember the injury approximately five years later when he testified on March 14, 2022. He had no intent to deceive the carrier or to obtain benefits that the claimant would not otherwise receive.

LEGAL ANALYSIS

*4 [WCL § 114-a\(1\)](#) states,

"If for the purpose of obtaining compensation pursuant to [\[WCL § 15\]](#), or for the purpose of influencing any determination regarding any such payment, a claimant knowingly makes a false statement or representation as to a material fact, such person shall be disqualified from receiving any compensation directly attributable to such false statement or representation. In addition, as determined by the board, the claimant shall be subject to a disqualification or an additional penalty up to the foregoing amount directly attributable to the false statement or representation."

Where the claimant had several prior injuries and awards and was asked about any previous injuries but failed to "list his prior injuries on his application or inform the medical providers of the injuries," the Board properly found that the claimant violated [WCL § 114-a\(1\)](#) (*Matter of Calderon v New York City Dept. of Corr.*, 144 AD3d 1382 [2016]). In contrast, where the Board found that the claimant credibly explained the reason for any discrepancies between his own testimony and the record of his past medical treatment, the Board properly found no [WCL § 114-a\(1\)](#) violation (*Matter of Belfiore v Penske Logistics LLC*, 209 AD3d 1095 [2022]).

Here, while the claimant denied any prior injuries during his testimony on March 14, 2022, records of previous medical treatment have subsequently been received by the Board. However, at the hearing on January 24, 2023, the claimant provided a credible explanation for not remembering the prior treatment when he stated that he did not miss any time from work and received no follow-up treatment after the initial visits to the emergency room. While the injuries caused some general soreness, the pain went away, and he forgot about it. There was no serious injury. The records of the claimant's prior emergency room treatment, which indicate that all of the x-rays that were performed were negative, support the claimant's testimony that the injuries were not serious.

Therefore, the Full Board finds that the claimant did not violate [WCL § 114-a](#).

CONCLUSION

ACCORDINGLY, the WCLJ decision filed on January 27, 2023, is AFFIRMED. No further action is planned at this time.

Clarissa Rodriguez

2024 WL 1110786 (N.Y.Work.Comp.Bd.)

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