

2023 WL 4629418 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: DEPARTMENT OF TRANSPORTATION

Case No. G310 4807

Carrier ID No. 08412230010 W847008

June 16, 2023

*1 CNY Other Than Ed, HEd Water

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Date of Accident 10/7/2021

The Full Board, at its meeting on May 16, 2023, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed January 9, 2023.

ISSUE

The issue presented for Mandatory Full Board Review is whether claimant sustained a compensable occupational disease.

The Workers' Compensation Law Judge (WCLJ) established this claim for occupational injuries to claimant's shoulders and set the date of disablement as October 7, 2021.

The Board Panel majority reversed and disallowed the claim.

The dissenting Board Panel member would affirm the WCLJ decision.

The claimant filed an application for Mandatory Full Board Review on February 7, 2023, arguing that the reports of his treating physician, Dr. Ahmed, “demonstrated more than a generalized knowledge of claimant's work activities” and that those “reports were sufficient, taking into consideration claimant's testimony, the lack of contrary evidence, and the lack of cross-examination of Dr. Ahmed, to establish the case.”

The self-insured employer (SIE) filed a rebuttal on March 9, 2023, arguing that “there is insufficient medical evidence of an occupational disease.”

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

FACTS

Claimant filed a C-3 (Employee Claim) on September 24, 2021, alleging that he sustained injuries to both shoulders as the result of his job performing road repair and maintenance. Claimant alleged that he worked for the SIE for 31 years, during which time he experienced “repetitive use/stress to both shoulders while working with heavy tools/equipment, jackhammers, rakes, shovels and the past 16 years heavy lifting drums of asphalt, planks, etc.”

The Board issued a notice of indexing on February 1, 2022, and on March 4, 2022, the SIE filed a FROI-04 (First Report of Injury-Denial) controverting the claim, arguing, among other things, that claimant did not sustain an accidental injury or an occupational disease within the meaning of the Workers' Compensation Law.

Claimant was examined by his treating physician, Dr. Ahmed, on October 7, 2021. In a narrative report based on that examination, Dr. Ahmed stated:

The patient is a 56 year-old male who is a construction worker working for the DOT, working 8 hours a day plus some overtime for 30 years using a jack hammer and lifting things over 200lbs over time he sustained injuries to his bilateral shoulders.

Dr. Ahmed diagnosed bilateral shoulder strain/sprain causally related to claimant's work duties, and found that the claimant, who continued to work, had a 50% temporary partial disability. On May 6, 2022, the Board received a report by Dr. Ahmed listing a date of service of October 7, 2021, indicating that Dr. Ahmed's prior report was being amended to better describe claimant's work duties. In the amended report, Dr. Ahmed wrote:

*2 The patient is a 56 year-old male who was employed for the last 32 years with the New York City DOT working his way up from assistant highway repairer to full time highway repairer working 8 hours a day 5 days a week plus overtime. He reports the repetitive use of jack hammers, sledge hammers, shoveling, raking, using hand tools such as drills, ratchets, constantly lifting and carrying heavy objects, using a chipping gun, using a grease [gun] for maintenance, he sustained injuries to his bilateral shoulders.

At a hearing on May 23, 2022, the WCLJ initially found that the SIE did not timely controvert the claim pursuant to WCL § 25(2)(b). Claimant then testified that he had worked for the SIE for over 32 years and worked five days per week. His job involved raking, shoveling, jackhammering, and using different tools. He worked in the asphalt plant where he did “a lot of plant repairing; like changing flights, lifting heavy flights inside the drum and repairing the drum” (Hearing Transcript, 5/23/22, p. 4). When he worked on a road or highway he would rake and shovel asphalt and use a jackhammer. At the moment, he was working in the asphalt plant which required him to perform “a lot of heavy lifting inside the drum” (p. 6). In the asphalt plant, he had to replace “flights” weighing 100 to 150 pounds every six months (p. 7). He would sometimes have to use a jackhammer both when working in the asphalt plant and when repairing a road. He would sometimes have to replace a motor in the asphalt plant and would use wrenches. He had worked in the asphalt plant for 11 or 12 years. He would use a chipping gun to chip asphalt from the inside of a drum and change conveyor belts. Changing a conveyor belt required him to pull the old belt out with a chain or rope. He would use his extremities during his entire eight-hour work shift. His shoulders began to hurt in October 2021. He has not lost any time from work due to his shoulder injuries.

After listening to claimant's testimony and summations by the parties, the WCLJ established the claim for occupational shoulder injuries, set the date of disablement as October 7, 2021, based on Dr. Ahmed's report of that date, and set claimant's average weekly wage at \$2, 400.00, without prejudice. The findings made at the May 23, 2022, hearing are reflected in a decision filed May 27, 2022.

The SIE requested administrative review, arguing that the medical evidence in the record was insufficient to establish a recognizable link between claimant's shoulder injuries and a distinctive feature of his employment, and requests that the claim be disallowed.

In rebuttal, claimant argued that the opinion of Dr. Ahmed was clear evidence of a recognizable link of a distinctive feature of claimant's employment, repetitive use of his shoulders, and his injuries. Claimant requested that the WCLJ decision be affirmed.

LEGAL ANALYSIS

“Workers' Compensation Law § 2(15) defines an occupational disease as ‘a disease resulting from the nature of employment and contracted therein.’ To establish an occupational disease, the claimant must demonstrate ‘a recognizable link between his or her condition and a distinctive feature of his or her employment’ (Matter of [Garcia v. MCI Interiors, Inc.](#), 158 AD3d 907, 908, 71 NYS3d 654 [2018] [internal quotation marks and citations omitted]; see Matter of [Mack v. County of Rockland](#), 71 NY2d 1008, 1009, 530 NYS2d 98, 525 N.E.2d 744 [1988]; Matter of [Corina-Chernosky v. Dormitory Auth. of State of N.Y.](#), 157 AD3d 1067, 1068, 69 NYS3d 182 [2018])” (Matter of [Barker v New York City Police Department](#), 176 AD3d 1271 [2019]).

*3 “To be entitled to workers' compensation benefits for an occupational disease, a claimant must establish a recognizable link between his or her condition and a distinctive feature of his or her occupation through the submission of competent medical evidence” Matter of [Phelan v. Bethpage State Park](#), 126 AD3d 1276 (2015) [internal quotation marks and citations omitted], lv denied 25 NY3d 911(2015). “Such medical proof, in turn, must signify a probability of the underlying cause that is supported by a rational basis and not be based upon a general expression of possibility” (Matter of [Corina-Chernosky v Dormitory Authority](#), 157 AD3d 1067 [2018][internal quotation marks and citations omitted]).

An SIE or carrier waives certain defenses when, as here, it fails to timely controvert a claim (WCL § 25[2][b]). However, that waiver does not relieve the claimant from the burden of submitting credible medical evidence of a causal relationship between an alleged occupational injury and a distinctive feature of his employment ([Matter of Lumia v City of N.Y., Off. of Queens Borough President](#), 21 AD3d 600 [2005]).

Here, the claimant testified extensively and with great detail about his work duties, and his testimony was unrefuted. Dr. Ahmed's October 7, 2021, report set forth that the claimant was “employed for the last 32 years with the [SIE] working his way up from assistant highway repairer to a full time highway repairer working 8 hours a day, 5 days a week, plus overtime. He reports the repetitive use of jack hammers, sledge hammers, shoveling, raking, using hand tools such as drills, rachets, constantly lifting and carrying heavy objects and equipment, using a chipping gun, using a grease [gun] for maintenance, he sustained injuries to his bilateral shoulders.” The activities encompassing the claimant's job duties, as reported to her by the claimant, were described in Dr. Ahmed's report. Dr. Ahmed was sufficiently informed of those activities to give an opinion on causal relationship. Dr. Ahmed's opinion, which is the only opinion on causal relationship in the file, is supported by sufficient credible evidence and rests upon a rational basis.

Therefore, the Full Board finds that the preponderance of the evidence in the record supports a finding that claimant has met his burden of demonstrating a recognizable link between his condition and a distinctive feature of his employment, and that he sustained an occupational disease involving his bilateral shoulders.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed May 27, 2022, is AFFIRMED. No further action is planned by the Board at this time.

Clarissa Rodriguez, Chair

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