

2022 WL 2388892 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: BATTERY PARK CITY AUTHORITY

Case No. G242 0698

Carrier ID No. 71821383-524 W204002

June 23, 2022

\*1 State Insurance Fund  
PO Box 66699  
Albany, NY 12206  
Date of Accident 1/2/2019

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

#### ISSUE

The issue presented for Mandatory Full Board Review is whether this claim should be amended to include a consequential right shoulder injury.

The Workers' Compensation Law Judge (WCLJ) established the claim for a right shoulder injury.

The Board Panel majority reversed and disallowed the claim for the right shoulder.

The dissenting Board Panel member would affirm the WCLJ decision.

The claimant filed an application for Mandatory Full Board Review on March 28, 2022, arguing that the record supports establishing this claim for a consequential right shoulder injury.

The carrier filed a rebuttal on April 12, 2022, arguing that the opinion of claimant's treating physician, Dr. Hanan, is not credible and that the record supports the decision of the Board Panel majority disallowing the claim for a consequential right shoulder injury.

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

#### FACTS

On January 2, 2019, claimant was injured lifting a bag of trash. This claim was established for an injury to claimant's left shoulder and her average weekly wage was set at \$699.14.

Claimant underwent arthroscopic cuff [debridement](#), labral [debridement](#), and [subacromial decompression](#) of the left shoulder on January 20, 2020, performed by Dr. Lager. Following her surgery, claimant had follow-up appointments with Dr. Lager on March 12, 2020, April 23, 2020, May 14, 2020, June 24, 2020, July 16, 2020, and August 13, 2020. Dr. Lager made no mention of right shoulder symptoms in any of his reports.

In his May 14, 2020, report, Dr. Lager found that claimant was much improved and was “ready to return to work without restrictions at 0% disability on May 23, 2020.” In his June 24, 2020, and July 16, 2020, reports, Dr. Lager indicated that claimant continued to experience pain, but was working full duty, without restrictions, and had “0% temporary disability.” In the July 16, 2020, report, Dr. Lager stated that claimant had resumed physical therapy and reported experiencing pain when she first woke up and at night, but denied weakness, dropping objects or paresthesias.

In his August 13, 2020, report, Dr. Lager noted that claimant was working full-time, full duty, but advised that she “still has peri scapular pain on the left which started postoperatively. She's also noted low back pain which began about a month ago at work.” According to Dr. Lager, claimant reported “that the pain is on the lower side of her Low back and radiates down her left leg.” Dr. Lager stated that claimant's left shoulder pain “does not appear to be directly related to the labral tear and the impingement which was addressed surgically. This seems Related to more postoperative PT.” Dr. Lager also stated that he did not believe that claimant's low back pain was “related to her injury date of 1/2/19” and advised claimant to file a new claim for that injury.

\*2 In his initial report, dated September 3, 2020, Dr. Hanan stated that claimant complained of pain in her left shoulder of 7 out of 10 severity, and in her right shoulder of 6 out of 10 severity. According to Dr. Hanan, claimant reported “that due to overuse of the right shoulder as a consequence of avoiding using her painful left shoulder, she has developed right shoulder pain as well.” Dr. Hanan found that claimant “has consequentially developed right shoulder problems and has diagnosis of Right shoulder derangement and strain.” Dr. Hanan found that claimant's left shoulder injury and surgery “forced her to use her right upper extremity more extensively.” Dr. Hanan noted similar findings in a report dated October 5, 2020.

By a decision filed January 11, 2021, the WCLJ found prima facie medical evidence for a consequential right shoulder injury based on Dr. Hanan's October 5, 2020, report.

Claimant was examined by the carrier's consultant, Dr. Selznick, on January 21, 2021. In his report, Dr. Selznick indicated that the examination of claimant's right shoulder was normal. Dr. Selznick concluded based on his examination of the claimant, the medical records he reviewed, “and the claimant's reported history given chronology[,]” that there is no causal relationship “between the accident in question and the claimant's right shoulder pain.”

Dr. Selznick issued an addendum report dated June 22, 2021, in which he reiterated his opinion that claimant's right shoulder injury was not causally related.

Dr. Hanan was deposed on July 14, 2021, and testified on cross-examination that following her accident, claimant “was unable to use left upper extremity, apparently, and she was heavily using right upper extremity, and ultimately she has developed consequentially right shoulder pain as well” (Deposition, Dr. Hanan, 7/14/21, p. 6). The only record of claimant's prior treatment with Dr. Lager that was provided to Dr. Hanan was the January 2020 surgical report. When asked when, according to claimant, her right shoulder pain began, Dr. Hanan responded that he did not document that information and did not “think she was able to provide me the exact time” (p. 7-8). Claimant was working when she began treating with Dr. Hanan, but the doctor was “not sure what she was doing at work at the time” (p. 8). He diagnosed right shoulder derangement and strain. When asked whether reviewing a report by Dr. Lager from August 2020 which made no mention of pain in claimant's right shoulder would change his opinion, Dr. Hanan responded:

I mean, I cannot tell you what she told to the other physician, but I know for sure that this is - whatever she told me, I mean, I cannot just rely on the other records, ma'am, I mean, I just know one thing, that she told me that she had a pain.

(p. 9). When asked whether reviewing “continuous treatment records from the surgery date in January of 2020 up until the date of your first appointment” (id.), which made no mention of right shoulder pain would cast any doubt on his opinion, Dr. Hanan responded: “Well, I don't think she injured right shoulder, I think she had developed right shoulder problems later on, so I mean, I don't know whether she told the physician, or - I just don't know” (id.). Dr. Hanan testified that claimant reported

that “she was more heavily using [her] right upper extremity which had led to the pain in her shoulder [.]” but “she did not specify what activities had caused her right shoulder pain” (p. 10). Dr. Hanan was aware that claimant “was a maintenance worker, so obviously she was performing maintenance job which requires her moving extremities and lifting and performing repetitive motion” (p. 11). When asked when he would expect a consequential shoulder injury to start as the result of an injury to the opposite shoulder, Dr. Hanan responded:

\*3 When would I anticipate it to start? I mean, it's hard to anticipate anything in medicine. I mean, it's like there is no textbook when it started, but I can say that if someone had an inability to use one extremity and overly using the other extremity it takes two, or three or six months to develop pain in the opposite side, but again, it's just speculation.

(id.). By a decision filed August 17, 2021, the WCLJ amended the claim to include a consequential right shoulder injury and found C-8.1's in favor of the medical providers.

The carrier requested administrative review, arguing that the claim for a consequential right shoulder injury should be disallowed. In rebuttal, the claimant argued that the WCLJ decision should be affirmed.

## LEGAL ANALYSIS

The courts have long recognized that a consequential injury is compensable, provided there is a sufficient causal nexus between the initial work-related injury for which a claim is established and the subsequent injury (see e.g. *Matter of Barre v Roofing & Flooring*, 83 AD2d 681 [1981]; *Matter of Pellerin v N.Y.S. Dept. of Corrections*, 215 AD2d 943 [1995], lv den 87 NY2d 806 [1996], *Matter of Scofield v City of Beacon Police Dept.*, 290 AD2d 845 [[2002]]. “Whether a claimant's disability consequentially arose from injuries sustained in a previous accident is a factual issue left for resolution by the Board (see *Matter of Scofield v City of Beacon Police Dept.*, 290 AD2d 845 [[2002]; *Matter of Trickle v Judski Assoc.*, 247 AD2d 778 [1998]).” (*Matter of Wallace v Oswego Wire, Inc.*, 29 AD3d 1057 [2006]). 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, even in the absence of conflicting medical evidence, the Board may reject the treating physician's opinion based on a determination that such opinion is not credible (*Matter of Lichten v New York City Tr. Auth.*, 132 AD3d 1219 [2015]).

In the present matter, claimant injured her left shoulder at work on January 2, 2019, underwent left shoulder surgery on January 20, 2020, and returned to work following the surgery on May 23, 2020. In his June 24, 2020, July 16, 2020, and August 13, 2020, reports, Dr. Lager made no mention of symptoms in claimant's right shoulder. However, Dr. Lager did note in those reports that claimant continued to experience pain in her left shoulder. In his initial report, dated September 3, 2020, Dr. Hanan found that claimant had developed a right shoulder injury as a consequence of overusing her right upper extremity due to her left shoulder injury.

\*4 The carrier argues that Dr. Hanan's opinion is not credible because Dr. Lager, in his reports in the months following claimant's surgery, made no mention of pain in claimant's right shoulder. This argument is premised on the assumption that a consequential right shoulder injury would have clearly manifested itself prior to Dr. Hanan's initial examination of the claimant on September 3, 2020. That assumption is not supported by the record. When advised during his testimony that Dr. Lager's reports had made no mention of right shoulder symptoms, Dr. Hanan declined to change his opinion that claimant's right shoulder injury developed as a result of overuse due to her left shoulder injury. Dr. Hanan instead testified “that if someone had an inability to use one extremity and overly using the other extremity it takes two, or three or six months to develop pain in the opposite side, but again, it's just speculation.” While claimant's right shoulder symptoms were not documented until more than seven months after her surgery, they manifested themselves just over three months after she returned to work following the surgery. Thus, Dr. Hanan reasonably and credibly concluded that claimant's right shoulder symptoms are consequential to her left shoulder injury.

Moreover, there is no medical evidence in the record that contradicts Dr. Hanan's opinion. The carrier's consultant, Dr. Selznick, found no causal relationship “between the accident in question and the claimant's right shoulder pain[,]” but did not clearly address the relevant question of whether claimant's right shoulder injury developed consequentially as a result of overuse following her left shoulder injury.

Therefore, the preponderance of the credible evidence in the record supports establishing this claim for a consequential right shoulder injury.

#### CONCLUSION

ACCORDINGLY, the WCLJ decision filed August 17, 2021, is AFFIRMED. No further action is planned by the Board at this time.

Chair - Clarissa Rodriguez

2022 WL 2388892 (N.Y.Work.Comp.Bd.)

---

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.