2022 WL 2189838 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: METER READINGS HOLDING LLC

Case No. G199 1412
Carrier ID No. FAW8219 W054001
June 8, 2022

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Date of Accident 11/14/2017

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 20, 2021.

ISSUE

The issue presented for Mandatory Full Board Review is whether a discretionary penalty of permanent disqualification from receiving lost wage benefits should be assessed against claimant based on his violation of Workers' Compensation Law (WCL) § 114-a(1).

The Workers' Compensation Law Judge (WCLJ) found that claimant violated WCL § 114-a(1), assessed a mandatory penalty disqualifying claimant from receiving benefits from July 25, 2018, to June 23, 2021, and a discretionary penalty permanently disqualifying claimant from receiving further lost wage benefits.

The Board Panel majority modified the WCLJ decision to assess a mandatory penalty disqualifying claimant from receiving benefits from July 25, 2018, to October 29, 2018, and a discretionary penalty equal to the mandatory penalty.

The dissenting Board Panel member would find that claimant did not violate WCL § 114-a(1).

The carrier filed an application for Mandatory Full Board Review on January 19, 2022, arguing that a discretionary penalty should be assessed permanently disqualifying claimant from receiving further lost wage benefits.

The claimant filed a rebuttal on February 3, 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

In a C-3 (Employee Claim) filed February 5, 2018, claimant alleged that he injured his lower back and right leg at work on November 14, 2017, when, while installing a meter, he was chased by a dog and jumped into his van. In a November 17, 2017, report, Dr. Quash diagnosed lumbar sprain and radiculopathy resulting from the November 14, 2017, accident.

In a November 29, 2017, report, Dr. Peretz noted a history of claimant being chased by a dog and twisting his back on November 14, 2017. Claimant complained of low back pain and tingling to his toes, and Dr. Peretz diagnosed low back pain radicular symptoms.

Dr. Epstein, in a report dated November 22, 2017, stated that, according to claimant, "on November 14 he had twisted his back while being chased by a dog. He had pain in the back radiating to his right lower extremity with occasional numbness in the right toes."

In a February 16, 2018, report, Dr. Epstein indicated that claimant complained of right-sided low back pain radiating into his right leg, with some tingling numbness. Dr. Epstein stated that claimant had "been to see a spine surgeon" and had an MRI which revealed herniated nucleus pulposus at L4-L5.

***2** Claimant was examined by the carrier's IME, Dr. Israelski, on May 31, 2018. In his report, Dr. Israelski noted that claimant complained of "right paralumbar sacral spine pain radiating down the right lower extremity." Dr. Israelski diagnosed lumbosacral radiculopathy and found that claimant had a moderate disability and could return to light duty work.

In a June 11, 2018, report, Dr. Cardenas stated that claimant complained of an exacerbation of low back pain, which was 9/10 in severity, and numbness in his toes. Dr. Cardenas found that claimant was temporarily totally disabled.

On June 14, 2018, claimant was involved in an accident in his father's automotive shop. However, medical records of his treatment for the injuries resulting from the June 14, 2018, accident, which included a T12 compression fracture, were not filed with the Board until June 23, 2021.

In a July 25, 2018, report, Dr. Epstein stated:

Patient here for follow-up because of concern about swelling in his low back. He feels soft lumps and bumps in his lower back. He is status post recent T12 burst fracture. Has been wearing a brace ever since and is following with surgery. Has been improving overall. His pain is much improved. Denies any new or recent injury trauma or fall since the accident.

By a decision filed August 2, 2018, this claim was established for injuries to the low back and radiculopathy and claimant's average weekly wage was set at $980.00 per week, without prejudice. Awards were made from February 22, 2018, to July 30, 2018, and continuing at the tentative rate of $490.00 per week. Awards for the period prior to February 22, 2018, were held in abeyance.

Claimant was examined by the carrier's IME, Dr. Israelski, on August 23, 2018. In his report, Dr. Israelski noted that he had previously examined the claimant on February 6, 2018, and May 3, 2018. Claimant had provided a history of injuring his back on November 14, 2017, when he was chased by a dog. According to Dr. Israelski, claimant "has not worked since the injury, has no new precipitant or prior injuries whatsoever." Dr. Israelski noted that he had reviewed Dr. Epstein's July 25, 2018, report "indicating recovery from a possible spinal fracture and suggesting a brace." Dr. Israelski did not otherwise comment on Dr. Epstein's July 25, 2018, report, or claimant's spinal fracture.

In an October 3, 2018, report, Dr. Peretz wrote:

I have not seen [claimant] since February 2018. He said since I saw him last, he did do pain management. He saw a neurosurgeon. He is now working with a podiatrist. He has a footdrop. He is on Neurontin. He is getting an AFO per the podiatrist. This scenario to me makes no sense.

When I saw him last in February 2018, he did have radicular pain; however, he was neurologically intact. He states after the pain management treatments, he states (sic) he developed a footdrop and his pain was worse. I do not understand the history, but again I have not seen him in eight months almost.

***3** Dr. Peretz further stated in his October 3, 2018, report that claimant ""has a dramatic neurologic deficit." Dr. Peretz concluded that claimant "needs a new MRI study and pending the MRI study, if he still has neurologic impingement, he is a surgical candidate; but there are some elements of limited expectations."

At a hearing on October 17, 2018, claimant's counsel advised that claimant had developed foot drop and that there was up-to-date medical evidence in the record indicating that claimant was 100-percent impaired. The WCLJ made awards from July 30, 2018, forward at the tentative rate of $490.00 per week.

In an October 29, 2018, report, Dr. Dholakia noted a history of low back and leg pain which began when claimant was chased by a dog and jumped into a car window. According to Dr. Dholakia, claimant also reported "that he fractured his back 3 months ago. He states that his right leg gave out on him and landed on and (sic) airbag and the airbag popped and he flew 10 feet in the year (sic). He was diagnosed with a burst fracture of the T12 area. He was treated nonsurgically. He denies any pain in that area."

Claimant was examined by the carrier's consultant, Dr. Berezin, on December 4, 2018. In a report dated December 4, 2018, Dr. Berezin noted a history of claimant injuring his back at work on November 14, 2017, when he was chased by a dog and jumped into a car. Dr. Berezin summarized claimant's treatment history and reported that claimant "states that at one point he fell, his right leg gave way, he fell onto an airbag at a gas station sustaining an L1 compression fracture." According to Dr. Berezin, claimant complained of back pain radiating down his right leg, numbness in the leg and foot drop. Dr. Berezin found that claimant had a marked (75%) disability and was limited to sedentary work, but noted that claimant's "subjective findings do not correlate with objective testing that has been performed. He has a long history of complaints and weakness, but there is no atrophy measured." Dr. Berezin recommended that claimant be seen by a neurologist.

Dr. Berezin again examined claimant on May 14, 2019. In his report of that examination, Dr. Berezin indicated that claimant continued to complain of back pain radiating down his right leg and numbness in his right leg. Claimant reported that his back pain was 10/10 at its worst. Claimant indicated that he could stand and walk for only 10 minutes, could sit for approximately 15 or 20 minutes, and did not drive currently. Claimant reported that he does minimal activities and needs assistance dressing and putting on his shoes. Dr. Berezin found that claimant had a marked (75%) disability and could do sedentary work. Dr. Berezin recommended that claimant "undergo a neurology follow up" but found that he had "reached maximum medical improvement from orthopedic care."

At a hearing on May 26, 2020, counsel for the carrier divulged "the existence of surveillance" (Hearing Transcript, 5/26/20, p. 4). Claimant testified that he had not done any work, on or off the books, in the last year, and denied doing any work for A&I Services, which is his father's business. The carrier raised WCL § 114-a(1) and submitted a social media investigation report dated April 8, 2020 (doc. #4000211414). The WCLJ denied the carrier's request to suspend awards and continued the case.

***4** The findings and directions made at the May 26, 2020, hearing, are reflected in a decision filed May 29, 2020. The carrier requested administrative review of that decision, arguing that the WCLJ should have suspended continuing awards based on its offer of proof that claimant violated WCL § 114-a(1). Claimant filed a rebuttal requesting that the WCLJ decision be affirmed.

In addition to the social media investigation report dated April 8, 2020, submitted at the May 26, 2020, hearing, the carrier submitted additional social media investigation reports on June 29, 2020 (doc. #342372641), July 2, 2020 (doc. #342521734), July 7, 2020 (doc. #4000240629 and July 8, 2020 (doc. 4000240930, 4000240932, 4000240939 and 4000240934). These reports include numerous social media posts, some of which depict claimant engaging in a variety of activities, including dancing and being lifted off the ground at his wedding and holding his child, and evidence of what is purportedly claimant's LinkedIn page which lists his profession as "grease monkey at a&I service".

At a hearing on July 8, 2020, testimony was taken of two investigators who performed the social media investigation of the claimant on behalf of the carrier. Following the investigators' testimony, the WCLJ found that the social media investigation materials submitted by the carrier was admissible into evidence and would be considered and denied the carrier's request that ongoing awards be suspended and continued the case for the testimony of the claimant. The WCLJ declined to find that claimant had reached maximum medical improvement and the carrier raised WCL § 28 with respect to a claim for a thoracic spine fracture.

The findings and directions made at the July 8, 2020, hearing, are reflected in a decision filed July 13, 2020. The carrier requested administrative review of that decision, arguing that continuing awards should be suspended based on its offer of proof that claimant violated WCL § 114-a(1). Claimant filed a rebuttal requesting that the WCLJ decision be affirmed.

Claimant testified at a hearing on August 19, 2020, regarding the contents of the social media investigation reports submitted by the carrier. Claimant testified that he thought he had created a LinkedIn profile when he was in middle school. At the completion of claimant's testimony, counsel for the carrier requested that the matter be adjourned so that the carrier could complete its review of claimant's bank records before a finding was made as to whether claimant had violated WCL § 114-a(1). The WCLJ continued the case.

By a decision filed September 24, 2020, the WCLJ found that the record was closed on the question of whether claimant had violated WCL § 114-a(1), directed the carrier to file a position paper by October 16, 2020, and claimant to file a response within 15 days.

In a decision filed October 8, 2020, the Board Panel affirmed the WCLJ decisions filed May 29, 2020, and July 13, 2020, finding that although claimant may ultimately be found to have violated WCL § 114-a(1), the record did not support suspending awards pending a decision on that question. The Board Panel noted that the carrier had failed to submit any evidence from a physician finding that claimant had misrepresented his physical abilities, as contended by the carrier. The Board Panel continued the case.

***5** The carrier filed a position paper on October 14, 2020, contending that claimant should be found to have violated WCL § 114-a(1). The carrier argued, among other things, that the social media investigation materials submitted into the record depict claimant engaged in activities that were inconsistent with the complaints and restrictions that he conveyed to his treating physicians and to the carrier's IME, Dr. Berezin.

Claimant filed a position paper on November 2, 2020, arguing that there was insufficient evidence to support a finding that he violated WCL § 114-a(1).

A hearing was held on November 3, 2020. Although the minutes of the hearing have not been transcribed, the WCLJ issued a decision on November 6, 2020, directing the "[c]laimant to comply with carrier's discovery demands regarding medical records." The WCLJ also indicated that no further action would be taken by the Board in this matter unless requested by the parties.

Claimant was again examined by the carrier's consultant, Dr. Berezin, on December 29, 2020. In his report, Dr. Berezin stated:

He did have an additional accident to his back in June 2019 (sic). He was at his father's auto repair shop and an airbag deployed. He fell back sustained (sic) an L1 compression fracture. He ultimately recovered from that and went to his baseline pain from the accident of 11/14/17. He had a right foot drop.

Dr. Berezin reported that claimant complained of low back pain radiating down his right leg to the bottom of his right foot, which is 8 out of 10 at its worst, and numbness in his right foot. Claimant reported that he tries to avoid driving and is unable to sleep due to his back and leg pain. Claimant stated that he was primarily sedentary and did minimal activities at home. He avoided bending, could stand or walk for only about 10 minutes, could sit for approximately 20 minutes, and reported needing assistance dressing and putting on his shoes. Dr. Berezin stated: "I reviewed the social media report and photos supplied. The photos do suggest the possibility that the examinee is more active than he indicates on my exam of 12/29/20. The photos are suggestive but not definitive." Dr. Berezin concluded: "Therefore I cannot state conclusively that these photos contradict the exam findings and history and his ranking would remain the same."

Dr. Berezin issued an addendum report dated January 13, 2021, in which he clarified that in addition to his November 14, 2017, work-related injury, claimant had also sustained a T12 compression fracture. Dr. Berezin opined that claimant's "current treatment /disability would be apportioned 60% to the accident of 11/14/17 and 40% to the accident of June 2018."

At a hearing on February 23, 2021, counsel for the carrier stated that "claimant was directed to produce a HIPAA so we could look into a subsequent accident, but the HIPAA has not been produced" (Hearing Transcript, 2/23/21, p. 8). Claimant's counsel indicated that a HIPAA release would be provided. Claimant testified that he had not worked since the hearing on July 8, 2020. At the request of the carrier, the WCLJ continued the case for additional testimony of the claimant on the question of whether he violated WCL § 114-a(1). In the resulting decision filed February 26, 2021, the WCLJ directed claimant "to produce HIPAA as previously directed within 15 days."

***6** Claimant testified at a hearing on April 12, 2021, that in June 2018:

I was waiting at my father's place of business for my mother to bring me to a doctor's appointment. And I had, like I have foot drop and I tripped and I, like, lost my balance and I fell. And I hit the corner of the lift. And like there was an air bag on the ground that my father took out of a car and it went off and I hit the ground.

(Hearing Transcript, 4/12/21, p. 4). Claimant testified that the June 2018 accident resulted in "a burst fracture of, I believe, it was my T-12 vertebrae" (id.). He was in the hospital for four days following the accident. On cross-examination, claimant denied participating in any work activities at his father's place of business at the time of his June 2018 injury, or at any time since the accident. He was thrown eight or ten feet when the airbag deployed and believes he lost consciousness. He denied experiencing any increased symptoms in his lower back after the June 2018 accident. He told his primary physician, Dr. Epstein, about the June 2018 accident. He believed he had mentioned the June 2018 accident to Dr. Israelski but was not sure. He told Dr. Berezin about the June 2018 accident when the doctor examined him in December 2018 and May 2019. Following claimant's testimony, the WCLJ continued the case.

On June 23, 2021, the carrier submitted records from Westchester Medical Center of treatment claimant received following his June 14, 2018, accident (doc. #4000562334). In a Discharge Summary dated July 1, 2018, Dr. Feeney stated that claimant "is a 22-year-old mechanic who was repairing a car when the airbag of the car which was outside of the vehicle deployed and hit his back. It send (sic) him spiraling forward and he complained of immediate and severe low back pain" (id., p. 2). Dr. Feeney indicated that claimant had sustained a T12 compression fracture and that he had adequate pain control following placement of a TLSO brace. Claimant was discharged from the hospital and was going to follow up "with the trauma surgery clinic in 2 weeks." A June 14, 2018, Mobile Life Support Services report states that "UPON ARRIVAL FOUND MALE LAYING ON L SIDE IN FETAL POSITION. ACCORDING TO FATHER ON SCENE PT WAS WATCHING HIM REMOVE AN ENGINE OUT OF A CAR WHEN THE AIR BAG ON THE FLOOR WHEN (sic) THE AIR BAG DEPLOYED BEHIND HIM KNOCKING HIM TO THE GROUND" (id., p. 20). In a June 14, 2018, ER report, Dr. Greenblatt stated that claimant "is a 22-year-old Male who presents to the ED via EMS endorsing that he was working on a vehicle, took out an airbag that was attached to the dashboard. Patient relates that the airbag exploded hitting him in the back along with the plastic piece causing LOC" (id., p. 27). The ER report noted that claimant had sustained a "T12 compression fracture with loss of approximately 20% of vertebral height and

retropulsion into the spinal canal approximately 5 mm" (id., p. 29). In a June 15, 2018, consultation report, Dr. Watts stated that claimant "is a 22-year-old-gentleman who was in his father's auto repair shop. While his father was working on a car, he was standing near what was apparently an airbag. There was a box sitting on the floor. Unfortunately, the airbag detonated and the patient was thrown back an estimated 5-8 feet. He had a brief loss of consciousness" (id., p. 39). Dr. Watts indicated that claimant was a good surgical candidate. In a June 16, 2018, note, Dr. Watts indicated that claimant was doing better and was "a reasonable candidate for conservative care" (id., p. 50).

***7** At a hearing on June 23, 2021, the WCLJ reviewed the medical records related to claimant's June 14, 2018, injury and the parties provided summations. The carrier argued that the social media investigation evidence it had submitted established that claimant had participated in work activities and showed him engaging in physical activities inconsistent with his alleged disability, in violation of WCL § 114-a(1). The carrier also argued that claimant violated WCL § 114-a(1) by failing to promptly disclose his intervening injury on June 14, 2018. Claimant's counsel argued that the record did not support a finding that claimant violated WCL § 114-a(1). Claimant's counsel contended that the Board Panel had previously found that the social media investigation evidence produced by the carrier was insufficient to a support a finding that claimant violated WCL § 114-a(1), and that claimant had advised Dr. Dholakia and the carrier's IME, Dr. Berezin, of his June 14, 2018, injury.

After listening to summations, the WCLJ found that claimant had violated WCL § 114-a(1) when he failed to disclose his June 14, 2018, accident to Dr. Epstein, Dr. Isrealski, or Dr. Peretz when examined by those physicians subsequent to June 14, 2018. The WCLJ assessed a mandatory penalty beginning July 25, 2018, the date claimant was examined by Dr. Epstein and failed to disclose his June 14, 2018, accident, and a discretionary penalty of permanent disqualification from receiving further indemnity benefits.

In a decision filed June 29, 2021, the WCLJ found that claimant had violated WCL § 114-a(1), assessed a mandatory penalty disqualifying claimant from receiving wage replacement benefits from July 25, 2018, to date, assessed a discretionary penalty permanently disqualifying him from receiving further indemnity benefits, and found that the carrier has a "recoverable overpayment for all indemnity benefits made on/after 07/25/18."

The claimant filed a request for administrative review arguing that he did advise his physicians and the carrier's IME about the June 14, 2018, accident in his father's shop and that the record does not support the WCLJ's finding that claimant violated WCL § 114-a(1). Claimant further argued that even if the Board Panel affirms the finding that he violated WCL § 114-a(1), the discretionary penalty of permanent disqualification was nonetheless disproportionate.

In rebuttal, the carrier argued that the WCLJ decision should be affirmed.

LEGAL ANALYSIS

Basis for Finding Violation of WCL § 114-a(1)

Although the sole issue raised on Full Board Review is whether a discretionary penalty of permanent disqualification is warranted based on the record, and not whether claimant violated WCL § 114-a(1), it is important to set forth in detail the basis for finding that a violation of WCL § 114-a(1) occurred in order to determine the appropriate penalty.

A violation of WCL § 114-a(1) will be found when, "for the purpose of obtaining compensation pursuant to [WCL § 15], or for the purpose of influencing any determination regarding any such payment, a claimant knowingly makes a false statement or representation as to a material fact...." (WCL § 114-a[1]).

***8** Initially, contrary to the claimant's contention, the Board Panel, in its earlier decision filed October 8, 2020, only addressed the question of whether awards should be suspended pending development of the record on the question of whether claimant had violated WCL § 114-a(1), and did not find that the social media investigation materials submitted by the carrier did not

evidence a violation of WCL § 114-a(1). Subsequently, neither the WCLJ nor the Board Panel ever expressly addressed the question of whether the social media investigation materials support a finding that claimant violated WCL § 114-a(1), and the carrier continues to assert that this evidence shows claimant engaged in physical activities that were inconsistent with his alleged disability and that he was engaged in "work activities," in violation of WCL § 114-a(1). However, nothing in those materials clearly shows that claimant was engaged in work activities in violation of WCL § 114-a(1) and the carrier's own consultant, Dr. Berezin, in his December 29, 2020, report, stated that he had "reviewed the social media report and photos supplied" and could not "state conclusively that these photos contradict the exam findings and history and his ranking would remain the same." Therefore, the social media investigation material submitted by the carrier do not support a finding that claimant violated WCL § 114-a(1)

Nonetheless, the evidence in the record related to the accident claimant suffered on June 14, 2018, at his father's automobile repair shop, and his resulting injuries, does support a finding that claimant violated WCL § 114-a(1). Claimant testified on May 26, 2020, that he had not done any work for his father's business, A&I Services. Claimant testified on April 12, 2021, that he had not engaged in any work activities at his father's shop at any time since his work accident, including when he was injured at the shop on June 14, 2018. Claimant testified on April 12, 2021, concerning the June 14, 2018, accident:

I was waiting at my father's place of business for my mother to bring me to a doctor's appointment. And I had, like I have foot drop and I tripped and I, like, lost my balance and I fell. And I hit the corner of the lift. And like there was an air bag on the ground that my father took out of a car and it went off and I hit the ground.

Several of the reports of claimant's treatment at Westchester Medical Center following the June 14, 2018, accident contain a history of the accident. In a Discharge Summary dated July 1, 2018, Dr. Feeney stated that claimant "was repairing a car when the airbag of the car which was outside of the vehicle deployed...." In a June 14, 2018, ER report, Dr. Greenblatt stated that claimant "presents to the ED via EMS endorsing that he was working on a vehicle, took out an airbag that was attached to the dashboard. Patient relates that the airbag exploded hitting him in the back...." A June 14, 2018, Mobile Life Support Services report states claimant was found lying in the fetal position and that his father reported claimant was watching the father remove an engine out of the car when the air bag deployed, striking claimant. In a June 15, 2018, consultation report, Dr. Watts stated that claimant "was in his father's auto repair shop. While his father was working on a car," an airbag detonated, injuring claimant.

***9** It is the opinion of the Full Board that the preponderance of the credible medical evidence in the record supports a finding that claimant was working in his father's automobile repair shop at the time of the June 14, 2018, accident, and that his testimony that he was simply visiting his father's shop and waiting to be taken to a doctor's appointment at the time of the accident is incredible and constitutes an intentional misstatement of a material fact for the purpose of securing workers' compensation benefits, in violation of WCL § 114-a(1).

Even if the Board elects to credit claimant's testimony that he was not working, and was merely visiting his father's shop at the time of the June 14, 2018, accident, the record still supports a finding that claimant violated WCL § 114-a(1). Claimant testified on April 12, 2021, that the June 14, 2018, accident was caused by his drop foot, stating: "I have foot drop and I tripped and I, like, lost my balance and I fell. And I hit the corner of the lift. And like there was an air bag on the ground that my father took out of a car and it went off and I hit the ground." However, none of the medical reports prior to the June 14, 2018, accident make any mention whatsoever of claimant suffering from a drop foot. The first mention of a drop foot was several months later, in the October 3, 2018, report by Dr. Peretz, who stated:

He has a footdrop. He is on Neurontin. He is getting an AFO per the podiatrist. This scenario to me makes no sense. When I saw him last in February 2018, he did have radicular pain; however, he was neurologically intact. He states after the pain management treatment, he states (sic) he developed a footdrop and his pain was worse. I do not understand the history, but again I have not seen him in eight months almost.

Claimant did not disclose his intervening June 14, 2018, accident to Dr. Peretz. Nor did claimant disclose his June 14, 2018, accident when he was examined on July 25, 2018, by Dr. Epstein, who noted in his report that claimant "[d]enies any new or recent injury trauma or fall since the accident[[,]" or to the carrier's IME, Dr. Israelski, who examined claimant on August 23, 2018, and stated in his report that claimant "has not worked since the injury, has no new precipitant or prior injuries whatsoever." Claimant's failure to disclose his intervening June 14, 2018, accident to Dr. Epstein, Dr. Peretz, or Dr. Israelski clearly constitutes material misrepresentations in violation of WCL § 114-a(1). Although, as noted by the dissent, claimant advised Dr. Epstein on July 25, 2018, that he had sustained a T12 burst fracture, the claimant did not advise Dr. Epstein that the cause of the injury was a significant intervening accident at his father's auto repair shop which resulted in his hospitalization.

Discretionary Penalty

Neither party requested Full Board Review of the mandatory penalty assessed by the Board Panel majority disqualifying claimant from receiving benefits from July 25, 2018, to October 29, 2018, and the only issue before the Full Board is whether a discretionary penalty of permanent disqualification is warranted based on the record.

***10** Pursuant to the authority granted by WCL § 114-a(1), the Board has the discretion to disqualify a claimant from receiving any future wage replacement benefits. However, "the penalty imposed may not be disproportionate to the underlying misconduct (Matter of Harp v New York City Police Dept., 96 NY2d 892 [2001])" (Matter of Kodra v Mondelez Intl., Inc., 145 AD3d 1131 [[2016]). In support of a determination that this onerous penalty is warranted, the Board must provide an explanation that the underlying deception was egregious or severe, or there was a lack of mitigating circumstances (Kodra, 145 AD3d 1131 [2016]).

In the present matter, the record supports imposing a discretionary penalty of permanent disqualification based on claimant's intentional and egregious misrepresentations. As discussed above, the record supports a finding that claimant lied under oath on multiple occasions concerning whether he worked at his father's auto repair shop following his work injury, and in particular at the time of his June 14, 2018, accident. Even if claimant was not working and was merely visiting his father's shop at the time of the June 14, 2018, accident, the record still supports a finding that claimant lied under oath on April 12, 2021, when he testified that the June 14, 2018, accident was caused by his drop foot, a condition which was not mentioned in the medical record until many months later. Finally, claimant failed to disclose his June 14, 2018, accident to Dr. Epstein, Dr. Israelski or Dr. Peretz when examined by the doctors in the months following the accident. That claimant was later forthcoming to other physicians about his June 14, 2018, accident does not at all mitigate his failure to disclose the accident to Dr. Epstein, Dr. Israelski or Dr. Peretz.

Therefore, the preponderance of the credible evidence in the record supports a finding that claimant's material misstatements, which include lying under oath before the Board, were sufficiently serious and egregious to warrant the imposition of a discretionary penalty pursuant to WCL § 114-a(1) permanently disqualifying claimant from receiving further lost wage benefits.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed June 29, 2021, is MODIFIED to assess a mandatory penalty disqualifying claimant from receiving benefits from July 25, 2018, to October 29, 2018, but is in all other respects affirmed. The case is closed.

Chair - Clarissa Rodriguez

2022 WL 2189838 (N.Y.Work.Comp.Bd.)

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