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In regard to Phillip John Thompson, DC Case # xxx-xx-8492

MEMORANDUM OF BOARD PANEL DECISION

Keep for your records

Opinion by: Robert E. Beloten
Samuel G. Williams
Candace K. Finnegan

The employer requests review of the Workers' Compensation Law Judge (WCLJ) decision filed on March 16, 2015. A timely rebuttal has been filed.

ISSUE

The issue presented for administrative review is whether the claimant has sustained his burden of proof under Workers' Compensation Law (WCL) § 120.

FACTS

On August 26, 2014, and October 6, 2014, the claimant filed a DC-120 (Discharge or Discrimination Complaint) dated August 19, 2014, against his former employer, Great Neck Public Schools (School), alleging that his employment was improperly terminated on May 21, 2014, in retaliation for his having filed a workers' compensation claim. The claimant also filed a second DC-120 dated October 31, 2014, involving the same circumstances, on November 17, 2014.

The claimant's workers' compensation claim was assigned WCB # G0656453, and has been established for a back injury. In WCLJ decisions filed on April 8, 2013, and November 6, 2013, the claimant was awarded compensation benefits at varying rates for the period of lost time from December 13, 2012, to September 16, 2013. He returned to work full duty on September 16, 2013, and although he had some treatment thereafter, no medical reports indicating a causally related disability were generated until May 23, 2014.

Claimant:	Phillip John Thompson	Employer:	Great Neck Public Schools
DC Case No.:	xxx-xx-8492	Carrier:	NA
Date of Complaint:	10/06/2004	Carrier Case No.:	NA
District Office:	Hempstead	Date of Filing of this Decision:	MAY 16 2016

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).

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On November 16, 2014, the employer filed a DC-130 (Employer's Statement) dated November 5, 2014, indicating that the claimant had failed to heed numerous warnings that his absences and tardiness would not be tolerated, and that he was ultimately terminated from his employment due to his poor attendance and poor work performance. The employer denied any causal connection between the claimant's workers' compensation claim and his termination. The employer filed a second DC-130 on September 4, 2015.

On January 8, 2015, the claimant testified that he began working for the School on November 26, 2007. On August 23, 2012, he injured his back while working. His supervisor at the time initially advised him that because of his job title of "cleaner," he was not eligible to receive workers' compensation benefits. Ultimately, a workers' compensation claim was filed. Claimant did not lose any time from work due to his injury until December 12, 2012. He was initially required to use his sick and vacation time while out of work (*see* Claimant's Exhibit E). The claimant returned to work full duty on September 16, 2013. At that time, he was reassigned to a different school, which required more strenuous work. In January of 2014, he was out of work for two days due to unrelated illness. He was paid his usual wages. The claimant identified Claimant's Exhibit B, which is a February 27, 2014, letter he received from the School's Director of Facilities and Operations (Director). Among other things, the letter lists all of the claimant's absences by school year since 2008. The claimant agreed with the amount of absences listed, but disagreed with that part of the letter that stated "these totals do not include absences attributable to vacation, personal leave, FMLA, or workers' compensation." The letter advised the claimant that his attendance record overall was unacceptable and would not be tolerated. The claimant was advised that this was his final notice, and that if he missed one more workday in the calendar year, his employment would be terminated. The claimant explained that the majority of his absences in 2012 and 2013 were due to his compensable injuries. The claimant testified that when he brought this error to the Director's attention, the Director responded that it did not matter whether the absences were due to compensable injuries, the claimant had failed to appear for work. The claimant believed that he only had five and a half sick days in the school year 2012-2013 that were not due to his work-related injury. In May of 2014, the claimant took one sick day because of flu symptoms. Thereafter, the claimant met with the Director and was advised that his employment was being terminated. In the school year 2008-2009, the claimant had 25 absences due to a motor vehicle accident. As a result, he was reprimanded, but was not terminated. The claimant also identified his Exhibit A, an April 12, 2013, letter from the employer advising him of his rights under Civil Service Law § 71. In light of that letter, the claimant believed he would not be terminated for his lost time associated with his workers' compensation claim. The claimant believes that his employment was terminated because he filed a workers' compensation claim.

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During cross-examination, the claimant admitted that he has never written a letter to anyone objecting to the contents of Exhibit B. The claimant's union representative was aware of the letter, and had been present at the meeting referenced therein. The claimant did not know whether a grievance had been filed on his behalf. The claimant admitted that he had received several warnings about the inadequacy of his attendance prior to February of 2014. The claimant then acknowledged his receipt, awareness, and understanding of the various warning letters and negative attendance evaluations that he has received over the course of his employment (*see* Employer's Exhibits 1-11). The claimant agreed that the last day that he had missed from work prior to his termination was due to illness unrelated to his workers' compensation claim.

The Director of Facilities and Operations for the School testified at the same proceedings. He has held the position of Director for five and a half years. The claimant was one of the employees that he supervised. The claimant has been counseled for his poor attendance on numerous occasions since 2009. As the claimant's job duties include cleaning the School, when the claimant does not appear, his co-workers have to do extra work and work longer hours. If co-workers are unable to get to the claimant's section, the section will remain neglected. The School will also be financially burdened by having to pay other employees time and a half as overtime to cover the claimant's absences. The witness identified the claimant's actual attendance records for the school years during which he was employed, and such were received as Employer's Exhibit 12. The Director testified that when the claimant's compensable lost time began, he was not sure whether the lost time would be covered by workers' compensation. Nonetheless, the School held the claimant's position for him by granting him family medical leave and, after that ran out, by placing him on a leave without pay status. The Director explained that in his position as cleaner, the claimant's entitlement to workers' compensation benefits is handled differently than that of other School employees, as other employees would have been contractually entitled to full salary payment for the first year following an injury. Benefits for cleaners are contractually different. After the claimant returned to work in September of 2013, he lost a day because of jury duty, then went out of work sick on October 10, 2013. The claimant went out of work sick again on December 9, 10, and 11, 2013, and January 27, 28, and 29, 2014. The claimant was allowed to use a vacation day for bereavement in February of 2014 because he is not contractually permitted bereavement pay. On February 27, 2014, the claimant was told he was being given a last chance to improve his attendance, and not to miss any more work. The claimant was then out of work on May 16, 2014. As this absence violated the last chance agreement, the Director called a meeting with the District, and requested and was granted authorization to terminate the claimant's employment. The meeting and the termination had nothing to do with the claimant's workers' compensation injury or the leave the claimant had taken in connection with the injury. After returning from

seven and a half months of leave due to his compensable injuries, the claimant was out of work for nine more days for unrelated reasons. The Director made the decision to terminate the claimant's employment.

During cross-examination, the Director testified that cleaners earn seven days of sick leave per year. He admitted that the February 27, 2014, letter incorrectly stated that the claimant's lengthy absences in 2012-2013 were unrelated to his workers' compensation claim, but explained that this was an oversight. The claimant had not been terminated for his absences prior to 2012 because he had always improved after being warned.

During re-direct testimony, the Director explained that he did not deliberately put false information in the February 27, 2014, letter.

The record reflects that on March 25, 2010, the claimant attended a meeting with the employer at which he was advised that his attendance was "unacceptable" and would not be tolerated. He was further advised that his failure to improve his attendance might lead to disciplinary action including termination (*see* Employer's Exhibit 7). In a November 8, 2010, performance evaluation for the claimant's performance during the 2009-2010 school year, the claimant was advised that his attendance was unsatisfactory. He was also told that he needed improvement in several other areas (*see* Employer's Exhibit 5). On November 19, 2010, the claimant attended a meeting with the employer at which he was advised that the number of sick days (5.62) he had used thus far was "irresponsible and excessive." The claimant was advised that his pattern of absence placed a burden on his fellow workers. He was told that the letter was his final warning, and that "if the remaining 1.38 sick days are exhausted between today and June 30, 2011, you will be terminated" (*see* Employer's Exhibit 1). On May 10, 2011, the claimant was advised that he had been absent for 6.15 days, and was cautioned to improve his attendance (*see* Employer's Exhibit 9). In a June 9, 2011, performance evaluation for the 2010-2011 school year, the claimant's attendance was noted to meet expectations, but the claimant was advised that he needed improvement in several other areas (*see* Employer's Exhibit 4). On September 21, 2011, the claimant was advised that he had already missed three days of work for that school year, and was cautioned to improve his attendance (*see* Employer's Exhibit 10). On June 21, 2012, the claimant was given an Employee Warning Notice advising that he had violated policy by failing to properly document his absence (*see* Employer's Exhibit 2). On July 20, 2012, the claimant was given another Employee Warning Notice advising that he had been late and had not called in correctly. The claimant was advised that this was a final warning before he would receive a formal write-up (*see* Employer's Exhibit 3). In an August 14, 2012, performance evaluation for the 2011-2012 school year, the claimant was advised that his attendance needed improvement.

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He was also told that he needed improvement in several other areas (*see* Employer's Exhibit 6). On December 9, 2013, the claimant was advised that he had missed three days in the past nine weeks. The claimant was advised that he had been given numerous opportunities to improve his attendance and had failed to do so. The claimant was instructed to attend a meeting two days later in order to discuss the matter further (*see* Employer's Exhibit 11).

After the January 8, 2015, hearing, the parties submitted memoranda of law.

In a decision filed on March 16, 2015, the WCLJ found that the employer's February 27, 2014, letter contained inaccuracies, was unconscionable, and should not have been enforced. The WCLJ found that the claimant was discriminated against primarily due to lost time associated with his compensable injuries, and continued the matter for a consideration of damages and mitigation of damages.

LEGAL ANALYSIS

In its application for administrative review, the employer argues that the claimant has failed to meet his burden of demonstrating that he was discriminated against in retaliation for filing a workers' compensation claim. The employer contends that the claimant was terminated eight months after he had returned to work full duty following an extended period of compensable lost time. The employer argues that the claimant was warned many times about his attendance prior to suffering his work-related injury, and that the claimant's termination was due to his continued poor attendance. The employer also argues that the claimant's termination was for a legitimate business reason, as the claimant's continuing absences disrupted the workplace. Lastly, the employer argues that the February 27, 2014, letter cannot be characterized as unconscionable because it is not a contract, and that even if it were to be considered a contract, the letter cannot reasonably be said to shock the conscience, as it offered the claimant a last chance to keep his job.

In rebuttal, the claimant argues that the employer's application for review is frivolous. The claimant suggests that the employer's February 27, 2014, letter rises to a level of malicious inaccuracy, as the Director knowingly presented that letter, containing false information, to the School when seeking authorization to terminate the claimant's employment. The claimant further argues that the employer's application for review should not be considered because the attorney who prepared it failed to sign the RB-89 cover sheet in violation of 12 NYCRR 300.15.

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Defective RB-89

When an application for review is incomplete or when the application lacks proper proof of service but the record contains a rebuttal, the Board has discretion to deny review of that application (*see* 12 NYCRR 300.15; *Matter of Greenough v Niagara Mohawk Power Corp.*, 45 AD3d 1116 [2007]).

In this matter, as a timely rebuttal has been received, the Board Panel exercises its discretion to consider the employer's defective application for administrative review.

WCL § 120

"The purpose of Workers' Compensation Law § 120 'is to protect employees from retaliation by an employer for filing claims for compensation or disability benefits' (*Matter of Johnson v Moog, Inc.*, 114 AD2d 538 [1985]; *see Matter of Axel v Duffy-Mott Co.*, 47 NY2d 1 [1979])." The claimant bears the burden of proving that the employer retaliated against him for seeking workers' compensation benefits (*Matter of Torrance v Loretto Rest Nursing Home,* 61 AD3d 1124 [2009]). This requires the claimant to demonstrate a causal nexus between his intent to claim workers' compensation benefits and the employer's allegedly retaliatory conduct (*id.*). If the employer's actions are found to have been made for a legitimate business reason, then no statutory violation has occurred (*see Matter of Morgan v New York City Dept. of Correction*, 39 AD3d 891 [2007]).

In this matter, there is no dispute that the claimant's attendance had been deemed unacceptable by the employer on numerous occasions prior to the claimant's 2012 work-related injury. Furthermore, other aspects of the claimant's work performance were found to be lacking, and the claimant was repeatedly advised that he needed to improve. The Board Panel credits the employer's explanation that the claimant had not previously been terminated in connection with such prior warnings because the claimant had heeded those warnings at the time they were made.

Although the employer's February 27, 2014, letter erroneously indicated that the claimant had been out of work for extensive periods of time for reasons unrelated to his workers' compensation claim, we find insufficient evidence that the error was intentional, or that the misinformation was included in an effort to retaliate against the claimant because he had filed a workers' compensation claim.

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In accordance with these credibility determinations, the Board Panel finds insufficient evidence of a causal nexus between the claimant's decision to file a workers' compensation claim, and the employer's ultimate decision to terminate his employment after the claimant failed to comply with the employer's directive as set out in the February 27, 2014, letter.

Additionally, the parties agree that per the employment contract, cleaners like the claimant were granted seven days of sick time. We credit the employer's testimony that anytime a cleaner is absent from work, there is a hardship on the other workers, and that the cleanliness of the school may suffer. As the record reflects that the claimant repeatedly failed to follow the employer's policies and procedures, we further find that the termination of the claimant's employment was the result of a legitimate business decision, and not the result of discrimination or retaliation (*see Matter of Monroe v Cortland County*, 275 AD2d 510 [2000]; *see also Gagnon v Foster Medical Supply,* 232 AD2d 681 [1996]; *Matter of Duncan v New York State Developmental Center*, 63 NY2d 128 [1984]).

Therefore, the Board Panel finds, upon review of the record and based upon a preponderance of the evidence, that the claimant has failed to meet his burden of establishing a violation of WCL § 120.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed on March 16, 2015, is REVERSED and the claim is disallowed. There is no further action planned by the Board at this time.

All concur.

ROBERT E. BELOTEN SAMUEL G. WILLIAMS CANDACE K. FINNEGAN

LR/REV/ZIL/HEM

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