The Full Board, at its meeting held on June 15, 2021, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed July 2, 2020.

ISSUES

The issues presented for Mandatory Full Board Review are:

1) whether the record supports a finding that claimant sustained causally related occupational injuries to his knees and shoulders; and

2) whether this occupational disease claim was timely filed and whether claimant provided timely notice.

The Workers' Compensation Law Judge (WCLJ) established the claim for occupational injuries to claimant's knees and shoulders with a date of disablement as December 12, 2018, and made awards from December 12, 2018, to July 24, 2019, and continuing at the temporary total disability rate.

The Board Panel majority affirmed the WCLJ decision in its entirety.

The dissenting Board Panel member would disallow the claim.
The carrier filed an application for Mandatory Full Board Review on July 31, 2020, arguing that the claim for the bilateral knees and shoulders should be disallowed as untimely, and that the medical evidence supports a finding that the claimant's conditions were not causally related to his employment.

The claimant filed a rebuttal on August 25, 2020, requesting that the Full Board adopt the opinion of the Board Panel majority.

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

FACTS

The claimant filed a C-3 (Employee Claim) on January 9, 2019, alleging that he sustained repetitive injuries to both of his knees due to his employment as a cheese cook, which involved “[c]onstant repetitive motion and use of his knees in awkward positioning to push and pull heavy materials and heavy racks... Climbing up and down stairs and safety ladders to access vats and kneeling and bending to clean work area.”

The carrier controverted the claim.

The Board file contains medical records for treatment dating back to 2013. In a medical narrative report for an examination on February 4, 2013, Nurse Practitioner Roberts noted that the claimant reported severe pain in his right knee and lesser pain in his left knee. NP Roberts further noted: “On history he does have a left hip replacement secondary to a fracture sustained in an automobile accident when he was only 18 years old. He works on concrete floors and he compensates for the pain in his knee by standing bowlegged.” X-rays revealed severe osteoarthritis in the right knee and moderate degenerative arthritis in the left knee. NP Roberts recommended a cortisone shot and then a follow-up with Synvisc injections.

*2 The claimant subsequently treated with Dr. Jhaveri and received Synvisc injections for his right knee on February 12, 2013, February 20, 2013, and February 28, 2013.

In a narrative report for an examination on June 23, 2014, NP Roberts noted that the claimant presented for a follow-up for pain in his right knee and ankle. NP Roberts noted diagnoses of osteoarthritis in his right knee and joint pain. An injection was administered to the right knee.

The claimant received follow-up injections to the right knee on several occasions with Dr. Jhaveri between June 30, 2014, and May 21, 2018.

In a narrative report for an examination on August 30, 2018, Dr. Jhaveri noted that the claimant had “bilateral osteoarthritis probably [and] will need to have knee replacement.”

In a narrative report for an examination on September 25, 2018, the claimant's treating physician, Dr. Byrne, noted that the claimant had “known primary knee degenerative joint disease.” The claimant indicated that he wanted to proceed with total knee arthroplasty surgery.

On November 5, 2018, the claimant underwent right total knee replacement surgery performed by Dr. Byrne.

In a narrative report for an examination on December 12, 2018, the claimant's treating physician, Dr. Lax, noted that the claimant presented with chronic bilateral shoulder and knee pain. The doctor noted that the claimant “wonders if chronic musculoskeletal pain is caused by 40 years of work in cheese factory.” The claimant reported that he had a gradual onset of progressive knee pain and progressive bilateral shoulder pain, with decreased strength and restricted movement. The doctor noted the claimant's job duties, which included the following: lifting blocks of cheese weighing 50 to 75 pounds; climbing stairs; carrying and lifting five-gallon jugs; standing on slippery tile floor while wearing rubber boots; climbing into a forklift multiple times through the
day; reaching and pulling, with stress to the shoulders and upper extremities; kneeling; going up and down the stairs and ladder multiple times through the day; bending; and squatting. The claimant reported three separate incidents where he fell at work and landed on his knees. Upon examination, the doctor diagnosed bilateral knee osteoarthritis and chronic bilateral shoulder pain. Dr. Lax opined that the claimant's job duties with "exposure to cumulative musculoskeletal trauma from prolonged weight bearing, walking on slippery tile flooring, frequent stair/ladder climbing (poor ergonomics), squatting or kneeling, reaching, lifting, pushing/pulling against resistance and awkward postures contributed significantly to the development of bilateral knee osteoarthritis and chronic bilateral shoulder pain."

At a hearing on April 4, 2019, the claimant testified that he was hired as a laborer for the employer in 1978. He started in the packaging unit. His job duties included: lifting 75 pounds; standing on a concrete floor for long periods of time; operating a forklift; manually raking and stirring the product; cleaning vats, which involved scrubbing and rinsing; heavy lifting with his shoulders; and pushing and loading 1,000-pound racks of cheese. The claimant worked 60 to 80 hours per week and most of this time was spent standing on hard floors. In 2003, his job duties changed. The claimant testified that he had to carry five-gallon jugs up the stairs, lift the jugs waist high, and then dump the contents into balance tanks in the whey department. At this time, he was working 44 to 48 hours per week. He would go up and down stairs three to four times in a 45-minute period. The five-gallon jugs weighed 50 to 75 pounds and the claimant would have to use the handrails to pull himself up and down the stairs. He first experienced knee pain about two years ago and treated with injections. He started having pain in his shoulders last year. He treated with Dr. Lax in December of 2018. Dr. Lax informed the claimant that his injuries were work-related. The claimant confirmed that Dr. Byrne and Dr. Jhaveri also opined that his injuries were work-related, but that this was not prior to December of 2018.

*3 On cross-examination, the claimant testified that he treated with Dr. Jhaveri in 2013 because his knees were bothering him. Dr. Jhaveri may have diagnosed osteoarthritis and recommended injections for treatment. He received injections to his knees once or twice a year through 2018. The claimant subsequently treated with Dr. Byrne and underwent knee surgery on November 7, 2018, which was put through private insurance. The claimant testified that he notified the employer that he was going to be out of work because of the surgery. He last worked for the employer in November of 2018.

Following the claimant's testimony, the employer's production manager/plant supervisor (manager) testified that the claimant had worked as a cheese cook (also known as cook vat operator). The manager testified that the claimant's job duties included chart work, continuous filling of cook vats with milk, operating the milk pasteurizer, checking vats, and lifting a five-gallon jug once a shift (once per hour prior to 2016), and going up and down the stairs. The manager testified that the claimant never notified him of injuries to his shoulders or knees in 2018. The usual protocol in cases where an employee was injured at work was to fill out an accident report and notify the human resources department. The manager reiterated that the claimant did not report injuries to his shoulders or knees in the three or four years prior to November of 2018.

Following the manager's testimony, the employer's production supervisor (supervisor) testified that she supervised the claimant in November of 2018. The supervisor testified that the claimant did not report any injuries to his shoulders; however, the claimant did report knee issues in October of 2018. The claimant advised that he was going to have his knee issues checked. The supervisor did not fill out any paperwork or an incident report. The claimant subsequently gave her a doctor's note indicating that he was going out of work because of knee surgery. The supervisor did not recall the claimant injuring his shoulders or knees at any point while he worked for the employer.

Testimony was also taken from the employer's labor relations manager, who testified that he was responsible for HR issues, including handling workers' compensation claims for the employer. The labor relations manager testified that he first learned of the claimant's injuries when the carrier advised him that a claim had been filed. The labor relations manager testified that the employer received the November 5, 2018, note from Dr. Byrne regarding surgery, but that did not prompt him to file a claim with the carrier.
Deposition testimony of Dr. Lax was taken on April 22, 2019. The doctor testified that he first treated the claimant on December 12, 2018. The claimant had previously undergone a right total knee replacement on November 5, 2018. The doctor testified that he reviewed medical records from Dr. Jhaveri documenting treatment from February 4, 2013, to May 21, 2018, as well as a report for treatment on December 6, 2018; however, he did not recall Dr. Jhaveri's opinion regarding the cause of the claimant's right knee problems. Dr. Lax testified that the claimant reported a history of working for the employer of record for over 40 years in various positions, including working as a waver, driving a forklift, and working as a cook and cook operator. The claimant's job duties included walking up and down stairs, kneeling, bending, squatting, carrying weights, raking vats, pushing heavy racks, and carrying five-gallon pails up and down the stairs. In addition, the claimant reported three specific occasions where he fell directly on his knees on a hard surface. The doctor opined that the claimant's job duties over 40 years of employment were risk factors that put increased stress on the claimant's knees and contributed to the development of osteoarthritis. With respect to the shoulders, the doctor opined that the claimant's repetitive lifting and carrying weight contributed to his condition. The doctor noted that the claimant's job as a cheese cook required him to reach into vats with a very long rake to pull heavy material from the vat. The claimant also worked in euro wrapping for 5 years, which required him to push heavy racks against resistance. When monitoring tanks, the claimant was required to walk 100 feet from where the computer screen was while carrying five-gallon pails of material up and down the stairs.

*4 In an IME-4 (Practitioner's Report of Independent Medical Examination) for an examination on April 24, 2019, the carrier's medical consultant, Dr. Carr, noted that the claimant reported working for over 40 years as a cheese cook, which involved a great deal of walking on tiled floors and going up and down stairs. The doctor noted that the claimant reported having progressive bilateral knee pain in the year prior. Upon examination, the doctor diagnosed the claimant with primary osteoarthritis. Dr. Carr opined that the claimant's condition was not causally related to his job, noting that, by definition, “primary osteoarthritis is not secondary to any other problem, such as an injury, but rather is a primary medical condition related to one's individual genetic predisposition and aging.”

Deposition testimony of Dr. Carr was taken on April 24, 2019. The doctor testified in accordance with his IME report and noted that the claimant's primary osteoarthritis was related to aging and genetic predisposition. The doctor was not asked to comment on claimant's shoulders. Dr. Carr acknowledged that repetitive functions such as running and jumping as well as repetitive squatting and kneeling could worsen osteoarthritis over time. However, the doctor opined that the claimant's work activities did not contribute to his osteoarthritis condition.

In a reserved decision filed on July 5, 2019, the WCLJ established the claim for an occupational disease involving the bilateral knees and the bilateral shoulders, and set the date of disablement as December 12, 2018, the date of Dr. Lax's first treatment when the claimant was first clearly advised that his conditions were causally related to his work.

In a Notice of Decision filed on July 29, 2019, the WCLJ set claimant's average weekly wage at $888.88, without prejudice, and made awards from December 12, 2018, to July 24, 2019, and continuing at the temporary total disability rate of $592.59 per week. In addition, the WCLJ granted an attorney fee in the amount of $1,000.00.

The carrier filed an application for administrative review on August 5, 2019, arguing that the claims for the bilateral knees and bilateral shoulders were untimely and should be disallowed. The carrier argued that the claimant knew or should have known that his conditions were work-related at the time of his treatment on February 4, 2013. The carrier also argued that Dr. Carr's credible opinion supported that the claimant's condition was not causally related to his work. With respect to the decision filed on July 29, 2019, the carrier argued that awards should be stayed pending the outcome of the appeal.

The claimant filed a rebuttal on September 5, 2019, requesting that the WCLJ decisions be affirmed.

LEGAL ANALYSIS

Occupational Disease - Causal Relationship
A claim for occupational disease “is restricted to medical conditions resulting from the ordinary and generally recognized risks incident to a particular occupation” (Matter of Mack v County of Rockland, 71 NY2d 1008 ([1988])). “An occupational disease is a condition which derives from the very nature of the employment and not from an environmental condition specific to the place of work’ (Matter of Bates v Marine Midland Bank, 256 AD2d 948 ([1998])). To establish an occupational disease, a claimant must demonstrate a “recognizable link’ between the alleged condition and a ‘distinctive feature’ of his or her work (Matter of Winn v Hudson Val. Equine Ctr., 215 AD2d 920 ([1995]))” (Matter of Ball v New Era Cap Co., Inc. 21 AD3d 618 [2005] [(additional citations omitted)].

*5 “It [i]s claimant's burden to establish a causal relationship between his employment and his disability by competent medical evidence (see Matter of Sale v Helmsley-Spear, Inc., 6 AD3d 999 [2004]; Matter of Keeley v Jamestown City School Dist., 295 AD2d 876 [2002]). To this end, a medical opinion on the issue of causation must signify ‘a probability as to the underlying cause’ of the claimant's injury which is supported by a rational basis (Matter of Paradise v Goulds Pump, 13 AD3d 764 [2004]; see Matter of Van Patten v Quandt's Wholesale Distr., 198 AD2d 539 [1993]). ‘M]ere surmise, or general expressions of possibility, are not enough to support a finding of causal relationship’ (Matter of Ayala v DRE Maintenance Corp., 238 AD2d 674 [1997], affd 90 NY2d 914 [1997]; see Matter of Zehr v Jefferson Rehab. Ctr., 17 AD3d 811 [2005])” (Matter of Mayette v Village of Massena Fire Dept., 49 AD3d 920 [2008]).

Here, the preponderance of the evidence in the record supports the establishment of the claim for an occupational disease involving the bilateral knees and bilateral shoulders. Dr. Lax credibly opined that the claimant's job duties contributed to his bilateral knee and bilateral shoulder conditions. Dr. Lax noted the repetitive nature of the claimant's work, which included the following: lifting blocks of cheese weighing 50 to 75 pounds; climbing stairs; carrying five-gallon jugs, with difficulty lifting from the floor to the holder at waist height; standing on slippery tile floor while wearing rubber boots; climbing into a forklift multiple times through the day; reaching and pulling, with stress to the shoulders and upper extremities; kneeling; going up and down the stairs and ladder multiple times through the day; bending; and squatting. Dr. Lax credibly opined that the claimant's repetitive duties over 40 years of employment put increased stress on the claimant's knees and contributed to the development of osteoarthritis. With respect to the shoulders, Dr. Lax credibly opined that the claimant's repetitive lifting and carrying weight contributed to his chronic bilateral shoulder pain. The claimant has demonstrated a recognizable link between his bilateral knee and bilateral shoulder conditions and distinctive features of his work, and therefore this claim is established for an occupational disease involving both knees and shoulders.

Date of Disablement - WCL §§ 28 and 45.

In a claim for an occupational disease, the claimant has “two years ‘after the disablement or after [he or she] knew or should have known that the disease is due to the nature of the employment, whichever is the later date’ (WCL § 45) to give notice [to the employer]” (Matter of Currier v Manpower, Inc. of N.Y., 280 AD2d 790 [2001]).

Pursuant to WCL § 28, the right to claim compensation for an occupational disease is not time barred if the claim is filed no more than two years after the date of disablement and after the claimant knew or should have known that the disease was caused by the employment (Matter of Patterson v Long Is. Jewish Med. Ctr., 296 AD2d 774 [2002]). Therefore, to determine the applicability of WCL § 28 to an occupational disease claim, three pieces of information generally are necessary: (1) the date of disablement, (2) the date on which the claimant knew or should have known that the condition was related to employment, and (3) the date on which the claim was filed.

*6 The Board has been affirmed when it has selected as the date of disablement the date of first medical treatment (Matter of Fredenburg v Emerson Power Transmission, 2 AD3d 1129 [2003]), the date that a physician “‘definitely concluded” that a condition was work related (see Hastings, 274 AD2d 660 [2000]), the date of claimant's first causally related lost time (see Matter of Glasheen v New York State Dept. of State, 239 AD2d 792 ([1997]), and the date claimant permanently ceased working for the employer, even though he had previously had causally related lost time (see Matter of Cummings v Tenneco Chems.
Div., Am. Plastics, 53 AD2d 944 [1976]). According to the Appellate Division, it is within “the power of the Board to fix any date of disablement supported by the evidence where the spirit and purpose of the occupational disease provisions of the Workmen's Compensation Law would thereby be furthered” (id.).

Here, although the claimant treated for his bilateral knee injuries since 2013, there is nothing in the medical record suggesting that the claimant knew or should have known that his injuries were work-related at that time. The medical report for the examination on February 4, 2013, notes that the claimant reported severe pain in his right knee and lesser pain in his left knee, that the claimant had a history involving a motor vehicle accident that resulted in a left hip replacement, and that the claimant worked on concrete floors and compensated for the pain in his knees by standing bowlegged. Subsequent medical records note a diagnosis of osteoarthritis and treatment involving knee injections; however, there is no indication that the claimant's bilateral knee injuries were related to his job duties. Furthermore, it is important to note that the claimant did not sustain any lost time for his injuries until 2018. The first diagnosis of a causally related injury was made by Dr. Lax on December 12, 2018. As such, the record supports a date of disablement of December 12, 2018, which is when the claimant definitively knew that his injuries were work-related. As the claimant filed his C-3 on January 9, 2019, the claim for the bilateral knees and bilateral shoulders was timely filed pursuant to WCL § 28 and notice to the employer was timely pursuant to WCL § 45.

CONCLUSION

ACCORDINGLY, the WCLJ reserved decision filed July 5, 2019, and decision filed on July 29, 2019, are AFFIRMED. No further action is planned by the Board at this time.

Chair - Clarissa Rodriguez

2021 WL 2745176 (N.Y.Work.Comp.Bd.)