

2022 WL 594591 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: REGIONAL TRANSIT SERVICE INC

Case No. G234 9243

Carrier ID No. WC-1734 W862130

February 16, 2022

*1 Rochester-Genesee Regional
Transportation Authority
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Date of Accident 7/26/2019

The Full Board, at its meeting on January 25, 2022, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed October 14, 2021.

ISSUE

The issue presented for Mandatory Full Board Review is whether claimant sustained an occupational disease involving injuries to his neck and right shoulder.

The Workers' Compensation Law Judge (WCLJ) established this claim for occupational injuries to claimant's neck and right shoulder and set the date of disablement as July 26, 2019.

The Board Panel majority affirmed the WCLJ decision.

The dissenting Board Panel member would find that claimant failed to demonstrate that his injuries resulted from a distinctive feature of his employment and would disallow the claim.

The self-insured employer (SIE) filed an application for Mandatory Full Board Review on November 12, 2021, arguing that there is insufficient evidence relating claimant's injuries to a distinctive feature of his employment, and therefore the claim should be disallowed.

The claimant filed a rebuttal on December 13, 2021, arguing that this claim was properly established based on the uncontroverted medical opinion of his treating physician.

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

FACTS

Claimant, a bus driver, filed a C-3 (Employee Claim) on August 2, 2019, alleging that on July 25, 2019, while driving a bus, “when I turn my head my neck in the back hurts and moving my arm my shoulder hurts.” In the C-3, claimant described his job activities as “constantly looking back and forth and turning the steering wheel.” Claimant indicated that he first sought medical treatment on July 26, 2019, at Workfit and Rochester Physical Therapy.

The SIE controverted the claim.

A July 26, 2019, note by PA Link at Workfit states that claimant reported pain in his neck and right shoulder of severity 10 out of 10 while driving a bus (Doc. ID #328352424, p. 3-8). In a follow-up note dated July 29, 2019, PA Link stated that claimant continued to complain of pain in his neck and right shoulder, and that “he thinks it's repetitive movements is what caused this because he did nothing injury wise to cause it.” (id.).

In a C-4NARR (Doctor's Narrative Report) based on an August 5, 2019, examination, Dr. Hagy stated that “while driving the bus neck and shoulder started hurting” (id. at p. 1-2). Dr. Hagy diagnosed sprain of the right shoulder and [spondylosis with myelopathy](#), and found causal relationship to his employment.

*2 In a December 7, 2020, report, claimant's treating physician, Dr. Masaba, stated that claimant complained of pain in his right shoulder and the right side of his neck of between five and seven out of ten in severity. Claimant had undergone physical therapy and treated with a pain management specialist, and was being seen by Dr. Masaba for a “further workup.” With regard to the history of claimant's condition, Dr. Masaba stated:

This patient is a 59-year-old left-handed male presents for evaluation of work-related injury which was reported on 7/25/19 involving the neck and right shoulder. He works as an RTS drive, has been with them for 5 years. Over the course of the month preceding the date of the injury, he was noticing progressive worsening of right shoulder and right neck pain with work-related activities. These included turning the steering wheel on the bus and turning his neck to monitor traffic.

Dr. Masaba diagnosed cervical myofascial derangements, rule out right shoulder [rotator cuff tear](#), likely right shoulder impingement, rule out [cervical spondylosis](#) (aggravated chronically), and right shoulder myofascial derangements. Dr. Masaba concluded that “[b]ased on the information that is provided to me, it is my opinion that patient's right shoulder and neck complaints, culminating on 7/25/19, are due to work activities.”

By a decision filed February 4, 2021, the WCLJ found prima facie medical evidence for the neck and right shoulder based on Dr. Masaba's December 7, 2020, report.

Claimant testified at a hearing on March 1, 2021, that he had worked for the employer as a bus operator for almost five years. He worked at least 40 hours per week and his job involved “a lot of turning, pushing and pulling” (Hearing Transcript, 3/1/21, p. 3). He has to reach a lot to “kneel” the bus. He spends eight hours per day driving. He has to be observant and turns his neck frequently while driving. The pain in his neck and shoulder began gradually about a month before he reported the injury to his employer and sought treatment at Workfit. His shoulder hurt and he could barely move his neck. The symptoms were worse at the end of his work shift than at the beginning. When asked if any particular job duties caused his symptoms to become worse, claimant responded, “It only happened when I drive the bus. I guess pushing and pulling, turning of my neck and reaching a lot” (p. 6). On cross-examination, claimant testified that his job requires him to reach forward to access switches on the dashboard of the bus to “kneel” the bus, which he did frequently.

In a decision filed March 4, 2021, the WCLJ noted that the carrier had waived the opportunity to obtain an IME and continued the case for the parties to depose Dr. Masaba.

In a March 11, 2021, report, Dr. Masaba stated that claimant continued to complain of pain in his neck and right shoulder. According to Dr. Masaba, claimant “describes having to reach forward in order to hit to switch to make the bus kneel at each stop, as an aggravating factor.”

*3 Dr. Masaba was deposed on April 21, 2021, and testified on cross-examination that he had examined claimant on four occasions, December 7, 2020, January 29, 2021, March 11, 2021, and April 20, 2021. When asked if claimant provided any additional information about his job duties at the April 20, 2021, examination, Dr. Masaba responded:

Yes, he did. I will read directly from the note. Here it states, he describes having to reach forward in order to hit the switch to make the bus kneel at each stop as an aggravating factor. He also had to reach forward with the right arm for the fare box and the ramp switch. On certain routes, there [are] a lot of wheelchair patients, up to 30 per day. He has to get out of his seat and strap these individuals in, reaching across to put his seat belt on is also an aggravating factor.”

(Deposition Transcript, 4/21/21, p.12). Dr. Masaba testified that claimant also described having to use his left hand to pull his seatbelt across his body and pass it to his right hand. Dr. Masaba stated that “the repetitive occupational activities which continued to cause aggravation of his symptoms and in the absence of any other clear cause, it's reasonable to presume that work activities were responsible” (p. 14). According to Dr. Masaba, repetitive occupational stress is a “known mechanism of [musculoskeletal injury](#)....” (p. 15). He did not believe that claimant's injuries were idiopathic. On re-direct, Dr. Masaba testified that it was more likely than not (“greater than 51 percent”) that claimant's injuries were caused by his job duties (p. 18). On re-cross, Dr. Masaba testified that his opinion that claimant's injuries were causally related to his employment was based not just on the history provided by the claimant, “but also my understanding of occupational medicine” (p. 19).

In a reserved decision filed May 27, 2021, the WCLJ established this claim for occupational injuries to claimant's neck and right shoulder, set the date of disablement as July 26, 2019, set claimant's average weekly wage at \$1, 001.11, and made awards.

The SIE requested administrative review, arguing that the record fails to adequately demonstrate that claimant's injuries were the result of a distinctive feature of his employment.

In rebuttal, claimant requested that the WCLJ decision be affirmed.

LEGAL ANALYSIS

To support a claim for 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 Camby v System Frgt., Inc.](#), 105 AD3d 1237 [[2013] [internal quotation marks and citation omitted]; see [Matter of Bates v Marine Midland Bank](#), 256 AD2d 948 [1998]]” ([Matter of Jones v Consolidated Edison Co. of N.Y., Inc.](#), 130 AD3d 1106 [2015]).

When the “medical opinion of claimant's treating physician [is] neither speculative nor a general expression of possibility and it ‘signif[ies] a probability as to the underlying cause of the claimant's injury which is supported by a rational basis’ ([Matter of Mayette v Village of Massena Fire Dept.](#), 49 AD3d 920 [2008],” and when there is no conflicting medical evidence, the Board may not reject the treating physician's uncontroverted medical opinion on causation ([Matter of Maye v Alton Mfg., Inc.](#), 90 AD3d 1177 [[2011] [additional internal citations omitted]). However, “[w]hile as a general rule the Board may not reject the unanimous opinion of experts and arrive at its own conclusion on the issue of causation (see [Matter of Van Patten v Quandt's Wholesale Distribs.](#), 198 AD2d 539; [Matter of Doersam v Oswego County Dept. of Social Servs.](#), 171 AD2d 934, 936, affd 80 NY2d 775), the Board is entitled to disregard an expert opinion when it is based upon an assumption that lacks evidentiary support in the record providing a rational basis (see [Matter of Freitag v New York Times](#), 260 AD2d 748, 749-750)” ([Matter of Marks v County of Tompkins](#), 274 AD2d 764 [2000]).

*4 Here, the record supports a finding that claimant sustained injuries to his neck and right shoulder as the result of a distinctive feature of his employment as a bus driver. Dr. Masaba credibly opined that claimant's injuries were caused by his repetitive work activities, including turning the steering wheel on the bus, turning his neck to monitor traffic, reaching forward to access a switch to make the bus kneel, and using his left hand to reach across his body and hand the seatbelt to his right hand. Dr. Masaba persuasively testified that “in the absence of any other clear cause, it's reasonable to presume that work activities were responsible” for his injuries, and that repetitive occupational stress is a “known mechanism of [musculoskeletal injury](#)....” The SIE declined to obtain an IME and the opinion of Dr. Masaba is uncontroverted.

Therefore, the preponderance of the credible evidence in the record supports the establishment of this claim for occupational injuries to claimant's neck and right shoulder.

CONCLUSION

ACCORDINGLY, the WCLJ reserved decision filed May 27, 2021, is AFFIRMED. No further action is planned by the Board at this time.

Clarissa Rodriguez
Chair

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