

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

Decided and Entered: March 11, 2021

530523

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In the Matter of the Claim of  
AHMAD ABDALLAH,  
Appellant,

v

NEW YORK CITY TRANSIT  
AUTHORITY,  
Respondent.

MEMORANDUM AND ORDER

WORKERS' COMPENSATION BOARD,  
Respondent.

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Calendar Date: February 10, 2021

Before: Lynch, J.P., Clark, Aarons, Reynolds Fitzgerald and  
Colangelo, JJ.

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Pasternack Tilker Ziegler Walsh Stanton & Romano LLP, New  
York City (Michael K. Gruber of counsel), for appellant.

Weiss, Wexler & Wornow, PC, New York City (J. Evan Perigoe  
of counsel), for New York City Transit Authority, respondent.

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Lynch, J.P.

Appeal from a decision of the Workers' Compensation Board,  
filed May 20, 2019, which ruled, among other things, that  
claimant did not give timely notice of injury and denied his  
claim for workers' compensation benefits.

Claimant allegedly suffered a work-related injury to his right knee on August 17, 2018. According to claimant, he twisted his knee when someone bumped into him while he was descending a staircase in the building where he worked. Although he testified that he sought medical treatment four days later, he did not give written notice of the injury to the employer until October 15, 2018 and did not apply for workers' compensation benefits until November 19, 2018. The employer opposed the claim citing, among other things, untimely notice. Following a hearing, the Workers' Compensation Law Judge accepted that the accident occurred but disallowed the claim, concluding that claimant did not provide timely notice of the accident to the employer pursuant to Workers' Compensation Law § 18 and had failed to demonstrate that the employer was not prejudiced as a result. The Workers' Compensation Board affirmed, and claimant appeals.

We affirm. "A claimant seeking workers' compensation benefits must give the employer written notice of the claim within 30 days of sustaining a compensable injury" (Matter of Johnson v T.L. Cannon Mgt., 145 AD3d 1202, 1203 [2016] [citations omitted]; see Workers' Compensation Law § 18; Matter of Nukicic v McLane Northeast, 174 AD3d 1260, 1260 [2019]). Claimant admittedly did not provide timely notice of the claim and such failure "generally precludes a claim unless the Board excuses the failure on the ground that notice could not be given, the employer or its agent had knowledge of the accident or the employer did not suffer any prejudice" (Matter of Rydstrom v Precision Carpentry of Westchester, Inc., 150 AD3d 1602, 1602 [2017] [internal quotation marks and citations omitted], lv denied 30 NY3d 902 [2017]; accord Matter of Taylor v Little Angels Head Start, 164 AD3d 1512, 1512-1513 [2018]). Notably, "[t]he Board is not required to excuse a claimant's failure to give timely written notice even if one of these grounds is proven; the matter rests within the Board's discretion" (Matter of Dusharm v Green Is. Contr., LLC, 68 AD3d 1402, 1403 [2009]; see Matter of Horvath v Mega Forklift, 176 AD3d 1279, 1280 [2019]; Matter of Johnson v T.L. Cannon Mgt., 145 AD3d at 1203).

Claimant's job responsibilities included controverting workers' compensation claims on behalf of the employer, and he admitted that he was aware that he was required to report the injury within 30 days. Claimant testified that he first sought treatment for his injury at an emergency room visit on August 21, 2018, but there is no report from this visit in the record. Claimant also sought treatment from an orthopedic surgeon on August 27, 2018 and on September 10, 2018, but admittedly did not mention that his injury was work related. During the September 10 examination, claimant was diagnosed with a meniscus injury of the knee and surgery was discussed, but claimant opted to have a cortisone injection instead. Claimant sought further treatment on October 15, 2018 after his knee locked up as he was running to cross a street. Claimant informed the surgeon at that time that his symptoms had worsened, that he wanted to have surgery and that he would be filing a workers' compensation claim based upon the injury.

Although claimant testified that he did not report the injury before October 15, 2018 because he did not think the injury was serious enough to warrant a workers' compensation claim, the Board found this contention suspect in light of his prior medical treatment. In refusing to excuse claimant's untimely notice, the Board noted that claimant had not produced the emergency room report and had failed to inform the employer or the surgeon that his injury was work related until October 2018, despite his knowledge of Workers' Compensation Law § 18 and ongoing medical treatment. Although the Board did not make an express finding as to whether the employer was prejudiced by the untimely notice, we discern no abuse of discretion in the Board's disallowance of the claim (see Matter of Nukicic v McLane Northeast, 174 AD3d at 1262; Matter of Bennett v Putnam N. Westchester BOCES, 123 AD3d 1397, 1399 [2014]; Matter of Dudas v Town of Lancaster, 90 AD3d 1251, 1253 [2011]).

Clark, Aarons, Reynolds Fitzgerald and Colangelo, 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