

2023 WL 3376895 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: W&W STEEL ERECTORS, LLC

Case No. G273 2874

Carrier ID No. C375C7696744 W019004

May 5, 2023

\*1 ACE American Insurance Co.  
P.O. Box 5122  
Scranton, PA 18505-0554  
Indemnity Ins. of N America  
P.O. Box 5122  
Scranton, PA 18505-0554  
American Zurich Insurance Co  
PO Box 968044  
Schaumburg, IL 60196-8044  
State Insurance Fund  
PO Box 66699  
Albany, NY 12206  
Weiss, Wexler & Wornow, PC  
Attorneys-at-Law  
25 Park Place, 4th Fl  
New York, NY 10007  
ERIN ERECTORS & CONSTRUCTION INC  
814 37TH AVE  
Long is City, NY 11101-6011  
CROSS COUNTRY CONSTRUCTION LLC  
Date of Accident 7/30/2020

The Full Board, at its meeting on April 18, 2023, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed December 12, 2022.

#### ISSUE

The issue presented for Mandatory Full Board Review is whether claimant sustained a compensable occupational disease.

The Workers' Compensation Law Judge (WCLJ) established this claim for occupational injuries to claimant's hands, wrists, right shoulder, and right hip, with a date of disablement of July 30, 2020.

The Board Panel majority reversed and disallowed the claim.

The dissenting Board Panel member would affirm the WCLJ decision.

The claimant filed an application for Mandatory Full Board Review on January 12, 2023, arguing that there is sufficient medical evidence in the record to establish this claim as an occupational disease to both hands and wrists, the right shoulder, and the right hip.

State Insurance Fund (SIF) filed a rebuttal on January 27, 2023, on behalf of Erin Erectors and Construction Inc. (Erin), arguing that the opinion of the claimant's treating physician was not credible and that the claim should be disallowed, but that if the claim is established, July 30, 2020, is the proper date of disablement.

SIF filed a rebuttal on February 8, 2023, on behalf of Vespa Stone LLC (Vespa), arguing that the decision of the Board Panel majority should be affirmed.

ACE American Insurance (ACE) filed a rebuttal on February 10, 2023, on behalf of W&W Steel Erectors, LLC (W&W), arguing that the decision of the Board Panel majority disallowing the claim should be affirmed, but that if the case is established, the date of disablement should be set at December 17, 2021, and W&W found not to be the liable employer.

SIF filed a rebuttal on February 10, 2023, on behalf of Cross Country Construction (Cross Country), arguing that the decision of the Board Panel majority disallowing the claim should be affirmed, but that if the case is established ACE, the carrier for W&W, should be liable for the claim.

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

#### FACTS

Claimant filed a C-3 (Employee Claim) on October 21, 2020, alleging that “[o]ver the course of 24 years working as a union operating engineer,” he sustained injuries to his “right shoulder, both hands and right hip” as the result of ““repetitive trauma at work.” Claimant listed his employer as W&W Steel Erectors. ACE, as the carrier for W&W, controverted the claim. Several other potentially liable employers and carriers were also placed on notice.

\*2 Claimant's treating physician, Dr. Hecht, submitted a C-4 (Doctor's Initial Report) based on a July 30, 2020, examination. Dr. Hecht diagnosed ““joint derangement” of claimant's right shoulder, right hip, and both wrists, which he found were due to the repetitive nature of claimant's job. In an accompanying narrative report, Dr. Hecht wrote:

This is an eval of a 53-year old right handed male operating engineer. He has been at that job for 24-years, 60-70 hours a week. His job requires repetitive operating heavy equipment, forklifts, crane, temporary elevators, lifting and lowering gates, climbing, doing mechanical repairs, using hand tools and tools which vibrate, fueling machines. Due to the repetitive nature of his job, he developed pain in the right shoulder, pain and numbness in the bilateral wrists and hands, pain in the right hip. I am the first physician to see him for this. He reports the right shoulder and hip pain started about 6-8 months ago. The pain and numbness in the hands started about a year ago.

In a May 13, 2021, report, Dr. Hecht indicated that claimant “has 0% impairment.”

In a September 30, 2021, report, Dr. Hecht indicated that claimant was still working and “has 0% impairment.” Dr. Hecht advised that claimant undergo ““physical therapy and proper care” but noted that he had not started physical therapy.

At a hearing on October 4, 2021, claimant testified that he had worked as a union operating engineer for 25 years. His job duties involve running “temporary forklifts, temporary elevators, forklifts, small cranes, um, generators, excavators, basically all power equipment that has to do with trades” (Hearing Transcript, 10/4/21, p. 8). Running temporary elevators involves lifting gates weighing between 200 and 300 pounds, 300 to 500 times a day. He had to pull himself into a crane and climb ladders. His hands would become stiff from running machines, which he usually did for eight to twelve hours a day. At the “Hudson Yards

job” he was “on the cocoon system,” which required him to climb ladders and do daily maintenance on the system, including a generator (pp. 8-9). He would work “with hand tools, and you know, it affects your hands” (p. 9). He then testified that the gates on the temporary elevators he operated weighed from 100 to 200 pounds. He would have to repeatedly climb into and out of machinery. He had to carry a fuel can weighing approximately 40 pounds and pull a fuel line which put stress on his hip and shoulder. The ““cocoon system” is “a safety system that goes up on the side of the building to keep workers from falling off the sides” (p. 12). He would use an oil filter wrench and an impact gun which “puts a lot of stress on your hands” (p. 13). He first sought treatment on July 30, 2020, with Dr. Hecht, and at that time he was working for W&W. He worked for W&W for “[r]oughly a year and a half” at the Hudson Yards project (p. 17). He worked for W&W 50 to 70 hours per week, including overtime. If he did not work overtime his work hours were 7:00 to 3:30.

\*3 On cross-examination, claimant testified that he was laid-off by W&W in July or August of 2021. After being laid-off by W&W he worked for Cross Country Construction and Vespa Stone as “a fill-in guy like, you know, on different things” (p. 20). He was now working for Erin Erectors at the Hudson Yards site, maintaining a welding machine. While working for Vespa Stone he operated a large forklift. Following claimant's testimony, the WCLJ directed that Cross Country, Vespa, Erin, and their carriers, be placed on notice.

At a hearing on February 3, 2022, the carriers for Cross Country, Vespa, and Erin were present and were afforded the opportunity to cross-examine the claimant. Claimant testified that he worked for Cross Country at the Hudson Yards site from November 11, 2019, to July 13, 2020, and then began working for W&W. While working for Cross Country he operated a temporary elevator and a forklift. He worked 40 hours per week for Cross Country during that time. The gates on the temporary elevator weighed hundreds of pounds. He worked for several employers at the Hudson Yards site and his duties were different with each employer. While working for Vespa he operated a large forklift. Claimant testified that he began experiencing pain in his hands, right shoulder, and right hip five or six months before he first treated with Dr. Hecht. He started working for Erin in November of 2021 and was laid off on December 17, 2021. His work for Cross Country and W&W was “very demanding. Vespa wasn't too bad, but it was tedious because you were in the machine for a long time” (Hearing Transcript, 2/3/22, p. 19).

The director of operation for Cross Country testified at the February 3, 2022, hearing concerning the period during which claimant worked for Cross Country.

The record contains payroll records for claimant's various employers, claimant's union payroll records, and a letter dated April 6, 2022, from claimant's attorneys clarifying the dates claimant worked for W&W, Cross Country, Vespa, and Erin.

At a hearing on April 7, 2022, after listening to summations by the parties, the WCLJ established the claim against W&W and its carrier, ACE, for occupational injuries to claimant's hands, wrists, right shoulder, and right hip, with a date of disablement of July 30, 2020. The findings made at the April 7, 2022, hearing are reflected in a decision filed April 12, 2022.

ACE requested administrative review, arguing that claimant had not shown a recognizable link between a distinctive feature of his work and his injuries, and therefore the claim should be disallowed. In the alternative, they argued that if the establishment of the claim was affirmed, the date of disablement should be set at December 17, 2021, and a finding made that W&W is not the liable employer.

In rebuttal, claimant argued that the WCLJ decision should be affirmed in its entirety. Rebuttals were also filed by Zurich Insurance for W&W, SIF for Erin, SIF for W&W, SIF for Vespa, and SIF for Cross Country.

## LEGAL ANALYSIS

\*4 “[Workers' Compensation Law § 2\(15\)](#) defines an occupational disease as ‘a disease resulting from the nature of employment and contracted therein.’ To establish an occupational disease, the claimant must demonstrate ‘a recognizable link between his or her condition and a distinctive feature of his or her employment’ (Matter of [Garcia v MCI Interiors, Inc.](#), 158 AD3d 907

[[2018] [internal quotation marks and citations omitted]; see *Matter of Mack v County of Rockland*, 71 NY2d 1008 [1988]; *Matter of Corina-Chernosky v Dormitory Auth. of State of N.Y.*, 157 AD3d 1067 [2018]]” (*Matter of Barker v New York City Police Dept.*, 176 AD3d 1271 [2019]).

“To be entitled to workers' compensation benefits for .... an occupational disease, a claimant must establish a recognizable link between his or her condition and a distinctive feature of his or her occupation through the submission of competent medical evidence” (*Matter of Phelan v Bethpage State Park*, 126 AD3d 1276 [2015] [internal quotation marks and citations omitted], lv denied 25 NY3d 911 [2015]). “Such medical proof, in turn, must signify a probability of the underlying cause that is supported by a rational basis and not be based upon a general expression of possibility” (*Corina-Chernosky*, 157 AD3d 1067 [2018] [internal quotation marks and citations omitted]).

Here, the record does not reflect that claimant's job required him to perform a single “specific repetitive movement suggesting a link between a distinctive feature of [his] job and [his] injuries” (*Matter of Clanton v Salon Visentin, Inc.*, 37 AD3d 968 [2007]). Instead, the record reflects that claimant performed a variety of tasks in his job as an operating engineer, including operating several different large vehicles and pieces of equipment, and maintaining equipment. Claimant testified that he worked for several employers at the Hudson Yards site and that his duties for each employer were different. In his July 30, 2020, report, Dr. Hecht provided a general description of claimant's job duties that was consistent with claimant's testimony concerning those duties, and concluded that the symptoms that claimant reported involving his right shoulder, right hip, and both wrists, were caused by the repetitive nature of claimant's job. However, Dr. Hecht offered little specific detail with respect to the repetitive motions claimant performed which allegedly caused his various injuries, or how frequently and for how long claimant performed those motions. Therefore, Dr. Hecht's opinion on causation is not supported by a rational basis and is insufficient to support a finding of causal relationship between claimant's symptoms and a distinctive feature of his employment (see *Matter of Sanchez v New York City Tr. Auth.*, 206 AD3d 1428 [2022]; *Matter of Bonet v New York City Tr. Auth.*, 205 AD3d 1287 [[2022]; *Barker*, 176 AD3d 1271 [2019]; *Matter of Yanas v Bimbo Bakeries*, 134 AD3d 1321 [2015]).

\*5 Therefore, the preponderance of the credible evidence in the record supports the disallowance of this claim for occupational injuries.

#### CONCLUSION

ACCORDINGLY, the WCLJ decision filed April 12, 2022, is REVERSED, and the claim is disallowed. The case is closed.

Clarissa Rodriguez

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