

2025 WL 1914651 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: SMART RESTORATION CORP

Case No. G332 9143

Carrier ID No. 73823262-373 W204002

July 8, 2025

*1 State Insurance Fund
PO Box 66699
Albany, NY 12206
Date of Accident 9/19/2022

The Full Board, at its meeting held on June 17, 2025, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed on February 27, 2025.

ISSUE

The issue presented for Mandatory Full Board Review is whether the claimant sustained a compensable injury on September 19, 2022.

The Workers' Compensation Law Judge (WCLJ) established the claim for injuries to the neck, back, right shoulder, both knees, and right ankle, that resulted from an accident on September 19, 2022.

The Board Panel majority reversed the WCLJ decision and disallowed the claim, finding that the claimant did not sustain an accident that arose out of or in the course of employment, because he was not employed by the employer of record at the time of the alleged accident.

The dissenting Board Panel member would affirm the WCLJ and establish the claim for work-related injuries, finding that the WCLJ is in the best position to judge the credibility of the witnesses, that the employer witnesses were entirely incredible, and that while “there are some inconsistencies in the claimant's testimony, ... those inconsistencies [are not] enough to reverse the decision, especially considering all the other evidence and testimony.”

The claimant filed an application for Mandatory Full Board Review, and argues that the decision of the dissenting Board Panel member should be adopted by the Full Board.

No rebuttal was filed.

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

FACTS

On September 26, 2022, the Board received an Employee Claim (C-3) in which the claimant reported that he was injured at 10:00 a.m. on September 19, 2022, while working as a laborer. He alleged that he fell while he was dismantling scaffold on the

roof at a jobsite located at 176 Broadway in Manhattan and had to move from the roof to the 19th floor using only a rope; he was not provided a harness. He reported [injuries to his head](#), neck, back, lower back, right hand, and right wrist. The claimant alleged that he gave oral notice of the accident to “supervisor,” and that “unknown workers” saw the accident happen.

The State Insurance Fund (SIF) has controverted the claim for several reasons, including no causal relationship, no medical evidence of injury, and no employee/employer relationship. SIF specified that the employer denied that the claimant is his employee, stating that “[c]laimant has not work[ed] for him for over two years” (ECF Doc ID #382123232).

The claimant sought treatment at the emergency room of Elmhurst Hospital on September 19, 2022, and reported that at about 11:30 a.m. that day, he fell at work going downstairs, falling about eight feet and landing on his knees (ECF Doc ID #388901835, p. 1). Claimant complained of body pain, back pain, arm pain, knee pain, and difficulty making a fist with his right hand, and denied neck pain, loss of consciousness, and dizziness (id.). Another part of the hospital report provides a “History of Present Illness,” which states that the claimant reported pain in his right thumb, right palm, neck and low back, and ““paresthesias radial site” from right elbow down to right thumb after he lost his balance while standing on top of a ten-foot ladder (id., p. 5). He reported that while falling he tried to grab at the wires and a ladder and landed on both feet (id.).

***2** On September 28, 2022, Dr. Wlodarczyk examined the claimant and noted a history that on September 19, 2022, while the claimant was working construction, he fell as he was attempting to take a rope down on the outside of a building. He has been unable to return to work due to pain in the neck, mid-back, low back, left shoulder, bilateral wrists, and right ankle. Dr. Wlodarczyk found that the injuries to the cervical, thoracic and lumbar spine, left shoulder, bilateral wrists, and right ankle are causally related to the accident on September 19, 2022.

On October 10, 2022, Dr. Karafin examined the claimant and noted a history that on September 19, 2022, the claimant was dismantling scaffold and fell from approximately ten feet high, injuring his neck, lower back, both knees, both shoulders, and right ankle. Subsequently, the claimant developed numbness in the bilateral third fingers because he tried to hold on a rope as he was falling. Dr. Karafin found that the injuries to the cervical and lumbar spine, right shoulder, bilateral knees and right ankle are causally related to the accident on September 19, 2022.

On January 3, 2023, Dr. Goldstein, the orthopedic consultant for SIF, evaluated the claimant and noted a history that while the claimant was working construction on September 19, 2022, he fell from a scaffold about ten feet and sustained injuries to his neck, back, right shoulder, both knees, and both ankles. Dr. Goldstein diagnosed cervical and lumbar spine sprains, right shoulder and right [ankle sprains](#), and bilateral knee derangement. The doctor found that the injuries to the right shoulder, bilateral knees, and right ankle are causally related to the accident on September 19, 2022.

On January 24, 2023, Dr. Sharma examined the claimant's right ankle and noted a history that while the claimant was working construction on September 19, 2022, he fell off a scaffold while holding onto a rope and then fell to the ground from a height of approximately seven to eight feet. He sustained injuries to his right ankle, right wrist, left shoulder, head, back and neck. Dr. Sharma diagnosed a causally related right [ankle injury](#) and a consequential left [ankle injury](#).

In a decision filed on February 8, 2023, the WCLJ directed SIF to produce job site sign in logs; directed the claimant to produce complete hospital records, work credentials, and work identification and paychecks, if any. On April 13, 2023, the Board received another copy of the initial emergency room records but none of the other documentation that was directed to be produced is in the Board file.

On May 15, 2023, the Board received screen shots of texts between T.Y. and the claimant, along with a translation from the original Spanish to English (ECF Doc ID #4003064307). The texts indicate that T.Y. texted the claimant on September 18, 2022, and stated “tomorrow 8:00 am 176 Broadway.” At 8:43 a.m. on September 19, 2022, T.Y. sent a link with the location of 176 Broadway. The next communication is a picture sent at 9:02 p.m. by the claimant with the message “I will call you until now I am here at the hospital.” T.Y. responded with a “thumbs up” emoji. The next communication is a picture sent at 11:29 p.m. by

the claimant with the message “It looks like they are going to make me stay bro.” On the following morning at 11:23 a.m., T.Y. sent a message to the claimant to ask him how he is. There is no response shown.

***3** At the hearing held on May 16, 2023, the claimant testified that on the date of his accident, he was working for the employer as a construction helper. He was given instructions by his supervisor, L.Y. He was paid in cash about \$200 daily and worked five days a week. On the date of the accident, he was instructed to disassemble some scaffolding. In order to get to the location of the scaffolding, he had to use a rope to go to a lower level of the building. While going down, he fell onto the floor below. The claimant injured his neck, back, hands, and right wrist. There were witnesses present during his fall, but he does not know their names because it was his first day at the worksite. He was unable to move his arm or wrist after he fell. The supervisor was not present at the time of the alleged accident. He did not notify the employer of the accident immediately. He didn't finish the workday. He went to the hospital emergency room at 2:00 p.m. and left at 3:00 a.m.

On cross-examination, the claimant testified that he had started working for the employer at another work location a week before the accident. Prior to that, he had worked for the employer in 2020 for about four and a half months. He did no other work for the employer until 2022. On the day of the accident, L.Y. either texted him or called him with the location of the worksite. On that day, he was directed to go on the roof of the building to work. He was able to access the roof by using the stairs. The accident occurred around 8:45 a.m. He was bleeding from the rope, but he was not offered medical attention at the site. From the worksite, L.Y. drove him home and after he was home for a while, he went to the hospital because the pain became unbearable. When he worked for the employer in 2020, he was paid in cash. He was not paid for his 2022 employment. The accident happened at 176 Broadway in Manhattan, New York.

At the hearing held on July 11, 2023, the owner of the employer company, L.A.A. (hereinafter L.A.) testified that on September 19, 2022, his company was performing construction roof work at 176 Broadway. L.A. knows the claimant as a friend. The claimant was not working for him on the date of the alleged accident. On September 19, 2022, L.A. was present at the worksite for the whole day and no injury was reported to him that day. L.A. learned of the accident when he received a report from the Board. L.A. had other employees at the site on the date of the alleged accident, including the foreman, F.M. There were no other companies doing work at the site that day. L.A. was the only person responsible for hiring employees. L.Y. is employed by L.A. as a supervisor. L.Y. was not at the site to work on September 19, 2022. However, on that date, L.Y. did meet the claimant at 176 Broadway. They agreed to meet there so L.Y. could pick the claimant up; L.Y. told L.A. that he and the claimant were going to a restaurant to drink beers and watch a soccer game that started around 12:00 or 12:30 (Hearing Transcript, 7/11/23, pp. 11, 15-16).

***4** On cross-examination, L.A. testified that his company employed between eight and eleven people at the time of the alleged accident. He cannot remember the exact number because some employees are just temporary. At the time of the alleged accident, there were three employees at the worksite. The supervisor was not constantly at the worksite but would sometimes be there. L.A. has known the claimant for about five or six years. In 2019, the claimant worked for him briefly but the claimant did not renew his OSHA card so he could not continue working. L.A. always pays his employees, including temporary helpers, by check and never in cash. L.A. was not aware that the claimant was going to the hospital on September 19, 2022. L.Y. never went to the worksite on September 19, 2022; he only met the claimant in front of the building to go watch the soccer game.

At the same hearing, L.Y. testified that he has been a supervisor at the employer since 2018. He did not work on September 19, 2022; he had plans to go watch a soccer game that day. The claimant is a friend of his that he has known for many years. L.Y. worked with the claimant “some time ago” for a period of four to six months (Hearing Transcript, 7/11/23, p. 24). On September 19, 2022, L.Y. had planned to meet the claimant at 9:30 or 10:00, and they were going to a restaurant to drink beer and watch the game on TV. At 1:30 or 2:00, L.Y. dropped the claimant off at his home and he was okay. The claimant never told him anything about an injury or going to the hospital that day. L.Y. goes by a different first name (T.) with his friends. On September 19, 2022, L.Y. was aware that there were three employees who worked at the site, including F.M., who was the foreman, and L.A. On cross-examination, L.Y. confirmed that he sent a text to the claimant to meet him at 176 Broadway at 8 a.m. on September 19, 2022. Work at the site does not start until 9:00 a.m. L.Y. also confirmed that the claimant sent pictures of himself in the hospital at 11:00 p.m. that night. L.Y. stated that when he asked the claimant what happened, the claimant did not respond.

At the hearing held on August 31, 2023, F.M. testified that he works for the employer as a foreman and that he works with L.A. and L.Y. On September 19, 2022, he was working at 176 Broadway with two other people. F.M. does not know who the claimant is and did not see any accident at the job site on September 19, 2022. On cross-examination, F.M. conceded that he has no independent recollection of the events of September 19, 2022. After the testimony was completed, the WCLJ established the claim for injuries to the neck, back, right shoulder, bilateral knees, and right ankle; set the average weekly wage at \$1,000.00 without prejudice; and made awards.

The findings made at the hearing on August 31, 2023, are reflected in a decision filed September 6, 2023.

SIF requested administrative review, arguing that the record does not support the WCLJ decision to establish the claim.

*5 No rebuttal was filed.

LEGAL ANALYSIS

Although [WCL § 21\(1\)](#) affords claimants the presumption that unwitnessed or unexplained accidents that occur in the course of employment also arise out of that employment, “that statute does not wholly relieve [a claimant] of the burden of demonstrating that the accident occurred in the course of, and arose out of, ... employment” ([Matter of Bond v Suffolk Transp. Serv.](#), 68 AD3d 1341 [2009] [citations omitted]). Thus, the presumption cannot be used to show that an accident occurred ([Matter of Fedor-Leo v Broome County Sheriff's Dept.](#), 305 AD2d 760 [2003]). In this regard, a credibility determination must be made, and the Board is not bound to credit the testimony of the claimant ([Matter of Wood v Colonial Tavern & Rest.](#), 22 AD2d 984 [1964], lv denied 15 NY2d 486 [1965]).

“The Board ‘is the sole arbiter of witness credibility’ ([Matter of Hammes v Sunrise Psychiatric Clinic, Inc.](#), 66 AD3d 1252 [2009]; accord [Matter of Richman v NYS Unified Ct. Sys.](#), 91 AD3d 1014 [2012])” ([Matter of Wiess v Mittal](#), 96 AD3d 1175 [2012]). “The Board is entitled to make its own factual findings and is not bound by the credibility determinations of a WCLJ (see [Matter of Ortiz v Five Points Correctional Facility](#), 307 AD2d 634 [2003])” ([Matter of Jones v New York State Dept. of Correction](#), 35 AD3d 1025 [2006]).

Here, the claimant stated that he was injured while working for the employer at the 176 Broadway worksite on September 19, 2022. However, L.A. and L.Y. (aka T.Y.) testified that the claimant was not working for the employer and was only at that address in the morning to meet L.Y. to go to a restaurant and watch a soccer game. While both L.A. and L.Y. stated that the claimant had done no work for the employer after 2019, when he only briefly worked for the employer, no sign in documentation for the job site on the date of the accident was produced as directed by the WCLJ. The employer also failed to produce any payroll records, despite L.A.'s assertion that he never paid any employees in cash and always paid by check. Further, while F.M. testified that he does not know who the claimant is and that only F.M. and two other people were at the jobsite on September 19, 2022, he conceded that he had no independent recollection of the events on that day. It is further noted that while there are some inconsistencies in the medical evidence regarding the details of how the accident happened and which body parts were injured, the claimant was consistent in reporting to all the medical providers that he injured several body parts after he fell from some height while at work. The evidence of text messages between T.Y. (aka L.Y.) also confirm that L.Y. and the claimant had planned to meet at the 176 Broadway worksite location on September 19, 2022. While no purpose was stated within the text message exchange, the claimant credibly testified that L.Y. had contacted him with the worksite location for that day. As such, the WCLJ properly found that the claimant was credible in terms of the mechanism of injury, the date of injury and his employment on September 19, 2022.

*6 Therefore, the Full Board finds that the record supports establishment of this claim for injuries to the neck, back, right shoulder, both knees, and right ankle, that resulted from an accident on September 19, 2022.

CONCLUSION

ACCORDINGLY, the WCLJ decisions filed on September 6, 2023, and October 12, 2023, are AFFIRMED, and the WCLJ decision filed February 7, 2024, is MODIFIED to resolve form C-8.1 issues in favor of the medical provider(s). No further action is planned by the Board at this time.

Clarissa Rodriguez
Chair

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