

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

Decided and Entered: March 28, 2024

535458

In the Matter of the Claim of BOLOT
DJANUZAKOV,
Appellant,

v

MANHATTAN & BRONX SURFACE
TRANSIT OPERATING
AUTHORITY,
Respondent.

DECISION AND ORDER
ON MOTION

WORKERS' COMPENSATION
BOARD,
Respondent.

Motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion for reargument is granted, without costs, the memorandum and order decided and entered July 20, 2023 (218 AD3d 980 [2023]) is vacated, and the following memorandum and order is substituted therefor, and it is further

ORDERED that the motion for permission to appeal to the Court of Appeals is denied, without costs.

Clark, J.P., Pritzker, Lynch, Reynolds Fitzgerald and Fisher, JJ., concur.

ENTER:



Robert D. Mayberger
Clerk of the Court

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

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In the Matter of the Claim of BOLOT
DJANUZAKOV,
Appellant,

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MANHATTAN & BRONX SURFACE
TRANSIT OPERATING
AUTHORITY,
Respondent.

MEMORANDUM AND ORDER

WORKERS' COMPENSATION
BOARD,
Respondent.

Calendar Date: June 7, 2023

Before: Lynch, J.P., Clark, Pritzker, Reynolds Fitzgerald and Fisher, JJ.

Schotter Millican, LLP, Brooklyn (*Geoffrey Schotter* of counsel), for appellant.

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

Pritzker, J.

Appeal from a decision of the Workers' Compensation Board, filed April 27, 2022,
which ruled that claimant did not sustain a compensable injury and disallowed his claim
for workers' compensation benefits.

Claimant, a bus driver, left his employment in November 2020 and later filed a claim for workers' compensation benefits alleging that he sustained work-related stress and psychological injuries as a result of his exposure to COVID-19, the COVID-19-related death and illness of coworkers, the conditions of his employment and his treatment by coworkers and passengers, among other things. Claimant's treating clinical psychologist diagnosed him with causally-related major depressive disorder and anxiety disorder due to multiple stressful events that he reported had occurred in the course of his work since the start of the pandemic and found him to be temporarily totally disabled, ongoing through a March 2021 hearing. Following a further hearing at which claimant testified, the Workers' Compensation Law Judge disallowed the claim, finding that claimant had not experienced work-related stress greater than that shared by similar workers during the pandemic. Upon administrative review, the Workers' Compensation Board affirmed.¹ Claimant appeals.

Among the arguments advanced by claimant is the contention that, in cases involving exposure to COVID-19, the Board improperly applies a disparate burden to claimants seeking compensation for contraction of the virus as compared to those, like claimant here, seeking compensation for psychological injuries stemming from such exposure in the workplace. For the reasons stated in *Matter of Anderson v City of Yonkers* (___ AD3d ___ [3d Dept 2024] [decided herewith]), we agree. Suffice it to say, "if the Board creates a special rule allowing claimants alleging physical injuries from exposure to COVID-19 to meet their burden of showing that an injury arose in the course of employment, it must also apply such a rule to claimants alleging psychological injuries from exposure to COVID-19" (*id.* at ___). The matter must therefore be remitted to the Board to determine, consistent with the guidance set forth in *Matter of Anderson*, whether claimant demonstrated "either a specific exposure to COVID-19 or the prevalence of COVID-19 in [his] work environment so as to present an elevated risk of exposure constituting an extraordinary event" and, if so, whether a causal connection exists between the alleged injury and the workplace accident (*id.* at ___). Claimant's remaining contentions have either been rendered academic in light of our determination or have been reviewed and found to be lacking in merit.

Lynch, J.P., Clark, Reynolds Fitzgerald and Fisher, JJ., concur.

¹ The Board rescinded the Workers' Compensation Law Judge's finding to the extent that it was premised on a determination that claimant was an "essential worker," finding that it had no bearing on his claim for workers' compensation benefits.

ORDERED that the decision is reversed, without costs, and matter remitted to the Workers' Compensation Board for further proceedings not inconsistent with this Court's decision.

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

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

Decided and Entered: July 20, 2023

535458

In the Matter of the Claim of BOLOT
DJANUZAKOV,
Appellant,

v

MANHATTAN & BRONX SURFACE
TRANSIT OPERATING
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Respondent.

MEMORANDUM AND ORDER

WORKERS' COMPENSATION
BOARD,
Respondent.

Calendar Date: June 7, 2023

Before: Lynch, J.P., Clark, Pritzker, Reynolds Fitzgerald and Fisher, JJ.

Schotter Millican, LLP, Brooklyn (*Geoffrey Schotter* of counsel), for appellant.

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Manhattan & Bronx Surface Transit Operating Authority, respondent.

Pritzker, J.

Appeal from a decision of the Workers' Compensation Board, filed April 27, 2022,
which ruled that claimant did not sustain a compensable injury and disallowed his claim
for workers' compensation benefits.

Claimant, a bus driver, left his employment in November 2020¹ and later filed a claim for workers' compensation benefits alleging, as he later testified, that he sustained work-related stress and mental health injuries as a result of his exposure to COVID-19, the COVID-19-related death and illness of coworkers, the conditions of his employment and his treatment by coworkers and passengers, among other things. Claimant's treating clinical psychologist diagnosed him with causally-related major depressive disorder and anxiety disorder due to multiple stressful events that he reported had occurred in the course of his work since the start of the pandemic, and found him to be temporarily totally disabled, ongoing through a March 2021 hearing. Following a further hearing at which claimant testified, the Workers' Compensation Law Judge disallowed the claim, finding that claimant had not experienced work-related stress greater than that shared by similar workers during the pandemic. The Workers' Compensation Board later affirmed.² Claimant appeals.

Initially, under the governing standard applied by the Board, "mental injuries caused by work-related stress are compensable if the claimant can establish that the stress that caused the injury was greater than that which other similarly situated workers experienced in the normal work environment" (*Matter of Rivenburg v County of Albany*, 187 AD3d 1282, 1283 [3d Dept 2020] [internal quotation marks and citations omitted]; *see Matter of Matthews v New York City Tr. Auth.*, ___ AD3d ___, ___ [3d Dept 2023] [decided herewith]; *Matter of Issayou v Issayuou Inc.*, 174 AD3d 1277, 1279 [3d Dept 2019], *lv denied* 34 NY3d 909 [2020]; *Matter of Karam v Rensselaer County Sheriff's Dept.*, 167 AD3d 1108, 1109 [3d Dept 2018], *lv denied* 33 NY3d 901 [2019]; *Matter of Lanese v Anthem Health Servs.*, 165 AD3d 1373, 1374 [3d Dept 2018]). Moreover, "[w]hether the stress experienced by a claimant is more than that normally encountered is a factual question for the Board to resolve, and its finding will not be disturbed when supported by substantial evidence" and, "[u]pon review, we defer to the Board's credibility assessments" (*Matter of Karam v Rensselaer County Sheriff's Dept.*, 167 AD3d at 1109 [internal quotation marks and citations omitted]; *see Matter of Matthews v New York City Tr. Auth.*, ___ AD3d at ___; *Matter of Casey v United Ref. Co. of Pa.*, 194 AD3d 1300, 1300-1301 [3d Dept 2021]; *Matter of Keane v New York State Elec. & Gas*

¹ Claimant's form C-3 employee claim indicated that he ceased working in December 2020, but he testified that he stopped working on November 22, 2020.

² The Board rescinded the Workers' Compensation Law Judge's finding to the extent that it was premised on a determination that claimant was an "essential worker," finding that it had no bearing on his claim for workers' compensation benefits.

Co., 272 AD2d 802, 804 [3d Dept 2000]). It is a claimant's "burden of establishing, by competent medical evidence, that a causal connection existed between [his or] her [psychological injury] and [his or] her employment" (*Matter of Issayou v Issayuou Inc.*, 174 AD3d at 1277; see *Matter of Lemon v New York City Tr. Auth.*, 72 NY2d 324, 327 [1988]), which likewise is a factual issue for the Board to resolve (see *Matter of Blanch v Delta Air Lines*, 204 AD3d 1203, 1204 [3d Dept 2022]).

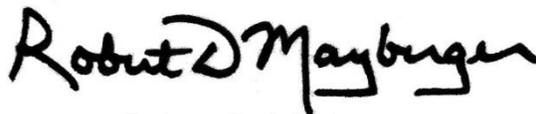
Claimant testified at the hearing that although he had never tested positive for COVID-19, he was fearful of contracting and bringing it home to his family, as most passengers refused to wear masks when he instructed them that masks were required and some threatened him, half of his coworkers went unmasked and he was only provided with one mask per week at the outset of the pandemic. He perceived that his coworkers were treating him differently during the pandemic – mistakenly believing that he was from China, at a time when rumors theorized that the novel coronavirus responsible for COVID-19 originated in that country – and he described an encounter with a police officer who blamed him for the pandemic. In finding that claimant did not have a compensable mental injury claim, the Board found that all drivers were given the same allotment of personal protective equipment, which was scarce at the outset, and all were subjected to the same risk of exposure to and contracting COVID-19, and claimant did not perform any duties outside his normal tasks. Moreover, claimant's belief that his coworkers were treating him differently, based only on his testimony that they stopped greeting him, was unfounded as there was no evidence to support the conclusion that this was due to his race or country of origin rather than to social distancing requirements. The Board did not find claimant's account of the encounter with a police officer to be credible and noted that, even if it occurred as recounted, it did not involve coworkers and was unrelated to his employment. Substantial evidence supports the Board's finding that claimant failed to demonstrate that the stress he experienced at work was greater than the stress normally experienced in the workplace by similarly situated bus operators, given that their job duties necessarily involved interacting with the general public and coworkers throughout the community where they are subjected to myriad illnesses, including COVID-19, and difficult passengers (see *Matter of Matthews v New York City Tr. Auth.*, ___ AD3d at ___; *Matter of Rivenburg v County of Albany*, 187 AD3d at 1284; *Matter of Issayou v Issayuou Inc.*, 174 AD3d at 1279; *Matter of Karam v Rensselaer County Sheriff's Dept.*, 167 AD3d at 1111; *Matter of Lanese v Anthem Health Servs.*, 165 AD3d at 1374; *Matter of Kraus v Wegmans Food Mkts., Inc.*, 156 AD3d 1132, 1134 [3d Dept 2017]; *Matter of Burke v New York City Tr. Auth.*, 148 AD3d 1498, 1499-1500 [3d Dept 2017]).

We further find the Board rationally rejected claimant's argument that the work environment was not "normal" or that an abnormal work environment alone satisfies the governing test for compensability of mental injuries caused by work-related stress (*see Matter of Matthews v New York City Tr. Auth.*, ___ AD3d at ___; *Matter of Rivenburg v County of Albany*, 187 AD3d at 1283; *Matter of Issayou v Issayuou Inc.*, 174 AD3d at 1279). To that end, there was no evidence that claimant or other drivers were "directed to carry out a deceptive, unethical or potentially illegal practice" (*Matter of Cox v Saks Fifth Ave.*, 130 AD3d 1236, 1238 [3d Dept 2015]). Claimant's remaining contentions have been examined and, to the extent preserved for our review, found to be without merit.

Lynch, J.P., Clark, Reynolds Fitzgerald and Fisher, 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