

2022 WL 12804728 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: JONATHAN ARNOLD INC

Case No. G193 8895

Carrier ID No. E9W7513 W212252

October 18, 2022

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Date of Accident 5/11/2017

The Full Board, at its meeting held on September 20, 2022, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed April 28, 2022.

#### ISSUE

The issue presented for Mandatory Full Board Review is whether claimant reattached to the labor market.

The Workers' Compensation Law Judge (WCLJ) found claimant reattached to the labor market as of April 1, 2021.

The Board Panel majority modified the WCLJ decision to find that claimant did not reattach to the labor market, and to rescind awards from April 1, 2021, forward.

The dissenting Board Panel member would affirm the WCLJ decision.

The claimant filed an application for Mandatory Full Board Review on May 4, 2022, arguing that he has demonstrated his reattachment to the labor market because he “has engaged in a diligent work search and the record is replete with proof of his ongoing schooling.” Claimant contends that his efforts to obtain employment were sufficient to demonstrate his reattachment, “especially in light of the fact that the work search efforts have taken place in the middle of a global pandemic.”

The carrier filed a rebuttal on June 3, 2022, arguing that the record supports the finding of the Board Panel majority that claimant has not reattached to the labor market. The carrier argues that claimant did not make a good faith job search, did not demonstrate active participation with Workforce1 or a similar agency, and did not submit documentation corroborating his testimony that he is taking classes.

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

#### FACTS

Claimant filed a C-3 (Employee Claim) on June 1, 2017, reporting that he sustained multiple injuries on May 11, 2017, carrying a door, while working as an “installer helper.” By a decision filed December 27, 2017, this claim was established for injuries to claimant's lumbar spine and left shoulder, his average weekly wage was set at \$562.50, and awards were made.

In a decision filed June 6, 2018, the WCLJ amended the claim to include injuries to claimant's neck and left knee, and consequential depression, and directed continuing awards.

At a hearing on December 6, 2019, the carrier raised the issue of labor market attachment. By a decision filed February 11, 2020, the WCLJ amended the claim to include a consequential left [ankle injury](#) and directed the carrier to suspend awards because claimant had “not produced documentation of work search.”

After hearing claimant's testimony and considering documentary evidence of his job search efforts, the WCLJ, in a decision filed July 28, 2020, found that claimant had reattached to the labor market as of March 1, 2020, and made awards from that date forward at the rate of \$187.50 per week. The carrier requested administrative review, and in a decision filed November 3, 2020, the Board Panel found that claimant had not reattached to the labor market and rescinded awards from March 1, 2020, forward.

\*2 On June 1, 2021, claimant submitted documentary evidence of his attempts to reattach to the labor market (doc. ID 357516654, 357516657, 357516656 and 357516655). These documents include: a copy of claimant's resume; a request for job search/training assistance to Hempstead Works; evidence that various Workforce1, One Stop and other job location services were closed due to COVID-19 as of June 2020; evidence that claimant enrolled in an ESOL class on January 8, 2021; an email dated August 31, 2020, indicating that claimant had registered with Workforce1 and that Workforce1 Career Centers were currently closed; documentation of jobs for which claimant applied online via ZipRecruiter between March 2020 and February 2021; and evidence that claimant applied to ACCES-VR for vocational rehabilitation services in November 2020.

On August 18, 2021, claimant underwent a posterior [spinal fusion](#) with the implantation of instrumentation at L5-S1.

Claimant also submitted documentary evidence of his attempts to reattach to the labor market on August 31, 2021 (doc. ID #361820855), October 21, 2021 (doc. ID #4000693110), and at a hearing on October 27, 2021 (doc. ID 4000699709 and 4000699706), much of which was duplicative of what he had previously submitted.

Claimant testified via an interpreter at a hearing on October 27, 2021, that he used ZipRecruiter to assist him in his job search. He applied for various jobs, including as a mobile dog groomer, dog walker, pet sitter, and carpenter. He attempted to obtain assistance from Workforce1 and Hempstead Works to obtain employment, but government offices “require that you have a doctor's note that says that you can work minimum 20 hours. So when I couldn't do that they told me that I needed to have a note, but that they would be in contact with me to let me know” (Hearing Transcript, 8/27/21, p. 7). Claimant testified that he obtained a job at a call center, but “they did an English test, and the English test was not satisfactory. And, also, I need a [GED], and 90 percent English” (id.). He took classes to learn English and computer classes, but did not seek to obtain a GED “because the costs are too high” (p. 8). He takes classes two hours per night, three nights per week. He also takes “classes for electronic repairs” six hours per day (p. 9).

On cross-examination, when asked if he had applied for any jobs in December 2020 or January 2021, claimant responded, “Yes, but I remember they didn't apply, they didn't give me those jobs because I applied for carpentry” (p. 10). When asked whether he was able to work as a carpenter, claimant responded, “No, but I didn't know what I could do, so I apply for carp - carpentry, and they told me that that was incorrect” (id.). When asked what jobs he applied to in February 2021, claimant stated, “Well, what I have here in my notes, carpentry, and like doorbell man, but, you know, again, they told me that that that was incorrect” (id.). When asked whether it was true that he was not physically able to perform those jobs, claimant stated, “That is correct, the attorney never told me what types of, of jobs I can apply. I had a lot of problems with that attorney. And I applied to what I thought would be correct” (p. 11). When asked whether he continued to apply for jobs he was physically unable to perform from May through July of 2021, claimant responded that he did not, and that he had talked to his doctor and “knew what I

can do and I started applying to answer phones, like a call center” (id.). He could not work at a call center because he could not speak English but did not know that until he “took the test to be able to work at a call center” (p. 12). Claimant testified that “if you guys are forcing me to look for work, I'm doing what you guys are asking me to do” (p. 14). He is taking classes to learn to repair cellphones and computers. These courses are eight months long and began in April 2021. He will obtain a certificate if he successfully completes the classes.

\*3 After listening to claimant's testimony and summations by the parties, the WCLJ found that claimant had reattached to the labor market as of April 1, 2021, when he “started taking classes in English, and in electronics repair, and cellphone repair” (p. 24). The WCLJ found that claimant had no compensable lost time from October 30, 2020, to April 1, 2021, made awards from April 1, 2021, forward at the rate of \$375.00 per week, and approved a fee of \$2, 000.00 to claimant's attorneys. The findings and awards made at the October 27, 2021, hearing are reflected in a decision filed November 1, 2021.

The carrier requested administrative review, arguing that the record does not support a finding that claimant reattached to the labor market.

In rebuttal, claimant argued that the record supported a finding that he made a bona fide search for work and that the WCLJ decision should be affirmed.

## LEGAL ANALYSIS

Reattachment to the labor market can be demonstrated by credible documentary evidence showing that the claimant is actively seeking work, within medical restrictions, through an independent job search that is timely, diligent, and persistent; is actively participating in a job location service such as (1) New York State's Department of Labor's re-employment services, (2) One-Stop Career Centers, or (3) a job service commonly utilized to secure work within a specific industry; is actively participating in vocational rehabilitation through Adult Career and Continuing Education Services Vocational Rehabilitation (ACCES-VR) f/ k/a VESID or other board approved rehabilitation program; is actively participating in a job retraining program; or is attending an accredited educational institution full time to pursue employment within the work restrictions (Matter of American Axle, 2010 NY Wrk Comp 80303659).

Active participation at a One-Stop Career Center means calling for an appointment, attending an orientation session, meeting with a One-Stop counselor to develop a resume, registering a resume in the One-Stop system, maintaining contact with the One-Stop Career Center to determine whether there were any job matches, and following up on all job referrals and matches (id.).

At a minimum, if the independent job search is in person, documentary evidence should provide the day, month, and year of the contact; the name and address of the employer; the name and telephone number of the person with whom employment was discussed; the type of job sought; and the response of the potential employer. If the contact was written, copies of the resume submitted if any; the inquiry letter or e-mail communication; or the application completed is necessary along with the day, month, and year submitted, the nature of employment sought, name and address of the employer and the response of the potential employer (id.).

Here, the documentary evidence of claimant's independent job search shows that the great majority of documented job applications the claimant submitted occurred in August and September 2020, and very few after that date. Moreover, claimant testified that he had applied for jobs he was physically incapable of performing, or not qualified for based on his lack of proficiency in English. Therefore, the record does not demonstrate that claimant made a timely, diligent, and persistent independent job search.

\*4 Claimant was previously found to have voluntarily removed himself from the labor market, and failed in his initial attempt to demonstrate reattachment, well before the COVID-19 pandemic began. Claimant did not register with Workforce1 until after the COVID-19 pandemic had begun, at which point the offices of Workforce1 were no longer open and he was unable

to actively participate with that organization. Therefore, his mere registration with Workforce1 was insufficient to demonstrate his reattachment to the labor market.

Claimant also testified that he had been taking ESOL, computer and cellphone repair classes several hours per day since April of 2021. However, claimant did not produce any documentary evidence of his participation in those classes prior to the October 27, 2021, hearing, making it impossible to make a reasoned determination whether those classes satisfied the requirements of American Axle.

Therefore, the Full Board finds that the question of whether claimant reattached to the labor market as of April 2021 will be held in abeyance pending the production of documentary evidence of claimant's participation in classes from April 1, 2021, forward. The claimant is directed to produce documentary evidence regarding his participation in ESOL, computer and cellphone repair classes beginning in April of 2021, which includes a detailed description of the content of those classes, how often the classes met and for how long, the duration of each course (the dates the course began and ended), the institution offering the classes, and evidence of claimant's participation in and successful completion of those courses. Claimant is to produce such evidence within 30 days of the filing date of this decision. Once that evidence is submitted to the Board, claimant will have the opportunity to testify regarding the evidence and his participation in the classes, and the carrier will have the opportunity to cross-examine the claimant.

#### CONCLUSION

ACCORDINGLY, the WCLJ decision filed on November 1, 2021, is RESCINDED and the matter continued for further development of the record on the question of whether claimant reattached to the labor market as of April 1, 2021. The case is continued.

Clarissa Rodriguez  
Chair

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