



Robert E. Beloten
Chair

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

State of New York - Workers' Compensation Board

In regard to Ibrahima Sow, WCB Case #G030 4882

MEMORANDUM OF BOARD PANEL DECISION

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Opinion By: Loren D. Lobban
Mark D. Higgins
Freida Foster

The No-fault insurance carrier requests review of the Workers' Compensation Law Judge (WCLJ) decision filed May 7, 2012. The Independent Livery Driver Benefit Fund (ILDBF) filed a rebuttal. No rebuttal was filed by the claimant.

ISSUE:

The issue presented for administrative review is whether this claim was properly disallowed.

FACTS:

Per the Employee's Claim for Compensation (C-3) filed on June 25, 2012 the claimant, a cab driver, was injured when the cab he was driving was in a collision with another vehicle on April 4, 2010. He sustained headaches and neck and back injuries. Per the employer's C-2 filed on August 31, 2010, the claimant was an independent contractor and leased the cab from them. The claimant was driving the cab at the time of the accident. He claimed headaches, neck pain and lower back pain due to the collision. The medical records filed with the Board support the claimed injuries.

Per the Notice that Right to Compensation is Controverted (C-7) filed by the carrier/ILDBF on

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Claimant -	Ibrahima Sow	Employer -	Barry Abdoulaye dba G
Social Security No. -		Carrier -	Hereford Ins. Co. ILDBF
WCB Case No. -	G030 4882	Carrier ID No. -	W999002
Date of Accident -	04/04/2010	Carrier Case No. -	LDF00044
District Office -	NYC	Date of Filing of this Decision -	01/03/2014

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).

August 23, 2011, the issues raised, among others, were that there is no coverage for the claim and the accident does not meet the criteria required under 12 NYCRR 309.3.

In its Pre-Hearing Conference Statement (PH-16.2) filed on September 27, 2011, the carrier/ILDBF argued in its memorandum of law that it is not the proper carrier for this claim pursuant N. Y. EXC. LAW § 160-ddd.

At the hearing held on May 2, 2012 the claimant testified that he was involved in a motor vehicle accident on April 4, 2010. His cab and another vehicle were involved. There was no ensuing fight, argument, physical assault or criminal activity. Claimant injured his head, neck, legs and back.

The attorney for the carrier/ILDBF made an oral application that the claim be disallowed because the accident as described did not meet the criteria for a compensable workers' compensation accident. The claimant did not describe an assault or altercation in a police report and there was no evidence of the injuries which must be sustained pursuant to the statute. The no-fault insurance carrier opposed the motion. It argued that it was too soon to disallow the claim without more record development on the issue of claimant's employment.

In the May 7, 2012 decision, the WCLJ found the accident does not meet the criteria set forth under NY Code - Article 6-G and disallowed the claim.

LEGAL ANALYSIS:

The no-fault insurance carrier asserts that the WCLJ disallowance of the claim is incorrect since the claimant is a statutory employee under WCL § 18-b.

In rebuttal the carrier/ ILDBF contends that the WCLJ decision is fully supported by the record, and so should be affirmed.

Prior to January 1, 2010, a multitude of intricate and time-consuming issues surrounded livery drivers relative to Workers' Compensation claims, including the Board's jurisdiction and the challenging issue of employer/employee relationship versus independent contractor. Thus, effective January 1, 2010, the NYILDBF was created, which developed a new statutory framework to identify when livery drivers are entitled to workers' compensation benefits (versus no-fault benefits). The issue of whether the Board has jurisdiction over a claim can now be resolved by examining the nature and type of injuries sustained by the injured/deceased employee in the motor vehicle accident (*see* 12 NYCRR 309.3[a][3], discussed below).

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Additionally, the issue of employer/employee relationship can now be resolved by ascertaining whether the livery base is a member of the NYILDBF (*see* Workers' Compensation Law § 18-c, "Independent Livery Bases,").

Relative to the threshold issue of jurisdiction, 12 NYCRR 309.3(a) (3) provides:

"Workers' compensation benefits shall be provided by the Fund for independent livery drivers dispatched by independent livery bases for deaths arising out of and in the course of providing covered services, and all injuries arising out of and in the course of providing covered services either:

- (i) Resulting from a crime committed against such livery driver as evidenced by a police report; or
- (ii) Resulting in the following conditions:
 - (a) Amputation or physical loss of an arm, leg, hand, foot, multiple fingers, index finger, multiple toes, ear or nose;
 - (b) Paraplegia or quadriplegia; or
 - (c) Total and permanent blindness or deafness."

Thus, if a claimant is not a crime victim, or does not sustain the type of injuries specified in 12 NYCRR 309.3(a) (3) (ii), the claimant shall not be entitled to Workers' Compensation, but may file a no-fault benefits claim (12 NYCRR 309.3[a][2]).

In this case, the accident happened on April 4, 2010 which is after the establishment of the NYILDBF. Therefore the threshold issue of the Board's jurisdiction as set forth in 12 NYCRR 309.3 is applicable to this case. Based on the testimony of the claimant, he was driving his cab when he was in a collision with another motor vehicle. His injuries were to his head, neck and back. The medical treatment records in the Board file are for injuries not specified in the regulation. Additionally the injuries did not result from a crime committed against the claimant/driver per his testimony.

Based on the facts of this case and pursuant to 12 NYCRR 309.3, the Worker's Compensation Board has no jurisdiction in this matter. Since jurisdiction is a threshold issue, the Board need not consider the issues in WCL § 18-c. The no-fault insurance carrier raises WCL § 18-b as a basis for review. However, based on the foregoing analysis, the Board has no jurisdiction. Since the Board's jurisdiction is a threshold issue, the Board need not consider the issues raised by the no-fault insurance carrier.

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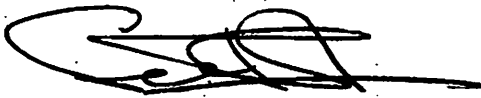
The Board Panel emphasizes that the claimant is not left without a remedy because, although the Board lacks jurisdiction, the claimant may file for no-fault benefits pursuant to article 51 of the Insurance Law.

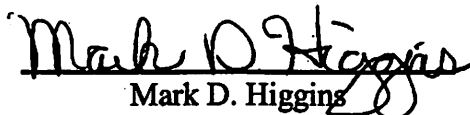
Therefore, the Board Panel finds, upon review of the record and based upon a preponderance of the evidence, that the Board has no jurisdiction over this claim, because the claimant's injuries are not of the nature and type enumerated in 12 NYCRR 309.3. As such, the WCLJ correctly disallowed the claim without further analysis of the no-fault insurance carrier's argument in opposition.

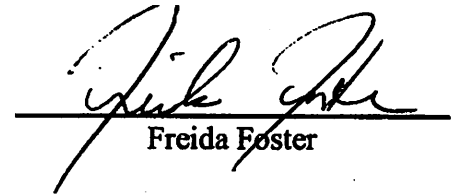
CONCLUSION:

ACCORDINGLY, the WCLJ decision filed May 7, 2012 is **AFFIRMED**, and the Board Panel finds that the Board has no jurisdiction over this claim because the claimant's injuries are not of the nature and type enumerated in Executive Law § 160-ddd and in 12 NYCRR 309.3(a)(3). No further action is planned by the Board at this time.

All concur.


Loren D. Lobban


Mark D. Higgins


Freida Foster

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