The Full Board, at its meeting held on July 20, 2021, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed February 26, 2021.

ISSUE

The issue presented for Mandatory Full Board Review is whether claimant must demonstrate attachment to the labor market before being awarded temporary total disability benefits.

The Workers' Compensation Law Judge (WCLJ) made awards at the temporary total disability rate from May 21, 2019, to January 9, 2020, and continuing.

The Board Panel majority affirmed the WCLJ decision, finding that claimant was not obligated to demonstrate attachment to the labor market before receiving awards.

The dissenting Board Panel member would find that claimant was required to demonstrate reattachment to the labor market before receiving awards.

The carrier filed an application for Mandatory Full Board Review on March 26, 2021, arguing that the record supports a finding that claimant had no wage loss due to his work-related disability, that he has not demonstrated an attachment to the labor market, and that therefore awards should be rescinded.

The claimant filed a rebuttal on April 25, 2021, arguing that the record supports awards at the temporary total disability rate beginning May 21, 2019, and that the decision of the Board Panel majority should be affirmed.

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

FACTS
Claimant filed a C-3 (Employee Claim) on April 16, 2019, alleging that on December 5, 2018, while working as a construction foreman, he injured his lower back unloading crates from a truck. He indicated that he first received treatment on December 9, 2018, at urgent care. The carrier controverted the claim.

A report based on claimant's treatment at urgent care on December 9, 2018, states that claimant was “presenting for low back pain. Started a few months ago while at work. Works in construction. Over the last few days progressively worsening. Pain radiates from lower back to bilateral buttocks.” The report did not offer an opinion with respect to whether claimant was disabled.

Claimant began receiving regular treatment at Buffalo Spine and Sports Medicine on December 13, 2018. In a December 13, 2018, report, physician assistant Andrea Goldbach of Buffalo Spine and Sports Medicine stated that claimant reported that his back pain “has been constant for the past few months, but started to exacerbate 1 week ago.” PA Goldbach also wrote that claimant “states symptoms were exacerbated 1 week ago without acute injury or onset. I believe his symptoms are discogenic in nature.” A January 29, 2019, physical therapy report from Buffalo Spine and Sports Medicine indicated that claimant was “[d]oing a little better, less pain intensity, less frequent down thigh.” However, a March 12, 2019, report by physician assistant Maria Schiller of Buffalo Spine and Sports Medicine noted that claimant “was finding relief with PT, which he participated in up until January. He again experienced a pain flare in Feb. which has not decreased with his home exercise, ibuprofen, tramadol, and gabapentin.” None of the reports from Buffalo Spine and Sports Medicine offer an opinion with respect to whether claimant was disabled.

The earliest medical evidence of a causally related disability is a May 21, 2019, report by Dr. Sherban, who found that claimant was temporarily totally disabled as a result of his December 5, 2018, back injury. Dr. Sherban indicated that he was requesting authorization to perform an L5-S1 anterior lumbar interbody fusion followed by posterior percutaneous instrumentation.

The record contains a letter dated April 1, 2019, from the employer, signed by R.R., to the claimant, stating that the employer had made repeated attempts over several months to contact claimant, and that based on the “lack of response on your behalf, I can only conclude that you have chosen to terminate your employment with RSR Construction Corp.” The letter also advised that claimant would no longer be entitled to unemployment insurance benefits as of April 1, 2019.

Claimant testified at a hearing on August 30, 2019, that his job title was foreman/general contractor. He did “most of the construction on the job” (Hearing Transcript, 8/30/19, p. 4). He supervised two employees, as well as the subcontractors on the job site. On Wednesday, December 5, 2018, he did not feel right after attempting to push a crate off a truck. He continued to work but the pain increased over the next few days. On Friday, December 7, 2018, he told his boss, R.R., about his injury, but did not fill out any paperwork. On Sunday, December 9, 2018, he could not take the pain anymore and sought treatment at urgent care. At approximately 4:30 a.m. on Monday, December 10, 2018, he texted his employer and advised that he was taking the day off because he was in too much pain, then unlocked his truck so a co-worker could take all the tools. He has not returned to work. He had worked for the employer for 18 years and had never previously missed a day of work. He did not have a primary care doctor at the time of his injury. On cross-examination, claimant testified that he collected unemployment benefits after he stopped working. He stopped receiving unemployment benefits on April 1, 2019.

Two employer witnesses, R.B. and R.R., also testified at the August 30, 2019, hearing. The owner of the employer, R.R., testified that claimant had worked for him for 16 years and described him as a great worker. Claimant testified him on December 8th or 9th and told him his back was injured but did not indicate that it was a work-related injury. R.R. testified that claimant was laid off in December 2018, because “we were going to be done at the end of the year. So he was laid off and the other two guys were laid off in January. I just figured if he - if he was sore and couldn't work, so he might as well” (p. 24). He terminated claimant in April 2019 after claimant failed to respond to texts from R.R. advising claimant to return to work. R.R. testified he had never previously had an employee file a claim for workers' compensation benefits in the 37 years he had operated the employer.
Claimant was examined by the carrier's consultant, Dr. Chertack, on October 17, 2019. In his report, Dr. Chertack found that claimant's back injury was causally related to his December 5, 2018, accident.

By a decision filed December 16, 2019, the WCLJ established the claim for a low back injury, set claimant's average weekly wage at $1,400.00, and continued the case to consider awards.

At a hearing on January 8, 2020, claimant testified that he stopped working due to his December 5, 2018, injury, and remained out of work due to the injury. He collected unemployment insurance benefits from approximately December 28, 2018, to April 1, 2019. He was fired by the employer because he could not go back to work due to the injury. Claimant testified that he spoke to the employer for 11 minutes on January 22, 2019, four minutes on January 7, 2019, and six minutes on January 10, 2019. Claimant's phone records were admitted into evidence (Doc. ID #335055058). Claimant acknowledged that he had to indicate that he was ready, willing, and able to work in order to receive unemployment benefits. However, he did not look for work. He was not required to complete a work search form to receive unemployment benefits because he indicated that his employer was going to bring him back. He has not looked for work since he stopped working in December of 2018.

By a decision filed January 13, 2020, the WCLJ found no medical evidence of causally related disability from December 2018, to May 21, 2019, and made awards from May 21, 2019, to January 9, 2020, and continuing at the temporary total disability rate of $904.74 per week.

The carrier requested administrative review, arguing that claimant had not demonstrated an attachment to the labor market and that he did not sustain a causally related wage loss.

In rebuttal, the claimant argued that he has never been found to have removed himself from the labor market and did not have an obligation to search for work within his restrictions.

LEGAL ANALYSIS

Generally the Board may not deny benefits based on a finding of voluntary removal from the labor market if the claimant's overall total disability is due, at least in part, to the work-related injury (see Matter of Knouse v Millshoe, 260 AD2d 948 [1999]). However, once the Board finds a voluntary removal from the labor market, the claimant must reattach to the labor market before there is a finding of subsequent causally related lost earnings (see Matter of Bacci v Staten Is. Univ. Hosp., 32 AD3d 582 [2006]).

This claim has been established for a low back injury resulting from a December 5, 2018, work-related accident. Although the first medical evidence of causally related disability is Dr. Sherban's May 21, 2019, report, the credible evidence in the record nonetheless shows that claimant began regularly treating for his back injury on December 9, 2018, and stopped working due to his injury on or about December 10, 2018. Reports from Buffalo Spine and Sports Medicine reflect that claimant's symptoms had improved by the end of January 2019, after claimant had undergone physical therapy, but then worsened in February 2019. Claimant continued to be employed by the employer, and could reasonably expect to return to work for the employer when his condition permitted and work was available, until he was advised by a letter dated April 1, 2019, that he had been terminated.

Claimant collected unemployment insurance benefits from approximately December 28, 2018, to April 1, 2019, and acknowledged that he was required to affirm that he was ready, willing, and able to work to receive those benefits. Although the receipt of unemployment insurance benefits suggests that claimant was not totally disabled during that period (see Matter of Systems 2000 Plumbing, 2021 NY Wrk Comp G2812089), claimant was not awarded benefits for the period during which he received unemployment benefits, and is not seeking awards for that period.

Finally, when Dr. Sherban issued his May 21, 2019, report finding claimant to be temporarily totally disabled, this claim had not been established and the issue of labor market attachment had not been raised.
Under these circumstances, there is no basis to find that claimant voluntarily removed himself from the labor market, or had an obligation to demonstrate an attachment to the labor market, prior to May 21, 2019, when Dr. Sherban found him to be temporarily totally disabled.

Therefore, the Full Board finds that the preponderance of the evidence in the record supports a finding that claimant is entitled to awards at the total disability rate beginning May 21, 2019.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed January 13, 2020, is AFFIRMED. No further action is planned by the Board at this time.

Chair - Clarissa Rodriguez

2021 WL 3610675 (N.Y.Work.Comp.Bd.)