

2023 WL 6950325 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: NYC DEPT OF EDUCATION

Case No. G300 6587

Carrier ID No. 00402120219 W842009

October 6, 2023

*1 Board of Education CNY
Attn: Maria Ziccardi
Deputy Dir of Claims Admin
350 Jay Street, 9th Fl.
Brooklyn, NY 11201
Date of Accident 4/4/2020

The Full Board, at its meeting held on September 19, 2023, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed April 26, 2023.

ISSUE

The issue presented for Mandatory Full Board Review is whether it was proper to disallow this claim for COVID-related death, without prejudice, and allow the claimant an opportunity to produce further evidence in support of the claim.

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

The Board Panel majority determined that the claimant failed to demonstrate either the prevalence of, or a specific exposure to, COVID-19 in the decedent's workplace, and rescinded the WCLJ decision without prejudice to the claimant producing further evidence in support of the claim.

The dissenting Board Panel member would affirm the WCLJ decision.

The claimant filed an application for Mandatory Full Board Review on May 26, 2023, arguing that the Board Panel decision should be reversed and that the WCLJ's April 8, 2022, decision be affirmed.

The self-insured employer (SIE) did not file a timely rebuttal.

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

FACTS

The claimant, the decedent's daughter, filed a C-3 (Employee Claim) on May 24, 2021, alleging that while working for the SIE as a paraprofessional, decedent contracted COVID-19 as the result of being exposed to an infected coworker. The date of injury/illness was indicated to be April 2, 2020. The claim was indexed against the SIE on May 27, 2021.

On June 21, 2021, the claimant filed a C-62 (Claim for Compensation in a Death Case), in which she alleged that the decedent died due to complications from COVID-19 on April 4, 2020. The decedent's attending physician was indicated to be Dr. Panjekar. In conjunction with the Form C-62, the claimant filed a copy of the decedent's death certificate, which indicated that she died on April 4, 2020. Dr. Panjekar certified the death certificate.

By notice issued on July 7, 2021, the Board advised the parties that a pre-hearing conference was scheduled for July 26, 2021. The claimant filed a timely PH-16.2 (Pre-Hearing Conference Statement) on July 8, 2021. The SIE did not file a timely pre-hearing conference statement.

At the pre-hearing conference on July 26, 2021, the WCLJ found that the claimant had not submitted prima facie medical evidence, noting that the death certificate does not indicate a cause of the decedent's death. This finding is reflected in the Notice of Decision filed on July 29, 2021.

On August 4, 2021, the SIE filed a FROI-04 (First Report of Injury - Denial), in which it controverted the claim.

*2 On November 16, 2021, the claimant filed a second copy of the C-62, accompanied by a "Confidential Medical Report" from the City of New York - Department of Health and Mental Hygiene. This report, which is not dated, states that the immediate cause of the decedent's death was [Acute Respiratory Distress Syndrome](#), due to or as a consequence of [Pneumonia](#), due to or as a consequence of COVID, and it was signed by Dr. Panjekar.

At a hearing on February 23, 2022, the WCLJ found prima facie medical evidence for a death caused by COVID-19. The WCLJ also found that the SIE filed an untimely FROI-04 and did not file a pre-hearing conference statement. The SIE was found to have waived certain defenses pursuant to Workers' Compensation Law (WCL) § 25(2)(b) which was found to apply, and was also found to have waived its defenses to the claim pursuant to [12 NYCRR 300.38](#). The case was continued for the claimant's testimony on prevalence and formal proof. The WCLJ's findings are reflected in the Notice of Decision filed on February 28, 2022.

At a hearing on April 5, 2022, the claimant testified that decedent worked as a paraprofessional in a school. In March of 2020, shortly before the school closed, the decedent was brought in to complete in-person training on conducting virtual learning. The decedent and the other paraprofessionals in the school all took the training together. Prior to that training, the decedent was working in her regular capacity as a paraprofessional with students and teachers. When asked whether she knew if anyone else that decedent had worked with had tested positive for COVID-19, claimant testified that decedent's "work best friend" had tested positive and that "they worked together all throughout, um, that time period" (Hearing Transcript, 4/5/22, p. 4). Claimant clarified that the decedent and the coworker/friend who tested positive for COVID-19, who was also a paraprofessional, had worked together during the training in March of 2020. Decedent and her coworker/friend had been inseparable since the coworker was hired. Claimant believed that approximately six paraprofessionals worked at the school. When asked, "[D]o you know when she started to have symptoms of having COVID-19?" claimant responded, "I do not know the exact date, but it was the week after or - so the week that she had training, the week after she started having symptoms" (p. 5). Claimant testified:

So the coworker received a test during that time, she tested positive. And so she contacted my mother to tell her that she got tested positive. And so we couldn't - at that time we couldn't go and get testing because it was limited, um, to only people who had extreme symptoms and my mom wasn't exhibiting extreme symptoms at that time.

(id.). When asked when decedent's coworker/friend had contacted the decedent and advised her that she had tested positive for COVID-19, claimant responded, "I would say the week of March 22, 2020 because it was two weeks my mom was sick for one week, for two weeks and then she passed" (p. 6). During the last two weeks of decedent's life, she and the claimant were "home together all the time" (id.). She believed the school closed on March 20, 2020. According to claimant, decedent last worked with students while school was in session "either the 13th of March or the week - I believe it was the week of March 8th" (id.).

*3 On cross-examination, claimant testified that during late February and early March of 2020, decedent had been working with students as a paraprofessional. She had worked for the employer as a paraprofessional for 11 years. Decedent worked one-on-one with a student with special needs, but she did not know whether the student was diagnosed with COVID-19. Other than decedent's friend/coworker, she was not aware of anyone else at the school who was diagnosed with COVID-19. According to claimant, decedent took an Uber to work in late February and early March of 2020, and it was unlikely that she took public transportation because she “did not enjoy public transportation” (p. 8). Decedent's symptoms began the week of March 22nd and became worse during the week of March 29th. After decedent stopped performing her full job duties at work during the week of March 8th, she had training the following week, and “[t]he last two weeks of her life she was doing [her job] virtually” (p. 9). She only knew the first name of decedent's friend/coworker, “T,” but could get her last name if she needed to. During the week of March 22nd, decedent's friend/coworker had contacted the decedent and advised her that she had tested positive for COVID-19. Claimant was not sure when the friend/coworker started exhibiting COVID-19 symptoms. The claimant and her sister both tested negative for COVID-19 before they returned to the decedent's home from their respective colleges in March 2020. At some point decedent began having her groceries delivered.

By a decision filed April 8, 2022, the WCLJ found that “[p]revalence has been established and the record supports causally related death due to COVID-19.” Awards to the decedent's daughters were held in abeyance pending the SIE's submission of payroll information.

The SIE requested administrative review, arguing that the claimant failed to demonstrate the prevalence of COVID-19 in decedent's workplace, or a specific exposure, and that the claim should therefore be disallowed.

In rebuttal, claimant argued that the record supported the establishment of this claim.

LEGAL ANALYSIS

The decedent, a 43-year-old female paraprofessional, worked in a Brooklyn school for the NYC Department of Education. According to the medical records, the decedent died on April 4, 2020, due to [acute respiratory distress syndrome](#), which was a consequence of [pneumonia](#) and COVID-19. There is no dispute herein that the decedent died from complications from COVID-19. Thus, the issue turns to whether the claimant can establish that the decedent contracted COVID-19 while at work. For the reasons set forth below, the Full Board finds that the claimant met her burden of establishing that the decedent contracted COVID-19 while at work.

Around the time of her death, the decedent was a single mother with twin daughters who were away at college. Her daughters returned home from college when the shutdown began in Mid-March. One of her daughter's, the claimant, had the difficult task of testifying at a hearing before the WCLJ on April 5, 2022. The claimant testified credibly to the best of her knowledge about her mother's job as a paraprofessional, her duties, and her day-to-day interactions while at home and at work. The claimant testified that the decedent worked for 11 years as a paraprofessional. The week of March 8 (through March 13), the decedent worked her normal duties, which was in a classroom with special needs students including working with a student one-on-one. The week of March 16, although the schools were shuttered, the decedent and the approximately 6 other paraprofessionals at the school were mandated by the SIE to take in-person training. The claimant testified all the paraprofessionals were together for the week of training. The training was on virtual learning, how to navigate the different platforms and to receive all the necessary equipment. The claimant testified that she believed the last day of school for her mother was Friday, March 20th. She recalled that the last two weeks (of her mother's life) they were home together “all the time.”

*4 More importantly, the claimant testified that one of the six paraprofessionals who attended the training with her mother tested positive for COVID-19, within the week following the training. The paraprofessional was named “T” and she was a very close coworker of the decedent. The claimant referred to “T” as her mother's “work best friend.” She clarified, “that was one of the closest coworkers that she had, um, and they worked together all throughout, um, that time period.” She further clarified

the time period she referenced was the mandatory training for the paraprofessionals. She stated that ever since the coworker was hired, they have been inseparable.

According to the claimant, “T” called the decedent during the week of March 22, 2020, which was the week following the training. “T” informed the decedent that she tested positive for COVID-19. That same week, the claimant testified that the decedent started having mild symptoms but as she described, her mother was unable to get tested because in NYC, testing during March 2020 was scarce and limited to people with extreme symptoms. Around this same time period, the claimant and her sister returned to Brooklyn from their out of state college due to the shutdown. Both daughters, who tested negative, were able to obtain tests prior to returning home. Although the Full Board finds the inadequacies in the availability of testing in different areas of the country during March 2020 totally irrelevant to the analysis, we merely point it out to counter the SIE's argument that the claimant is less than credible because she and her sister were able to be tested, while her mother was not.

Additionally, on cross-examination, the SIE was searching to find another means of transmittal, to no avail. The claimant testified that when the decedent was working, she would take Ubers to school because she didn't like public transportation. The decedent also had groceries delivered to the home during the relevant time period. No one else lived in the home. The claimant stated that the last two weeks of her mother's life she was working virtually (Monday, March 23 and March 30). However, within days of the training she began to exhibit mild symptoms but the following week beginning March 29th, the decedent's symptoms became worse, and she tragically passed away on April 4, 2020.

To be compensable, the COVID-19 infection must arise out of and in the course of employment. New York Courts have previously treated diseases as accidental injuries if two conditions are met. First, the inception of the disease must be assignable to a determinate— or a single act identified in space or time and second, it must also be assignable to something catastrophic or extraordinary. The criterion is to be evaluated by the commonsense viewpoint of the average man and the claimant need not pinpoint the exact date on which the incident occurred. A general time period of exposure is sufficient for the establishment of the case. In addition, widespread infection throughout the community is sufficient to qualify as something catastrophic and extraordinary (see *Matter of McDonough v Whitney Point Cent. School*, 15 AD2d 191 [1961]; *Matter of Lerner v Rump Bros.*, 241 NY 153 [1925]; *Matter of Middleton v Cocksackie Correctional Facility*, 38 NY2d 130 [1975]). Additionally, the Board has found a claim for contracture of COVID-19 is compensable when the record demonstrates the prevalence of COVID-19 in the workplace or where there is credible evidence of a specific exposure to COVID-19 in the workplace (*Matter of Bronx Gardens Rehabilitation*, 2021 NY Wrk Comp G2815436).

*5 Here, based on the above criteria, there is clearly evidence in the record to support the establishment of the claim. In March 2020 and for many months following, NYC was the epicenter for the COVID-19 virus. The Governor declared a State of Emergency. Schools and businesses were closed, and only essential workers were to report to work. However, the decedent, who was not an essential employee, was mandated by the SIE to report to work the week of March 16, 2020, for training. During that period, she was taking precautions, such as not taking public transportation and getting groceries delivered. It was during that training that she was in close contact with, and exposed to, her “work best friend” who shortly thereafter tested positive for COVID-19. The claimant need not pinpoint the exact date her mother contracted COVID-19. However, the commonsense viewpoint of the average man, absent of evidence supporting otherwise, would conclude that the decedent contracted the disease from her coworker during the mandatory in-person training.

Lastly, similar to the WCLJ decision, the Full Board finds the claimant's testimony credible regarding the decedent's close contact with a COVID-19 positive coworker. “The WCLJ's assessment of the evidence received at the hearing, and his resolution of contradictions that may exist, is entitled to great deference, unless no support in the record exists (see *Matter of Hernandez v Vogel's Collision Serv.*, 48 AD3d 861 [2008]; *Matter of Provenzano v Pepsi Cola Bottling Co.*, 30 AD3d 930 [2006])” (*Matter of Barth v Hanson Aggregates, Inc.*, 57 AD3d 1042 [2008]). The SIE did not put forth any evidence to the contrary and failed to obtain any testimony on cross-examination of the claimant that would be sufficient to undermine establishing the claim.

The Full Board, after making a complete and independent review of the record herein, concludes that the WCLJ decision and findings of fact are supported by a preponderance of the evidence. ACCORDINGLY, the Full Board finds that the claimant satisfied her burden of demonstrating the decedent's exposure to a COVID-19 positive coworker while at work. The record supports the establishment of the case for a COVID-19 related death. The WCLJ decision filed on April 8, 2022, is therefore affirmed.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed on April 8, 2022, is AFFIRMED. No further action is planned by the Board at this time.

Chair - Clarissa Rodriguez

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