*State of New York*
*Supreme Court, Appellate Division*
*Third Judicial Department*

Decided and Entered: May 30, 2024 CV-22-2103

---

In the Matter of the Claim of DAVID BROWN,
Claimant,
v

VAN LINER INSURANCE CO. et al.,
Appellants, MEMORANDUM AND ORDER
and

MICHAEL J. CRONIN, INC.,
Respondent.

WORKERS' COMPENSATION BOARD,
Respondent.

---

Calendar Date: May 3, 2024

Before: Garry, P.J., Reynolds Fitzgerald, Fisher, McShan and Powers, JJ.

---

*Lois Law Firm LLC*, New York City (*Addison O'Donnell* of counsel), for appellants.

*Ryan, Roach & Ryan LLP*, Kingston (*John D. Dunne* of counsel), for Michael J. Cronin, Inc., respondent.

*Letitia James*, *Attorney General*, New York City (*Donya Fernandez* of counsel), for Workers' Compensation Board, respondent.

---

McShan, J.

Appeal from a decision of the Workers' Compensation Board, filed November 4, 2022, which, among other things, amended the claim to include injuries to claimant's neck, back and right wrist.

In April 2021, claimant, a truck driver and mover, filed a claim for workers' compensation benefits alleging that he sustained injuries while loading a moving truck when his leg went through the "floor of the truck." The claim was not initially controverted by either the employer or its workers' compensation carrier and third-party administrator, and claimant received temporary indemnity benefits. In June 2021, the carrier filed an RFA-2 form (Request for Further Action by Carrier/Employer) requesting a hearing to suspend temporary indemnity benefits pursuant to 12 NYCRR 300.23 (b) and to address its allegation that claimant violated Workers' Compensation Law § 114-a by failing to disclose that he was involved in three automobile accidents since 2005 that resulted in various injuries. Following an August 2021 hearing, the claim was established for a work-related injury to the right hip, prima facie medical evidence was found for various other sites of injury and, among other issues, the question of whether claimant violated Workers' Compensation Law § 114-a was held in abeyance. At the conclusion of an October 2021 hearing, claimant alleged that the carrier was raising frivolous issues of controversy and that the employer violated Workers' Compensation Law § 114-a by submitting contradictory payroll reports. In an October 19, 2021 notice of decision, a Workers' Compensation Law Judge (hereinafter WCLJ) then directed, among other things, the carrier to provide separate legal counsel for the employer regarding claimant's allegations of a Workers' Compensation Law § 114-a violation due to a potential conflict of interest.

Additional hearings ensued to address, among other things, the parties' Workers' Compensation Law § 114-a allegations as well as additional alleged sites of injury. In a March 22, 2022, reserved decision, the WCLJ found that claimant violated Workers' Compensation Law § 114-a by intentionally failing to disclose prior accidents to the Workers' Compensation Board and by working while claiming a disability and receiving indemnity benefits and, accordingly, the WCLJ imposed mandatory and discretionary penalties.[1] Upon the carrier's appeal from the October 2021 WCLJ decision and claimant's appeal from the March 2022 WCLJ decision, the Board, in a single November

[1] The WCLJ did not address claimant's additional claimed sites of injury or claimant's allegation that the employer violated Workers' Compensation Law § 114-a.

2022 panel decision, denied review of the carrier's appeal from the October 2021 decision because the carrier failed to preserve its challenge – by interposing an exception or objection at the hearing – to the WCLJ's ruling directing it to provide the employer with a separate representative and/or legal counsel. The Board also amended the claim to include injuries to claimant's neck, back and right wrist. As to the alleged Workers' Compensation Law § 114-a violations, the Board found no violation by the employer and reversed the WCLJ's finding as to claimant, ruling that claimant did not violate Workers' Compensation Law § 114-a because, in sum and substance, he disclosed his prior injuries in a manner that did not indicate an intent to defraud. The carrier appeals.

We affirm. Turning first to the question of whether amendment of the claim was proper, "the Board is empowered to determine the factual issue of whether a causal relationship exists based upon the record, and its determination will not be disturbed when supported by substantial evidence" (*Matter of Cartafalsa v Zurich Am. Ins. Co.*, 175 AD3d 1762, 1763 [3d Dept 2019] [internal quotation marks, brackets and citations omitted]; *accord Matter of Martinez v RNC Indus., LLC*, 213 AD3d 1109, 1109 [3d Dept 2023]). It is established that "[a] claimant bears the burden of establishing, by competent medical evidence, a causal relationship between an injury and his or her employment" (*Matter of Maldonado v Doria, Inc.*, 192 AD3d 1247, 1248 [3d Dept 2021] [internal quotation marks and citations omitted]; *see Matter of Issayou v Issayuou Inc.*, 174 AD3d 1277, 1277-1278 [2019], *lv denied* 34 NY3d 909 [2020]). Further, "the Board is vested with the discretion to assess the credibility of medical witnesses, and its resolution of such issues is to be accorded great deference, particularly with regard to issues of causation" (*Matter of Martinez v RNC Indus., LLC*, 213 AD3d at 1110 [internal quotation marks and citations omitted]; *accord Matter of Guna v Delta Airlines, Inc.*, 202 AD3d 1190, 1191 [3d Dept 2022]).

The record medical evidence and testimony reflect that both of claimant's treating orthopedic surgeons, as well as the carrier's consultant, found that claimant's injuries to his cervical spine, lumbar spine and/or right wrist were causally related. Salvatore Corso, an orthopedic surgeon who examined claimant in May 2021, testified that claimant's injuries to his lumbar spine and right wrist were "directly related" to his accident at work and expressed his doubt that claimant would, given the severity of his injuries, be able to engage in work of any kind "without major restrictions." Angel Macagno, an orthopedic surgeon who first examined claimant in May 2021, diagnosed claimant with acute radiculopathy of his cervical and lumbar spines and that, as a result of the accident at work, claimant was temporarily totally disabled. Consistent with his medical report, Macagno testified that, since the accident, claimant was temporarily totally disabled due

to the causally-related injuries, that claimant's spinal conditions would continue to worsen without surgery and that further injury could result in paralysis. George Ackerman, an orthopedic surgeon who performed an independent medical examination of claimant in September 2021 and reviewed claimant's medical history, similarly found that claimant's injuries to his cervical spine, lumbar spine and right wrist were causally related to claimant's work accident, that these injuries were, significantly, "not a mere manifestation of a pre-existing degenerating condition" and that the "natural aging process is not the proximate cause" of claimant's injuries and disability.

Deferring to the Board's assessment of the credibility of medical opinions and testimony before it, substantial evidence supports its decision to amend the claim to include injuries to claimant's neck, back and right wrist (*see Matter of Martinez v RNC Indus., LLC*, 213 AD3d at 1110-1111; *Matter of Kotok v Victoria's Secret*, 181 AD3d 1146, 1148 [3d Dept 2020]). Although the carrier contends that claimant's prior injuries and limited postaccident work activity undermine his request to amend the claim to include the additional causally-related injuries, the Board noted in its decision that "[r]egardless of prior injuries, . . . claimant was working full duty at the time of this accident and was not in treatment [at that time]." As indicated above, claimant's limited work following the injury does not refute the medical evidence that the Board elected to credit. In view of the foregoing, and "[a]ccording great deference to the Board's evaluation of the proof presented, particularly with regard to the issue of causation" (*Matter of Kotok v Victoria's Secret*, 181 AD3d at 1148 [internal quotation marks, brackets and citation omitted]), we conclude that substantial evidence supports the Board's decision to amend the claim to include causally-related injuries to claimant's neck, back and right wrist (*see Matter of Martinez v RNC Indus., LLC*, 213 AD3d at 1110-1111; *Matter of Kotok v Victoria's Secret*, 181 AD3d at 1148).

As to the Board's finding that claimant did not violate Workers' Compensation Law § 114-a (1), that provision "provides, in relevant part, that a claimant who, for the purpose of obtaining workers' compensation benefits or influencing any determination relative thereto, knowingly makes a false statement or representation as to a material fact shall be disqualified from receiving any compensation directly attributable to such false statement or representation" (*Matter of Yolas v New York City Tr. Auth.*, 224 AD3d 1112, 1113 [3d Dept 2024] [internal quotation marks and citations omitted]; *see Matter of Losurdo v Asbestos Free*, 1 NY3d 258, 265 [2003]). "A fact will be deemed material so long as it is significant or essential to the issue or matter at hand, and an omission of material information may constitute a knowing false statement or misrepresentation" (*Matter of Nappi v Verizon N.Y.*, 205 AD3d 1181, 1182 [3d Dept 2022] [internal

quotation marks and citations omitted]). "Whether a claimant has violated the statute lies within the province of the Board, which is the sole arbiter of witness credibility, and its decision will not be disturbed if supported by substantial evidence" (*Matter of Koratzanis v U.S. Concrete, Inc.*, 209 AD3d 1075, 1076-1077 [3d Dept 2022] [internal quotation marks and citations omitted]; *accord Matter of Yolas v New York City Tr. Auth.*, 224 AD3d at 1113).

Although claimant stated on his C-3 form that he could not recall his prior injuries, he did truthfully disclose the existence of his prior injuries on his claim form. More importantly, when claimant was examined in May 2021 by Macagno, claimant disclosed that he has a history of involvement in vehicular accidents but that all injuries/symptoms from prior accidents resolved with conservative treatment. Ackerman similarly reported that claimant disclosed to him the fact that claimant was involved in a prior vehicular accident resulting in an upper left back injury that resolved in four weeks with physical therapy and that is unrelated to his lower back injury in this matter. Claimant testified that, in 2017, he was involved in a vehicular accident in which he injured his left shoulder, an injury that resolved with conservative treatment. Claimant further stated that he was involved in two other vehicular accidents – one in 2005 and the other in 2017 or 2018 but that he was either not injured or was not in the vehicle at the time of the accident and that he did not receive any medical treatment for these accidents. Claimant explained that he did not mention these other two accidents to Macagno or Ackerman because he was asked only about prior injuries for which he received medical treatment and/or whether he had sustained prior injuries to the current sites of injury, which he had not. As for his postaccident work activity, claimant testified that, a few days after the April 2021 accident, he did, prior to filing the instant claim, report for work on one day to observe and oversee a delivery. The Board also reviewed the relevant video surveillance evidence and testimony and found that the video evidence did "not support the allegation that . . . claimant misrepresented his condition." Although the record evidence concerning claimant's prior vehicular accidents and location of injuries is amorphous at times, "it is not the role of this Court to second-guess the Board's resolution of factual and credibility issues, and the mere fact that there may be evidence in the record to support contrary conclusions is of no moment" (*Matter of Hartman v Arric Corp.*, 224 AD3d 959, 961 [3d Dept 2024] [internal quotation marks and citations omitted]). Inasmuch as the Board based its rationale upon a credibility determination, its decision that claimant did not violate Workers' Compensation Law § 114-a will not be disturbed (*see id.*; *Matter of Belfiore v Penske Logistics LLC*, 209 AD3d 1095, 1096 [3d Dept 2022]).

Finally, we reject the carrier's challenge to the Board's denial of its administrative appeal from the WCLJ's October 19, 2021 decision. The record reflects that the carrier failed to interpose or state an exception or objection to the WCLJ's ruling and direction that it provide a separate representative and/or legal counsel for the employer for defending against claimant's allegation that the employer violated Workers' Compensation Law § 114-a. Moreover, the record shows that the carrier also consented to the WCLJ's ruling and instruction. Accordingly, we agree with the Board that this issue was unpreserved for its review (*see* 12 NYCRR 300.13 [b] [4] [v]; *Matter of Puccio v Absolute Chimney & Home Improvement, LLC*, 222 AD3d 1060, 1062-1063 [3d Dept 2023]; *see also Matter of Romero v Capital Concrete*, 221 AD3d 1149, 1151 [3d Dept 2023]; *compare Matter of Dimaggio v Mayrch Excavation Found.*, 189 AD3d 1841, 1843 [3d Dept 2020]). To the extent not specifically addressed above, the carrier's remaining arguments, including its contentions regarding the Board's finding that the employer did not commit fraud, have been examined and found to be lacking in merit.

Garry, P.J., Reynolds Fitzgerald, Fisher and Powers, JJ., concur.

ORDERED that the decision is affirmed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court