

2022 WL 739209 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: NEW YORK CITY TRANSIT AUTHORIT

Case No. G293 3532

Carrier ID No. TA202003394 W848006

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*1 NYC Transit Authority
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Date of Accident 11/29/2020

The Full Board, at its meeting held on February 15, 2022, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed November 12, 2021.

ISSUE

The issue presented for Mandatory Full Board Review is whether this claim should be established for [post-traumatic stress disorder](#) (PTSD).

The Workers' Compensation Law Judge (WCLJ) established this claim for PTSD.

The Board Panel majority affirmed the WCLJ.

The dissenting Board Panel member would find claimant did not experience stress that was greater than normal and would disallow the claim.

The self-insured employer (SIE) filed an application for Mandatory Full Board Review on December 8, 2021, arguing that claimant “was a mere bystander,” rather than an active participant, and did not experience stress that was greater than that experienced by similarly situated workers.

The claimant filed a rebuttal on January 7, 2022, arguing that she experienced stress that was greater than that experienced by similarly situated workers in the normal work environment, and that the record supports the decision of the Board Panel majority.

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

FACTS

Claimant filed a C-3 (Employee Claim) on December 7, 2020, alleging that on November 29, 2020, while working as a cleaner for the transit authority and checking the station platform for debris, she came across a person lying in the fetal position. She “called it in and the FDNY told [her] the person was deceased.” Claimant alleges that she sustained “psychological injury due to mental stress experienced by coming upon a deceased person on subway platform; stress greater than usual experienced in the work environment.”

The SIE controverted the claim.

In a November 30, 2020, report, claimant's treating physician, Dr. Xiao, diagnosed [acute stress disorder](#) that was causally related to the November 29, 2020, incident:

She works as a station agent from MTA. On 11/29/20 she sustained a work-related injury. She states: “while working at the booth at work, I saw a man bent over at the platform and he looked sick. I called for help, the fire department came and found the man passed away. I saw he was covered over a white sheet and was carried away”.

She was traumatized by this event and developed sleeping problems, flashbacks, and [anxious mood](#).

In a report dated January 1, 2021, which was based on a December 16, 2020, examination, claimant's treating licensed clinical social worker, Ashley Huie, stated that while at work claimant had come upon a “passenger on the platform bent over with his chin to his lap on a bench. She called into her supervisor and the fire department and the passenger was declared dead.” Claimant then “broke down crying on the platform.” LCSW Huie diagnosed PTSD which she found was “causally and directly related to the incident that occurred on November 29, 2020.”

*2 Claimant was examined by the SIE's consultant, Dr. Bienenfeld, on March 4, 2021. In his report, Dr. Bienenfeld stated that claimant had worked as a cleaner for the transit authority for 14 years and that on November 29, 2020, “she was in the station and saw a man seated on [a] bench, he was not moving. A woman sat next to him and noticed the man was unresponsive as well, it turns out he was deceased.” According to Dr. Bienenfeld's report, claimant called the command center and the fire department responded and “covered him in a white sheet and took him away. The claimant says she was very shaken up.” Dr. Bienenfeld concluded that claimant had PTSD that was causally related to the November 29, 2020, incident.

Dr. Xiao was deposed on March 17, 2021, and testified that she most recently examined claimant on February 25, 2021. Claimant continues to experience flashbacks, is very emotional, feels nervous in crowds and around people, and is “worried if she goes back to work, she could see another dead man, and that makes her scared. She doesn't think she can handle her job right now” (Deposition Transcript, 3/17/21, p. 10). According to Dr. Xiao, claimant's diagnosis could be changed from [acute stress disorder](#) to PTSD, as more than 30 days had passed since the incident.

LCSW Huie was deposed on March 25, 2021, and testified that she has treated claimant on six occasions. Claimant continues to be fearful of riding the subway. In January of 2021, claimant had a panic attack and had to go to the emergency room. Claimant is experiencing crying spells, hypervigilance, and flashbacks of the November 29, 2020, incident. LCSW Huie testified that although she had never previously treated a cleaner for the transit authority, “it's a commonality in all of the roles at Transit to come across things like dead bodies or accidents that happened on the subway, people, passengers being hurt or killed” (Deposition Transcript, 3/25/21, p. 26).

Dr. Bienenfeld was deposed on April 6, 2021, and testified in accordance with his report. According to Dr. Bienenfeld, claimant reported that she avoided trains, subways, and anything else that reminded her of the November 29, 2020, incident.

At a hearing on May 7, 2021, claimant testified that she began working for the transit authority as a station cleaner on May 21, 2006. On November 29, 2020, she observed a man seated on a bench who was not moving, and it turned out that he was deceased. She did not observe any blood or wounds and did not touch the deceased. She watched the deceased for five to seven minutes and when he did not move, she asked the clerk to request police and medical assistance. It was several more minutes until the fire department arrived. After calling the booth, she called her supervisor and requested that she come down to the platform. She testified that she did not “remember what she [her supervisor] said to me. Because I know my job, I guess she knows I will take care of it, I am waiting for EMS” (Hearing Transcript, 5/7/21, p. 7). Claimant testified that the fire department arrived and asked her “what happened, I told them what I did, I had been standing there watching the body to see if I saw movement” (id.). She was advised by the fire department that the person was deceased. Claimant was crying hysterically. In her career with the transit authority, she had never before encountered a dead body and had never heard of another cleaner encountering a dead body. In her training with the transit authority, she was never instructed how to respond if she encountered a dead body. On cross-examination, when asked whether her training included what to do if a person was in medical distress, claimant responded that “[t]hey only tell us to call it in” (p. 10). Counsel for the SIE then asked: “Similarly, I would assume that death is the ultimate medical distress and you called it in just as you did, correct?” Claimant responded, “Yes” (id.).

*3 After listening to claimant's testimony and summations by the parties, the WCLJ established the claim for PTSD, set claimant's average weekly wage at \$1, 221.34, and made awards. The findings and awards made at the May 7, 2021, hearing are reflected in a decision filed May 12, 2021.

The SIE requested administrative review, arguing that claimant was not subject to stress greater than that experienced by similarly situated workers in the normal work environment, and that the claim should be disallowed.

In rebuttal, claimant argued that she experienced stress that was greater than that experienced by similarly situated workers in the normal work environment when she encountered a dead body, and that the WCLJ decision should be affirmed.

LEGAL ANALYSIS

“A mental injury may be compensable under the Workers' Compensation Law. However, to obtain benefits, the claimant must demonstrate that the stress that caused the claimed mental injury was greater than that which other similarly situated workers experienced in the normal work environment” (Matter of [Casey v. United Refining Company of Pennsylvania](#), 194 AD3d 1300 [2021] [[internal citations and quotation marks omitted]]).

Here, claimant credibly testified that in her career with the transit authority, she had never encountered a dead body, had never heard of another cleaner encountering a dead body, and in her training with the transit authority, was never instructed how to respond if she encountered a dead body. The SIE contends that the testimony of LCSW Huie that “it's a commonality in all of the roles at Transit to come across things like dead bodies or accidents that happened on the subway, people, passengers being hurt or killed,” supports a finding that the stress experienced by claimant was not greater than that experienced by similarly situated workers. LCSW Huie did not state how she came to believe that encountering dead bodies was such a common occurrence among transit authority employees, but presumably she derived this belief from treating other patients. However, LCSW Huie conceded that she had never previously treated a patient who, like claimant, had worked as a cleaner for the transit authority. Moreover, the subset of transit authority workers with which LCSW Huie was familiar was limited to patients who sought treatment with her for psychological conditions, and who might be more likely to have experienced trauma while at work. Thus, the testimony of LCSW Huie in this regard is given little weight.

Therefore, based on the credible testimony of the claimant, the record supports a finding that the stress claimant experienced was greater than that experienced by similarly situated cleaning workers.

In claims for mental injuries resulting from emotional trauma caused by “witnessing another's tragedy” (Matter of [Wood v. Laidlaw Tr.](#), 77 NY2d 79, 81 (1990)), courts have also taken into consideration whether claimant was an “active participant” (id.

at 83), as opposed to a “mere bystander (id.). In Wood, claimant, a school bus driver, came upon the scene of a fatal automobile accident, remained at the scene until emergency assistance arrived, and developed mental injuries as a result. The Court of Appeals reversed the decision of the Appellate Division, Third Department, which had disallowed the claim, and reinstated the decision of the Board that had found that claimant's mental injuries were the result of a compensable accident. The Court found that claimant “was by virtue of her employment an active participant” (id. at 84), and that her “job responsibilities involved her in a unique way and distinguished her from others who might have passed on the road” (id.). The Court of Appeals also made clear that not all claimants seeking benefits for mental injuries were required to demonstrate that they were active participants, and that “‘active participants' are simply one category of claimants who might recover workers' compensation for injuries that result from witnessing events that befall someone else” (id.).

*4 In the present case, claimant testified that she had been trained to “‘call it in” when she saw a passenger in medical distress. On November 29, 2020, she observed a passenger who was not moving and when he did not move after several minutes, she requested that assistance be sought consistent with her training. She then continued to observe the passenger until the fire department arrived. Under these circumstances, claimant was clearly more than a mere bystander, and that by virtue of her job responsibilities was an active participant in the incident that resulted in her mental injuries.

Therefore, the Full Board finds that the preponderance of the evidence in the record supports establishing this claim as an accidental injury for PTSD.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed on May 12, 2021, is AFFIRMED. No further action is planned by the Board at this time.

Clarissa Rodriguez
Chair

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