

2024 WL 2713473 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: IRVING CONSUMER PRODUCTS INC

Case No. G304 6039

Carrier ID No. A00396616 W020507

May 2, 2024

*1 Date of Accident 10/06/2021

MANDATORY FULL BOARD REVIEW FULL BOARD MEMORANDUM OF DECISION

RULING

The Full Board, at its meeting held on April 16, 2024, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed on November 16, 2023.

ISSUE

The issue presented for Mandatory Full Board Review is whether claimant violated [WCL § 114-a](#) and if so, whether a discretionary penalty was disproportionate to the misconduct.

The Workers' Compensation Law Judge (WCLJ) found that claimant did not violate [WCL § 114-a](#), and found no [WCL § 114-a\(3\)\(i\)](#) penalty should be assessed against the carrier.

The Board Panel majority reversed, finding that the claimant violated [WCL § 114-a](#). The Board Panel majority assessed a mandatory penalty relative to a specific period of awards, and a discretionary penalty of a lifetime bar.

The dissenting Board Panel member would find that claimant did not violate [WCL § 114-a](#).

The claimant filed an application for Mandatory Full Board Review arguing that there should be no finding of a [WCL § 114-a](#) violation “where a claimant candidly testified with respect to his activities and earnings and there is no evidence that the claimant testified falsely.” The claimant contends that he did not misrepresent his abilities to his medical providers; that he merely made a mistake when he testified that the reason he stopped working was because the employer was unable to accommodate his restrictions; and that he did not misrepresent having a prior injury but rather, he was unable to recall the prior injury because he had no treatment beyond an initial x-ray. Finally, the claimant argues that the discretionary penalty that permanently bars him from any and all future wage replacement benefits is disproportionate to any alleged misconduct.

In rebuttal, the carrier argues that the Board Panel majority properly found that the claimant violated [WCL § 114-a](#), noting that the claimant used crutches at medical appointments and subsequently lied to the carrier about using crutches, while at the same time, the claimant was seen ambulating without crutches and performing heavy labor activities on surveillance footage. The carrier argues that the crutches were a “device [the claimant] used to mislead his doctors and the carrier regarding his disability,” noting that while the claimant testified that his use of crutches was prescribed by Dr. Fein, the doctor testified the claimant “self-presented with crutches.” The carrier further asserts that the Board Panel majority properly acknowledged the claimant's

misrepresentation when he blamed his work stoppage on the employer. Finally, the carrier argues that the claimant violated WCL § 114-a when he failed to disclose a prior right [knee injury](#) until questioned under cross-examination.

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

FACTS

The claimant filed an Employee Claim (C-3) to report that he was injured on October 6, 2021, while working as a machine operator. The claimant alleged that a ladder he was using came loose causing him to fall, and his right knee buckled/twisted. The claimant reported that he stopped working on October 7, 2021, and returned to limited duty work on October 11, 2021. The claimant denied that he had previously injured his right knee.

The claimant went to urgent care on October 7, 2021, and was examined by Family Nurse Practitioner (FNP) Hynick, who diagnosed a right [knee sprain](#) (ECF Doc ID #4000899539). FNP Hynick noted a history of injury on October 6, 2021, when the claimant had a “fall/twist” from a ladder and had internal pain and popping in his right knee. No prior injuries were reported. FNP Hynick opined that the claimant was partially disabled as of October 7, 2021, and that he should avoid bending, squatting or kneeling, and should do sedentary activities only. FNP Hynick opined that the claimant was able to lift, carry, push/pull, twist, grasp, grip, perform fine manipulation of the hands, and perform repetitive wrist use. FNP Hynick recommended only occasional standing and walking. An x-ray showed no fracture or dislocation, and showed minimal spurring along the patellofemoral compartment. FNP Hynick referred the claimant to an orthopedist for follow-up on October 12, 2021.

Dr. Fein, the claimant's orthopedist, examined the claimant on October 12, 2021, and in a Doctor's Progress Report (C-4.2), the doctor noted the same history of injury at work on October 6, 2021. The claimant complained of right knee pain, which is worse when going from sitting to standing, and a “tearing” sensation. Musculoskeletal history was noted for chronic low back pain, but no other prior injury history was noted. Upon examination, Dr. Fein observed that the claimant walked with a limp, and had significant tenderness, with some pain. Dr. Fein diagnosed a right knee (acute medial collateral ligament) sprain and prescribed a hinged knee brace. The doctor found a causal relationship and opined that the claimant had a 50% temporary impairment. Dr. Fein further noted that he “definitely want[s] him to be on crutches partial weightbearing with the brace which allowed him to ambulate a little bit better and safer.” Dr. Fein provided light duty restrictions with a plan to reevaluate in two weeks. In a note dated October 12, 2021, Dr. Fein opined that the claimant could return to work on October 12, 2021, with restrictions to minimize walking, with no climbing, heavy lifting, pushing, pulling, or squatting (ECF Doc ID #4000903120).

Dr. Fein submitted a C-4.2 report of an examination on October 28, 2021, noting the claimant's report of pain that is a 7 out of 10. The doctor further noted no change in condition from the last visit; the claimant states “it is still very painful.” Dr. Fein again recommended “a partial weight-bearing with crutches and a brace.” Upon examination, Dr. Fein continued to note that the claimant walked with a limp, and had significant tenderness, with some pain. Dr. Fein again diagnosed a causally related right knee MCL sprain. Dr. Fein ordered an MRI since the claimant continues to be quite symptomatic. The doctor noted that the claimant has been on light duty, and while he continued to opine that the claimant had a 50% temporary impairment, there is a note dated October 28, 2021, in which Dr. Fein opined that the claimant could not return to work as of October 28, 2021 (ECF Doc ID #4000837871). In that note, the doctor opined that the claimant may return to work on November 8, 2021, with the same restrictions provided on the note dated October 12, 2021.

*3 On November 2, 2021, an investigator interviewed the claimant as requested by the carrier (ECF Doc ID #4000837870). According to the investigator's report, when the claimant was asked about his “self-reported limitations,” the claimant stated that “walking long distances is difficult. He noted he cannot lift his child due to his restrictions, and everyday activities at work are difficult to perform. He stated he is able to drive at the moment. [[The claimant also] noted difficulty sleeping and is relegated to mainly sitting on the couch all day.” When asked about prior work injuries, the claimant reported a left shoulder injury in December 2019. When asked about how his pain and physical limitations affect his daily life, the claimant responded that his

ability to do yard work, home improvement, empty and move trash, push a shopping cart, and load and unload groceries are all affected by his injury because he cannot walk and is using crutches.

On November 5, 2021, the carrier submitted a Subsequent Report of Injury-Initial Payment (SROI-IP) and reported that awards were paid to the claimant for his lost time for the period from November 4, 2021, through November 9, 2021.

Dr. Fein submitted a C-4.2 report of an examination on November 10, 2021, and noted that the claimant reported that his condition was improving, but he is still sore and that “the crutches and brace have helped.” The claimant is no longer working light duty because his employer no longer has light duty work for him. Since the examination on October 12, the claimant has been partial weightbearing, with crutches and a brace; he is still having pain rising from chairs and ambulating on stairs. Upon examination, Dr. Fein again observed that the claimant walked with a limp, and had significant tenderness, with some pain. Dr. Fein diagnosed a causally related right knee MCL sprain, and continued to opine that the claimant had a 50% temporary impairment.

In a report of an MRI of the claimant's right knee done on November 15, 2021, Dr. Wolfe noted a history of an acute medial collateral [ligament sprain](#), and that the claimant “[f]ell injuring knee 11/2021.” The MRI was compared to a prior x-ray done on January 5, 2018, and the MRI revealed no evidence of acute internal derangement.

In a note dated November 16, 2021, Dr. Fein opined that the claimant could return to work on November 22, 2021, with no restrictions (ECF Doc ID #4000899546). On November 16, 2021, the claimant sent an email to the carrier's claims adjuster to inform her that based on the MRI results, Dr. Fein has cleared him to return to work on November 22, 2021 (ECF Doc ID #4000916599, p. 24).

On November 22, 2021, the employer reported that the claimant had been out of work from October 28, 2021, to November 22, 2021.

In a decision filed on February 23, 2022, the WCLJ established this claim for a right [knee injury](#) that resulted from an accident on October 6, 2021; noted that the carrier raised the question of [WCL § 114-a](#), and has video surveillance of the claimant; and noted that the claimant raised [WCL § 114-a\(3\)\(i\)](#) against the carrier regarding its [WCL § 114-a](#) allegation.

*4 On March 24, 2022, Dr. Fein testified that when he first saw the claimant on October 12, 2021, the claimant told him he injured himself at work on October 6, 2021, when a ladder gave out underneath him, and he fell and landed on the right knee, twisting it. At the time of this first examination, the claimant walked with a limp and had significant tenderness over the medial side of his knee, which is consistent with the history of injury reported by the claimant. The doctor diagnosed an acute sprain of the medial collateral ligament, found a 50% disability, cleared the claimant to work light duty, prescribed a hinged knee brace, and wanted the claimant to continue using crutches, partial weightbearing. When he next saw the claimant on October 28, 2021, there was no change in diagnosis or in the recommended work restrictions. Dr. Fein believed the claimant was still working light duty at that time. When Dr. Fein next saw the claimant on November 10, 2021, there was no change in his degree of disability opinion, but the claimant reported that light duty was no longer being offered to him. At that time, the doctor made no changes to his recommendation regarding the claimant's ability to work light duty. Dr. Fein stated that November 10, 2021, was the last time he saw the claimant. On cross-examination, Dr. Fein testified that he had not seen the claimant for any other injuries before October 12, 2021, and while he does not recall whether he asked the claimant about any prior right knee conditions or injuries, his chart indicates nothing about prior problems with the knee. On October 12, 2021, Dr. Fein recommended restrictions of minimal walking, no climbing, no heavy lifting, no pushing, no pulling or squatting; no driving restrictions were provided. On October 28, 2021, Dr. Fein removed the claimant from work, and provided a return date of November 8, 2021, with no lifting, pushing, pulling, squatting or climbing, and limited walking. However, Dr. Fein could not recall why he took the claimant out of work at that time. The claimant was still limping at that time. Dr. Fein reviewed his note from November 10, 2021, and testified that he did not see any work restrictions. He did not examine the claimant on November 16, 2021, but provided the claimant with a note at that time indicating a return to work date of November 22, 2021.

At the hearing on March 29, 2022, the claimant testified that after he was injured on October 6, 2021, he kept working light duty per Dr. Fein and the employer was accommodating his light duty restrictions. His light duty work consisted of sitting and watching cartons, so they didn't jam the machine, and putting stickers on cartons. He was given crutches and a hinged knee brace by Dr. Fein. He tried to use his crutches while working on light duty, but it was very difficult. Dr. Fein told him he could work without crutches as long as he kept the knee brace on. On October 29, 2021, he was pulled from work because the employer could no longer accommodate his light duty restrictions. He stated that he did not tell the employer he had a change in his restrictions. Rather, it was D.J.B. at the employer who told the claimant that they had no more light duty available. He would have continued working light duty if it was available. The restrictions recommended by Dr. Fein allowed him to walk one to two hours on light duty with no pushing, pulling or lifting over 15 pounds, no squatting, and no kneeling. He followed the restrictions for the most part but while out of work after October 29, 2021, he did some things that were outside of his restrictions while he and his wife cleaned out the garage to prepare for winter. Specifically, he loaded his truck with scrap metal, an old vacuum cleaner, a washing machine, and a toilet. His wife helped him load these things, and then they went to the scrap metal yard to recycle the metal. During this period, he received one check from the carrier for his lost time. He did not cash the check. When asked if he was told by the carrier that he needed to meet with an investigator in order to file his claim, the claimant responded "Yes" (Hearing Transcript, 3/29/22, p. 9).

*5 On cross-examination, the claimant testified that before October 6, 2021, he had a right [knee injury](#) in 2018. The injury was so minor that he did not previously remember it. The injury occurred while he was working for another employer, but he did not file a workers' compensation claim. He had an [x-ray of his knee](#), but nothing came of it. He missed no time from work. He does not recall if occupational medicine asked him on October 7, 2021, if he had any prior right [knee injuries](#). In early November 2021, the claimant met with a carrier's investigator and provided information and completed a questionnaire. When specifically asked who prescribed him the crutches, the claimant responded that it was Dr. Fein. He first used crutches at work on October 10, 2021, but did not use them for long because he felt like he was in danger of injuring himself while using them. The claimant denied asking Dr. Fein to take him out of work when he saw the doctor on October 28, 2021, and that on that day, he was provided with the same restrictions. Dr. Fein gave him a note with these restrictions, but the claimant could not recall if Dr. Fein gave him a note stating he could return to work with restrictions on November 8, 2021. After October 28, 2021, the claimant called K.R. at the employer numerous times to try to return to work light duty. The claimant was always under the same light duty restrictions provided by Dr. Fein until November 22, 2021, when he was released to return to work full duty. The claimant confirmed that other than the one occasion when he and his wife were cleaning out the garage and went to the scrap metal yard, he did no activities that were outside his restrictions. The note dated November 16, 2021, in which Dr. Fein released the claimant to return to work, was based on the results of a right [knee MRI](#). When the claimant met with the carrier's investigator on November 2, 2021, he reported that he could only do yard work with crutches, and that he was unable to do home improvements because of the crutches. He also reported that he could not lift his 40-pound child. He does not recall if he was asked about his ability to do the recycling. He remembers that he reported that he could not load and unload groceries because of the crutches. He reported that his doctor's restrictions were no lifting, pushing, pulling, climbing, or squatting, and limited walking. From October 6, 2021, to November 22, 2021, he had no significant physical problems other than his right knee, and from October 28, 2021, to November 22, 2021, he stayed home, spending most of his time inside his house. On November 4th or 5th, he did the recycling/trash activities with his wife's help. The activity was outside of his lifting restriction. He has no restrictions on driving. His last physical therapy treatment was on November 16, 2021, and he stopped using crutches that day. However, he continued using his knee brace and used his brace when he returned to work on November 22, 2021; he wore the brace under his trousers.

*6 On re-direct examination, the claimant stated that he was told that it was mandatory for him to complete the questionnaire when he met with the carrier's investigator. When asked how he understood the question of "“Limitations?”" regarding his ability to do things, the claimant explained that he responded "yes" when he was not completely unable to do a task but could do it with some restriction. After the claimant's testimony, the WCLJ directed the claimant to execute a HIPAA release for hospital records related to treatment of his right knee in 2018.

On April 1, 2022, the Board received the investigator's report of surveillance of the claimant on dates between November 5, 2021, and November 17, 2021.

Surveillance footage on November 5, 2021, the claimant was observed from 1:48 p.m. until approximately 2:08 p.m. At approximately 1:51 p.m. the claimant braces himself before hopping off the back of a pickup truck. During this time, he is seen moving a washing machine out of the garage, pushing and pulling the machine towards a pickup truck. He and an unidentified woman (presumably his wife) lift the machine onto the liftgate of the pickup truck, and the claimant then pushes the machine along the bed, towards the cab of the truck. At 1:55 p.m., the claimant lowers himself down onto the tailgate when getting out of the truck. He also lifts a microwave and a toilet into the pickup truck, and puts some other items such as a fan, a vacuum cleaner, and some boxes into the truck. While moving between the garage and the truck, the claimant was not using crutches, but was limping. The truck drives away and approximately 20 minutes later, at 2:28 p.m., the claimant and his wife are seen unloading items from the truck into a dumpster. Then, at 2:35 p.m., the claimant backs the pickup truck into a spot at a scrap metal recycling facility. Due to the surveillance camera's view, the claimant cannot be seen unloading anything. At 2:40 p.m., the claimant moves the truck and parks near the office of the recycling facility, and the claimant and his wife take some of the smaller items from the truck. At 2:45 p.m., the claimant walks into the office, returns to the truck approximately two minutes later, and then drives away.

Surveillance on November 6, 2021, does not show any activity. Surveillance on November 10, 2021, shows the claimant ambulating with crutches. Surveillance on November 11, 2021, shows the claimant stand up from a table after eating, and walk away without crutches while carrying a tray. Surveillance on November 15, 2021, and November 16, 2021, shows the claimant ambulating with and without crutches. Surveillance on November 17, 2021, shows the claimant ambulating without crutches, and walking into a home improvement store. In the store, he is observed bending to get things off the shelves. On the same day, surveillance shows the claimant walking into a pharmacy without crutches, exiting approximately two minutes later, and driving away.

*7 On April 6, 2022, the Board received copies of email correspondence dated November 1, 2021, through December 6, 2021, between the claimant and the claims adjuster who was handling his case (ECF Doc ID #4000916599). In the correspondence, the claimant is providing information about his restrictions and requesting information on how he can receive awards for his lost time. The emails indicate that the claimant was making attempts to return to work.

At the hearing on April 7, 2022, testimony was provided by N.G., a field investigator who was assigned to surveil the claimant on November 5, 2021, and November 6, 2021. After N.G.'s testimony, the claimant's attorney conceded that the individual under surveillance was the claimant.

At the same hearing, K.R., the HR manager at the employer, testified that the claimant first provided a note with work restrictions on October 7, 2021. The employer accommodated his restrictions from October 7, 2021, through October 28, 2021. He was subsequently taken out of work on October 28, 2021, until November 8, 2021. Then, on November 8, 2021, the claimant provided work restrictions of no lifting, pushing, pulling, squatting, or climbing, and limited walking. However, the employer was unable to accommodate the restrictions. K.R. confirmed that the claimant was currently employed and working full time, full duty for the employer. She also confirmed that during the time he was out of work, the claimant kept in touch with the employer and expressed a desire to return to work.

At the same hearing, D.B., the operations leader in the department where the claimant works, was asked the date that the employer was no longer able to accommodate the claimant's restrictions. D.B. testified that just before November 8, 2021, which was one of the dates the claimant was supposed to return to work, he spoke to the claimant on either November 3rd or 4th, to "state to him that we could no longer accommodate his restrictions until he has full duty clearance from his doctor" (Hearing Transcript, 4/7/22, p. 26). Prior to then, the employer had been able to accommodate the claimant's restrictions.

In a decision filed April 12, 2022, the WCLJ closed the record on the issue of possible violations of [WCL § 114-a](#); and directed the parties to produce memoranda of law by May 1, 2022.

The claimant and the carrier submitted written summations in April 2022.

On June 13, 2022, the Board received evidence of the claimant's treatment with Dr. Stein for a work injury on January 5, 2018, when the claimant fell on some ice and hit his right knee (ECF Doc ID #375869643, p. 8). Upon examination, Dr. Stein observed reduced range of motion with pain, and no swelling. Dr. Stein diagnosed a right [knee contusion](#), and recommended sedentary work only. The claimant was given crutches and directed to follow-up in a week. A [right knee x-ray](#) on January 5, 2018, showed no fracture or dislocation, no significant [joint effusion](#), and unremarkable surrounding soft tissues (*id.*, p. 5). The record contains no evidence of any follow-up treatment.

*8 In a reserved decision filed on August 12, 2022, the WCLJ found that the claimant did not violate [WCL § 114-a](#) because the testimony of the claimant and Dr. Fein, the carrier's surveillance video evidence, and the medical report of Dr. Stein from January 2018, do not provide sufficient credible evidence to support a finding that the claimant made an intentional misrepresentation of material fact for the purpose of obtaining compensation. The WCLJ found “that claimant credibly and forthrightly testified regarding the activities he did in November 2021, which were outside his work restrictions and regarding his failure to mention the prior 2018 right knee work injury.” The WCLJ denied the claimant's request for a [WCL § 114-a\(3\)\(i\)](#) penalty to be assessed against the carrier, finding that the claimant's activities observed on the surveillance video taken on November 5, 2021, provide a sufficient basis for the carrier to request record development on the question of a [WCL § 114-a](#) violation.

The carrier filed an application for administrative review, and requested that the WCLJ decision be rescinded. The carrier argued that the claimant misrepresented his condition and his physical abilities to the doctors, to the carrier, and to the WCLJ. The carrier further asserted that the claimant lied under oath when he testified that he stopped working on October 28, 2021, because the employer could no longer accommodate his restrictions when, in fact, it was the claimant that provided a note from Dr. Fein taking him out of work through November 8, 2021, with a recommendation for restrictions thereafter. Finally, the carrier argued that the claimant also failed to timely disclose a prior right [knee injury](#) and downplayed the significance of the prior injury during his testimony. The carrier requested a finding that the claimant violated [WCL § 114-a](#); and requested a mandatory penalty for the period the claimant was out of work between October 29, 2021, and November 22, 2021, and a discretionary penalty that permanently bars the claimant from receiving any future wage replacement benefits or schedule loss of use awards.

In rebuttal, the claimant requested that the WCLJ reserved decision be affirmed because the finding that the claimant did not violate [WCL § 114-a](#) is supported by the evidence in the record as well as the relevant law. The claimant argued that he did not knowingly or unknowingly misrepresent any material facts for the purpose of obtaining wage replacement benefits. The claimant contended that he merely made a mistake when he testified that the reason he stopped working was because the employer was unable to accommodate his restrictions. The claimant also asserted that while the claimant did, on one day, perform work outside of his restrictions, he candidly and credibly testified with respect to his activities that day. The claimant further argued that the surveillance video of his activities on this day shows him walking with an impaired gait, and he appears to be in some pain while doing the activities. The claimant also contended that the carrier questionnaire of the claimant's activities of daily living fails to show a material misrepresentation, noting that the claimant was unrepresented at the time that he completed the questionnaire. Finally, the claimant noted that he was not being paid lost wage benefits during the period of surveillance.

LEGAL ANALYSIS

*9 [WCL § 114-a\(1\)](#) states,

“If for the purpose of obtaining compensation pursuant to [[WCL § 15](#)], 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.”

Even if the claimant's testimony is not inconsistent with the activities observed during surveillance, the Board must still consider whether the claimant “fail[ed] to affirmatively disclose highly relevant information” about his activities to a physician who examined him for purposes of determining the level of his disability (*Matter of Gramza v Buffalo Bd. of Educ.*, 125 AD3d 1074 [2015], quoting *Matter of Passari v New York City Hous. Auth.*, 13 AD3d 853 [2004]). The Board must decide “whether claimant's failure to disclose the extent of his abilities was material, and done both knowingly and for the purpose of obtaining benefits (see *Matter of Donato v Aquarian Designs, Inc.*, 96 AD3d 1302 [2012]; *Matter of Johnson v New York State Dept. of Transp.*, 305 AD2d 927 [2003])” (*Gramza*, 125 AD3d 1074 [2015]).

Where the claimant had several prior injuries and awards and was asked about any previous injuries but failed to “list his prior injuries on his application or inform the medical providers of the injuries,” the Board properly found that the claimant violated WCL § 114-a(1) (*Matter of Calderon v New York City Dept. of Corr.*, 144 AD3d 1382 [2016]). In contrast, where the Board found that the claimant credibly explained the reason for any discrepancies between his own testimony and the record of his past medical treatment, the Board properly found no WCL § 114-a(1) violation (*Matter of Belfiore v Penske Logistics LLC*, 209 AD3d 1095 [2022]).

Here, in Dr. Fein's report of the examination on October 12, 2021, Dr. Fein noted that he “definitely want[s] him to be on crutches partial weightbearing.” As such, while Dr. Fein may not have “prescribed” the crutches, he clearly agreed that the crutches should be used and testified to that on March 24, 2022. As for the surveillance video evidence, the Full Board notes that on most of the seven dates of attempted surveillance of the claimant, the investigators observed a lack of any activity by the claimant. While the claimant was seen on one date doing activities that appeared to be beyond the recommended restrictions of Dr. Fein, the claimant is clearly seen to be limping, and is helped with lifting of items by his wife. Also, when he testified, the claimant candidly admitted that he had performed activities that were outside of his restrictions on that day. The claimant's failure to follow recommended work restrictions does not prove, without some other evidence, that he misrepresented the scope of his physical condition to Dr. Fein.

***10** As for the claimant's testimony about the reason he stopped working on October 28, 2021, it is noted that while Dr. Fein provided a note dated October 28, 2021, stating that the claimant could not return to work as of October 28, 2021 (ECF Doc ID #4000837871), the doctor testified that he could not recall why he took the claimant out of work at that time. Further, while the claimant acknowledges that he made a mistake when he testified that the reason he stopped working was because the employer was unable to accommodate his restrictions, the testimony of the employer witnesses confirms that the employer was, in fact, unable to accommodate his restrictions on a date other than October 28, 2021. Specifically, D.B. testified that just before November 8, 2021, he spoke to the claimant on either November 3rd or 4th, to “state to him that we could no longer accommodate his restrictions until he has full duty clearance from his doctor” (Hearing Transcript, 4/7/22, p. 26). K.R. testified that on November 8, 2021, when the claimant provided work restrictions of no lifting, pushing, pulling, squatting, or climbing, and limited walking, the claimant was told that the employer was unable to accommodate the restrictions.

Finally, as for the claimant's failure to disclose his prior right **knee injury**, the record of the prior injury reveals that while an x-ray was taken, there was no fracture or dislocation. Further, the only finding made upon examination was reduced range of motion with pain, and the diagnosis was a right **knee contusion**. The report further states that the claimant was given crutches, but there is no evidence that the claimant received any follow-up treatment. At the hearing on March 29, 2022, the claimant provided a credible explanation for not remembering the prior treatment when he stated that the injury was minor, and he missed no time from work. The x-ray report indicating no fracture or dislocation, and the lack of any evidence of follow-up treatment, support the claimant's testimony that the injury was not serious.

Based on the above, the Full Board finds insufficient evidence that the claimant misrepresented the scope of his physical condition, that he testified falsely about the reason for the out-of-work note from Dr. Fein, and that he knowingly misrepresented a material fact when he failed to report his prior right [knee injury](#).

Therefore, the Full Board finds that the claimant did not violate [WCL § 114-a](#).

CONCLUSION

ACCORDINGLY, the WCLJ decision filed on August 12, 2022, is AFFIRMED. No further action is planned at this time.

Clarissa Rodriguez
Chair

2024 WL 2713473 (N.Y.Work.Comp.Bd.)

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