

2022 WL 2189842 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: TWIN CITY GLASS CORP

Case No. G219 7110

Carrier ID No. 01-WCU0266M-100027 W165759

June 8, 2022

*1 Old Dominion Insurance Co.

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Date of Accident 12/19/2018

The Full Board, at its meeting held on May 17, 2022, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed December 23, 2021.

ISSUE

The issue presented for Mandatory Full Board Review is whether claimant has reached maximum medical improvement (MMI).

The Workers' Compensation Law Judge (WCLJ) found that claimant had not reached MMI.

The Board Panel majority disagreed and found that claimant was at MMI.

The dissenting Board Panel member would affirm the WCLJ's finding that claimant has not reached MMI.

The claimant filed an application for Mandatory Full Board Review on January 21, 2022, arguing that the record supports a finding that he has not reached MMI, as his treating physician, Dr. Vigna, has found that the implantation of a [spinal cord stimulator](#) and [SI joint fusion](#) surgery may be warranted in the future, and that further [spinal injections](#) were planned that would aid in determining what further treatment was necessary.

The carrier filed a rebuttal on February 16, 2022, arguing 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

On December 19, 2018, claimant, a glazier, was injured lifting a mirror. This claim is established for an injury to claimant's low back, the average weekly wage was set at \$851.84, and awards have been made at various rates.

Claimant was diagnosed with [lumbar radiculopathy](#), [spinal stenosis](#) with neurogenic [claudication](#), decreased disc height at L4-5 and L5-S1, and lumbar disc displacement at L4-5 and L5-S1. On November 19, 2019, claimant underwent anterior lumbar interbody [arthrodesis](#) surgery at L4-5 and L5-S1, performed by his treating orthopedist, Dr. Vigna. On December 3, 2019, Dr. Vigna performed a posterior lumbar fusion at L4-5 and L5-S1.

Following the two surgeries, awards were made at the temporary total disability rate until August 19, 2020, when they were reduced to the temporary partial disability rate of \$378.60. By a decision filed February 11, 2021, the WCLJ directed both parties to submit medical evidence on the questions of MMI and permanency, and continued the case.

In a narrative report dated March 1, 2021, Dr. Vigna noted that claimant complained of low back pain which would occasionally radiate into his right posterior thigh region. Dr. Vigna wrote:

[Claimant] has been having ongoing pain in his low back and also in his right leg, which seems to be primarily in the right posterior thigh area. We did review an [MRI of the lumbar spine](#) without contrast. It does appear that there is a recurrent disc herniation at L4-5, though it is more left-sided. The MR imaging does not necessarily account for the symptoms that he is having in his right low back and also in his right leg.

*2 As a diagnostic and therapeutic measure, we have decided to schedule [[claimant] for right-sided transforaminal epidural steroid injections at L4 and L5. Consideration can also be given for a right transforaminal epidural steroid injection at S1 as well. [Claimant] could be a good candidate for a [spinal cord stimulator](#) if he has refractory pain despite the injections. At this point in time, I do not feel that [claimant] has reached maximum medical improvement and we are still working through diagnostic and therapeutic treatments for the care of his lumbar spine.

On March 3, 2021, Dr. Vigna filed an MG-2 (Attending Doctor's Request for Approval of Variance and Insurer's Response) requesting approval to perform right and left side lumbar facet injections at L4 and L5, and an MG-2 requesting approval to perform a right side S1 joint injection.

On March 4, 2021, claimant was examined by the carrier's consultant, Dr. Carr. In his report, Dr. Carr noted that claimant complained of “low-back pain, spasm and radiation along the low back. He does not have a radicular pattern.” Dr. Carr stated that claimant “does not have neurologic deficits or radicular problems.” Dr. Carr opined that claimant had reached maximum medical improvement and had a severity ranking 3B permanent impairment of the lumbar spine. Dr. Carr stated that “[i]n terms of further causally related treatment, only maintenance treatment is necessary and that is what he is getting at this point. I would not recommend ongoing opioids. Injections as needed up to three times a year is reasonable.” With respect to the MG-2 variance requests filed by Dr. Vigna, Dr. Carr stated that claimant's “pain at this point appears to be more mechanical and the injections as requested are reasonable as they are not epidurals and he does not have a radicular component so epidurals would not likely be beneficial.”

Based on Dr. Carr's report, the carrier authorized the injections for which Dr. Vigna requested a variance.

Dr. Vigna submitted a C-4.3 (Doctor's Report of MMI/Permanent Impairment) (doc. #4000467545) dated March 8, 2021, indicating that claimant had not reached MMI. With respect to his proposed treatment plan, Dr. Vigna stated: ““[spinal cord stimulator](#).””

At a hearing on April 5, 2021, the WCLJ continued the case and directed claimant to produce up-to-date medical evidence of the outcome of the injections recommended by Dr. Vigna (see Notice of Decision filed April 8, 2021).

On April 7, 2021, Dr. Vigna filed an MG-2 “retracting the request for facet injections dated 03/01/2021” and requesting approval to perform a “transforaminal epidural steroid injection for the right side @ L4 and L5”. In support of the MG-2, Dr. Vigna listed his March 1, 2021, report. The carrier denied this request based on Dr. Carr's report.

The Board issued a proposed conciliation decision on April 28, 2021, finding the MG-2 filed by Dr. Vigna on April 7, 2021, in favor of the carrier. The claimant objected and the Board, by a notice filed June 7, 2021, notified the parties that the proposed decision had been cancelled and that a hearing would be scheduled.

*3 In a May 24, 2021, report, Dr. Vigna indicated that he had performed a [sacroiliac joint injection](#) on that date. According to Dr. Vigna, claimant noted “some initial improvement after the injection was performed, stating that the pain in his right back felt better than it did before the injection.” Dr. Vigna indicated that claimant would be seen for a follow-up appointment in the next few weeks.

In a June 21, 2021, report, Dr. Vigna stated that according to claimant, “[t] he injection provided at least 50-60% pain relief. He states that the leg pain that was located posteriorly in his right leg has resolved. His low back pain is reduced to around 3-4/10, down from 5-6 at his last visit. Overall, it seems that his right leg pain has been improved more than his low back pain after having the injection.” Dr. Vigna indicated that claimant would be seen for a “follow-up appointment in the next couple of months.” Dr. Vigna stated that “[w]e may consider repeat SI joint injection with the possibility that SI [joint fusion](#) be considered if he continues to get ongoing relief with SI joint injections.”

At a hearing on July 19, 2021, the WCLJ found that claimant was not at MMI “as further injections are being considered along with a [spinal cord stimulator](#) and possible fusion” (Hearing Transcript, 7/19/21, p. 6), and found the MG-2 filed by Dr. Vigna on April 7, 2021, in favor of the provider. The findings made at the July 19, 2021, hearing are reflected in a decision filed July 22, 2021.

The carrier requested administrative review, arguing that the record supported a finding that claimant had reached MMI. In rebuttal, claimant argued that the credible opinion of Dr. Vigna supported a finding that claimant was not at MMI.

LEGAL ANALYSIS

Section 1.2 of the Board's 2012 and 2018 Guidelines for Determining Impairment both state:

A finding of MMI is based on a medical judgment that (a) the claimant has recovered from the work injury to the greatest extent that is expected and (b) no further improvement in his/her condition is reasonably expected. The need for palliative or symptomatic treatment does not preclude a finding of MMI. In cases that do not involve surgery or fractures, MMI cannot be determined prior to 6 months from the date of injury or disablement, unless otherwise agreed to by the parties.

Here, by a decision filed February 11, 2021, the WCLJ directed both parties to submit medical evidence on the questions of MMI and permanency. At that time, more than two years had passed since claimant's accident, and more than a year had passed since his spinal surgery.

In a March 1, 2021, report, Dr. Vigna stated that “[a]s a diagnostic and therapeutic measure,” he was going to perform right-sided transforaminal epidural steroid injections at L4 and L5 and noted that he was considering performing “a right transforaminal epidural steroid injection at S1 as well.” Dr. Vigna noted that claimant “could be a good candidate for a [spinal cord stimulator](#) if he has refractory pain despite the injections.” Dr. Vigna concluded that claimant had not “reached maximum medical improvement and we are still working through diagnostic and therapeutic treatments for the care of his lumbar spine.” On March 3, 2021,

Dr. Vigna requested approval to perform right and left side lumbar facet injections at L4 and L5, and a right side S1 joint injection, and the carrier granted approval for both requests. Dr. Vigna then submitted a C-4.3 dated March 8, 2021, indicating that claimant had not reached MMI.

*4 In a March 4, 2021, report, the carrier's consultant, Dr. Carr, found that claimant had reached MMI and that “[i]n terms of further causally related treatment, only maintenance treatment is necessary and that is what he is getting at this point. I would not recommend ongoing opioids. Injections as needed up to three times a year is reasonable.”

At a hearing on April 5, 2021, the WCLJ continued the case and directed claimant to produce up-to-date medical evidence of the outcome of the injections recommended by Dr. Vigna.

On April 7, 2021, Dr. Vigna, without explanation, rescinded his prior request for approval to perform facet injections and instead requested approval to perform a “transforaminal epidural steroid injection for the right side @ L4 and L5”. The carrier denied that request.

Dr. Vigna performed a [sacroiliac joint injection](#) on May 24, 2021, and claimant reported feeling improvement in his level of pain after the injection. In a June 21, 2021, report, Dr. Vigna noted that claimant experienced significant relief of his back and leg pain as a result of the May 24, 2021, injection, and stated that “[w]e may consider repeat SI joint injection with the possibility that SI [joint fusion](#) be considered if he continues to get ongoing relief with SI joint injections.” Dr. Vigna made no mention in his June 21, 2021, report of the possibility of implanting a [spinal cord stimulator](#).

The Board has repeatedly found that “[t]he mere assertion of the possibility of future surgery is not a bar to MMI” (Matter of Pepsi-Cola Bottling Co of NY, 2022 NY Wrk Comp G2856387; Matter of FOJP Service Corporation, 2021 NY Wrk Comp G2267129). At no point did Dr. Vigna indicate that he intended to definitively recommend that claimant undergo implantation of a [spinal cord stimulator](#) or SI [joint fusion](#) surgery, nor has the doctor requested authorization to perform either procedure. During the period that is relevant here, the only treatment for which Dr. Vigna has sought authorization, or ultimately performed, has been injections designed to reduce claimant's pain.

Therefore, the Full Board finds that the preponderance of the credible evidence in the record supports a finding that although claimant may require ongoing palliative care, he has reached MMI.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed July 22, 2021, is MODIFIED to find that claimant has reached MMI. The case is continued to address the question of permanency.

Chair - Clarissa Rodriguez

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