

2023 WL 9018638 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

IN REGARD TO GARY J MADISON

WCB Case No. G268 0111

Carrier ID No. FNS4561 W212252

December 14, 2023

\*1 Date of Accident 1/16/2020

**MANDATORY FULL BOARD REVIEW FULL BOARD MEMORANDUM OF DECISION**

*keep for your records*

The Full Board, at its meeting held on November 14, 2023, considered the above captioned case for Full Board Review of the Board Panel Memorandum of Decision filed on April 3, 2023.

Both the claimant and the carrier have filed Applications for Reconsideration/Full Board Review (RB-89.2), indicating that review is Mandatory. However, the claimant argues that the carrier's application should be procedurally denied because it was incorrect for the carrier to characterize its application for Full Board Review as Mandatory rather than discretionary, and also because the carrier's attorney's electronic signature on the application form is defective.

[WCL § 23](#) states, in relevant part, that Full Board Review is Mandatory if a Board Panel decision includes “a dissent from such decision ...” Otherwise, Full Board Review of a Board Panel decision is discretionary (*see* [WCL § 142](#) [[2]]).

Here, the carrier filed an application to request review of an issue that was decided unanimously by the Board Panel. As such, the claimant is correct that Full Board Review of that issue is not Mandatory. Nevertheless, pursuant to [WCL § 142\(2\)](#), the Full Board elects to consider the merits of the issue raised by the carrier, as though the carrier filed its request as a discretionary application.

It is further noted that [12 NYCRR 300.13\(b\)\(1\)](#) states that an application for review or rebuttal “must be filled out completely” in the format prescribed by the Chair. An attorney may sign certain forms, including the Form RB-89.2, electronically in accordance with the New York State Electronic Signatures and Records Act (ESRA) and its accompanying regulations (9 NYCRR Part 540). However, the form must be submitted “to the Board with an additional attestation by the attorney ... on the letterhead of their firm” (<https://www.wcb.nv.gov/content/main/TheBoard/COVID-19-signature-requirements.isp>).

Pursuant to [12 NYCRR 300.13\(b\)\(4\)\(i\)](#), “[t]he Board may deny an application for review where the party ... fails to comply with prescribed formatting, completion and service submission requirements” (*Matter of Jones v Human Resources Admin.*, 174 AD3d 1010 [2019] [internal quotation marks and citations omitted]). The Board has previously denied review of an application that does not include the attestation as required for an electronic signature because the application was “not filled out completely as required by [12 NYCRR 300.13\(b\)\(1\)](#)” (*Matter of Anheuser Bush Distributors*, 2021 NY Wrk Comp G1087156; *see also* *Matter of Project IV Realty LLC*, 2020 NY Wrk Comp G1497664; *Matter of NYC Dept of Transportation*, 2020 NY Wrk Comp G2584848; *Matter of DOCCS Sing Sing Corr Facility*, 2020 NY Wrk Comp G2521866).

\*2 However, the Board provides sufficient due process if the parties are “afforded an opportunity to be heard at a meaningful time and in a meaningful manner” (*Matter of Sheikh v White & Blue Group Corp.*, 168 AD3d 1196 [2019] [[internal quotation marks and citations omitted]). WCL § 23-a further states that, “[n]otwithstanding anything contained in 12 NYCRR 300.13 (b) [or as] further defined in Subject Number 046-878 and Subject Number 046-940 ... a mistake, omission, defect and/or other irregularity in a cover sheet (currently known as form [RB-89.2]) ... shall not be grounds for denial of said application ...”

Here, while the signature on item #17 of the carrier's Form RB-89.2 does appear to be electronic and the carrier did not submit the attestation as required by ESRA and 9 NYCRR Part 540, the claimant had an opportunity to and did submit a timely rebuttal to respond to the merits of the issues raised in the carrier's RB-89.2. Further, prior decisions noted herein in which the Board denied review of an application for this type of defect are distinguishable from the instant matter in that the applications in those cases were filed prior to the effective date of WCL § 23-a on December 22, 2021.

As such, the Full Board will exercise its discretion and review the merits of the issue raised by the carrier.

### ISSUES

The issues presented for discretionary and Mandatory Full Board Review are:

- 1) whether the claim was properly amended to include the additional conditions of [post-concussion syndrome](#), [cognitive deficits](#), and [major depressive disorder](#);
- 2) whether awards were made at the proper rate for periods after July 19, 2021;
- 3) whether the carrier's video surveillance evidence should have been precluded; and
- 4) whether the claimant violated [Workers' Compensation Law \(WCL\) § 114-a](#).

In a decision filed on May 12, 2022, the Workers' Compensation Law Judge (WCLJ) amended the claim to include the neck, concussion, [post-concussion syndrome](#), [cognitive deficits](#), and [major depressive disorder](#); made an award from July 19, 2021, to May 9, 2022, and continuing, at the temporary total rate of \$934.11 per week; awarded a fee in the amount of \$5,900.00 to the claimant's attorney; and continued the case for further development of the record on the issue of [WCL § 114-a](#).

\*3 In a decision filed on June 28, 2022, the WCLJ found no violation of [WCL § 114-a](#); made an award from May 9, 2022, to June 23, 2022, at the temporary total rate of \$934.11 per week; and directed no continuing payments.

The Board Panel majority modified the WCLJ decision filed on May 12, 2022, to find that awards for the period from July 19, 2021, to February 17, 2022, are reduced to a temporary moderate (50.00%) rate of “\$467.05 per week”; to hold awards in abeyance for the period after February 17, 2022; and to reduce the amount of the attorney fee. The Board Panel majority also modified the WCLJ decision filed on June 28, 2022, to rescind the WCLJ's preclusion of the carrier's surveillance video; to find that the claimant violated [WCL § 114-a](#); and to impose a mandatory penalty for the period from February 17, 2022, to June 23, 2022.

The dissenting Board Panel member agreed that the carrier's surveillance video should be admitted into evidence but would award the claimant temporary total disability benefits for all periods in question and would find that the claimant did not violate [WCL § 114-a](#).

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

### FACTS

This claim is established for injuries to the scalp and head, that resulted from an accident on January 16, 2020. The claimant's average weekly wage is \$1,573.72.

On the date of accident, the claimant went to the St. Vincent's Medical Center emergency department and received staples to close a 12cm midline [scalp laceration](#) (Doc ID #369424962, p. 7) and was also diagnosed with blunt [head trauma](#)/minor [head injury](#) (*id*, p. 8).

On January 21, 2020, the claimant was examined by Dr. Burnette who noted an irregular [scalp laceration](#) with 16 staples in place, and recommended that the claimant stay out of work until a re-evaluation on January 24, 2020. Dr. Burnette referred the claimant to Dr. Calica who removed the claimant's staples on January 24, 2020, and counseled the claimant about the signs or [symptoms of post-concussion](#) syndrome. The claimant reported that he had several incidents of headaches and an incident of nausea and vomiting. When Dr. Burnette saw the claimant next on June 4, 2020, the claimant reported severe headaches starting at the base of his neck and going to the back of his head with blurred vision that was so bad at times that he was unable to go to work driving a truck. Dr. Burnette recommended that the claimant undergo an MRI/MRA of the brain. The MRI and MRA of the brain on June 8, 2020, did not show any abnormal findings.

\*4 There is no further medical evidence in the record until January 21, 2021, when the claimant saw Dr. Gross for his neck pain and reported headaches and blurred vision in both eyes. Dr. Gross noted that x-rays of the thoracic and cervical spine showed mild [degenerative disc disease](#). The doctor also noted a mild [compression fracture](#) at T5, but it was consistent with the claimant's [chest x-ray](#) from 2019. Dr. Gross recommended a referral to a neurologist for the headaches and blurred vision.

Dr. Radna examined the claimant for the first time on July 19, 2021, for a neurosurgical evaluation; MRIs of the brain and cervical spine were done on the same date. The doctor noted the claimant's complaints of dizziness, light-headedness, lack of orientation, memory difficulties, nausea, vomiting, and difficulty with vision, hearing, and balance, all of which were labeled by Dr. Radna as post-concussional symptoms. The claimant also complained of constant cervical pain with diffuse radiation to the left hand. On examination, the doctor noted evidence of severe bilateral paravertebral spasm in the cervical region with severely diminished range of motion. Dr. Radna noted that the MRI of the brain was negative for acute changes, and that the [MRI of the cervical spine](#) showed diffuse [cervical spondylosis](#), disc desiccation, and multi-level, diffuse, moderate foraminal stenoses. Dr. Radna diagnosed causally related [cerebral concussion](#), [post-concussional syndrome](#), and cervical musculo-skeletal and radicular pain syndromes, and opined that the claimant was totally disabled from work due to [post-concussional syndrome](#) and [cervical radiculopathy](#). Upon examination on October 18, 2021, Dr. Radna continued to find the claimant to be totally disabled from work, due to cephalgia and [cervical radiculopathy](#).

In a letter dated December 7, 2021, Dr. O'Donnell, the claimant's psychologist, diagnosed moderate [major depressive disorder](#), noting that he began treating the claimant on October 18, 2021, for [symptoms of post-concussion](#) syndrome, including “frequent intense headaches with blurred vision, depression, insomnia, loss of energy, difficulty concentrating, cognitive rumination and feelings of hopelessness” (Doc ID #4000747219). In a Psychotherapy Treatment Plan dated October 19, 2021, Dr. O'Donnell noted additional diagnoses of [anhedonia](#), feelings of helplessness and hopelessness, flattened affect, loss of emotional spontaneity, and insomnia.

\*5 The claimant saw Dr. Levy for a neuropsychological evaluation on November 11, 2021. In a report signed by Dr. Levy and co-signed by Dr. Brown, Dr. Levy indicated that the claimant had been referred to him for problems with memory and attention, and he noted the claimant's symptoms that followed the January 16, 2020, work accident, which included physical pain, severe headaches, dizziness, difficulty walking/standing, sleep disturbance, balance and vision problems, and symptoms of anxiety and depression. The doctor noted that the claimant had been working as a commercial truck driver, but stopped as of July 19, 2021, and is on disability. The claimant reported cognitive, emotional, and physical symptoms that have interfered with his daily functioning since the accident. The claimant also reported neck and back pain, and intense headaches, which had worsened to the point that he could no longer drive commercial trucks. After the performance of various tests, Dr. Levy noted

that the claimant had deficits in multiple neuropsychological functions, including but not limited to memory, verbal working memory, immediate verbal recall, narrative memory recognition, and response inhibition. The doctor diagnosed [head injury](#), [post-concussion syndrome](#), and [cognitive deficits](#), and recommended a course of cognitive rehabilitation treatment.

In a decision filed on December 14, 2021, the WCLJ found prima facie medical evidence for [post-concussion syndrome](#), [cognitive deficits](#), and [major depressive disorder](#). The carrier was directed to produce a report from an independent medical examiner (IME) on causal relationship by the next hearing on February 7, 2022. The parties were directed to depose Dr. Levy, Dr. O'Donnell, Dr. Radna, and the carrier's IME, and submit the transcripts by ""3/9/21" [sic - 3/9/22]. In a decision filed on February 10, 2022, the time for depositions was extended to April 19, 2022.

The claimant was evaluated on behalf of the carrier on January 14, 2022, by IME Dr. Camacho, a clinical neuropsychologist. In the resulting IME-4, under the section entitled "Cognitive Concerns," Dr. Camacho noted the claimant's reported memory decline since the accident. Dr. Camacho further noted that the claimant is able to complete the majority of his activities of daily living (ADLs), including bathing and dressing, and using a smart phone. However, the claimant "is not currently driving due to blurry vision, dizziness and headaches" (Doc ID #368213908, p. 7). The doctor raised a question as to the validity of the data gathered, noting that "[the claimant's] test performance is not consistent with his level of functioning in everyday life, which further supports the conclusion of invalid test performance" (*id.*, p. 10). The doctor was "unable to provide in depth interpretations of [the claimant's] cognitive abilities," although "these findings certainly do not rule out the possibility of true [cognitive deficits](#)" (*id.*).

\*6 The claimant was also evaluated on behalf of the carrier by Dr. Gerling, a neurologist, on January 21, 2022, at which time the claimant reported a history that, approximately two weeks after the work accident of January 2020, he began getting severe headaches, which would become so severe that he would have to pull over while driving. He is now not driving because of the headaches and episodes of blurry vision. The claimant continued to work at his regular job as an over the road truck driver until August 2021, but he is unable to return to his job due to the perceived safety issue caused by his blurry vision and cognitive difficulties. Upon examination, Dr. Gerling observed a normal clinical neurological examination with no evidence of decreased range of motion in his joints or cervical spine. The doctor noted only subjective complaints, which claimant alleges to be the cause of his inability to work. Dr. Gerling found no evidence of neurological, spinal, chronic, or serious injury that resulted from the [scalp laceration](#). In an Addendum dated January 28, 2022, Dr. Gerling stated that there was no objective evidence of any causally related injury to the claimant's cervical spine.

At a deposition on February 25, 2022, Dr. Camacho testified in accordance with her report with respect to the claimant's invalid test results. Because the invalid test results suggested poor effort and motivation, she is not able to provide a diagnosis. Dr. Camacho confirmed that she reviewed Dr. Levy's report from November 2021, and the claimant's score on the Rey-15 item test suggests poor effort. Dr. Camacho had no other validity concerns with respect to the results of the tests performed by Dr. Levy.

At a deposition on February 25, 2022, Dr. Gerling testified that upon examination of the claimant, he found no [abnormalities in the nervous system](#). Therefore, he did not diagnose the claimant with any [neurological disease](#) or condition. The doctor testified that the record does not indicate a concussion, and so the claimant could not have [post-concussion syndrome](#). There also was no evidence of a [cervical spine injury](#).

At a deposition on March 1, 2022, Dr. Radna testified in accordance with his reports regarding the claimant's symptoms and the doctor's diagnoses. The doctor testified that on the date of the accident, the treating physician evaluated the claimant for a concussion and thereafter, he had headaches. At the time of the accident, the claimant did not lose consciousness and remembered the impact, but he had an "altered level of consciousness and was dazed" (Deposition, Dr. Radna, 3/1/22, p. 5). He had a progressive onset of neck pain, which is typical for this type of axial loading injury. Therefore, Dr. Radna found the neck to be causally related to the accident on January 16, 2020. At the time of Dr. Radna's examination on July 19, 2021, the claimant had a litany of subjective complaints, which is known as [post-concussional syndrome](#), frequently seen after [head trauma](#). While the neurological exam was unremarkable, neuropsychometric testing by Dr. Brown shows causally related [cognitive deficits](#). Dr.

Radna had referred the claimant to Dr. Brown, a neuropsychiatrist. The claimant had been working up until the date that Dr. Radna examined him on July 19, 2021, when the doctor opined that the claimant had a total disability and could not continue to safely work; he should not be driving a truck with his post-concussional symptoms. As of his October 2021 examination, the claimant remained totally disabled from all work. On cross-examination, Dr. Radna confirmed that it was his opinion that the claimant was unable to perform any gainful employment as of July 19, 2021. Regarding the history of injury, Dr. Radna explained that with [head trauma](#), the claimant may have some judgment and memory issues, and “his ability to give a history is compromised by his injury” (*id.*, p. 14). On re-direct examination, Dr. Radna reiterated that “a [cerebral concussion](#) is defined as an altered level of consciousness, such as being dazed following a [head trauma](#) ...” (*id.*, p. 16). He also testified that, “[a] [cerebral concussion](#) is a litany of subjective complaints absent a structural injury. So the fact that [the claimant] had a normal MRI and [CAT scan](#) of his brain is consistent with a [cerebral concussion](#)” (*id.*, pp. 16-17).

\*7 At a deposition on March 8, 2022, Dr. Brown testified that he is a neurologist with a specialty in behavioral neurology, which generally focuses on the relation of brain damage to language, memory, and cognition. He does not actually practice neurology, but is the director of a concussion/TBI [[traumatic brain injury](#)] program wherein they provide psychological testing and cognitive remediation. The doctor testified that he never personally saw the claimant. The claimant had been seen by Dr. Levy, a neuropsychologist who recently left Dr. Brown's practice, but Dr. Brown had Dr. Levy's report and he is familiar with the testing that was done, as well as the conclusion. The carrier stipulated to the doctor's qualifications subject to cross-examination relevant to this claim. According to the history given by the claimant, the claimant had been dazed and confused following the work accident. The claimant passed the test given for malingering/effort, and was found to be impaired in multiple areas of testing that included memory, speed, processing, attention, and frontal lobe function. The overall impression was a cognitive function problem consistent with a concussion, and it was recommended that the claimant undergo a course of cognitive remediation. The diagnoses were causally related [head injury](#) and [post-concussion syndrome](#) with [cognitive deficits](#), and on November 11, 2021, the claimant had approximately a 70.00% to 80.00% cognitive disability. On cross-examination, the doctor noted that the claimant scored much better in the areas of spatial function, logic, and judging. Dr. Brown testified that, according to the claimant, the claimant “has severe headaches which impair his ability to drive commercial trucks, and he has other psychological and cognitive symptoms, sleep problems, and so on that have also affected his ability to work and daily function” (Deposition, Dr. Brown, 3/8/22, pp. 15-16). The doctor opined that the claimant also has a mild-to-moderate [traumatic brain injury](#) based on evidence that he had a concussion. The doctor conceded that he is not familiar with the claimant's ADLs.

At a deposition on April 11, 2022, Dr. O'Donnell testified that he saw the claimant about 16 times since the initial evaluation. The claimant reported experiencing multiple symptoms since his work accident, including intense headaches during which his vision blurs. The claimant is unable to drive because of the blurry vision, nausea, and difficulty concentrating that occur with the onset of a headache. The doctor diagnosed causally related [major depressive disorder](#), moderate, with melancholic features. During the course of treatment, the doctor opined that the claimant could not perform any work because he cannot drive due to the unpredictability of the headaches and blurred vision. The claimant's inability to drive is a major factor in his depression. Dr. O'Donnell testified that he is not a neurologist, so he does not know when the claimant's headaches are expected to come under control or lessen in frequency or intensity. On cross-examination, Dr. O'Donnell was asked whether the claimant chose not to drive or whether the doctor had recommended that the claimant not drive. The doctor testified that it was “[s]ome of each,” that “[i]t would be an extremely dangerous situation for him,” and that “[i]t could be life-threatening to him and others if he has blurred vision and can't even concentrate while he is driving” (Deposition, Dr. O'Donnell, 4/11/22, pp. 11-12). After it was explained to Dr. O'Donnell that his reports were not in the Board file, he agreed to submit them.

\*8 At the hearing on May 9, 2022, the carrier's representative raised the issue of [WCL § 114-a](#) based on video surveillance of the claimant. The parties then gave summations on the issues of additional sites/conditions and awards. The claimant's attorney argued that Drs. Radna, Brown, and O'Donnell were most credible and asked that the case be amended to include the neck, concussion, [post-concussion syndrome](#), [cognitive deficits](#), and [major depressive disorder](#). The carrier's representative stated that, although there was a concussion and possibly a resolved neck strain/sprain, there is no credible proof that the claimant has post-concussion/cognitive issues, and that IME Dr. Camacho provided the most credible opinion on that question. The carrier also argued that Dr. O'Donnell's opinion is not credible because not all of Dr. O'Donnell's reports are in the record. The WCLJ

agreed with the claimant and amended the claim to include the neck, concussion, [post-concussion syndrome](#), [cognitive deficits](#), and [major depressive disorder](#). The WCLJ explained that the record of a severe traumatic [injury to the head](#) and gradual onset of the neck symptoms is completely consistent with the mechanism of injury in this case, that Dr. Camacho was unable to provide an opinion, and that Dr. Gerling was not credible because he assumes the claimant did not have a concussion. The WCLJ held awards in abeyance for dates prior to July 19, 2021; relied on the opinions of Dr. Radna and Dr. O'Donnell to make awards for the period from July 19, 2021, to May 9, 2022, and continuing, at the temporary total rate of \$934.11 per week; and awarded a fee of \$5,900.00 to the claimant's attorney, pending a fee application.

The WCLJ's findings and awards were set forth in the decision filed on May 12, 2022, in which it was noted that the case was continued to hearings on June 7, 2022, and June 23, 2022, for testimony on the issue of [WCL § 114-a](#). On June 9, 2022, the carrier filed an Application for Board Review on the issues of whether the WCLJ properly amended the claim to include [post-concussion syndrome](#), [cognitive deficits](#), and [major depressive disorder](#), and whether awards are supported by the record, and if so, at what rate.

On June 7, 2022, the claimant initially testified on cross-examination that he does not drive. He then stated that he drives occasionally, and last drove “[p]robably about a couple of days ago maybe, a week” (Hearing Transcript, 6/7/22, p. 6). When asked where he drives, he stated “[i]t's either usually to the grocery store or maybe to the beach with my wife” (*id.*). The claimant testified that he did not recall telling Dr. Levy or Dr. Gerling that he does not drive due to his medical conditions. When asked if he recalled telling Dr. Arteches [sic] that he does not drive, the claimant replied, “I don't drive commercial vehicles. I just drive my personal truck. I was never told not to drive” (*id.*, p. 7). The claimant testified that he did not converse with Dr. O'Donnell regarding whether he should be driving. He is able to load groceries in and out of his pickup truck. He is able to do chores, such as cleaning a little bit, or taking groceries and packages into the house. When asked about yardwork, the claimant said he weed-whacked once or twice. He has a pickup truck that he drives and also has driven his wife's car once or twice.

\*9 On re-direct examination, the claimant testified that he thinks he drives two or three times per week in his personal vehicle, five to ten miles at the most. If he has to go further, his wife or son drives. He does not drive commercial vehicles. He had a commercial driver's license and drove for a living.

On June 23, 2022, the carrier's investigator, F.M., testified. During the preliminary questioning of F.M. about his assignment to conduct surveillance on the claimant, the WCLJ interjected and asked the claimant's attorney if he conceded that it was the claimant who was seen in the video, and the attorney confirmed that it was. The claimant also advised that it was his truck that was seen in the video. F.M. testified that video was taken on February 16, 17, 19, and 20, 2022, and that all the video had been turned in. When the parties and the WCLJ noted there was only video surveillance from February 17, 2022, F.M. explained that the claimant had not been observed in the surveillance video taken on February 16, 19, and 20, 2022. On February 17, 2022, the claimant was observed driving to multiple locations, ending up at a beach, removing beach chairs and a bag from the back of his truck, carrying them to the beach, sitting on the beach, walking around at times, then leaving the beach, placing the items back into his truck, and returning to his residence. The video that day commenced at 12:03 PM at the claimant's residence and ended at 4:09 PM when the claimant was placing chairs in the back of his truck. The video was recorded on a memory card and then uploaded into F.M.'s employer's computer system. After it was uploaded, F.M. did not know what happened to the video or who had access to it. He had not viewed the footage on the DVD that was sent to the carrier.

The WCLJ found that F.M. could not authenticate the DVD footage. However, the WCLJ also questioned whether the video demonstrated a [WCL § 114-a](#) violation. The carrier's representative argued that the claimant had misrepresented a material fact, because he told the IMEs that he does not drive, and also because Dr. O'Donnell testified that it would be extremely dangerous for the claimant to drive based on his headaches and blurred vision. The WCLJ found that the DVD would not be admitted into evidence because it could not be authenticated. The WCLJ also found that, even if he did not preclude the DVD, he was finding no [WCL § 114-a](#) violation because there is no evidence on the DVD that the claimant intentionally misrepresented or omitted a material fact for the purpose of influencing a determination regarding workers' compensation benefits, the claimant was not seen doing anything that is inconsistent with his physical or mental restrictions, and the claimant conceded that he

drove. The WCLJ noted that awards were “up-to-date” but were suspended as of the hearing date because there is no current medical evidence of disability. The carrier noted its objection to the finding of no [WCL § 114-a](#) violation, and to the WCLJ decision to not admit the surveillance DVD into evidence. The carrier also confirmed that its appeal of the May 12, 2022, decision made no objection to the neck claim.

**\*10** A review of the video surveillance of the claimant on February 17, 2022, confirms that the description provided by F.M. during his testimony is accurate. Specifically, the video footage, which is one hour and 26 minutes in length, shows the claimant driving a red pickup truck, stopping at a convenience store but staying seated in the truck while his passenger went into the store, parking at the beach, removing beach chairs and a small cooler bag from the back of his truck, carrying these items to the beach, sitting in a chair on the beach, and standing and walking around at times. The video concludes as the claimant leaves the beach and places items back into the bed of the pickup truck.

The WCLJ's finding regarding the preclusion of the surveillance DVD was not included in the decision filed on June 28, 2022, in which the WCLJ found that the claimant had not violated [WCL § 114-a](#), and made an award for the period from May 9, 2022, to June 23, 2022, at the temporary total rate of \$934.11 per week, with no direction for continuing payments based on a lack of up to date medical evidence.

In the carrier's Application for Board Review of the decision filed on May 12, 2022, the carrier conceded that the case was properly amended to include the neck and a concussion (Doc ID #375618458, p. 4), but argued that the decision should be modified to rescind the establishment of [post-concussion syndrome](#), [cognitive deficits](#), and [major depressive disorder](#), because there is insufficient credible medical evidence in the record. The carrier also argued that, because these conditions should be disallowed, awards as of July 21, 2021, which were based on inclusion of these conditions, should also be rescinded and a determination made as to the proper degree of disability; regardless, awards should be held in abeyance based on discrepancies in the record and pending a final determination on the issue of [WCL § 114-a](#).

In rebuttal, the claimant asserted that the WCLJ decision should be affirmed in its entirety, as it is supported by the credible opinions of Drs. Radna, Brown, and O'Donnell.

On June 23, 2022, and July 19, 2022, the Board received reports of Dr. O'Donnell's regular and continuous treatment of the claimant for his ongoing symptoms of depression on dates between October 19, 2021, and June 29, 2022.

The carrier also requested administrative review of the decision filed on June 28, 2022, arguing that the decision should be modified to find that the claimant violated [WCL § 114-a](#), and to impose appropriate mandatory and discretionary penalties. The carrier maintained that the claimant misrepresented material facts to physicians and participated in activities outside the level and scope of what he advised the physicians, as seen in the surveillance video.

**\*11** The claimant asserted in his rebuttal that the WCLJ decision should be affirmed because the video was properly precluded, and because he did not violate [WCL § 114-a](#). The claimant contended that because the investigator was unable to authenticate the video, the video was properly precluded and the investigator's testimony regarding the video should not be considered. The claimant also contended that, even if the video is admitted as evidence, there is nothing in the video to support a finding that he misrepresented or omitted a material fact. The claimant further argued that the carrier never showed the video to any doctors to request whether it changed their opinions. Finally, the claimant asserted that there is insufficient evidence to determine whether the claimant told doctors that he never drove any vehicles, or if he was referring to his pre-injury work as a commercial driver.

## LEGAL ANALYSIS

Amendment of claim to include [post-concussion syndrome](#), [cognitive deficits](#), and [major depressive disorder](#)

“It is axiomatic that a claimant bears the burden of establishing a causal relationship between his or her employment and a disability by the proffer of competent medical evidence” (*Matter of Williams v Colgate Univ.*, 54 AD3d 1121 [2008] [citations omitted]). The medical opinion need not be expressed with absolute certainty (*Matter of Norton v North Syracuse Cent. School Dist.*, 59 AD3d 890 [2009]). It must, however, be a medical opinion, which is supported by a rational basis, that indicates sufficient probability as to the cause of the injury (*id.*). ““It is well settled that the Board is vested with the discretion to assess the credibility of medical witnesses and its resolution of such issues is to be accorded great deference, particularly with respect to issues of causation’ (*Matter of Peterson v Suffolk County Police Dept.*, 6 AD3d 823 [2004]; see *Matter of Joyce v United Food & Commercial Workers Local 342-50*, 307 AD2d 552 [2003])” (*Matter of Provenzano v Pepsi Cola Bottling Co.*, 30 AD3d 930 [2006]).

As for [post-concussion syndrome](#), Section B.1. of the Board's Medical Treatment Guidelines for Traumatic [Brain Injury](#) (TBI Guidelines) states that

“[Post-concussion syndrome](#) is a term that is used by many practitioners to describe the persistence of a constellation of symptoms beyond the usual recovery period after a concussion. Although initial complaints of impaired memory, attention and executive function are common immediately following TBI, the vast majority of individuals recover within a few hours to days. However, some patients report new, persistent or worsening cognitive symptoms weeks, months or sometimes years postinjury. Those who have persistent [post-concussion symptoms](#), may have pre-morbid or comorbid conditions that may play a role in the persistence of the [PCS](#) symptoms and this should be considered in the evaluation and management of [post-concussive syndrome](#)”

\*12 Here, the treating doctors were concerned about [post-concussion syndrome](#) and its effects from the outset. Further, the contemporaneous records from St. Vincent's Hospital include a diagnosis of blunt [head trauma](#)/minor [head injury](#). On January 24, 2020, Dr. Calica counseled the claimant about the signs or [symptoms of post-concussion syndrome](#). On June 4, 2020, Dr. Burnette noted the claimant's posterior headaches with blurred vision, and worsening symptoms over many weeks. On January 21, 2021, Dr. Gross referred the claimant to neurology to address the claimant's headaches and blurred vision. The symptoms persisted and on July 19, 2021, Dr. Radna diagnosed causally related [post-concussion syndrome](#). Dr. Radna testified that while the claimant did not lose consciousness, he had an “altered level of consciousness and was dazed” at the time of the impact. Dr. Radna explained that [cerebral concussion](#) is an altered level of consciousness and is a litany of subjective complaints; a normal MRI and [CAT scan](#) of his brain is not inconsistent with a [cerebral concussion](#). In contrast, Dr. Gerling found no evidence of [neurological injury](#) and testified that the claimant could not have a [post-concussion syndrome](#) because the record does not indicate a concussion.

The Full Board finds that the opinion of Dr. Radna is more credible than Dr. Gerling because Dr. Radna credibly explained that [post-concussion syndrome](#) is a condition identified by the presence of a litany of subjective complaints, an explanation that is supported by the definition set forth in the Board's TBI Guidelines.

As for the [cognitive deficits](#), Dr. Levy evaluated the claimant on November 11, 2021, and noted that the claimant had deficits in multiple neuropsychological functions, including but not limited to memory, verbal working memory, immediate verbal recall, narrative memory recognition, and response inhibition. These findings support Dr. Levy's diagnosis of [cognitive deficits](#), and his recommendation for cognitive rehabilitation treatment. Dr. Levy was unavailable to testify, and while Dr. Brown did not treat the claimant, he testified that his specialty is behavioral neurology, which generally focuses on the relation of brain damage to language, memory, and cognition. Dr. Brown reviewed the records and conclusion of Dr. Levy, noting that the claimant passed the test given for malingering/effort, and was found to be impaired in multiple areas of testing that included memory, speed, processing, attention, and frontal lobe function. Dr. Brown testified that the overall impression was a cognitive function

problem consistent with a concussion. In contrast, Dr. Camacho had concerns that the claimant was magnifying his symptoms, and therefore was not able to provide an opinion of the claimant's cognitive abilities. However, she noted in her report that “these findings certainly do not rule out the possibility of true [cognitive deficits](#)” (Doc ID# 368213908, p. 10). Further, while Dr. Camacho testified that she was unable to provide any diagnosis because of the claimant's invalid test results, she had no other validity concerns with respect to the results of the tests performed by Dr. Levy.

\*13 As for [major depressive disorder](#), Section B.2. of the Board's Medical Treatment Guidelines for Work-Related Depression and [Depressive Disorders](#) (Depression Guidelines) sets forth the several criteria that support a diagnosis of [major depressive disorder](#), including but not limited to, depressed mood, diminished interest in activities, insomnia, fatigue or loss of energy, and feelings of worthlessness. Dr. O'Donnell evaluated the claimant in October 2021, at which time the claimant presented with symptoms of depression, insomnia, and loss of energy. The doctor diagnosed [anhedonia](#), feelings of helplessness and hopelessness, and flattened affect. Dr. O'Donnell testified that he diagnosed causally related [major depressive disorder](#), moderate, with melancholic features, and that the claimant's inability to perform any work because he cannot drive is a major factor in his depression. As such, Dr. O'Donnell's diagnosis meets the criteria set forth in the Depression Guidelines.

Therefore, based on the credible medical evidence in the record, the Full Board finds that the claim was properly amended to include [post-concussion syndrome](#), [cognitive deficits](#), and [major depressive disorder](#).

#### *Awards*

“‘A claimant bears the burden of establishing, by competent medical evidence, a causal relationship between a ... disability and the established work-related injury’ (*Matter of Campito v New York State Dept. of Taxation & Fin.*, 153 AD3d 1063 [2017] [citations omitted])” (*Matter of Hughes v World Trade Ctr. Volunteer Fund*, 166 AD3d 1279 [2017]). In evaluating the medical evidence presented, the Board is not bound to accept the testimony or reports of any one expert, either in whole or in part, but is free to choose those it credits and reject those it does not credit (*see Matter of Morrell v Onondaga County*, 238 AD2d 805 [1997], *lv denied* 90 NY2d 808 [1997]; *Matter of Wood v Leaseway Transp. Corp.*, 195 AD2d 622 [1993]). Thus, questions of credibility, reasonableness, and relative weight to be accorded to conflicting evidence are questions of fact that come within the exclusive province of the Board (*see Matter of Berkley v Irving Trust Co.*, 15 AD3d 750 [2005]).

\*14 Here, the claimant was taken out of work by Dr. Radna on July 19, 2021, because the doctor found him to be totally disabled due to [post-concussional syndrome](#) and [cervical radiculopathy](#). Dr. Radna testified that the claimant had a total disability on July 19, 2021, because he should not be driving a truck with his post-concussional symptoms, later clarifying that the claimant was unable to perform any gainful employment effective as of July 19, 2021. However, the doctor conceded that he is not treating the claimant for [cognitive deficits](#) and that he had referred the claimant to neuropsychiatrist Dr. Brown.

In a report co-signed by Dr. Brown, Dr. Levy opined that upon various testing the claimant had deficits in multiple neuropsychological functions. Dr. Brown, who testified in Dr. Levy's stead, testified credibly that the claimant passed the test given for malingering/effort, the overall impression was a cognitive function problem consistent with a concussion, and the claimant had approximately a 70.00 to 80.00% cognitive disability on November 11, 2021.

Neither Dr. Camacho nor Dr. Gerling provided an opinion of degree of causally related disability as neither doctor found that the claimant actually has [post-concussion syndrome](#) and/or [cognitive deficits](#). Further, there is no opinion on the degree of causally related disability which is due to [major depressive disorder](#). Specifically, while Dr. O'Donnell testified that it was his opinion that the claimant could not perform any work because he could not drive due to headaches, Dr. O'Donnell only diagnosed the claimant with moderate [major depressive disorder](#) and provided the claimant only with psychological treatment. In his reports through June 2022, Dr. O'Donnell did note depressive symptoms, difficulty coping with headaches, and concentration issues, but he did not actually treat the claimant's headaches and only counseled the claimant on how to cope with the headaches. As such, his opinion on the issue of degree of disability due to headaches is of less value than that of Dr. Brown, as based on Dr. Levy's report.

Therefore, the Full Board finds that based on the credible opinions of Drs. Radna, Levy, and Brown, there is sufficient medical evidence in the record to find that the claimant has not been able to return to his employment as a commercial truck driver, which supports a finding of a partial, not total, disability. Based on Dr. Levy's report of November 11, 2021, there is sufficient medical evidence to make awards for the period from July 19, 2021, to February 9, 2022 (90 days after the date of the evaluation), at the temporary partial (75.00%) rate of \$786.86 per week. The claimant continued to treat with Dr. O'Donnell from February 9, 2022, to June 29, 2022, for his moderate [major depressive disorder](#), and based on Dr. O'Donnell's credible testimony, it is clear that the claimant is disabled from his work as a commercial driver due to his psychological disability. However, it is not credible to find that the claimant's moderate depression precludes all work, and instead, Dr. O'Donnell's medical evidence supports the finding of a 50.00% temporary partial disability from February 9, 2022, to June 23, 2022.

**\*15** Therefore, the Full Board finds that the medical evidence in the record supports awards for the period from July 19, 2021, to February 9, 2022, at the temporary partial (75.00%) rate of \$786.86 per week; and for the period from February 9, 2022, to June 23, 2022, at the temporary partial (50.00%) rate of \$524.57 per week. Also, based on the additional records (received on June 23, 2022, and July 19, 2022) of Dr. O'Donnell's treatment on dates through June 29, 2022, the record supports a direction for continuing payments at the tentative rate of \$524.57 per week.

#### *Preclusion of the video surveillance evidence*

Here, the investigator was unable to confirm that the footage submitted to the Board was identical to the surveillance video he made. However, the responses received from the claimant and his attorney upon early questioning by the WCLJ at the hearing held on June 23, 2022, effectively authenticated the video because the claimant's attorney confirmed that it was the claimant seen in the video, and the claimant confirmed that it was his truck that was seen in the video. Therefore, the Full Board finds that the WCLJ decision to preclude the video from being admitted into evidence is rescinded.

#### *WCL § 114-a*

“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” ([WCL § 114-a \[1\]](#)).

In *Matter of Belfiore v Penske Logistics LLC*, 209 AD3d 1095 (2022), the claim was established for a [head injury](#) and related conditions, and when the carrier raised [WCL § 114-a](#) based on evidence of past medical treatment that was denied by the claimant, the claimant testified that he has had memory loss since the date of his work accident. In response to the carrier's allegation that the claimant's misrepresentation regarding his past medical history was intentional, the Board Panel found that the claimant did not knowingly misrepresent his prior medical treatment because he testified that he has suffered from memory problems since the accident, and he credibly explained that if the medical records show prior treatment then he would agree that the medical records were correct ([Matter of Penski Logistics LLC](#), 2021 NY Wrk Comp G2683864). The Court deferred to the Board's credibility determination and found that substantial evidence supports the Board's conclusion that claimant did not knowingly make false representations, noting that the carrier failed to present any evidence that claimant did not suffer from memory loss ([Belfiore](#), 209 AD3d 1095 [2022]).

**\*16** As noted herein, the Full Board finds that Drs. Radna, Levy, and Brown provide credible medical evidence to support amending the claim to include [post-concussion syndrome](#) and [cognitive deficits](#). These same reports of Drs. Radna and Levy state that the [post-concussion syndrome](#) and [cognitive deficits](#) have caused the claimant to have ongoing symptoms that include lack of orientation, memory difficulties, cognitive function problems, and deficits in immediate verbal recall, narrative memory recognition, and response inhibition. Dr. Radna further testified that with [head trauma](#), the claimant may have some judgment

issues, and that “his ability to give a history is compromised by his injury” (Deposition, Dr. Radna, 3/1/22, p. 14). Dr. Brown agreed with Dr. Levy’s report and testified that the claimant was impaired in multiple areas of testing that included memory, speed, processing, attention, and frontal lobe function. Based on this evidence of cognitive processing issues and memory problems, there is sufficient evidence in the record to find that claimant did not knowingly make false representations (*Belfiore*, 209 AD3d 1095 [2022]).

Further, because of the claimant’s problems with memory and cognition, and because the medical evidence in the record supports findings that the claimant is not totally disabled for the periods in question, and that he has only a partial (50.00%) disability on February 17, 2022 (the only date of surveillance video that in the record), the Full Board finds that the physicians’ opinions regarding the claimant’s ability to drive do not provide sufficient support for a finding that the claimant violated WCL § 114-a. Specifically, it is not disputed that at the time he was injured, the claimant was employed as a commercial truck driver. While the claimant initially testified that he does not drive, he later clarified that he drives occasionally, and does not drive commercial vehicles. The video evidence does not contradict his testimony that his driving is usually to the grocery store or maybe to the beach with his wife. Further, Dr. Levy and Dr. Gerling noted that the claimant reported that he was no longer able to drive commercial trucks. While Dr. O’Donnell testified that driving would be “an extremely dangerous situation for him,” Dr. O’Donnell explained that his recommendation of no driving stems from the claimant’s headaches and accompanying blurred vision, neither of which is treated by Dr. O’Donnell. Also, the claimant testified that he did not converse with Dr. O’Donnell regarding whether he should be driving. As such, it is unclear from the record whether the physicians who found that the claimant could no longer drive believed the claimant could no longer drive at all or whether he could no longer drive commercially, and/or whether the recommendation to no longer drive was effectively communicated to the claimant. Finally, even if the Full Board were to credit Dr. O’Donnell’s opinion that it would be extremely dangerous for the claimant to drive, it is not a WCL § 114-a violation for the claimant to disregard that opinion and engage in occasional driving for personal reasons, a fact that he has not misrepresented.

\*17 Therefore, the Full Board finds that there is insufficient evidence in the record to support a finding that the claimant violated WCL § 114-a because the claimant’s ability to do some personal driving was not an intentional misrepresentation of a material fact.

#### CONCLUSION

ACCORDINGLY, the WCLJ decision filed May 12, 2022, is MODIFIED to make awards for the period from July 19, 2021, to February 9, 2022, at the temporary partial (75.00%) rate of \$786.86 per week, and for the period from February 9, 2022, to May 9, 2022, and continuing, at the temporary partial (50.00%) rate of \$524.57 per week. The rest of the WCLJ decision remains in effect.

The WCLJ’s decision filed June 28, 2022, is MODIFIED to find that the surveillance video evidence is not precluded; to make awards for the period from May 9, 2022, to June 23, 2022, at the temporary partial (50.00%) rate of \$524.57 per week; and to direct continuing payments at the temporary partial (50.00%) rate of \$524.57 per week. The rest of the WCLJ decision remains in effect. No further action is planned by the Board at this time.

The above reflects the unanimous opinion of the Board.

FOR THE WORKERS’ COMPENSATION BOARD,

Clarissa M. Rodriguez

2023 WL 9018638 (N.Y.Work.Comp.Bd.)