

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

Decided and Entered: June 20, 2019

526921

In the Matter of the Claim of
DONNA VELANO,
Respondent,

v

KINGSTON BLOCK & MASONRY
SUPPLY, LLC, et al.,
Appellants.

MEMORANDUM AND ORDER

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: April 29, 2019

Before: Egan Jr., J.P., Lynch, Clark, Mulvey and Pritzker, JJ.

William O'Brien, State Insurance Fund, Albany (Edward Obertubbesing of counsel), for appellants.

Edward J. Seplavy, Saugerties, for Donna Velano, respondent.

Letitia James, Attorney General, New York City (Steven Segall of counsel), for Workers' Compensation Board, respondent.

Lynch, J.

Appeal from a decision of the Workers' Compensation Board, filed September 8, 2017, which ruled that decedent's death was causally related to his employment and awarded claimant workers' compensation death benefits.

Claimant's husband (hereinafter decedent), a truck driver, was found dead in the cab of his truck at an intersection approximately one-half mile from the employer's location. The death certificate listed the cause of death as cardiac arrhythmia due to atherosclerosis cardiovascular disease with mild cardiac scarring and cardiomyopathy. Claimant thereafter applied for workers' compensation death benefits. Following a hearing, a Workers' Compensation Law Judge awarded benefits, finding that decedent's death was unwitnessed and the employer had not rebutted the presumption contained in Workers' Compensation Law § 21. On review, the Workers' Compensation Board found that the employer had rebutted the statutory presumption, but concluded that claimant had established that decedent's death was causally related to his employment and affirmed the award of benefits. The employer and its workers' compensation carrier appeal.

When an unwitnessed or unexplained death occurs during the course of employment, there is a presumption of compensability (see Workers' Compensation Law § 21 [1]; Matter of Lavigne v Hannaford Bros. Co., 153 AD3d 1067, 1068 [2017]; Matter of Rasiej v Syska Hennesy Group Inc., 145 AD3d 1332, 1332 [2016]). "The presumption dispenses with the requirement that the claimant submit, in the first instance, prima facie medical evidence of a causal relationship" (Matter of Lavigne v Hannaford Bros. Co., 153 AD3d at 1068; see Matter of Kaplan v New York City Tr. Auth., 162 AD3d 1194, 1195 [2018]; Matter of Stevenson v Yellow Roadway Corp., 114 AD3d 1057, 1058 [2014]). "The presumption may be rebutted, however, by substantial evidence to the contrary" (Matter of Hanna v Able Body Labor, 62 AD3d 1200, 1201 [2009] [citation omitted]; see Matter of Rasiej v Syska Hennesy Group Inc., 145 AD3d at 1332). "If the employer does rebut the presumption, the burden of proving that a death is causally related to the employment shifts back to claimant" (Matter of Puig v New York Armenian Home, Inc., 65 AD3d 1444, 1445 [2009] [citation omitted]; see Matter of Lavigne v Hannaford Bros. Co., 153 AD3d at 1068).

Here, the Board found that the employer had rebutted the presumption of compensability based upon the information in the

death certificate that decedent's death was caused by atherosclerosis cardiovascular disease (see Matter of Schwartz v Hebrew Academy of Five Towns, 39 AD3d 1134, 1135 [2007], lv denied 9 NY3d 807 [2007]), shifting the burden back to claimant to demonstrate a causal relationship. In finding that decedent's death was causally related to his employment, the Board noted the uncertainty in the record regarding whether decedent had engaged in strenuous work-related activity the morning of his death and resolved it in claimant's favor (see Matter of Thompson v Genesee County Sheriff's Dept., 43 AD3d 1252 [2007]; compare Matter of MacDonald v Penske Logistics, 34 AD3d 967, 968 [2006]). Given the Board's determination that claimant engaged in strenuous work activity during the half hour before his death, and showed no signs of distress the evening before, we find the Board's determination is supported by substantial evidence.

Egan Jr., J.P., Clark, Mulvey and Pritzker, 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