

2022 WL 594617 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: MANHATTAN & BRONX SURFACE

Case No. G284 5448

Carrier ID No. MS202000727 W835003

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Date of Accident 11/19/2020

The Full Board, at its meeting on January 25, 2022, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed October 14, 2021.

ISSUE

The issue presented for Mandatory Full Board Review is whether the record supports establishing this claim for work-related [post-traumatic stress disorder](#) (PTSD), anxiety, and depression.

The Workers' Compensation Law Judge (WCLJ) disallowed the claim.

The Board Panel majority established the claim for PTSD, anxiety, and depression.

The dissenting Board Panel member would affirm the WCLJ decision.

The self-insured employer (SIE) filed an application for Mandatory Full Board Review on November 12, 2021, arguing that “[t]he Board erred in holding that the employer witness testimony could not be considered as it was hearsay as this argument was not previously raised ...” The SIE argues that, as found by the WCLJ, claimant is not credible and that the stress claimant experienced was not greater than that experienced by similarly situated employees.

The claimant filed a rebuttal on December 10, 2021, arguing that she was credible, that she experienced stress greater than that which occurs in a normal work environment, and that the Board Panel majority properly established the claim.

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

FACTS

This is a controverted claim for mental injuries which claimant alleges resulted from an incident at work on November 19, 2020.

In a November 24, 2020, report, claimant's treating psychologist, Dr. Levinson, stated:

On 11/19/20 [claimant] was working on the job as a Bus Operator with the MTA. A man boarded her bus and became increasingly agitated and aggressive towards her. He was telling other customers that she was racist and a bitch. He had a bag of groceries and pulled out a fruit cup and threw it forward towards [[claimant] and it splattered on her pants. She stopped the bus and called the control center. He then started threatening her by yelling "I know what you look like, I'm going to fuck you up" and more. He pulled out a can of food to throw. [Claimant] was fearful and scared. Another bus operator pulled up alongside her and told her to pull over and let everyone off. The man remained on the bus until supervisors came and took him off.

Dr. Levinson diagnosed [adjustment disorder with anxiety](#), [agoraphobia without panic disorder](#), and sleep disorder due to psychological distress. Dr. Levinson opined "that the psychological symptoms the patient is experiencing currently are causally related to the assault she had while on the job." Dr. Levinson found claimant to be totally disabled.

*2 In a December 8, 2020, report, claimant's treating psychologist, Dr. Rivera, recounted the following history provided by claimant:

Male customer on my bus stated I left him at the bus stop. He stated yeah, b— h I caught up to you, he also stated I should spit on you. And he was threatening me with physical harm. As I was waiting at the traffic light male customer threw a fruit cup at me. In which the juice splattered onto my pants legs. Then the male customer threatened me stating he was going to throw other things at me. He continued with the threat stating, next time he'll see me he was going to cause me physical harm. Feeling depressed, not sleeping well. Having flashbacks about the incident, just complete sadness!!!

Dr. Rivera diagnosed PTSD and [major depressive disorder](#) and found that claimant's symptoms "are causally and directly related to the incident that occurred on November 19, 2020." Dr. Rivera found that claimant was temporarily totally disabled.

Dr. Levinson was deposed on February 15, 2021, and testified that claimant "reported that she was working as a bus operator and a very aggressive man boarded her bus. And he was yelling racial epithets and throwing things at the front of the bus and threatening her that he was going to kill her" (Deposition Transcript, 2/15/21, p. 6). He diagnosed [adjustment disorder with anxiety](#), [agoraphobia without panic disorder](#), and sleep disorder. He believed that those diagnoses were causally related to the November 19, 2020, incident, "especially since she had a clean psychological history, having never had, you know, these symptoms or seen a therapist, take any medication, et cetera" (p. 7). Claimant continued to attend weekly therapy sessions with Dr. Levinson. Claimant was referred to a psychiatric nurse practitioner who prescribed psychotropic medications which have helped to stabilize her and reduce her symptoms. On cross-examination, Dr. Levinson testified that he understood that there was a divider between where bus drivers sit and the passengers on the bus, but that was not part of his discussion with the claimant. His appointments with claimant have been "via telehealth only" (p. 11).

Dr. Rivera was deposed on March 2, 2021, and testified on cross-examination regarding the history of the November 19, 2020, incident provided by claimant. It was Dr. Rivera's understanding that claimant did not know the male passenger prior to the November 19, 2020, incident. Claimant did not mention being hit or touched, except by the fruit cup. Dr. Rivera did not recall whether claimant reported that there was a barrier between where she sat and the passengers on the bus. She did not recall if claimant had told her that there was a verbal exchange between claimant and the male passenger, or if claimant yelled back at him. Dr. Rivera diagnosed claimant with PTSD and [depressive disorder](#), which were causally related to the November 19, 2020, incident based on the history provided by claimant. If that history was changed or modified, that could impact her opinion on causal relationship. Dr. Rivera's sessions with claimant were by video.

*3 On March 15, 2021, the Board received 21 pages of documents which relate to the SIE's investigation of the November 19, 2020, incident, which were submitted by the SIE (Doc. ID #4000446280). The documents include a form entitled "Violation of Rule" which states that on November 19, 2020, claimant failed to stop at a bus stop, "which was the reason for this incident. All of this could have been avoided if she were stop and pick up the customer." The documents also include an on-the-job injury form signed by claimant and dated November 19, 2020, which states that claimant suffered "mental trauma" resulting from an incident where a "[m]ale customer threw a fruit cup at me, causing the juice to splatter onto my pant's legs. Also threatened me with physical harm. Everytime he'll see me." (id. at p. 3). There is also a statement signed by the claimant and dated November 19, 2020, which provides:

Customer stated that I left him at the bus stop. Yeah Bitch that's why I caught up to you, he also stated I should spit on you. I told male customer to go right ahead and do it. As I waiting at traffic light, male customer threw a fruit cup at me. In which the juice splatter onto my pants legs. The male customer, threatened me, stating he was going to throw some other items at me. He continue with the threat's, stating next time he'll see me he was going to cause me physical harm. I then press RTT and command states he was calling the police. Police officer arrive and took male customer off the bus. Police officer name was Turzer Shield number 26919 from the 44 Precinct.

(id. at p. 7).

At a hearing on March 22, 2021, testimony was taken of the claimant and an employer witness. Claimant testified that on November 19, 2020, she was working for the SIE as a bus operator. With respect to the incident on that date, claimant testified:

My bus went - I pulled up to the bus stop. And as I was loading up the customers, one customer stated: "Yes, I caught up with you 'B' what you called me a bitch. So I paid him no mind. So I left the bus stop. So while I was driving down the road, he was saying that I had left him at the bus stop. I didn't respond to his complaint or whatever. Next thing you know, something came flying towards me; it was a fruit cup. So it was fruit juice all over where I was sitting at. And he was threatening me. He told me that if you ever see me again, he's going to beat me up, and how I was racist. And just continued to verbally threaten me with physical harm. And then as I had stopped, I pulled over and we was going back and forth. He had a can of Ravioli - he had a can of something in his bag, and he was about to open it to throw that at me, too. So I called control. I explained the situation. So the police came and my supervisor came, and the police escorted him off the bus. They took my information and that was that. I was traumatized. I was scared to death because I've been driving for like 13 years now, and I never experienced anything like that before. I have been - I'm used to being verbally abused; but to have something thrown at me, that was the first time that ever happened.

*4 (Hearing Transcript, 3/22/21, pp. 3-4). The entire incident lasted approximately 15 minutes. During the incident, the passenger stated, "'Bitch, next time I see you, I'm going to fuck you up,'" and he knew "what I look like" (p. 5). She had never seen the passenger before. She was on her regular route at the time of the incident, and had been assigned that route for approximately three months. Every three or four months she is able to pick a new route. A supervisor showed up after she called "control." She was unable to drive after the incident. She filled out some paperwork and went home. She did not have any problems with stress, anxiety, or trauma prior to the November 19, 2020, incident.

On cross-examination, claimant testified that she had to deal with irate passengers during her 13 years as a bus operator. Claimant denied failing to stop at the bus stop where the passenger was waiting or telling the supervisor that she didn't stop because she knew the passenger was not going to pay. She only needs to stop at a bus stop if there is a passenger that needs to get on or off the bus. When asked whether the passenger could have been at the stop and she "just didn't see him?", claimant responded, "I don't know, its possible. He probably arrived there after I passed the stop; that's a possibility" (p. 10). The passenger stood in front of the white line that passengers are supposed to stay behind. The bus has a door and a partial partition that separates the driver from the passengers. The fruit cup thrown by the passenger "hit the partition, yes; and the juice and fruit splattered onto my pants and into the front of the window - and I guess the dashboard if you want to call it" (p. 12). She stopped the bus after he threw the fruit cup.

The SIE's general superintendent of safety and environmental management testified that she is responsible for handling workers' compensation claims for the employer. She handled this claim for the employer. She testified that she “did request the bus video which I was able to review. I sent it to the workers' compensation department” (p. 16). According to the witness, the fruit cup hit the “door partition,” and “it didn't appear that [claimant] got hit with the fruit cup” (id.). The passenger that threw the fruit cup was standing at the white line. The witness testified that claimant:

made a statement to the dispatcher, that was on the scene, that she didn't stop at the bus stop to pick up the customer because she knew he wasn't going to pay, and that he ran to the next stop to get the bus; and when he got on, he asked her why she didn't stop, and then the passenger accused her of being a racist; and the statement was that the bus operator answered that: ‘Yes, I am.’

(pp. 17-18; see Doc. id. #4000446280, pp. 9-10]). On cross-examination, the witness testified that there was no sound on the video of the incident that she had reviewed. According to the witness, the video depicted the bus driving past the prior stop and not picking up the passenger involved in the incident.

*5 After listening to claimant's testimony and summations by the parties, the WCLJ, stated:

Okay. So I'll cut right to the chase. I am going to find that there's no compensable claim under Section 2.7. I don't think that there was any unusual stress that is not typically experienced by bus operators. There are so many numerous claims such as this, most with much more significant situations. I don't entirely accept claimant's account of what happened here. The official report actually shows that she was being reprimanded in some way for improper procedure. I'm not saying that - I'm certainly not saying that she willfully brought about the incident; however, her testimony today conflicts with that what's in the official report from the employer, notably as to whether she passed the customer, and her statements on being a racist. So it does affect the credibility as to how she related this incident to her doctors, and how she's presented her symptom. It's quite possible that the claim was filed because she was going to be disciplined in this situation; But regardless, I don't think that there is stress any greater than that which is experienced by similarly situated employees. So I'm going to find that the claim is disallowed.

(pp. 26-27). The findings made at the March 22, 2021, hearing are reflected in a decision filed March 25, 2021. That decision also directed the carrier to pay fees to Dr. Rivera and Dr. Levinson for their testimony.

Claimant requested administrative review, arguing that the claim should be established.

In rebuttal, the SIE argued that this claim was properly disallowed.

LEGAL ANALYSIS

Evidence

In its October 14, 2021, decision, the Board Panel majority found that “[a] lthough the employer attempts to rely on evidence from a witness who watched video of the incident, the employer failed to produce such video at the hearing, thereby rendering the testimony of its witness regarding the contents of the video, to be hearsay and inherently suspect and unreliable.” The SIE contends that “[t]he Board erred in holding that the employer witness testimony could not be considered as it was hearsay as this argument was not previously raised....”

The Board is not “bound by common law or statutory rules of evidence or by technical or formal rules of procedure” (WCL § 118), and in proceedings before the Board, “‘hearsay evidence is permissible as long as it is corroborated or found to be otherwise sufficiently reliable’ (*Matter of Pugliese v Remington Arms*, 293 AD2d 897 [2002] [internal citation omitted])” (*Matter of Calabrese v Fortini Inc.*, 179 AD3d 1279 [2020]). However, while WCL § 118 makes hearsay testimony admissible, “the statute does not require the Board to accept it as true. The credibility and weight to be given all the evidence is for the Board's

determination” (Matter of [Kelly v. Marine Works, Inc.](#), 3 AD2d 873 [[1957]]). Thus, the issue here is not whether the hearsay testimony of the SIE's witness was admissible, but whether that evidence is credible and what weight it should be given. The Board is the sole arbiter of witness credibility and the weight that evidence should be given (see [Matter of Wiess v Mittal](#), 96 AD3d 1175 [2012]). The assessment of the credibility and weight to be given to evidence by the Board is inherent in the Board's role as fact finder and is not an “issue” that must be expressly raised by a party to preserve review.

*6 Here, the SIE submitted into evidence the signed statement of one of its employees concerning statements allegedly made by claimant concerning the November 19, 2020, incident (Doc. Id. #4000446280, pp. 9-10]), but did not produce that employee as a witness. Instead, the SIE produced a witness with no personal knowledge, who testified concerning the statement. Because the employee who made the written statement was not produced as a witness by the SIE, and could not be cross-examined under oath, and insofar as the contents of the statement are not independently corroborated, the contents of that statement, as well as hearsay testimony of the employer witness concerning that statement, are not afforded any weight by the Full Board.

The SIE's witness also testified concerning the contents of a video of the November 19, 2020, incident, which she contends that she had viewed. However, the SIE has inexplicably failed to enter the video itself into evidence. Therefore, the witness's testimony concerning the contents of the video is not afforded any weight by the Full Board.

The description of the November 19, 2020, incident offered by claimant in the initial injury report (Doc. Id. #4000446280, p. 3) and statement (id. at p. 7) that she completed soon after the incident, as well as to her treating psychologists, and in her testimony before the Board, are consistent and reflect that claimant experienced a credible threat of physical violence by a passenger, and had an object thrown in her direction, which resulted in acute mental stress. There is no evidence in the record that undermines this contention, including the assertion by the WCLJ that claimant was being “disciplined” for violating a work rule which required bus operators to stop for all fares. Workers' compensation provides for the payment of benefits regardless of fault (see WCL § 10), and even if the record supported a finding that claimant's violation of a work rule precipitated the incident, that would in no way preclude this claim. Moreover, claimant alleged almost immediately after the incident that she had experienced “mental trauma” as a result of being threatened with violence (see Doc. Id. #4000446280, p. 3), and the record simply does not support the conclusion that claimant fabricated the details of the incident, and her resulting symptoms, in response to her concern of potential discipline by her employer.

Therefore, the record supports a finding that claimant's allegation that she experienced acute stress as the result of being threatened with physical violence at work is credible. The uncontradicted medical evidence in the record clearly demonstrates a causal relationship between that stress and claimant's psychological injuries. Therefore, the only remaining issue is whether claimant sustained an accidental injury.

Accident - Stress Greater Than

“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 A.D.3d 1300 [2001][[internal citations and quotation marks omitted]]).

*7 In [Matter of New York City Transit Authority](#), 2021 NY Wrk Comp G2888543, claimant, a bus operator, brought a claim for psychological injuries resulting from being threatened with physical violence by a passenger. The Board Panel disallowed the claim, stating:

In the present matter, the burden of demonstrating stress greater than that of other similarly situated workers has not been met. The claimant's, and the Dispatcher's, testimony demonstrate that incidents such as the record occurrence is common among bus drivers. In this regard, the claimant provided that irate passengers curse, yell and scream at her every other day and other drivers relay it is common for them as well. Additionally, the record does not bare out the claimant's allegation that the threat

of being spit on or punched, and the unruly passenger coming near her, renders this experience more stressful than usual. Here, the claimant testified that other female bus operators are threatened while driving the bus, to the point that they are afraid to perform their normal operator duties and work in the building. Additionally, the regularity of threats of physical violence on the persons of bus drivers is reflected in the claimant's Dispatcher's, and Dr. Isaacson's, testimony that annual training on how to handle such situations is provided upon hire and yearly and that there are protocols on how to proceed when such situations occur. Further, the installation, configuration and operation of the plexiglass partition, as well as the presence of a panic button on buses, indicate that protective measures are required for situations like, and even more severe than, the record incident. For these reasons, neither Dr. Isaacson's nor Dr. Clark's causal relationship opinion demonstrates that the claimant's psychological diagnoses pertain to stress greater than that experienced by similarly situated workers in the normal work environment.

(id.). In the present claim, however, in contrast to *Matter of New York City Transit Authority*, 2021 NY Wrk Comp G2888543, the record was not extensively developed with respect to how often the claimant, or other bus drivers, experienced credible threats of physical violence. The only relevant evidence in this regard is the testimony of claimant that "I was traumatized. I was scared to death because I've been driving for like 13 years now, and I never experienced anything like that before. I have been - I'm used to being verbally abused; but to have something thrown at me, that was the first time that ever happened" (Hearing Transcript, 3/22/21, pp. 3-4).

In *Manhattan & Bronx Surface Transportation*, 2020 NY Wrk Comp G2575658, the Board disallowed a claim brought by a bus driver for psychological injuries stemming from a verbal altercation with a passenger. The Board Panel emphasized that "the claimant in our matter acknowledged that he did not feel physically threatened by the unruly passenger and did not suggest that he was frightened. In fact, the claimant stated that he was angry. It should also be noted that no physical altercation took place, nor were any threats of violence made" (id.).

*8 Here, claimant testified that she had "never experienced anything like that before," and the SIE failed to produce any evidence to contradict that testimony. Therefore, the record as developed in this claim supports a finding that the stress experienced by claimant as the result of a credible threat of physical violence was greater than that which other similarly situated workers experienced in the normal work environment, and that claimant sustained an accidental injury.

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

CONCLUSION

ACCORDINGLY, the WCLJ decision filed March 25, 2021, is MODIFIED to establish this claim as an accidental injury for PTSD, anxiety, and depression. No further action is planned by the Board at this time.

Clarissa Rodriguez
Chair

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