

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: June 20, 2019

525483

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In the Matter of the Claim of  
MARIE CANNETTI,  
Appellant,

v

DARR CONSTRUCTION EQUIPMENT  
CORPORATION et al.,  
Respondents.

MEMORANDUM AND ORDER

WORKERS' COMPENSATION BOARD,  
Respondent.

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Calendar Date: April 25, 2019

Before: Lynch, J.P., Clark, Devine, Aarons and Pritzker, JJ.

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Polsky Shouldice & Rosen, Rockville Centre (Patrick Conroy of counsel), for appellant.

William O'Brien, State Insurance Fund, Melville (Katherine M. Horowitz of counsel), for Darr Construction Equipment Corporation and another, respondents.

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Pritzker, J.

Appeal from a decision of the Workers' Compensation Board, filed November 20, 2017, which ruled, among other things, that decedent sustained an accident solely due to intoxication and denied claimant's claim for workers' compensation death benefits.

In July 2015, Brian Cannetti (hereinafter decedent), a heavy equipment operator, sustained serious injuries in a motor vehicle accident that was caused when the pick-up truck he was driving crossed the double yellow line into on-coming traffic and collided with another vehicle. Decedent later died as a result of complications from the injuries he sustained. Claimant, decedent's widow, applied for workers' compensation death benefits, which the employer's workers' compensation carrier controverted on the basis that, among other things, decedent's death was caused solely by intoxication.

Following an initial hearing, a Workers' Compensation Law Judge (hereinafter WCLJ) found that claimant was decedent's lawful spouse and that there are four alleged dependent stepchildren, and directed that deposition transcripts be submitted. At the next hearing, claimant's attorney raised the issue of Workers' Compensation Law § 20 given that a new WCLJ was presiding over the matter. That WCLJ noted that the initial WCLJ was unavailable. The case was then continued for the parties to submit certain medical deposition transcripts. At the next and final hearing, a new WCLJ presided, stating that the former WCLJs were unavailable. Following testimony and review of deposition transcripts and other evidence, the new WCLJ issued a decision finding that the accident was due solely to decedent's intoxication and disallowed the claim. The Workers' Compensation Board affirmed that decision, with one panel member dissenting. Claimant sought full Board review and, following its review, the full Board affirmed. Claimant appeals.

Initially, we are unpersuaded by claimant's contention that the case was improperly reassigned to different WCLJs in violation of Workers' Compensation Law § 20. Workers' Compensation Law § 20 (1) provides that, "[w]henever a hearing or proceeding for the determination of a claim for compensation is begun before a referee, pursuant to the provisions of this chapter, such hearing or proceeding or any adjourned hearing thereon shall continue before the same referee until a final determination awarding or denying compensation, except in the absence, inability or disqualification to act of such referee,

or for other good cause, in which event such hearing or proceeding may be continued before another referee by order of the chair or [B]oard." "To be sure, the statute does not require that the same WCLJ preside over any and all hearings that may be conducted in conjunction with a given claim. The statute does, however, require that once a hearing before a particular WCLJ has commenced, such hearing must continue before him or her until a final determination is made, absent inability, disqualification or other good cause" (Matter of Prather v Amerada Hess Corp., 95 AD3d 1633, 1634 [2012] [internal citation omitted]).

The record indicates that the first WCLJ was unavailable at the time of the second hearing and, thereafter, the second WCLJ was unavailable when the proceeding continued. Although Workers' Compensation Law § 20 (1) "reflects a legislative intent for the same WCLJ to preside over a case from its commencement to its conclusion and recognizes that continuity in the presiding hearing officer is desirable" (id. at 1634 [internal quotation marks, brackets, ellipsis and citation omitted]), because it was not until the third appearance that testimony related to the merits of the claim was received, and it was that presiding WCLJ who reviewed the evidence and rendered the final determination, we do not find that the "spirit of the statute" was violated here (id.).

Turning to the merits, we find that substantial evidence supports the Board's finding that the record contains sufficient evidence to rebut the presumption of Workers' Compensation Law § 21 (4) that the injury was not caused solely by decedent's intoxication. In addition to claimant's testimony that decedent had two sips of a vodka and soda at home before leaving to return to work, the evidence in the record included a toxicology report performed on the date of the accident. According to the toxicology results, at the time of the accident decedent had an "abnormally high" level of ethanol in his system, as well as abnormal levels of benzodiazepines, cocaine and opiates. Jeffrey Perry, an independent medical examiner, testified that, given decedent's alcohol level and the presence of the other substances in decedent's system, decedent's ability to drive

would have been impaired and he should not have been driving. According to Perry, decedent's death occurred and was the result of intoxication due to drugs and alcohol. In addition, the police accident report did not note any vehicle or road issues at the time of the accident. The proof of drugs and alcohol in decedent's system, the medical testimony and the circumstances under which the accident occurred constitute substantial evidence to overcome the presumption of Workers' Compensation Law § 21 as found by the Board and its ultimate conclusion that the accident was caused solely by decedent's intoxication due to drugs and alcohol (see Matter of Purcell v American SIP Corp., 248 AD2d 844, 845 [1998]; Matter of Harvey v Allied Chem. Corp., 51 AD2d 1066, 1066-1067 [1976], lv denied 39 NY2d 707 [1976]; Matter of Majune v Good Humor Corp., 26 AD2d 849, 849-850 [1966]; compare Matter of Milz v J & R Amusement Corp., 96 AD2d 607, 608 [1983]; Matter of Dashnow v State Am. Sales, 53 AD2d 717, 717-718 [1976]; Matter of Rosebrook v Glen & Mohawk Milk Assn., 40 AD2d 928, 928 [1972], affd 33 NY2d 964 [1974]).

Lynch, J.P., Clark, Devine and Aarons, JJ., concur.

ORDERED that the decision is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger  
Clerk of the Court