



Robert E. Beloten  
Chair

ADMINISTRATIVE REVIEW  
DIVISION WORKERS' COMPENSATION  
BOARD 328 STATE STREET  
SCHENECTADY, NY 12305  
*www.wcb.Try.gov*

State of New York- Workers' Compensation Board

In regard to [REDACTED], WCB Case #G041 0425

**MEMORANDUM OF BOARD PANEL DECISION**

*Keep for your records*

Opinion By: Donna Ferrara  
Mona A Bargnesi  
Ellen O, Paprocki

In their respective applications for review, the both the claimant and the carrier request review of the Workers' Compensation Law Judge (WCLJ) decision filed on November 8, 2011. Each party has filed a rebuttal in response to the other party's application.

**ISSUES**

The issues presented for administrative review are:

1. Whether the awards should have been suspended as of June 27, 2011 based on the carrier's Workers' Compensation Law (WCL) § 114-a allegation.
2. Whether the carrier's video surveillance material and investigators' testimony should have both been precluded.

**FACTS**

The case was previously established for a February 21, 2011 low back injury. The claimant's average weekly wage was set at \$319.83, and awards have been made.

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Claimant -	[REDACTED]	Employer -	Aeropostale
Social Security No. -	[REDACTED]	Carrier -	Travelers Indemnity Company
WCB Case No. -	G041 0425	Carrier ID No. -	[REDACTED]
Date of Accident -	02/21/2011	Carrier Case No. -	[REDACTED]
District Office -	Rochester	Date of Filing of this Decision-	12/06/2012

**ATENCION:**

Puede llamar a la oficina de la Junta de Compensacion Obrera, en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclamacion(caso).

At the hearing held on November 3, 2011, the carrier asked the WCLJ to conclude the hearing with the usual questions regarding any employment since the last hearing; in response to the WCLJ's questioning, the claimant acknowledged that she volunteered at bingo once a week (MINUTES, 11/3/11, p.5). Her attorney asked if there was anything else, and the claimant responded "No" (*id.*, p.6). Her response was followed by the carrier asking, "No owned business or self work?" (*id.*) After the claimant again responded "No," The carrier then raised WCL § 114-a and asked that the carrier's investigators and the claimant be scheduled for testimony, but the carrier noted that it was not requesting suspension of the claimant's benefit awards (*id.*, pp.6-7).

Among other things, the WCLJ directed the parties to depose each other's doctor. The WCLJ also brought awards up to date at the tentative partial disability rate of \$142.15 per week from July 13, 2011 to November 4, 2011, with the carrier to continue payments at the tentative \$142.15 per week rate. After the body of the decision, under the heading of "Information about Next Hearing / Meeting," the following note appeared: "On 12/9/2011 at 1pm for testimony of the claimant and 12/14/2011 at 3pm for testimony of the private investigators ... on [WCL] Section 114-a issue" (EC-23, 11/8/11, p.2).

### LEGAL ANALYSIS

The claimant asserts that the carrier's investigation and all related materials and testimony should be precluded since the claimant had not been advised, prior to his testimony regarding work status, that the carrier had conducted an investigation. Citing Matter of Waldbaum's, 1996 NY Wrk Comp 09018108 and its progeny, the claimant argues that as the carrier's representative questioned the claimant without first divulging the investigation, the WCLJ erred in allowing further development of the issue of WCL § 114-a applicability. The claimant maintains that the investigators' testimony, their investigative reports and all video surveillance must be precluded.

In rebuttal, but also in presenting its own application, the carrier contends that the continuing awards should be rescinded because of the evidence of a WCL § 114-a violation. The carrier points out that the cases cited by the claimant all refer to preclusion of the carriers' evidence as concerns videotaped surveillance, but that here, the carrier wishes to introduce only evidence obtained through the on-line social medium Facebook (CORR, 12/5/11 [Carrier's Exhibit A]). The carrier argues that given the public nature of Facebook, nothing should preclude use of such evidence with or without first notifying the claimant before cross-examination about her work activities. The carrier also asserts that the awards should be suspended based upon the plain language of WCL § 114-a, which allows for the claimant's disqualification from receiving any compensation awards.

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By way of her own rebuttal, the claimant contends that the carrier's request that benefits be suspended is frivolous. The claimant highlights that the carrier specifically stated that it was not seeking suspension of benefits. The claimant adds that the carrier did not raise any objection on the record when the WCLJ announced that the awards were going to be brought up to date and continued. Further, the claimant argues that the carrier is seeking disqualification pursuant to WCL § 114-a when there has not been any adjudication that the claimant did commit such a violation.

In its relevant portions, 12NYCRR 300.13(e)(1)(iii) provides that "[t]he board panel may deny review ... of any issues raised in the application that were not raised before the Workers' Compensation Law Judge...." In this instance, the carrier not only did not note its objection to the benefits awarded on the record, but its representative specifically stated that the carrier was not objecting to them. On that premise alone, the Board Panel would usually not entertain review, and more likely than not, we would find such an appeal to be frivolous. However, under the totality of the circumstances and in the interest of justice, we will consider the carrier's arguments on their merits.

With respect to the issue of the videotape surveillance, the Board Panel notes that it has the authority to govern disclosure of any surveillance materials in the parties' possession (*Matter of Monzon v Sam Bernardi Constr., Inc.*, 60 AD3d 1261 [2009]). An employer or carrier may withhold video surveillance tapes and investigative reports until after the claimant testifies and receive the benefit of maximizing the effect of that evidence for cross-examination purposes (*see Matter of Reimers v American Axle Aeffg.*, 2 AD3d 1246 [2003]). Yet the Board requires that, before the claimant's testimony is taken, the claimant must be notified that the carrier or the employer has a surveillance videotape in its possession (*Matter of De Marco v Millbrook Equestrian Center*, 287 AD2d 916 [2001]; see also Matter of Waldbaum's). Such advance notification serves to limit the gamesmanship that otherwise might occur (*see e.g., Matter of City of New York Social Servs.*, 1999 NY Wrk Comp 09231717). Failure to notify the claimant of the existence of videotaped surveillance prior to testifying warrants preclusion of the videotaped surveillance, associated investigative reports, and any testimony relating to the reports (*see e.g., Matter of Gary Cummings*, 2006 NY Wrk Comp 79911267; Matter of St. Charles R.C. School & Church, 2005 NY Wrk Comp 00048213).

Here, the carrier questioned the claimant on the exact issue for which it allegedly has surveillance material, namely the claimant's work activities. However, while any surveillance videotape, investigator's testimony and/or allied reports must be precluded, case law does not foreclose the use of Facebook-derived information. Though carriers' attempts at gamesmanship

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must be discouraged by preclusion of the evidence listed above, a social medium such as Facebook is not part of any surveillance activities on a carrier's part (Matter of City of New York Social Servs.). Instead, the nature of Facebook is that communication of information is initiated by the user, in this instance, the claimant. Generally, its purpose is to broadcast to as wide a network of contacts as possible to pass on information that the user wants to have disseminated. The claimant cannot assert that she put out a very public advertisement for everyone to view except the carrier or its investigators. Further, testimony by the carrier's investigators about the claimant's Facebook advertisement would not be precluded solely on the claimant's anticipation that such testimony was intended to address surveillance that may have conducted.

Therefore, the Board Panel finds upon review of the record and based upon a preponderance of the evidence, that the carrier's surveillance material, associated investigative reports, and any testimony relating to such reports, if any, should be precluded, but that any evidence, testimonial or documentary, involving the claimant's own Facebook posting may be freely used. The Board Panel also finds that while disqualification from receiving further compensation awards may only be imposed following a finding that the claimant did violate WCL § 114-a, her benefits should be suspended based upon the prima facie evidence submitted.

#### CONCLUSION

ACCORDINGLY, the WCLJ decision filed November 8, 2011 is MODIFIED as follows: to the extent that awards were brought up to date at the tentative partial disability rate of \$142.15 per week from July 13, 2011 to November 4, 2011, with the carrier to continue payments at the tentative \$142.15 per week rate, such awards are rescinded without prejudice pending further development of the record on the issue of a possible WCL § 114-a violation, of which the carrier has filed prima facie evidence. The WCLJ decision otherwise remains in effect. The carrier is precluded from producing any videotaped surveillance, associated investigative reports, and any testimony relating to the reports in support of its WCL § 114-a claim, inasmuch as the carrier failed to disclose the existence of these materials prior to the claimant's testimony at the

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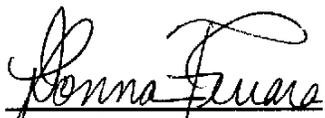
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Social Security No. -		Carrier -	Travelers Indemnity Company
WCB Case No. -	G041 0425	Carrier ID No. -	██████████
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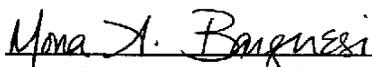
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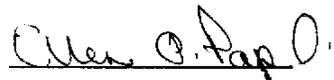
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November 5, 2011 hearing; the carrier may not pursue its WCL § 114-a claim to the extent it is based on such material. However, the carrier may use the Facebook exhibit that it has introduced, and may produce any witness to discuss that exhibit. The case is continued.

All concur.

  
Donna Ferrara

  
Mona A. Bargnesi

  
Allen P. Papoi

Claimant -   
Social Security No. -   
WCB Case No. - G041 0425  
Date of Accident - 02/21/2011  
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**Carrier:**  
Employer:  
Other:

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