

John Cappellino was employed by Baumann & Sons Bus Company as a bus driver. In July 2000, while supervising a van and bus wash, he suffered a fatal heart attack. Claimant, the decedent's wife, brought a claim for death benefits under the Workers' Compensation Law.

A Workers' Compensation Law Judge found that the employer failed to file its notice of controversy (C-7) within 25 days of the mailing of the notice that the case had been indexed, as required by Workers' Compensation Law § 25 (2) (b). That provision provides, in relevant part, as follows:

"Failure to file the notice of controversy within the prescribed twenty-five day time limit shall bar the employer and its insurance carrier from pleading that the injured person was not at the time of the accident an employee of the employer, or that the employee did not sustain an accidental injury, or that the injury did not arise out of and in the course of the employment."

Nevertheless, a hearing was held at which a physician retained by the employer was permitted to testify that in his opinion, decedent's work activity was not a precipitating cause of his death. That was error.

On appeal, the Workers' Compensation Board found that the employer's physician provided contrary medical evidence to the claimant's proof and demonstrated a significant issue as to the accuracy of the factual history relied upon by the claimant's doctor. Based on this finding, it concluded that further development of the issue of causal relationship was warranted and

the case was referred to an impartial specialist, who considered, among other things, the testimony of the employer's physician. The Impartial Specialist opined that "the evidence for causal relation to work" was inadequate. Both the Workers' Compensation Board and the Appellate Division later relied on these findings in holding that decedent's death was not causally related to his work.

Here, there is an undisputed finding that the employer untimely filed the notice of controversy and there was no showing of good cause or other reason to excuse the failure. Thus, the employer should have been precluded from offering its physician's testimony to dispute claimant's evidence on the issue of causation. The Board must determine, without regard to the employer's proof, whether claimant, in the first instance, demonstrated that the decedent's death was work-related.

* * * * *

Order reversed, with costs, and case remitted to the Appellate Division, Third Department, with directions to remand to the Workers' Compensation Board for further proceedings in accordance with the memorandum herein. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided February 9, 2012

Supreme Court, Appellate Division

Third Judicial Department

Decided and Entered: June 19, 2008

502199

In the Matter of the Claim of
KATHLEEN F. CAPPELLINO,
Appellant,

v

BAUMANN & SONS BUS COMPANY
et al.,
Respondents.

MEMORANDUM AND ORDER

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: April 24, 2008

Before: Cardona, P.J., Peters, Carpinello, Kane and Stein, JJ.

Joel M. Gluck, New York City, for appellant.

Cherry, Edson & Kelly, Hempstead (David W. Faber of
counsel), for Baumann & Sons Bus Company and another,
respondents.

Carpinello, J.

Appeal from a decision of the Workers' Compensation Board,
filed June 15, 2006, which ruled that claimant's decedent did not
sustain a causally related injury and denied her claim for
workers' compensation death benefits.

Claimant's decedent suffered a fatal heart attack on July
22, 2000 precipitating the instant claim for workers'
compensation death benefits. At the time of his death, decedent
was walking through his employer's bus yard when he collapsed. A

coworker witnessed the event. After a series of hearings, the Workers' Compensation Board rendered a decision finding no causal relationship between decedent's death and his employment thus disallowing the claim. Claimant now appeals.

Even assuming that decedent's death, which occurred during the course of employment, was unexplained (see e.g. Matter of Moltzon v Computer Assoc., 39 AD3d 1053 [2007]) and thus entitled to a presumption of compensability, such a presumption may be rebutted by an employer with "substantial evidence to the contrary" (Workers' Compensation Law § 21 [1]; see Matter of Schwartz v Hebrew Academy of Five Towns, 39 AD3d 1134, 1135 [2007], lv denied 9 NY3d 807 [2007]; Matter of Wallas v Mastic Beach Excavation, Inc., 18 AD3d 1107, 1108 [2005], lv denied 5 NY3d 712 [2005]). Upon our review of the record, substantial evidence supports the Board's conclusion that decedent's death was not causally related to his work and thus must be affirmed (see Matter of Crump v Saint Patrick's Church, 38 AD3d 1040, 1041 [2007]).

In particular, an impartial specialist who reviewed decedent's medical records opined that his death was unrelated to his work activities. This opinion was based upon decedent's documented medical history which included diagnoses of high blood pressure and high cholesterol and noted a strong family history of coronary artery disease. In addition, these records revealed that decedent had been a chronic smoker, was markedly obese and had a permanent tracheostomy for obstructive sleep apnea. Notably, he had suffered two prior heart attacks for which he had been treated with intracoronary stent insertion and coronary balloon angioplasty. Although claimant submitted contrary medical proof on the issue of causation, the Board's determination that decedent's fatal heart attack was not work related is amply supported by substantial evidence.

Claimant's remaining contentions have been examined and found to be lacking in merit, including the claim that the Board misapplied Workers' Compensation Law § 25 (2) (b) (see Matter of Nwoko v City of New York, 29 AD3d 1070, 1071 [2006]).

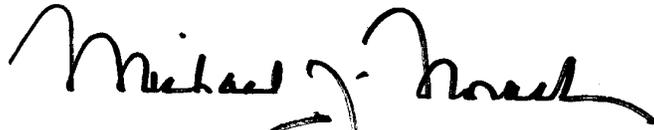
Cardona, P.J., Peters, Kane and Stein, JJ., concur.

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ORDERED that the decision is affirmed, without costs.

ENTER:



Michael J. Novack
Clerk of the Court