



Inside Workers Comp NY

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

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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 Silipos, Inc.

Case # 80801128

Date of Accident: 1/4/08

District Office: Buffalo

Employer: Silipos, Inc.

Carrier: Travelers Indemnity Co.

Carrier ID No.: W212252

Carrier Case No.: 015-CB-CDY0552-F

Date of Filing of Decision: 4/13/10

Claimant's Attorney: Sanford Clark

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 September 17, 2009.

ISSUE

The issue presented for Full Board Review is whether the claimant has voluntarily withdrawn from the labor market.

In a decision filed on April 30, 2009, the Workers Compensation Law Judge (WCLJ), in pertinent part, found that the claimant was attached to the labor market and made awards.

The Board Panel majority affirmed the WCLJ, finding sufficient credible evidence in the record to conclude that the claimant had made a reasonable and sincere job search, whereby she remained attached to the labor market.

The dissenting Board Panel member found that the claimant had not made a good faith search for work within her restrictions.

In its application for Full Board Review, the carrier asserts that the Board Panel decision is not supported by either the facts or the law.

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

FACTS

By form C-669 filed on January 28, 2008, the carrier accepted this claim for injuries sustained on January 4, 2008, when the claimant slipped and fell at work, and indicated that the payment of compensation had begun as of January 9, 2008.

The MRI studies performed on the claimant's lumbar spine on April 1, 2008, revealed a herniated disc at L5-S1 with impingement upon the thecal sac, and a minor bulging disc at L5-L5. The MRI studies performed on the claimant's cervical spine on April 17, 2008, revealed a herniated disc at C5-C6, with slight impingement upon the thecal sac.

The claimant's attending physician, Dr. Komal Chandan, completed a "Current Abilities Form" for the carrier on February 11, 2008, and March 20, 2008, indicating that the claimant was unable to return to work in any capacity.

The carrier had the claimant examined by its consulting physiatrist, Dr. David Miller, on April 28, 2008. In his resulting report, Dr. Miller noted that the claimant complained of intense pain in the low back, with some radiation into her right leg; neck stiffness and soreness; diminished rotation of the neck; headaches; and no problems with the left hand. However, upon examination, Dr. Miller found no causally related neck injury and no causally related left shoulder injury; diagnosed a causally related lumbar strain and left wrist strain; found that the claimant exaggerated/fabricated her complaints of pain; opined that the claimant had reached maximum medical improvement; found no disability; and opined that the claimant could return to work without restrictions. In an addendum subsequently filed on May 23, 2008, Dr. Miller opined that the claimant had no disability as a result of any neck injury that may have occurred on January 4, 2008.

At the hearing held on July 16, 2008, the WCLJ established the case for low back, neck, and left wrist injuries; set the average weekly wage at \$622.00; made awards; directed the carrier to continue payments at a moderate rate of \$207.33 per week; and referred the claimant for a vocational rehabilitation evaluation.

On September 12, 2008, the claimant was examined by Dr. Romanth Waghmarae, a pain specialist. Dr. Waghmarae found decreased extension of the neck, and decreased range of motion in the back; noted that the claimant complained of intense pain upon palpitation of the lower back, and diffuse muscular pain in the neck and back; noted the positive diagnostic testing results; found a marked partial disability; and recommended a treatment plan.

On September 16, 2008, Dr. Chandan examined the claimant and indicated in the resulting form C-4 that she remained totally disabled.

At the hearing held on September 18, 2008, the WCLJ made an award for the period from July 17, 2008, to September 19, 2008, at a moderate partial disability rate of \$207.33 per week, and directed the carrier to continue payments at the same rate.

On October 14, 2008, Dr. Chandan examined the claimant and indicated in the resulting form C-4.2 that she was 100% disabled due to pain (which was so intense that it made the claimant

nauseous), tenderness in the back, and a decrease in range of motion.

The claimant was reexamined by Dr. Waghmarae on November 7, 2008, who disagreed with the opinion of the carrier's consultant that the claimant was "faking"; indicated that the claimant had genuine issues in her cervical spine; and found that the claimant had a marked disability.

On November 11, 2008, Dr. Chandan examined the claimant and indicated in the resulting form C-4.2 that she was still 100% disabled due to both neck and back pain, which had increased since his last examination.

At the hearing held on November 24, 2008, the WCLJ made an award for the period from September 19, 2008, to November 25, 2008, at a moderate partial disability rate of \$207.33 per week, directed the carrier to continue payments at the same rate, and referred the claimant for a vocational rehabilitation evaluation.

On December 5, 2008, the Board received a copy of a summary report of the functional capacity examination (FCE) performed at St. Mary's Hospital (at the carrier's request) on October 22, 2008. In this report, the claimant was noted to have given "near full physical effort"; the claimant was found to have a minor inconsistency regarding her perception of her lower extremity abilities; the claimant's mobility was assessed over the course of 3.5 hours; the claimant was found to be able to work in a full sedentary position (primarily sitting, with some walking and standing for brief periods) with light physical demands (i.e., up to 20 pounds occasionally and up to 10 pounds frequently); and additional physical therapy was recommended.

On December 16, 2008, and January 13, 2009, Dr. Chandan examined the claimant and indicated in the resulting form C-4.2 that she was still 100% disabled. Dr. Waghmarae subsequently found the claimant to have a marked disability on January 16, 2009.

In a letter filed on January 21, 2009, VESID advised the claimant that it was unable to take any action upon her referral for vocational rehabilitation services because her treating physician continued to find her to be totally disabled. According to the letter, VESID requires that an injured worker's attending physician must release that worker to participate in VESID's programs.

At the hearing held on March 16, 2009, the WCLJ made an award from November 25, 2008, to March 17, 2009, at the moderate rate of \$207.33 per week; directed the carrier to continue payments at the same rate; directed the carrier to audit the claimant's mileage and transportation expenses; noted that the carrier raised the issue of labor market attachment; and continued the case for testimony.

On March 3, 2009, Dr. Chandan examined the claimant and again indicated in the resulting form C-4.2 that she was still 100% disabled.

The claimant was reexamined by Dr. Waghmarae on March 27, 2009, who continued to find that the claimant had a marked disability.

At the hearing held on April 29, 2009, the claimant testified as follows: She continues to treat with both her primary care physician, Dr. Chandan, and her pain management specialist, Dr. Waghmarae, for the injuries she sustained at work on January 4, 2008. Dr. Chandan continues to indicate that she is 100% totally disabled from both her prior job and any other jobs; however, as soon as he clears her to work she intends to contact VESID again. Dr. Waghmarae has also informed her that she cannot return to work yet. Her doctors have restricted her from pushing, pulling, lifting, squatting, and bending. However, she has attempted to look for work within those restrictions. After the first few attempts, when she just picked prospective employers out of the phonebook, she began looking for work primarily in the local newspapers. She has kept a list of the places that she has contacted for employment since she was advised that it was required on March 18, 2009 (ECF Doc ID #151592754). She contacted prospective employers by fax (letter) and e-mail. Her letters and e-mails advised the employers of her 75% disability and asked if they had any positions that met her restrictions. She also included a resume. She has made approximately five contacts a day. She did not know whether any of the employers actually had a job that would meet her restrictions when she contacted them. She did not perform any follow-up, did not submit any actual applications, received very few replies (usually just receipt acknowledgements or that the employer had no openings that met her restrictions), and did not receive any offers of employment.

At the conclusion of the claimant's testimony, the WCLJ found that the claimant remained attached to the labor market, brought awards up-to-date at the moderate rate of \$207.33 per week, directed the carrier to continue payments at the same rate, and designated the case for no further action. The carrier duly noted its exception and filed a timely application for review of the WCLJ decision subsequently filed on April 30, 2009.

LEGAL ANALYSIS

"[I]t is now settled that [w]here a claimant has a permanent partial disability but there has been no finding of involuntary retirement, the claimant has an obligation to demonstrate attachment to the labor market with evidence of a search for employment within medical restrictions" (Matter of Hare v Champion Intl., 50 AD3d 1254 [2008], lv dismissed 11 NY3d 863 [2008] [citations omitted]). Likewise, a claimant who is temporarily partially disabled must also demonstrate an attachment to the labor market to be entitled to continuing compensation benefits (see Matter of Bacci v Staten Island Univ. Hosp., 32 AD3d 582 [2006]). A partially disabled person need only seek employment within his or her medical restrictions (Matter of Sanchez v Consolidated Edison Co. of N.Y., Inc., 40 AD3d 1153 [2007]) and for which he or she is qualified (see Matter of St. Francis Constr. Co., 2009 NY Wrk Comp 30705539).

Attachment to the labor market can be demonstrated by credible documentary evidence showing that a claimant is actively seeking work within the 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 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).

In the present case, the claimant's attending physicians have consistently found her to be either totally disabled (Dr. Chandan) or partially disabled to a marked degree (Dr. Waghmarae). While the carrier did have the claimant examined by a consultant, this examination took place on April 28, 2008, a year prior to the period of awards now in question, and is now stale. The only other medical evidence in the record is the FCE performed at the carrier's request on October 22, 2008, which found that the claimant could work a sedentary job, but only with significant weight restrictions. Thus, although the WCLJ has made all of the awards subsequent to May 6, 2008, at a moderate partial disability rate, the opinions of Dr. Chandan and Dr. Waghmarae, the positive diagnostic test results, and the FCE results all indicate that the claimant has at least a moderate to marked partial disability.

It should further be noted that, despite the claimant's inability to return to her prior job, her significant disability, and Dr. Chandan's continual findings of a total disability, the claimant testified that she nevertheless attempted to look for work starting in March of 2009, once she learned at the March 16, 2009, hearing that it was required. The claimant's testimony was taken only six weeks later, at which time she presented a seven-page listing of employers that she had contacted, either via fax or e-mail. The claimant testified that she was initially a little uncertain as to how to proceed with a job search, and started with the phonebook, but she soon ended up looking in the newspaper for open positions. Although the claimant did not keep any of the newspaper advertisements to which she responded, she testified that she contacted Erie Niagara, the Statler, the Ramada Inn, and a company that was looking for a receptionist. Her log confirms that she contacted these entities, as well as several other businesses. Although the claimant's handwriting in her log is often illegible, the other discernible businesses listed include Ataria, NWC MC, a maintenance company, an apartment complex, several health care entities, the American Institute of Consumer Studies, Catholic Charities, two realty companies, a hospitality company, Old Fort Niagara, the Buffalo Marriott, a group home, Metro Mattress, at least two medical groups, a dry cleaners, a law firm, and a coffee house. Therefore, the claimant has submitted sufficient documentary evidence to find that she has made a timely, diligent, and persistent search for work within her restrictions.

In addition, the record reflects that claimant has evidenced a desire to participate in vocational rehabilitation with VESID, but that VESID has declined the claimant's request for services because it is their "policy that you must be released by your physician in order to participate in services."

The claimant testified that her employment inquiries included a notice that she could only perform a light duty job due to her disability. While the carrier asserts that this is proof that the claimant's job search efforts were insincere, such an approach was entirely appropriate and constituted evidence upon which it could be concluded that there was a causal relationship between the claimant's disability and her failure to find work (see *Matter of Boyle v Gatti*, 40 AD2d 1063 [1972]). Although the carrier relies upon *Matter of Griffs Auto Service*, 2008 NY Wrk Comp 70300840, the claimant in that case was a mechanic who primarily applied only for mechanic positions which he already knew that he was physically unable to perform with his medical

restrictions. In the present case, the claimant testified that she contacted numerous different types of employers, and that she did not know the physical requirements of most of the positions prior to sending her letter and resume. As a result, it cannot be concluded that the claimant's efforts were insincere.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed on April 30, 2009, is AFFIRMED. No further action is planned by the Board at this time.