

2022 WL 1057862 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: MID HUDSON FORENSIC PSYCHIATRI

Case No. G271 9532

Carrier ID No. 72584576-253 W204002

April 4, 2022

*1 State Insurance Fund
PO Box 66699
Albany, NY 12206
Bronnberg & Henriquez PC
621 Chestnut Street
Garden City, NY 11530
Date of Accident 3/27/2020

The Full Board, at its meeting on March 15, 2022, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed October 20, 2021.

ISSUE

The issue presented for Mandatory Full Board Review is whether this claim should be established for work-related contraction of COVID-19.

The Workers' Compensation Law Judge (WCLJ) established this claim for COVID-19.

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 November 18, 2021, arguing that her credible testimony that she was exposed to a COVID-19 positive co-worker was uncontroverted, and supports the establishment of this claim.

The carrier filed a rebuttal on December 16, 2021, arguing that the record supports the decision of the Board Panel majority disallowing the claim.

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

FACTS

Claimant filed a C-3 (Employee Claim) on April 21, 2020, alleging that she contracted COVID-19 as the result of being “exposed to Covid-19 by co-worker” in her job as Security Hospital Treatment Assistant in a psychiatric hospital. Claimant indicated that onset of the illness was March 27, 2020, and that she received a positive test result for COVID-19 on April 14, 2020.

The carrier controverted the claim.

The record contains a laboratory report dated April 14, 2020, indicating that claimant had tested positive for COVID-19 based on a sample collected on April 7, 2020.

At a pre-hearing conference on September 22, 2020, claimant testified that on March 27, 2020, she was exposed to COVID-19 by a co-worker and reported the exposure to her employer. She was not at work from March 28 to June 1. Following the claimant's testimony, the WCLJ found prima facie medical evidence for COVID-19 and continued the case. The findings made at the September 22, 2020, pre-hearing conference are reflected in a decision filed September 25, 2020.

At a hearing on December 2, 2020, claimant testified that she worked as a security hospital treatment assistant in a forensic psychiatric hospital. She was exposed to a COVID-19 positive co-worker, E.G., on March 27, 2020. She began to experience symptoms on March 28, 2020. She had a bad headache and was feverish. Her symptoms were not "too bad" initially. On March 30 or 31, 2020, she was advised that she had been exposed to a COVID-19 positive co-worker on March 27, 2020. She first sought treatment on April 3, 2020, at urgent care. She had a COVID-19 test on April 7, 2020, which was positive. She was out of work from March 28, 2020, to June 1, 2020, because she had trouble breathing and was very fatigued. When she received her test results, she immediately notified her employer that she had been exposed to COVID-19 at work and had tested positive herself.

*2 On cross-examination, claimant testified that she was not told that she needed to wear, and did not wear, personal protective equipment during the month of March of 2020. She lived with her daughter, age 20, and her son, age 17. In March 2020 her daughter worked at Target and her son went to school. Her son's school closed approximately March 18 or 19, 2020. She drove to and from work. Her son took public transportation (bus) to school and her daughter took public transportation to work. Her daughter stopped working sometime in March 2020. Claimant did not visit friends or family during March 2020. She went grocery shopping in early March of 2020. She did not go out to eat in March 2020. She had to stop for gas regularly and shopped at a convenience store.

After listening to claimant's testimony and summations by the parties, the WCLJ established the claim for COVID-19, set claimant's average weekly wage at \$1, 572.40, and made awards. The findings and awards made at the December 2, 2020, hearing are reflected in a decision filed December 7, 2020.

The carrier requested administrative review, arguing that the record does not contain prima facie medical evidence, that there is insufficient medical evidence of causal relationship, that claimant failed to demonstrate that COVID-19 was prevalent in her work environment, and that claimant's "alleged exposure and the onset of her symptoms are so inconsistent with the incubation period for COVID-19 that it is improbable that she contracted COVID-19 at work on March 27, 2020."

In rebuttal, the claimant argued that "[b]ased upon the carrier's failure to overcome the presumptions and based upon the claimant's work as an essential worker during the pandemic with a co-worker testing positive, we contend that the Law Judge correctly established the case for COVID-19."

LEGAL ANALYSIS

"For over a century, the New York State Workers' Compensation Board (Board) has responded to outbreaks and chronic injuries by ensuring that claims are handled quickly and benefits are paid promptly. From diseases like [tuberculosis](#) and [asbestosis](#), to the tragedy of 9/11, and to the opioid crisis, the Board has always risen to meet the needs of injured workers across the state. COVID-19 is no exception." (COVID-19, Information for Workers, <http://www.wcb.ny.gov/covid-19/information-workers.jsp>). The Board has reached out to carriers and other payers to encourage the prompt resolution of all claims for COVID-19 resulting from workplace exposure (Letter From Chair Rodriguez to Carriers and Payers of Workers' Comp: Speeding up the resolution process for COVID-19 claims, <http://www.wcb.ny.gov/content/main/TheBoard/letter-from-chair-rodriguez-9-10-2020.jsp>). In most workers' compensation claims, the claimant has the burden of demonstrating a causal relationship between an injury and a work-related accident by submitting competent medical evidence. However, due to

the unique circumstances surrounding the COVID-19 pandemic, the Board has routinely established claims for work-related COVID-19 based on medical evidence that claimant was diagnosed with COVID-19, coupled with evidence that COVID-19 was prevalent in claimant's workplace. Thus, while a claimant may submit a medical opinion stating that they contracted COVID-19 at work to bolster their claim, failure to submit such evidence is not fatal to the claim (see *Matter of DOCCS Edgecombe Cor Facility*, 2020 NY Wrk Comp G2718395).

*3 In *Matter of Middleton v Coxsackie Correctional Facility*, 38 NY2d 130 (1975), the Court of Appeals noted that the Board's finding that persistent impacts of exposure, provided "substantial evidence from which the board could determine that this was an accident gauged by the commonsense viewpoint of the average man, [and also that] the time-definiteness required of an accident was satisfied by application to the result...."

In *Matter of Johannesen v New York City Dep't of Hous. Pres. & Dev.*, 84 NY2d 129 (1994), the Court of Appeals stated, "[t]he seriously adverse environmental conditions to which claimant was subjected as part of her job and workplace reasonably qualify as an unusual hazard, not the 'natural and unavoidable' result of employment ([WCL] § 2[7])."

Viewed together, *Middleton* and *Johannesen* indicate that if the claimant contracts COVID-19 through close contact with the public (such as a patient), such exposure could be found to be a work-related accident within the meaning of WCL § 2(7).

Therefore, when alleging that COVID-19 was contracted at work, the claimant may show that an accident occurred in the course of employment by demonstrating "prevalence." Prevalence is evidence of significantly elevated hazards of environmental exposure that are endemic to or in a workplace, which demonstrates that the level of exposure is extraordinary (*id.*).

Claimant must demonstrate "prevalence" in terms of evidence of the nature and extent of work activities, which must include significant contact with the public and/or co-workers, in an area where COVID-19 is prevalent. Public-facing workers, and workers in a highly prevalent COVID-19 environment are the workers who can show that the exposure was at such a level of elevated risk as to constitute an extraordinary event (*Matter of ABF Freight*, 2021 NY Wrk Comp G2811695).

Claimant, who was represented by counsel, did not assert or show that COVID-19 was prevalent in her workplace. Nor is there any evidence in the record to substantiate a claim of prevalence. For example, claimant did not provide information about the size of the patient population she interacted with, or the extent of her interaction with the public and co-workers. The Board's guidance on prevalence had been developed and thoroughly disseminated prior to her testimony in December 2020. As shown above, the Board has specifically provided this guidance as a way of showing the pathway for a claimant to demonstrate work-related exposure of a pandemics infectious disease. Nonetheless, she and her counsel did not provide testimony or any other evidence to substantiate prevalence. Rather, the claimant chose to base her claim on a specific purported exposure.

Even in the absence of a demonstration of prevalence, a claim for COVID-19 can be established based on a specific exposure to an individual who is COVID-19 positive (*Matter of DOCCS Downstate Cor Facility*, 2021 NY Wrk Comp G2688223). This claim is premised on the assertion that claimant contracted COVID-19 as the result of a specific exposure on March 27, 2020. Claimant testified that on March 27, 2020, she was "exposed" to a co-worker who later tested positive for COVID-19. Claimant did not indicate precisely where she encountered that individual, how close the contact was, or how long the contact lasted. Moreover, claimant testified that her symptoms began the very next day, March 28, 2020. As the generally accepted incubation period for COVID-19 is two to 14 days after exposure (see <https://www.cdc.gov/coronavirus/2019-ncov/hcp/faq.html#Transmission>), claimant's assertion that she became symptomatic on March 28, 2020, undermines her claim that she contracted the disease as the result of a specific exposure at work on March 27, 2020.

*4 Therefore, the Full Board finds that there is insufficient evidence in the record to establish this claim for COVID-19 at the present time. The case is hereby restored to the trial calendar for claimant to have the opportunity of demonstrating that COVID-19 was prevalent in her workplace.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed December 7, 2020, is RESCINDED, without prejudice, and the case continued for further development of the record on the issue of whether COVID-19 was prevalent in claimant's workplace.

Clarissa Rodriguez

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