



Inside Workers Comp NY

The insiders view of the New York State Workers Compensation Board
by a former Commissioner and Member of the Board

Posted as a service of: www.INSIDEWORKERSCOMPNY.COM

The New York State Workers Compensation Board periodically publishes those decisions which it reaches after a review of the full board of commissioners at its monthly meetings. As these are maintained on the Board's website for only a short period of time, InsideWorkersCompNY is posting them to its website where these decisions will be available anytime in the future. Any comments or suggestions should be sent to: TheInsider@InsideWorkersCompNY.com.

Matter of Intrepid USA Healthcare Services

Case # G0024768

Date of Accident: 5/19/08

District Office: Hauppauge

Employer: Intrepid USA Healthcare Svcs.

Carrier: ACE American Insurance Co.

Carrier ID No.: W019004

Carrier Case No.: C375C754922-3

Date of Filing of Decision: 4/13/10

Claimant's Attorney: Dell, Little, Trovato & Vecere

Panel: Robert E. Beloten

The Full Board, at its meeting held on March 16, 2010, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed on August 26, 2009.

ISSUE

1. Whether the claimant sustained an accident arising out of and in the course of her employment on May 19, 2008; and
2. If so, whether the claimant's late notice to the employer should be excused under Workers' Compensation Law (WCL) § 18.

The Workers' Compensation Law Judge (WCLJ), by a decision filed April 6, 2009, established the case for an injury to the claimant's right shoulder. Following an application for Board Panel review by the carrier, the Board Panel majority reversed, finding that the claimant was not credible and that no accident occurred, whereby the claim was disallowed. The dissenting Board Panel member would have affirmed the WCLJ. The dissent found that the claimant credibly testified regarding her work-related injury and that late notice should be excused, as there was no prejudice to the employer.

On September 24, 2009, the claimant filed a request for Mandatory Full Board Review

In her application for Full Board Review, the claimant asserts that her testimony regarding the happening of the accident was credible; that the employer conceded that the accident occurred; and that the only issue that should have been addressed is whether the claimant's late notice should be excused. In addition, the claimant contends that the late notice should be excused, as there was no prejudice to the employer.

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

FACTS

The first documents filed in this matter were the forms C-2 and C-7 filed by the carrier on January 16, 2009. On the form C-2, the employer indicated that the claimant, a registered nurse, had reported injuring her right shoulder at 4:00 p.m. on May 19, 2008, while playing football with a patient. The employer further indicated that the claimant had not lost any time from work due to the injury, and that the injury was first reported to the employer on January 9, 2009 (i.e., almost eight months later). On the form C-7, the carrier controverted the claim on various grounds, including accident arising out of and in the course of employment, and notice under WCL § 18.

On January 22, 2009, the carrier submitted a copy of the claimant's job description, as well as the physical requirements of the position. It is noted that, although the duties listed are quite numerous and fairly specific, there is no mention of engaging in recreational activities with patients. However, one of the duties does require "interact[ing] with clients and families to meet individual physical, psychosocial, and spiritual needs."

The first medical report was filed with the Board on January 23, 2009, for the initial examination performed by Dr. Stuart Cherney, an orthopedist, on January 14, 2009. The form C-4 indicated that the claimant reported injuring her shoulder by lifting a patient at work on May 19, 2008, and diagnosed causally related bursitis and adhesive capsulitis. In the attached narrative, Dr. Cherney elaborated that the claimant had been experiencing right shoulder pain for several months, which had started while lifting a patient at work. The X-rays were negative; the claimant was noted to be in pain; the physician found a marked limitation in range of motion; and the physician found a positive impingement sign.

The claimant also filed her form C-3 on January 23, 2009. On this form, the claimant indicated that her job required her to participate in daily life activities with patients, including entertainment; that she was throwing a football with her patient on May 19, 2008, when she "threw the football hard" and her right shoulder/upper arm started hurting; that her patient (a minor) witnessed the accident; that she did not seek treatment until January 5, 2009 (with Dr. Anthony Antonucci); and that she did not inform the employer of the injury until January 13, 2009. It is noted that no reports from Dr. Antonucci were filed with the Board.

The claimant was examined by the carrier's orthopedic consultant, Dr. Robert Moriarty, on March 11, 2009. In his resulting report, Dr. Moriarty noted the history of the accident reported by the claimant (i.e., throwing a football "farther and farther" with a child patient and experiencing a "sharp pain" in the right shoulder); noted that the claimant attempted to self-treat for a period of time, but that her shoulder kept getting "stiffer"; indicated that the claimant eventually sought treatment with Dr. Antonucci, who prescribed physical therapy, but that she was put on a home exercise plan when she told the physician that her private insurance did not cover physical therapy; noted that the claimant did not inform Dr. Antonucci that the injury was work-related; and indicated that the home exercises only aggravated her condition, whereby the claimant sought treatment with Dr. Cherney. The claimant complained of very sharp pain, was afraid to use her arm for fear of pain, and indicated that her injury interfered with most activities of daily living.

Upon examination, Dr. Moriarty found a sprain/strain and adhesive capsulitis, which were causally related "if the history is accurate."

On March 20, 2009, Dr. Cherney submitted an "amended" report for his initial examination from January 14, 2009. In this new version of his report, the physician corrected the accident history as follows: "It should be noted that the original [injury] occurred while the patient was working with a child and throwing a football. After several throws she experienced a sharp pain in her right shoulder."

At the hearing held on April 1, 2009, the claimant testified as follows: She provides private duty home care for children. On May 19, 2009, she was throwing a football with her patient, and the patient kept asking her to throw it farther and farther, but she had to stop because she "thought [her] shoulder hurt." She did not seek treatment following the incident, or tell anyone at work "because I didn't want to make an issue...I was concerned about my work record [with respect to workers' compensation]...I was ignorant that it would be a problem if I had to [report it] later on." She thought that she would get better, based upon prior strains that she has had. However, it continued to hurt when she made certain movements, particularly when she had to lift things at work. The first time that she mentioned the injury to a medical professional was when she told her primary care physician on January 5, 2009, when she was there for other health issues. She later sought treatment from Dr. Cherney, an orthopedist, on January 14, 2009, because she then felt that she "should really have this checked out." She told the employer of the accident in between these two medical appointments. The child patient was aware of the injury because he laughed at her, and the father may have been aware, as he was in and out of the house.

Upon cross-examination, the claimant indicated that she had been caring for the patient in question since July of 2003. He has a tube in his trachea, which requires constant monitoring. She works from 7:00 a.m. to 5:00 p.m., with some overnights. One of her jobs is to keep him awake, because he has to go on a vent when he sleeps. She keeps him moving because "otherwise I have to watch him carefully, if he's just sitting there." The accident date provided was an estimate, based upon what she remembered, since she did not write anything down when it happened. When asked why she did not report the incident after the injury continued to give her problems, she indicated that she thought that resting would "take care of it." When asked again why she let so many months pass without telling anyone, she indicated that she was concerned about her record, since "if you have anything on your record with Workers' Compensation, you're not as employable." She was also concerned about her employer's reaction, although she has since been "pleasantly surprised" by how nice the employer has acted. It was not until one day when she was unable to lift something that she decided to use her nursing skills and test her range of motion. When she realized that she had a deficit on the right side, it "hit" her that resting may not be the best solution. She believes that she told Dr. Antonucci how she injured her shoulder, but acknowledged that the visit was paid through her regular insurance because she was primarily there for unrelated health issues. She also believes that she gave Dr. Cherney the correct history initially, and that she asked him to fix his report when she saw that it was incorrect.

The employer's office manager, Jean C., testified on April 1, 2009, as follows: She first learned of the accident on January 9, 2009. The claimant called her after going through the employee manual

and seeing that she needed to report injuries. She tried to recreate events with the claimant to pinpoint the accident date, and they ended up with the May 19, 2008 date. She believed the claimant to be a truthful person. It would not be unreasonable for the claimant to engage in some "fun things" with her patient during the day. The patient is able to speak, but she did not know if anyone ever asked him to confirm the claimant's story. The claimant never lost any time from work and the employer has not received any doctor's notes. The claimant continues to work with the patient in question.

At the conclusion of the testimony, the carrier raised the issue of notice, asserting that the claimant provided late notice, that the claimant did not seek prompt medical treatment, and that the claimant did not prove a lack of prejudice. The WCLJ found the claimant to be credible, and found no prejudice to the employer by the late notice, as the claimant has not lost any time from work, the claimant fully discussed the matter with the employer, and the employer has had a sufficient opportunity to investigate, as the patient still uses the employer's services. As a result, the WCLJ established the case for a right shoulder injury, authorized the MRI testing being requested by Dr. Cherney, and resolved the outstanding form C-8.1 issues for the providers. The carrier subsequently appealed, again asserting that the case should be disallowed pursuant to WCL § 18.

LEGAL ANALYSIS

Accidental Injury

The testimony of the claimant and the employer's lay witness support a finding that it would have been entirely reasonable for the claimant to have been playing catch with a football with her patient on the alleged date of injury. Although her patient had a serious health issue, he was ambulatory and the nature of his condition appears to have required physical activity. Furthermore, the testimony of the employer lay witness clearly indicated that the claimant was considered to be an honest person, and that the lay witness worked closely with the claimant to identify the exact date of the injury. Although the claimant was unsure of the exact date, she did provide significant detail regarding how the date was determined: it was after the patient's parents had opened their pool for the season (confirmed by the father to be May 11, 2008) and prior to both the death of the patient's uncle and Memorial Day (May 26, 2008).

At the underlying hearing at which the claimant and the employer's lay witness testified, the carrier's representative effectively conceded the occurrence of the injury, and controverted the claim solely on the basis of late notice.

Based upon the foregoing, the Full Board finds claimant was a credible witness and that the claimant had a work-related accident on May 19, 2008.

WCL § 18 Notice

WCL § 18 provides that written notice of an injury for which compensation is payable shall be given to the employer within 30 days after the accident causing such injury. In the present case, it is undisputed that the claimant did not provide timely written notice of the May 19, 2008 accident to the employer within 30 days.

However, the failure of a claimant to give timely written notice under WCL § 18 may be excused by the Board if any one of the following conditions applies: (1) the claimant had a sufficient reason for the failure to provide timely written notice; (2) the employer had actual knowledge of the accident; or (3) the employer was not prejudiced by the lack of notice.

Late written notice can be excused on the grounds that claimant had a sufficient reason for failing to provide timely written notice "if a claimant was not aware of the seriousness or causal connection of an injury to employment" (Matter of Peters v Putnam Hospital Center, 146 AD2d 834 [1989]; see also Matter of Blain v Emsig Manufacturing Corp., 249 AD2d 602 [1998]). In the present case, it is clear that the claimant, who is a registered nurse, was aware from the outset that there was a causal connection between her work and her injury, and that her symptoms continued from the time of her injury in May 2008, until she first sought treatment and provided notice in January 2009. Claimant's testimony that she initially believed her injury would go away on its own may explain why she waited almost eight months before seeking medical treatment, but it does not constitute a sufficient reason for her failure to provide timely notice. Claimant's testimony suggests that her failure to provide timely notice was intentional and was based on her unwarranted concern that reporting the injury would have a negative affect on her work record.

Finally, claimant argues that her untimely notice should be excused on the ground that it did not result in any prejudice to the employer. The burden of showing that the delay in reporting an injury has not been prejudicial to the employer is on the claimant (Matter of Dempster v United Parcel Service, 280 AD2d 722 [2001]; Matter of Hosie v NY Telephone Co., 60 AD2d 715 [1977]; Matter of Klausner v S&T Delicatessen, 41 AD2d 798 [1973]; Matter of Choudhury v Brooklyn Hebrew Home & Hospital, 46 AD2d 954 [1974]). When the Board excuses the claimant's failure to provide timely notice, it must articulate its reasons for doing so (Matter of Ross v New York Tel. Co., 59 AD2d 815 [1977]). The Board's "mere naked statement of 'no prejudice' is not sufficient" (Matter of Wesser v House of Good Shepherd, 37 AD2d 1005 [1971]). A lack of prejudice may be found when the claimant receives prompt medical treatment and the employer is not impeded in its investigation of the claim (Matter of Keegan v Kraft, Inc., 195 AD2d 775 [1993]; Matter of Pierce v New York Telephone Company, 99 AD2d 898 [1984]).

Here, claimant did not seek medical treatment until almost eight months after her injury and has not introduced any evidence showing that her failure to seek prompt and appropriate medical treatment did not cause her condition to deteriorate, to the prejudice of the employer. Therefore, claimant has not met her burden of providing that her late notice did not prejudice her employer.

Therefore, the Full Board finds that claimant's late notice to the employer cannot be excused.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed on April 6, 2009, is MODIFIED to find that this claim is barred by WCL § 18 based on claimant's failure to provide timely notice. Therefore, this claim is disallowed.