

2022 WL 17078559 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: DELTA AIR LINES INC

Case No. G259 7178

Carrier ID No. 301934766690001 W112502

November 15, 2022

\*1 Indemnity Ins. of N America  
P.O. Box 5122  
Scranton, PA 18505-0554  
Cipriani & Werner PC  
Woodbridge Corporate Plaza  
485 (E) Route 1  
South Iselin, NJ 08830  
Date of Accident 9/11/2019

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 May 23, 2022.

#### ISSUES

The issues presented for Mandatory Full Board Review are:

- (1) whether claimant's lost time from November 12, 2020, forward was causally related to her disability; and
- (2) whether claimant violated [WCL § 114-a](#).

The Workers' Compensation Law Judge (WCLJ) found that claimant did not violate [WCL § 114-a](#) and made awards from November 12, 2020, to November 24, 2021, and continuing at the temporary total disability rate of \$363.33 per week.

The Board Panel majority rescinded the WCLJ decision without prejudice and returned the case to the trial calendar for further development of the record on the questions of claimant's wage loss and whether she violated [WCL § 114-a](#), directing that the carrier produce documentary evidence of claimant's suspension and termination.

The dissenting Board Panel member would affirm the WCLJ decision.

The claimant filed an application for Mandatory Full Board Review on June 17, 2022, arguing that the WCLJ decision should be affirmed. Claimant contends that “[t]he carrier had ample time to produce documentation of the claimant's alleged suspension and termination, and should be precluded from producing it at this point in the case.”

The carrier filed a rebuttal on July 15, 2022, arguing that the record supports a finding that claimant's wage loss from November 9, 2020, forward was not causally related, and that she violated [WCL § 114-a](#).

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

## FACTS

On September 11, 2019, claimant, a customer service agent at an airline, slipped and fell at work. This claim is established for injuries to claimant's right knee, elbow, and wrist. Claimant returned to work at full wages on August 10, 2020.

In a report based on an August 17, 2020, examination, Maha Komal, a physician's assistant (PA) for Dr. Ceja, stated that claimant "is working full duty, tolerates well." According to PA Komal, claimant reported that she had not experienced pain in her right elbow, wrist, or hand since May 2020, but continued to have intermittent knee pain ("2 -3/10"), with "'cracking', 'locking', worse with walking and climbing stairs."

In a report based on a November 12, 2020, examination, Rianne Karmin, a PA for Dr. Ceja, stated:

Patient is working full duty with severe pain. She states her employer has made her now push customers in wheelchairs throughout her day working at the airport. This has worsened her right wrist, right hand, and right knee pain. She states she can't work anymore, due to her worsening pain, and needs to rest.

\*2 According to PA Karmin, claimant reported on November 12, 2020, that "[h]er right knee pain is 8/10, constant, 'cracking', 'locking', radiating to her posterior right knee, worse with walking, climbing stairs, and pushing customers at work in wheelchairs." PA Karmin found that claimant was temporarily totally disabled.

Claimant did not appear at a hearing held on February 25, 2021, and the WCLJ made awards to August 10, 2020, when claimant returned to work, held awards after August 10, 2020, in abeyance, and indicated that no further action was planned by the Board (see Notice of Decision filed March 2, 2021).

A hearing was subsequently scheduled for August 12, 2021, to address a C-4AUTH (Attending Doctor's Request for Authorization) filed by one of claimant's treating providers, which had been denied by the carrier. At the August 12, 2021, hearing, claimant's attorney advised that claimant was "out of work as of November 12, 2020" (Hearing Transcript, 8/12/21, p. 2), and requested that the WCLJ "address awards" (id.). The carrier's attorney argued that claimant had been suspended and subsequently terminated by the employer, and that her wage loss was not causally related. The WCLJ continued the case for the testimony of the claimant and a witness for the carrier.

At a hearing on November 24, 2021, the claimant testified that she returned to work in August 2020. She stopped working again in November 2020 "[b]ecause it was the jet bridges it's too much. My knee started acting up again and my wrist was - opening the doors and everything with the aircraft" (Hearing Transcript, 11/24/21, p. 4). When asked if she informed her employer that she stopped working due to her knee and [wrist injuries](#), claimant responded that she "contacted Sedgwick, yes" (id.). Her doctor took her out of work in November 2020.

On cross-examination, claimant was asked: "So, ma'am, your testimony here today, is the only reason that you went out of work sometime in November of 2020 was because you had increased amount of pain; is that right?" (p. 6). Claimant responded, "Yes. Ahah" (id.). She was then asked: "You didn't go out of work, at all, because there was anything - any incident of employment or being suspended from work for other reasons; none of that?" (id.). Claimant responded, "No" (id.) Claimant again testified that her hand and knee began to hurt as a result of assisting passengers in wheelchairs.

The employer's Senior Human Resources Manager for the Northeast testified that claimant returned to work on August 10, 2020, following her accident. Claimant was suspended from work on November 9, 2020, after an investigation into a "'performance error," whereby claimant placed a passenger on an incorrect flight which "sent him instead of to Boston airport in Massachusetts, sent him to an airport in Mexico" (p. 11). The incident occurred on October 28, 2020. Claimant was "suspended pending employment review on November 9, 2020" (id.). Claimant was ultimately terminated January 7, 2021, as a result of the incident.

\*3 On cross-examination, the Senior Human Resources Manager testified that there is documentation regarding the dates to which he testified. He testified that claimant's job duties did not change in October and November of 2020. Claimant "had remained a Customer Service Agent the entire time with the same job duties" (p. 13-14). Claimant's job duties as a Customer Service Agent included transporting passengers in wheelchairs on and off aircraft. He did not know who claimant's direct supervisor was. The last day claimant worked was November 8, 2020, and she was suspended without pay as of November 9, 2020. If an employee had to go out of work due to a work-related injury, they would notify their team leader and file documentation with Sedgwick.

Following testimony, the parties provided summations. Claimant's attorney argued that claimant stopped working due to her causally related disability. Counsel for the carrier argued that claimant stopped working because she was suspended and therefore her wage loss was not causally related, and that she violated [WCL § 114-a](#). The WCLJ initially found that the testimony of the employer's Senior Human Resources Manager was "very credible" (p. 23). Nonetheless, the WCLJ found that claimant's lost time beginning November 2020 was causally related to her compensable disability, noting that claimant continued to be employed by the employer until January 7, 2021. The WCLJ further found that claimant did not violate [WCL § 114-a](#) because "the question that the claimant was asked today was just a little bit too general under the circumstances" (p. 24). When asked by the WCLJ why no documentary evidence regarding claimant's suspension and termination had been submitted into the record, the carrier's attorney responded that the employer's internal legal department had not approved the release of the relevant documents, but he was still attempting to obtain that evidence. The WCLJ again stated that the employer's witness was very credible, but "wished that he had supplied at least minimal documentation" (p. 30). The WCLJ stated that "[b]ased upon the lack of documentation to support the otherwise credible testimony of the employer's witness, I find that the claimant went out of work due to her injuries as supported by the 11-12-2020 medical in the file" (p. 33). The WCLJ made awards from November 12, 2020, forward at the temporary total disability rate of \$363.33 per week. The findings and awards made at the November 24, 2021, hearing are reflected in a decision filed December 2, 2021, and a supplemental decision filed December 17, 2021.

The carrier requested administrative review, arguing that claimant's wage loss from November 9, 2020, forward was not causally related, and that she violated [WCL § 114-a](#).

In rebuttal, claimant argued that the WCLJ decision should be affirmed. Claimant emphasized that the carrier failed to produce any documentary evidence regarding claimant's suspension or termination and failed to produce claimant's direct supervisor who would have direct knowledge of whether claimant knew about her suspension, or reported that she was having issues performing her job duties.

## LEGAL ANALYSIS

### Documentary Evidence

\*4 The employer's Senior Human Resources Manager testified that claimant was suspended without pay on November 9, 2020, following an investigation of a work performance error, and was ultimately terminated on January 7, 2021, following an employment review. The WCLJ who heard the witnesses found the testimony of the employer's Senior Human Resources Manager to be very credible. That testimony alone is sufficient to support a finding that claimant was suspended by the employer as of November 9, 2020, even in the absence of corroborating documentary evidence.

When a party is directed to produce specific documentary evidence, the Board can draw a negative inference based on the party's failure to produce that evidence (see *Matter of Turner v New York City Department of Juvenile Justice*, 159 AD3d 1236 [2018]; *Matter of Wiess v Arcelor Mittal*, 96 AD3d 1175 [2012]). Here, however, the WCLJ never directed the carrier to produce documentary evidence of claimant's suspension and termination and there is no basis to draw any inference from its failure to produce that evidence, or to question the credibility of the employer's witness.

Therefore, based on the credible testimony of the employer's Senior Human Resources Manager, the Full Board finds that claimant stopped working on November 9, 2020, because she was suspended for cause.

#### Causally Related Lost Time

When a claimant stops working due to factors other than her work-related disability, she bears the burden of demonstrating that her disability contributed to her continued unemployment (Matter of [Woodworth v Clifton Springs Hosp.](#), 35 AD3d 1062 [2006]; Matter of [Gross v BJ's Wholesale Club](#), 29 AD3d 1051 [2006]). Here, claimant last worked on November 8, 2020, and was suspended and stopped working on November 9, 2020, for reasons other than her work-related injury. Although PA Karmin subsequently found claimant to be temporarily totally disabled, the record supports a finding that claimant's loss of wages was not due to her causally related disability (see Matter of [Garcia v. MCI Interiors, Inc.](#), 173 A D3d 1575 [2019]; Matter of [Bacci v. Staten Is. Univ. Hosp.](#), 32 AD3d 582 [2006]). Moreover, that PA Karmin's opinion was based on claimant's subjective complaints immediately following her suspension, undermines the credibility of that opinion.

#### 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.

\*5 Here, claimant was asked during cross-examination whether she went out of work due to “any incident of employment or being suspended from work for other reasons[ , ]” to which claimant responded, “No.” However, the credible evidence in the record reflects that claimant last worked November 8, 2020, and was suspended by her employer on November 9, 2020. Therefore, the record supports a finding that claimant made a material misstatement of fact in violation of [WCL § 114-a](#), when she denied going out of work because she was suspended by her employer.

#### [WCL § 114-a](#) Penalties

Because the WCLJ found that claimant did not violate [WCL § 114-a](#), the question of appropriate penalties was never addressed. Because no awards have been made after November 24, 2021, the date of claimant's testimony that she did not stop working because she was suspended by her employer, it is clear that claimant did not receive any benefits that are directly attributable to that material misstatement. Therefore, a mandatory penalty is not warranted based on the record. However, this matter is remitted to the trial calendar for further development of the record on the question of the appropriate discretionary penalty to be assessed pursuant to [WCL § 114-a](#).

#### CONCLUSION

ACCORDINGLY, the WCLJ decision filed on December 2, 2021, is REVERSED and the WCLJ supplemental decision filed December 17, 2021, is RESCINDED. The Full Board finds that claimant's lost time beginning November 9, 2020, was not causally related to her disability and to find that she violated [WCL § 114-a](#). The Full Board further finds that a mandatory penalty pursuant to [WCL § 114-a](#) is not warranted based on the record and the case is continued for further development of the record on the question of the appropriate discretionary penalty to be assessed pursuant to [WCL § 114-a](#).

Chair - Clarissa Rodriguez

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