2022 WL 17078440 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: ABATAR LLC

Case No. G247 1466
Carrier ID No. LDF01800 W999002
November 2, 2022

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The Full Board, at its meeting held on October 18, 2022, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed June 17, 2022.

ISSUES

The issues presented for Mandatory Full Board Review are:

1) whether the carrier raised new issues or attempted to introduce new evidence in its application for Board review;

2) whether claimant violated WCL § 114-a; and

3) if so, whether mandatory and discretionary penalties should be assessed.

The Workers' Compensation Law Judge (WCLJ) found that claimant did not violate WCL § 114-a.

The Board Panel majority affirmed the WCLJ decision, found that the carrier raised a new issue and attempted to introduce new evidence in its application for Board review, and declined to address the issue, or consider the evidence.

The dissenting Board Panel member would find that claimant violated WCL § 114-a and would assess a mandatory penalty disqualifying him from receiving benefits from September 26, 2019, to December 21, 2021, and a discretionary penalty permanently disqualifying him from receiving further lost wage benefits.

The carrier filed an application for Mandatory Full Board Review on July 15, 2022, arguing that claimant should be found to have violated WCL § 114-a by failing to disclose his employment as a driver subsequent to his accident, and that the questionnaires attached to the reports of its IMEs were not "new evidence" and should be considered by the Board.

The claimant filed a rebuttal on August 2, 2022, arguing that the decisions of the WCLJ and Board Panel majority should be affirmed.

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

FACTS

On February 9, 2019, claimant, an Uber driver, was injured in a motor vehicle accident. At the time of the accident, claimant was concurrently employed in a maintenance position at a school district. Claimant brought this claim for workers' compensation benefits, which has been established for injuries to the neck, back, left shoulder, and right knee, as well as a third-party action seeking to recover damages for the injuries he sustained in the February 9, 2019, motor vehicle accident.

Claimant was examined by the carrier's chiropractic consultant, Dr. Kim, on September 26, 2019. In his report, Dr. Kim stated that claimant complained of pain in his neck, low back, left shoulder, and right knee, which he rated as eight out of ten in severity. Claimant reported that he could walk six city blocks before he was in too much pain, had difficulty with stairs, and could sit for 30 minutes before being in too much pain. According to Dr. Kim, the examination of claimant's neck and back "demonstrated no objective positive findings." Concerning claimant's occupational status, Dr. Kim wrote:

***2** At the time of the accident, the claimant was employed part-time with Uber. He reports that he missed work following the accident 'until current.' The claimant states he had been as a school maintenance staff [sic] for the past 7 years. Currently, he is not working.

In a questionnaire attached to Dr. Kim's report, claimant answered "No" to whether he had a new job. The questionnaire contains a handwritten note that claimant had been working for the school district for the past seven years.

On October 23, 2019, claimant was examined by the carrier's orthopedic consultant, Dr. Passick. In his report, Dr. Passick noted that claimant complained of pain in his neck, low back, left shoulder, and right knee, which he rated as eight out of ten in severity. Claimant reported that he could walk six city blocks and sit for 30 minutes before being in too much pain, and that his pain was "worsened by driving." According to Dr. Passick, there were no objective findings upon examination of claimant, who displayed "blatant symptom magnification." Dr. Passick stated that, according to claimant, "his daily activities include 'drive my son to school, therapy, and go to my full time job.'" Dr. Passick noted that claimant missed time from work as an Uber driver following the accident and was not currently working as an Uber driver. In a questionnaire attached to Dr. Passick's report, claimant answered "No" to whether he had a new job.

At a hearing on November 20, 2019, claimant's attorney argued that reduced earnings awards should be made based on claimant's lost time from work as an Uber driver. Claimant testified that at the time of his accident on February 9, 2019, he was working for both Uber and for the school district. He had been working for the school district for seven or eight years and that was where he made his "main living" (Hearing Transcript, 11/20/19, p. 6). He only missed one day of work from the school district as a result of the accident. Claimant's attorney asserted that although claimant "can't drive, he still maintains those expenses on the vehicle" (p. 12). Claimant testified that he continued to make payments on his vehicle, maintain commercial insurance on the vehicle, and renew "the inspection on the vehicle for TLC every three months" (p. 13). The WCLJ set claimant's concurrent

average weekly wage (AWW) with the school district at $1, 141.19 and continued the case for further development of the record on the questions of claimant's primary AWW, which had previously been tentatively set at $250.00, and awards. The findings made at the November 20, 2019, hearing are reflected in a decision filed November 25, 2019.

At a hearing on February 6, 2020, claimant testified that he never returned to work for Uber after his February 9, 2019, accident. He only lost one day of work from the school district as a result of the accident. He was in another motor vehicle accident on August 28, 2019, injuring his left knee, left elbow, and left wrist. Claimant's attorney indicated that claimant's primary AWW could remain at $250.00. On cross-examination, claimant testified that he advised Dr. Kim and Dr. Passick of his August 28, 2019, motor vehicle accident when they examined him. He stopped working for Uber because, after the accident, he could not sit for too long with his knee bent, and "it was actually better for [him] to actually be walking and standing up" (Hearing Transcript, 2/6/20, p. 13). Claimant stated:

***3** When you're working for Uber, you have to work, you know, long hours to make money. And I couldn't just - I couldn't sit down for too long. It felt too uncomfortable. I would get this sharp pain on my knee and a real sharp pain on my left shoulder. And then of course my neck and back you know.

(pp. 13-14). Claimant testified that his orthopedist recommended that he undergo surgery and told him that "once you get the surgery, you could definitely get better and then you could get back to working the taxi business, you know. So I said all right" (p. 14).

Following claimant's testimony, the WCLJ made awards from February 10, 2019, to October 23, 2019, at the tentative reduced earnings rate of $166.67 per week, held awards from October 23, 2019, forward in abeyance, and approved a fee of $910.00 to claimant's attorney. The carrier's attorney took exception to awards. The carrier's attorney argued that claimant should be found to have violated WCL § 114-a, and that it was the carrier's "position that the IME doctors had no knowledge of any subsequent motor vehicle accident and there's no mention of it in the reports" (p. 28). The WCLJ responded:

I am going to find no violation of Section 114-a based on the claimant's testimony today that there were no overlapping sites of injury. Given the lack of overlapping sites of injury, I don't think he had to tell the IMEs about any subsequent accident, not to mention the fact that the claimant says he did tell the IMEs. But I think that without the lack of overlap [sic], telling the IMEs is not necessary.

(id.). The carrier's attorney did not object to the WCLJ's finding that claimant did not violate WCL § 114-a. The findings and awards made at the February 6, 2020, hearing are reflected in a decision filed February 10, 2020.

The carrier requested administrative review, arguing that claimant's primary AWW should be set at $70.81, rather than $250.00 as previously found, and that the record did not support the award of reduced earnings benefits.

In rebuttal, claimant's attorney requested that the WCLJ decision be affirmed and that his fee be increased from $910.00 to $2, 000.00.

In a decision filed June 8, 2020, the Board Panel modified the WCLJ's February 10, 2020, decision to set claimant's primary AWW at $68.48 and his overall AWW at $1, 209.67, and to make awards from February 10, 2019, to October 23, 2019, payable at the reduced earnings rate of $45.65 per week. The Board Panel noted that in 2018, claimant reported gross earnings from Uber of $13, 374.00, and a net profit of $3, 682.00 after expenses were deducted, and a net profit from Uber of $420.48 in the first six weeks of 2019 prior to his accident.

Awards were subsequently made from October 23, 2019, to January 8, 2021, and continuing at the rate of $45.65 per week.

Claimant was examined by the carrier's orthopedic consultant, Dr. Weiss, on January 23, 2021. In his report, Dr. Weiss found that claimant had reached maximum medical improvement and agreed with the opinion of claimant's treating physician that claimant's left shoulder and right knee injuries were amenable to schedule loss of use (SLU) awards. In a questionnaire attached to Dr. Weiss's report, there are handwritten notations stating "working as supervisor for board of education" and "not driving since accident."

***4** Pursuant to a stipulation between the parties, claimant was awarded a 20% SLU of the left arm and a 15% SLU of the right leg in a decision filed June 17, 2021. The decision also approved a fee of $9, 784.26 to claimant's attorney and noted that claimant had settled his third-party action with the carrier's consent for $30, 000.00 and received a net recovery of $14, 755.99.

The carrier filed an RFA-2 (Request for Further Action by Carrier/Employer) on July 15, 2021, alleging that "claimant was working as a driver when he testified he was not working". In a letter to the Board dated August 23, 2021, counsel for the carrier requested that a hearing be scheduled to consider whether claimant violated WCL § 114-a.

On October 8, 2021, the Board received 25 pages of documents submitted by the carrier (Doc. ID #363625144). Included in those documents was a copy of the police accident report (MV-104) concerning claimant's February 9, 2019, motor vehicle accident, and a response by the New York City Taxi and Limousine Commission (TLC) dated June 10, 2021, to a Freedom of Information Law request by the carrier for claimant's trip records from February 9, 2019, forward.

The TLC records reflect that claimant drove 193 for-hire-vehicle (FHV) and high-volume FHV (FHVHV) trips in the 39 days immediately prior to his February 9, 2019, accident. The TLC records further reflect that claimant continued to drive FHV and FHVHV trips after his February 9, 2019, accident as follows: 57 trips between February 12 and February 28, 2019; 156 trips in March 2019; 0 trips in April 2019; 207 trips in May 2019; 149 trips in June 2019; 189 trips in July 2019; 166 trips in August 2019; 86 trips in September 2019; 115 trips in October 2019; 103 trips in November 2019; 140 trips in December 2019; 80 trips in January 2020; 108 trips in February 2020; 225 trips in March 2020, 366 trips in April 2020; 286 trips in May 2020; 158 trips in June 2020; 297 trips in July 2020; 191 trips in August 2020; 116 trips in September 2020; 150 trips in October 2020; 137 trips in November 2020; 130 trips in December 2020; 0 trips in January 2021; 77 trips in February 2021, and; 193 trips in March 2021.

At a hearing on October 21, 2021, counsel for the carrier argued that the TLC records show "that claimant was actually working when he said he was not" (Hearing Transcript, 10/21/21, p. 3), and that claimant should therefore be found to have violated WCL § 114-a. Claimant's attorney argued that the record did not show that claimant made any false statements. Claimant's attorney stated:

My understanding is that [claimant], only after an inquiry was made most recently, did inform me that he had picked up some part-time work for a car service, although he was not able to do the work he was previously doing with Uber, based upon his injuries.

He would have - and he made substantially less money. He would have been receiving a diminished income award, regardless.

***5** (p. 4). Claimant's attorney further argued that no harm was done to the carrier because it received a lien recovery and a credit from the proceeds of the settlement of claimant's third-party action, and that claimant's "statements to the Board [were] not about working in general," (p. 5), but were only about "working for Uber" (id.). After hearing arguments by counsel, the WCLJ continued the case for claimant's testimony.

Claimant testified at a hearing on December 21, 2021, that, after his February 9, 2019, accident, he performed work for "a company called BQN" as a driver (Hearing Transcript, 12/21/21, p. 3). He worked for BQN "part time only when I was physically able to do so and for short periods of time" (pp. 3-4). He did not make as much money working for BQN as he had working for Uber. When asked why he was able to drive for BQN but not for Uber following his accident, claimant responded:

With BQN - you know - with Uber, I had to drive for long periods of time. And for BQN, it was more part time, you know, on-call, you know, when I was physically able to do so and for a short period of time. You know, I only worked there when I will felt [sic] good - when I was okay to work.

(p. 4). He was not physically able to work for Uber after the accident because Uber required him "to work for long periods of time and you have to commit to working X amount of time, and it was just beginning to be too much for me" (id.). Regarding his testimony at the February 6, 2020, hearing, claimant stated:

I was only asked about working for Uber and the school district, which I answered truthfully. I always said that I wasn't working for Uber. I was never asked if I was working for another company. And if I was asked, I would have said I was working for BQN. But I was never asked.

(p. 6). On cross-examination, claimant testified that he was not sure when he started to work for BQN, but that it might have been a few weeks after his February 9, 2019, accident. He did not work for BQN before the accident. He was still working for BQN at the time of the hearing.

After listening to claimant's testimony and summations by the parties, the WCLJ found that claimant did not violate WCL § 114-a. That finding is reflected in a decision filed December 24, 2021.

The carrier requested administrative review, arguing that claimant should be found to have violated WCL § 114-a and the case returned to the trial "calendar for a determination on mandatory and discretionary penalties." The carrier argued that the claimant violated WCL § 114-a by failing to disclose that he was working for BQN to the Board and the carrier, as well as in questionnaires that he filled out when he attended IME examinations on September 26, 2019, October 28, 2019, and January 23, 2021.

In rebuttal, claimant argued that the carrier was attempting to introduce new evidence with its application for administrative review without an accompanying affidavit explaining why the evidence could not have been produced before the WCLJ, and that the carrier was making a new argument for the first time in its application for review: that claimant violated WCL § 114-a by failing to disclose that he was working for BQN in questionnaires that he completed at three IME examinations. Claimant further argued that the record supports the WCLJ's finding that he did not violate WCL § 114-a, noting that he only testified that he had not returned to work for Uber following his accident, which was true, but was never asked if he worked as a driver for BQN or any other entity. Claimant also asserts that the handwritten notes on the IME questionnaires attached to the reports of Dr. Kim and Dr. Weiss were written by the doctors, not the claimant, and that the questionnaires, even if considered, do not support a finding that he violated WCL § 114-a.

LEGAL ANALYSIS

***6** New Evidence - New Issues

The Board will deny review of any issue that was not raised before the WCLJ, and which is raised for the first time in a party's application for review (see Matter of ESS Technologies USA Inc., 2022 NY Wrk Comp G2476512; Matter of Pinacie Environmental, 2022 NY Wrk Comp G3109844; Matter of NYCT, 2022 NY Wrk Comp G2332561). There is, however, a distinction between an "issue" that is not raised before the WCLJ, and an "argument" in support of a party's position with respect to an issue which was not articulated before the WCLJ. Here, the issue in dispute was whether claimant violated WCL § 114-a, which was clearly raised before the WCLJ, and was not a new "issue" raised for the first time on appeal. Although the carrier did not argue before the WCLJ that the IME questionnaires completed by the claimant were evidence that he violated WCL § 114-a, there is nothing that prohibits a party from making additional arguments, or citing additional evidence in the record, that is relevant to an ""issue" raised before the WCLJ, in its application for review. Counsel routinely expand upon, amplify, and bolster arguments made at the underlying hearing in an application for review, and are not required to expressly articulate every argument, or cite to every piece of relevant evidence, at the hearing in order to preserve the argument for appeal.

In addition, the IME questionnaires cited in the carrier's application for review were in the record at the time of the hearing where the WCLJ found that claimant did not violate WCL § 114-a and were clearly not "new evidence." Therefore, those questionnaires, and the carrier's argument that they support its assertion that claimant had violated WCL § 114-a, should have been considered by the Board Panel.

Violation of WCL § 114-a

WCL § 114-a (1) provides, in relevant part:

If for the purpose of obtaining compensation pursuant to section fifteen of this chapter, 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, such person shall be disqualified from receiving any compensation directly attributable to such false statement or representation. In addition, as determined by the board, the claimant shall be subject to a disqualification or an additional penalty up to the foregoing amount directly attributable to the false statement or representation.

The failure of a claimant who is receiving lost wage benefits to disclose to the Board and the carrier that he has returned to work has frequently been the basis of a finding that claimant has violated WCL § 114-a (see Matter of Angora v. Wegmans Food Markets, Inc., 171 AD3d 1419 [2019]; Matter of Hadzaj v. Harvard Cleaning Service, 77 AD3d 1000 [2010], lv denied 16 NY3d 702 [2011]; Matter of Fighera v New York City Dept. of Envtl. Protection, 303 AD2d 861 [2003], lv denied 100 NY2d 514 [2003]).

***7** Here, the TLC records reflect that claimant drove 193 trips, presumably through Uber, in the 39 days immediately prior to his February 9, 2019, accident. The TLC records further reflect that claimant continued to frequently and consistently drive trips after his February 9, 2019, accident, presumably through BQN, with his first trip after the accident being on February 12, 2019. In many months following his accident, claimant drove over 100 trips per month, and during a three-month period from March to May of 2020, claimant drove 225, 366, and 286 trips per month, while receiving lost wage benefits. Claimant did not disclose to the Board or the carrier that he had been driving for BQN until the hearing on October 21, 2021, after the carrier had submitted the TLC records and raised WCL § 114-a based on those records.

The claimant's failure to disclose the significant, regular work he was performing as a driver for BQN following his February 9, 2019, accident, while he was receiving lost wage benefits based on his purported inability to drive for Uber, constitutes a clear violation of WCL § 114-a. That claimant denied that he had a new job in the questionnaires he filled out when examined by Dr. Kim and Dr. Passick provides additional support for the conclusion that claimant was willfully concealing his earnings from working for BQN in an effort to obtain lost wage benefits.

WCL § 114-a Penalties

Because the WCLJ found that claimant did not violate WCL § 114-a, the question of appropriate penalties was never addressed. WCL § 114-a (1) provides that a mandatory penalty must be imposed which disqualifies the claimant "from receiving any compensation directly attributable to such false statement or representation...." Here, given the substantial work that claimant performed for BQN following his February 9, 2019, accident, it is possible, if not likely, that claimant would have either been entitled to none of the lost wage benefits he received, or received awards at a reduced rate. However, the benefits claimant received which were based on his purported reduced earnings were subsequently subsumed into the SLU awards made by stipulation between the parties. It is well settled that an SLU award is not based on claimant's actual lost time from work or reduction in earnings (see Landgrebe v Westchester County, 57 NY2d 1 [1982]). Thus, even if claimant had promptly disclosed his earnings with BQN and found not to be entitled to an award based on an actual reduction in earnings, he would still be entitled to SLU awards based on the anatomical or functional losses or impairments resulting from his injuries (see Matter of

Fuller v NYC Transit Authority, 202 AD3d 1189 [2022]). Therefore, the SLU awards received by claimant were not ""directly attributable" to claimant's failure to disclose his earnings and a mandatory penalty is not warranted.

However, the Full Board finds that a discretionary penalty of permanent disqualification from receiving further lost wage benefits is warranted. 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]).

***8** Here, within days of his February 9, 2019, accident, claimant began regularly driving for BQN, and continued to drive regularly and frequently for BQN. He testified on February 6, 2020, that he was unable to continue driving for Uber due to his compensable injuries but failed to disclose that he was currently driving for BQN. Claimant failed to disclose that he was driving for BQN until after he was confronted with the TLC records obtained by the carrier, and testified on December 21, 2021, that he only drove for BQN "part time only when I was physically able to do so and for short periods of time." However, the TLC records indicate that claimant regularly drove well over 100 trips per month for BQN, contradicting his testimony that his work for BQN was infrequent and limited. Given claimant's misleading testimony and failure to disclose his significant work for BQN, the Full Board finds that a discretionary penalty of permanent disqualification from receiving further lost wage benefits is supported by the record.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed on December 24, 2021, is REVERSED. The Full Board finds that claimant violated WCL § 114-a and imposes a discretionary penalty of permanent disqualification. No further action is planned by the Board at this time.

Clarissa Rodriguez

2022 WL 17078440 (N.Y.Work.Comp.Bd.)

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