

No. _____

**In The
Supreme Court of the United States**

—❖—

IN THE MATTER OF THE CLAIM OF
DAVID DUNLAP,

Petitioner,

v.

JETBLUE AIRWAYS CORPORATION,

Respondent,

-and-

NEW HAMPSHIRE INSURANCE CO.,

Respondent,

-and-

WORKERS' COMPENSATION BOARD,

Respondent.

**On Petition for a Writ of Certiorari to
the New York State Court of Appeals**

APPENDIX FOR A WRIT OF CERTIORARI

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1a

2024 NY Slip Op 62799

**IN THE MATTER OF DAVID DUNLAP,
Appellant,
v.
JETBLUE AIRWAYS CORPORATION ET AL.,
Respondents.
WORKERS' COMPENSATION BOARD,
Respondent.**

Motion No. 2023-707.

Court of Appeals of New York.

Decided February 22, 2024.

Motion for leave to appeal denied. Judge Halligan
took no part.

Save trees - read court opinions online on Google
Scholar.

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

Decided and Entered: August 17, 2023 534443

In the Matter of DAVID DUNLAP,
Appellant,

v DECISION AND ORDER
ON MOTION

JETBLUE AIRWAYS
CORPORATION et al.,
Respondents.

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 is denied, without
costs.

3a

Egan Jr., J.P., Lynch, Clark, Pritzker and Ceresia,
JJ., concur.

ENTER:

A handwritten signature in blue ink that reads "Robert D. Mayberger". The signature is written in a cursive style with a large, stylized "R" and "M".

Robert D. Mayberger
Clerk of the Court

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

Decided and Entered: May 25, 2023 534443

In the Matter of DAVID DUNLAP,
Appellant,

v

MEMORANDUM
AND ORDER

JETBLUE AIRWAYS
CORPORATION et al.,
Respondents.

WORKERS' COMPENSATION
BOARD,
Respondent.

Calendar Date: May 3, 2023

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

The Chase Sensale Law Group, Hauppauge (*John F. Clennan*, Ronkonkoma, of counsel), for appellant.

Goldberg Segalla, Rochester (*Bradford J. Reid* of counsel), for JetBlue Airways Corporation and

another, respondents.

Lynch, J.

Appeals (1) from a decision of the Workers' Compensation Board, filed November 9, 2021, which ruled that claimant failed to comply with 12 NYCRR 300.13 (b) and denied review of a decision by the Workers' Compensation Law Judge, and (2) from a decision of said Board, filed February 11, 2022, which denied claimant's application for reconsideration and/or full Board review.

In October 2019, claimant, an airline pilot, filed a claim for workers' compensation benefits, alleging that he had developed work-related brain damage and neurological disorders as the result of toxic fume inhalation. Following a hearing, a Workers' Compensation Law Judge (hereinafter WCLJ) found, among other things, that claimant had not established a causally-related disability and disallowed the claim. On August 21, 2021, claimant filed an application for review by the Workers' Compensation Board (form RB-89) challenging the WCLJ's determination. In a November 2021 decision, the Board denied claimant's application for review, finding that claimant had failed to provide a complete response to question number 13 on the application as then required by 12 NYCRR 300.13 (b) (1). Claimant's subsequent application for reconsideration and/or full Board review was denied. Claimant appeals from both decisions.

We affirm. "As we previously have stated, the Board may adopt reasonable rules consistent with and supplemental to the provisions of the Workers' Compensation Law, and the Chair of the Board may make reasonable regulations consistent with the provisions thereof" (Matter of Darcy v Brentwood UFSD, 202 AD3d 1256, 1256-1257 [3d Dept 2022] [internal quotation marks and citations omitted]; see Matter of Boehm v Town of Greece, 196 AD3d 947, 947-948 [3d Dept 2021]). "Pursuant to the Board's regulations, an application to the Board for

administrative review of a decision by a WCLJ shall be in the format as prescribed by the Chair, and such application must be filled out completely" (Matter of Muse v Asplundh Constr., 201 AD3d 1115, 1116 [3d Dept 2022] [internal quotation marks, brackets and citation omitted]; see 12 NYCRR

300.13 [b] [1]; Matter of Luckenbaugh v Glens Falls Hosp., 176 AD3d 1281, 1282 [3d Dept 2019]).

"Where, as here, a party who is represented by counsel fails to comply with the formatting, completion and service submission requirements set forth by the Board, the Board may, in its discretion, deny the application for review" (Matter of Holman v Brinks Co., 181 AD3d 1142, 1143 [3d Dept 2020]

[internal quotation marks, brackets and citations omitted]; see Matter of Martinez v New York Produce, 182 AD3d 966, 967 [3d Dept 2020]).¹

¹ As we have previously noted, the Legislature recently enacted Workers' Compensation Law § 23-a (1), which provides that "a mistake, omission, defect and/or other irregularity in a [form RB-89] accompanying an application for administrative review or a [form RB 89.2] accompanying an application for full [B]oard review shall not be grounds for denial of said application." This newly-enacted provision, however, explicitly provides that it "shall apply to any and all forms prescribed by the [B]oard with respect to said applications . . . subsequent to the effective date of this section" (Workers' Compensation Law § 23-a [4]). As Workers' Compensation Law § 23-a did not go into

The Board's instructions for completing the RB-89 application with respect to question number 13 in effect at the time that claimant filed his application for Board review required him to, among other things, "[i]dentify by date and/or documents ID number[s] the transcripts, documents, reports, exhibits, and other evidence in the Board's file that are relevant to the issues and grounds being raised for review" (Workers' Comp Bd, Instructions for Completing RB-89 [Nov. 2018]). In responding to question number 13 on the application, claimant, who was represented by counsel, did not identify the written report of Richard Stripp, a toxicologist who reviewed claimant's medical records on behalf of the employer, despite challenging the admissibility of the report and Stripp's findings in the letter accompanying the application. Under these circumstances, we find no abuse of discretion in the Board determining claimant's response to question number 13 to be incomplete and denying the application (see *Matter of Muse v Asplundh Constr.*, 201 AD3d at 1116; *Matter of Drescher v Washingtonville Cent. Sch. Dist.*, 177 AD3d 1225, 1227 [3d Dept 2019]).

effect until December 22, 2021 (L 2021, ch 718, §§ 1-2), this statute does not apply here (see *Matter of Christie v Universal Music Group*, 211 AD3d 1305, 1306 n [3d Dept 2022]).

9a

Egan Jr., J.P., Clark, Pritzker and Ceresia, JJ.,
concur.

ORDERED that the decisions are affirmed, without
costs.

ENTER:

A handwritten signature in black ink, reading "Robert D. Mayberger". The signature is written in a cursive, flowing style with a large initial "R" and "M".

Robert D. Mayberger
Clerk of the Court



**Workers'
Compensation
Board**

GENERAL COUNSEL
WORKERS' COMPENSATION BOARD
328 STATE STREET
SCHENECTADY, NY 12305-2318
www.wcb.ny.gov

2075039890

State of New York - Workers' Compensation Board

In regard to David Dunlap, WCB Case #G258 9047

**NOTICE OF DECISION
REGARDING APPLICATION FOR FULL
BOARD REVIEW**

Keep for your records

Opinion By: Fredrick M. Ausili
Martin M. Dilan
Linda Hull

The Workers' Compensation Board, pursuant to Workers' Compensation Law Sections 23, 142, and 12 NYCRR 300.13, has considered David Dunlap's application for Reconsideration/ Full Board Review, received on December 08, 2021, of a Board Panel Memorandum of Decision (MOD) filed November 09, 2021, in the above-cited case.

The Board Panel's unanimous MOD considered the evidence in the record relevant to the dispute, and included a statement of facts which formed the basis for its decision. The MOD does not contain any error of law or fact that requires the decision to be

modified or rescinded. Therefore, the application for Reconsideration/ Full Board Review is denied.


Fredrick M. Ausili


Martin M. Dilan


Linda Hull

Claimant – David Dunlap
Social Security No. –
WCB Case No. – G258 9047D
Date of Accident – 11/03/2017
District Office – NYC
Employer – JETBLUE AIRWAYS CORPORATION
Carrier – New Hampshire Insurance Co
Carrier ID No. W154009
Carrier Case No. DISALLOWED
Date of Filing of This Decision – 02/11/2022

ATENCION:

Puede llamar a la oficina de la Junta de Compensacion Obrera, en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclamacion(caso).

EBRB-5 (112014)
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Page 1 of 1



**Workers'
Compensation
Board**

ADMINISTRATIVE REVIEW DIVISION
WORKERS' COMPENSATION BOARD
PO BOX 5205
BINGHAMTON, NY 13902
www.wcb.ny.gov

**State of New York – Workers' Compensation
Board**

**In regard to David Dunlap, WCB Case #G258
9047**

**MEMORANDUM OF BOARD PANEL
DECISION**

keep for your records

Opinion By: Fredrick M. Ausili
Martin M. Dilan
Linda Hull

The claimant requests review of the Workers' Compensation Law Judge's (WCLJ) decision filed on July 22, 2021. The carrier has filed a rebuttal.

ISSUE

The issue presented for administrative review is whether the claimant's application for review properly complies with 12 NYCRR 300.13(b)(1).

FACTS

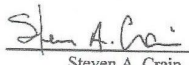
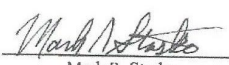

The claimant filed a C-3 (Employee Claim) on October 31, 2019, alleging that while working as an

airline pilot on November 3, 2017, he inhaled toxic fumes which caused injuries to his neuro-system and brain damage.

By decision filed on June 3, 2020, prima facie medical evidence was found for aero toxic syndrome and the carrier was directed to produce an IME on the issue of causal relationship.

The record on the issue of causal relationship was developed with medical reports and the testimony of the claimant, Drs. Sovran and Ploss, the claimant's consulting physicians, and Drs.

**** Continued on next page ****

 Steven A. Crain	 Mark R. Stasko	 Ellen O. Paprocki
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Claimant – David Dunlap
Social Security No. –
WCB Case No. – G258 9047D
Date of Accident – 11/03/2017
District Office – NYC
Employer – JETBLUE AIRWAYS CORPORATION
Carrier – New Hampshire Insurance Co
Carrier ID No. W154009
Carrier Case No. DISALLOWED
Date of Filing of This Decision – 11/09/2021

14a

ATENCION:

Puede Hamar a la oficina de la Junta de Compensacion Obrera, en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclarnacion(caso).

Gerstenblitt and Stripp, the carrier's consultants.

At a hearing held on December 10, 2020, the claimant raised the issue of a WCL § 137 violation with regard to Dr. Stripp's Independent Medical Examination (IME) report because a questionnaire sent to the doctor was not copied to the Board or other parties and because the claimant was not listed as a recipient of the report. The carrier argued that proof that the questionnaire had been submitted to all parties had been submitted to the Board and requested an opportunity to determine how the report itself was sent to the claimant. The WCLJ continued the issue of WCL § 137 and such finding was memorialized in a decision filed on December 15, 2020.

In a decision filed on July 22, 2021, the WCLJ found no violation of WCL § 137. The WCLJ disallowed the claim, finding the opinions of the carrier's consultants on the issue of causal relationship to be more credible.

LEGAL ANALYSIS

On appeal, the claimant argues that Dr. Stripp's IME report violates WCL § 137 and that both it and the doctor's testimony should be precluded from the record. He also argues that the medical evidence in the record supports the establishment of the claim. In rebuttal, the carrier argues that Dr. Stripp's IME report does not violate WCL § 137. It also argues that the claim was properly disallowed based on the

testimony of the claimant himself and its consultants.

12 NYCRR 300.13(b)(1) states that an application for review or rebuttal "must be filled out completely" in the format prescribed by the Chair. The Chair has prescribed that "completion" means that each section or item of the application or rebuttal is completed with the information requested on the form and pursuant to the instructions for each form, and that a form is not "filled out completely" when a party responds to sections or items on the form merely by referring to the attached legal brief or other documentation without further explanation (Board Subject Number 046-940, dated April 27, 2017). An application or rebuttal that is not filled out completely as required by 12 NYCRR 300.13(b)(1), will be denied (12 NYCRR 300.13[b][4][i]).

The RB-89 and RB-89.1 forms include an Instructions page providing a detailed explanation to aid in the completion of each element of the form.

**** Continued on next page ****

Claimant – David Dunlap
Social Security No. –
WCB Case No. – G258 9047D
Date of Accident – 11/03/2017
District Office – NYC
Employer – JETBLUE AIRWAYS CORPORATION
Carrier – New Hampshire Insurance Co
Carrier ID No. W154009
Carrier Case No. DISALLOWED

17a

Date of Filing of This Decision – 11/09/2021

ATENCION:

Puede Hamar a la oficina de la Junta de Compensacion Obrera, en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina ypida inforrnacion acerca de su reclarnacion(caso).

The Office of General Counsel published a Guidance Document and a Supplement with Decisional Examples on the Proper Application of Board Rule 300.13.

The Board Panel has consistently denied applications for review and rebuttals for failure to fully complete the RB-89 and RB-89.1 as instructed by the Board (see Matter of JAD Transportation Inc., 2017 NY Wrk Comp G1299752; Matter of Breakaway Courier Systems, 2018 NY Wrk Comp G1912222; Matter of W NY Hotel, 2018 NY Wrk Comp G1526988; Matter of Human Resources Administration, 2018 NY Wrk Comp G1597639).

In this case the claimant's RB-89 was not filled out completely because in response to Item #13 (Hearing dates, Transcripts, Documents, Exhibits, and other Evidence) the claimant did not include the IME report of Dr. Stripp despite alleging its violation of WCL § 137 as one of the bases for his appeal and referring to the report in the attached legal brief.

The Board Panel exercises its discretion under 12 NYCRR 300.B(b)(4)(i) to deny consideration of the improperly completed form, because the Board has advised the parties through its Subject Number, the Instructions page of the forms, the Guidance Document, and case law about proper form completion, and has consistently denied applications for review and/or rebuttals as a result of improper form completion. As such, the claimant received consistent, sufficient notice regarding the Board's requirements in this regard yet failed to comply.

Therefore, the application is denied.

CONCLUSION

ACCORDINGLY, the claimant's application for review of the WCLJ's decision filed on July 22, 2021 decision is DENIED and such decision REMAINS IN EFFECT. No further action is planned at this time.

All concur.



Frederick M. Ausili Martin M. Dilan Linda Hull

Claimant – David Dunlap

Social Security No. –

WCB Case No. – G258 9047D

Date of Accident – 11/03/2017

District Office – NYC

Employer – JETBLUE AIRWAYS CORPORATION

Carrier – New Hampshire Insurance Co

Carrier ID No. W154009

Carrier Case No. DISALLOWED

Date of Filing of This Decision – 11/09/2021

ATENCION:

Puede Hamar a la oficina de la Junta de Compensacion Obrera, en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina ypida informacion acerca de su reclarnacion(caso).

20a



State of New York
Workers' Compensation
Board
PO Box 5205
Binghamton, NY
13902-5205
www.wcb.ny.gov
(877) 632-4996

**State of New York Workers' Compensation
Board**

In regard to David Dunlap, WCB # G2589047

**NOTICE OF CASE ASSEMBLY
Keep for your records**

Claimant: David Dunlap
WCB Case No.: G258 9047
Date of Accident: 11/03/17
Injury: Brain Damage, Neuro-System
Date of Assembly: 11/13/2019

Employer: JETBLUE AIRWAYS CORPORATION
Carrier: New Hampshire Insurance Co
Carrier ID No.: W154009
Carrier Case No.:
Date of Notice: 11/13/2019

To the injured worker: The Workers' Compensation Board was notified that you suffered an on-the-job injury or job-related illness.

The Board created a case folder and assigned the above WCB case number (WCB#)

The Board's eCase application enables you to view the content! of your case folder online. For general information or to register for eCase, please visit our website at www.wcb.ny.gov. The Board will monitor your claim to ensure that you receive all benefits due.

Please take a moment to review this notice. It contains important information about your rights and responsibilities.

Is our information correct? Please contact the Board at (877) 632-4996 if you need to correct information or have questions.

Next Steps:

If this claim is disputed by your employer or your employer's workers' compensation insurance carrier, meetings or hearings may be necessary. All parties will be notified in writing as to the date, time and location of any meeting or hearing.

After you have healed from your injury and when no further medical improvement is expected (typically one year after the date of accident or surgery, if surgery was performed), you can ask your doctor to evaluate whether your condition is permanent. Your doctor should perform this evaluation and file their opinion with the Board using Form C-4.3 Doctor's Report of MMI/Permanent Impairment. The insurance

carrier may also have you examined by a doctor that they select.

We have not received a medical report regarding this injury or illness. If you have received medical treatment, please give your health care provider the WCB case number assigned to your claim and ask them to submit all medical reports related to this injury to the insurance carrier listed on this notice, with a copy to the Board

The medical report is essential to the timely and ongoing payment of lost wage benefit.¹⁵

To the carrier: Since Board records indicate you are the insurance carrier on the date of accident or disablement, the Board's electronic file has been made available to you. Notify the Board immediately if you are not the correct insurance carrier.

Carriers must submit a First Report of Injury (FRO!) on or before the 18th day after the disability event or within 10 days after the employer has knowledge of the disability event, whichever period is longer. You may be subject to penalty for failure to file timely.

Kindly submit the reports listed below which are required to complete the file. acceptance or denial; Medical Report;

EC-1 (0912011)
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State of New York
Workers'
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**State of New York- Workers' Compensation
Board**

**In regard to David Dunlap, WCB Case #G258
9047**

NOTICE OF DECISION

keep your records

At the Workers' Compensation hearing held on 05/29/2020 involving the claim of David Dunlap at the Queens hearing location, Judge Michael Affleck made the following decision, findings and directions:

DECISION: If the carrier/employer wishes to produce a consultant's medical report (IME) in accordance with Workers' Compensation Law Section 137 and Board Rule 300.2 on the current medical issue(s) of within 60 days, it must be produced before or at the next hearing. If such report is not produced, a finding may be made that the carrier has waived the opportunity to submit a consultant's medical report.

I find prima facie medical evidence for aero toxic syndrome per Dr Ploss 3/16/20.

Parties reserve their rights to cross the doctors.

Case continued for testimony of claimant. The case is continued to address the following issue(s): Failure To Report Accident Timely, No Causal Relationship (No Injury Per Statutory Definition), No Causal Relationship (No Medical Evidence of Injury), No Compensable Accident/Not in Course and Scope of Employment (Not WCL Definition of Accident), No Jurisdiction. This case is not subject to the expedited hearing process and penalties.

Information about Next Hearing/ Meeting

Case is continued for testimony of the claimant.

Claimant - David Dunlap
Social Security No. -
WCB Case No. - G258 9047
Date of Accident – 11/03/2017
District Office – NYC

Employer – JETBLUE AIRWAYS CORPORATION
Carrier – New Hampshire Insurance Co.
Carrier ID No. – W154009
Carrier Case No. – 555278711
Date of Filing of this Decision 06/03/2020

25a

ATENCION:

Puede llamar a la oficina de la Junta de Compensacion Obrera, en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclarnacion(caso)



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COMPENSATION
BOARD
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**State of New York - Workers' Compensation
Board
In regard to David Dunlap, WCB Case #G258
9047**

NOTICE OF DECISION
keep for your records

At the Workers' Compensation hearing held on 11/04/2020 involving the claim of David Dunlap at the Queens hearing location, Judge Michael Affleck made the following decision, findings and directions:

DECISION: Case continued for consideration of all issues and possible testimony of claimant. Parties are discussing resolution. The case is continued to address the following issue(s): Failure To Report Accident Timely, No Causal Relationship (No Injury Per Statutory Definition), No Causal Relationship (No Medical Evidence of Injury), No Compensable Accident/Not in Course and Scope of Employment (Not WCL Definition of Accident), No Jurisdiction.

27a

This case is not subject to the expedited hearing process and penalties.

Claimant - David Dunlap
Social Security No. -
WCB Case No. - G258 9047
Date of Accident – 11/03/2017
District Office – NYC

Employer – JETBLUE AIRWAYS CORPORATION
Carrier – New Hampshire Insurance Co.
Carrier ID No. – 555278711
Date of Filing of this Decision – 11/09/2020

ATENCION:

Puede llamar a la oficina de la Junta de Compensacion Obrera, en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclarnacion(caso)



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**State of New York - Workers' Compensation
Board**

**In regard to David Dunlap, WCB Case #G258
9047**

NOTICE OF DECISION

keep for your records

At the Workers' Compensation hearing held on 12/10/2020 involving the claim of David Dunlap at the Queens hearing location, Judge Michael Affleck made the following decision, findings and directions:

DECISION: Claimant raises Sec 137 violations.

Claimant to provide HIPAA releases for prior treatment within 15 days.

Case continue for return of medical records from VA and other providers.

The case is continued to address the following issue(s): Failure To Report Accident Timely, No Causal Relationship (No Injury Per Statutory Definition), No Causal Relationship (No Medical Evidence of Injury), No Compensable Accident/Not in Course and Scope of Employment (Not WCL Definition of Accident), No Jurisdiction. This case is not subject to the expedited hearing process and penalties.

Claimant - David Dunlap
Social Security No. -
WCB Case No. - G258 9047
Date of Accident – 11/03/2017
District Office – NYC

Employer – JETBLUE AIRWAYS CORPORATION
Carrier – New Hampshire Insurance Co.
Carrier ID No. – 555278711
Date of Filing of this Decision – 12/15/2020

ATENCION:

Puede llamar a la oficina de la Junta de Compensacion Obrera, en su area corresponcliente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclarnacion(caso)



STATE OF NEW YORK
WORKERS'
COMPENSATION
BOARD
PO BOX 5205
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(877) 632-4996

**State of New York - Workers' Compensation
Board**

**In regard to David Dunlap, WCB Case #G258
9047**

NOTICE OF DECISION

keep for your records

At the Workers' Compensation hearing held on 02/05/2021 involving the claim of David Dunlap at the Queens hearing location, Judge Michael Affleck made the following decision, findings and directions:

DECISION: Parties are directed to submit deposition transcript(s) of Drs Abdullah, Fagen, Routray and Bhattacharya, pursuant to Sections 121 and 142 of the New York State Workers' Compensation Law. Deposition transcript(s) should be submitted by 4/20/21 for further adjudication by a WC Law Judge. To insure the timely submission of the deposition transcript(s), the party requesting the cross-examination shall, as soon as possible and

after consulting with the deponent and other parties to the extent possible, arrange for and schedule the deposition(s), giving notice to the deponent and complying with the provisions of 12 NYCRR 300.10. The carrier is directed to provide a copy of the deposition transcript to the Board. Requests for extension of time to file a deposition transcript(s), if any, must be filed prior to the date upon which the transcripts are due and must be in the form of an affirmation or affidavit with copies forwarded to the claimant, employer/carrier, and all representatives. Absent good cause shown as to why a deposition was not taken and the transcript(s) filed as directed, the record may be closed and a decision rendered. A medical witness is entitled to a witness fee pursuant to Part 301 of Title 12 of the Official Compilation of Codes, Rules and Regulations of the State of New York. Within ten days of the completion of a witness's deposition, the party responsible for such witness's fee, if any, pursuant to the Workers' Compensation Law and regulations, shall remit payment of the fee to the witness. The fee is to be awarded in like manner as a witness fee, awarded for attendance at a hearing, irrespective of the location where the deposition takes place (including telephone and video testimony). If the witness believes that a fee in excess of that set in Part 301 is warranted, such witness must submit a request to the Board within ten days of the deposition. The Board will review such request and issue a subsequent decision concerning whether an additional fee is warranted. The claimant is to produce HIPAA release for Dr Abdullah within 7 days.

Depositions on Causal Relationship due in 75 days. The case is continued to address the following issue(s): Failure To Report Accident Timely, No Causal Relationship (No Injury Per Statutory Definition), No Causal Relationship (No Medical Evidence of Injury), No Compensable Accident/Not in Course and Scope of Employment (Not WCL Definition of Accident), No Jurisdiction. This case is not subject to the expedited hearing process and penalties.

*** Continued on next page ***

Claimant - David Dunlap
Social Security No. -
WCB Case No. - G258 9047
Date of Accident – 11/03/2017
District Office – NYC

Employer – JETBLUE AIRWAYS CORPORATION
Carrier – New Hampshire Insurance Co.
Carrier ID No. – W154009
Carrier Case No. – 555278711
Date of Filing of this Decision – 02/10/2021

ATENCION:

Puede llamar a la oficina de la Junta de Compensacion Obrera., en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclarnacion(caso).

Information about Next Hearing/Meeting

Next Hearing: Return of depositions on causal relationship and summations on section 137 and on causal relationship. C-7 issues.

Claimant - David Dunlap
Social Security No. -
WCB Case No. - G258 9047
Date of Accident – 11/03/2017
District Office – NYC

Employer – JETBLUE AIRWAYS CORPORATION
Carrier – New Hampshire Insurance Co.
Carrier ID No. – W154009
Carrier Case No. – 555278711
Date of Filing of this Decision – 02/10/2021

ATENCION:

Puede llamar a la oficina de la Junta de Compensacion Obrera., en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclarnacion(caso).

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STATE OF NEW YORK
WORKERS'
COMPENSATION
BOARD
PO BOX 5205
BINGHAMTON, NY
13902-5205
www.wcb.ny.gov
(877) 632-4996

**State of New York - Workers' Compensation
Board**

**In regard to David Dunlap, WCB Case #G258
9047**

NOTICE OF DECISION

keep for your records

At the Workers' Compensation hearing held on 05/07/2021 involving the claim of David Dunlap at the Queens hearing location, Judge Keith Freedman made the following decision, findings and directions:

FEEES:

In addition to claimant's award, the carrier or insurance carrier are directed to pay the following fee TO DOCTOR for testimony:

Sum of	To
\$450.00	PLOSS LESTER NORMAN
\$450.00	PAUL SOVRAN

DECISION: The record is now closed. Parties are directed to submit Memorandum of Law by 7/9/2021 on issues of controversy and all other issues. Carrier waives cross examination of remaining doctors.

Carrier maintains defense issues. The case is continued to address the following issue(s): Failure To Report Accident Timely, No Causal Relationship (No Injury Per Statutory Definition), No Causal Relationship (No Medical Evidence of injury), No Compensable Accident/Not in Course and Scope of Employment (Not WCL Definition of Accident), No Jurisdiction. This case is not subject to the expedited hearing process and penalties.

Information about Next Hearing/ Meeting

Date Certain: 7/19/21 at 1:30PM for Oral Arguments on issues of controversy and all other issues. C-7 issues.

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Claimant - David Dunlap
Social Security No. -
WCB Case No. - G258 9047
Date of Accident – 11/03/2017
District Office – NYC

Employer – JETBLUE AIRWAYS CORPORATION
Carrier – New Hampshire Insurance Co.
Carrier ID No. – W154009
Carrier Case No. – 555278711
Date of Filing of this Decision – 05/12/2021

ATENCION:

Puede llamar a la oficina de la Junta de
Compensacion Obrera., en su area correspondiente,
cuyo numero de telefono aparece al
principio de la pagina y pida informacion acerca de
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37a



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**State of New York- Workers' Compensation
Board**

**In regard to David Dunlap, WCB Case #G258
9047**

NOTICE OF DECISION

keep for your records

At the Workers' Compensation hearing held on 07/19/2021 involving the claim of David Dunlap at the Queens hearing location, Judge Anne Marie Thomson made the following decision, findings and directions:

DECISION: Claim is disallowed. Correct claimant's zip code to 34771

I find no Section 137 violation.

"It is axiomatic that a claimant bears the burden of establishing a causal relationship between his or her employment and a disability by the proffer of competent medical evidence" (Matter of Williams v

Colgate Univ., 54 AD3d 1121 [2008] [citations omitted]). The medical opinion need not be expressed with absolute certainty (Matter of Norton v North Syracuse Cent. School Dist., 59 AD3d 890 [2009]). It must, however, be a medical opinion, which is supported by a rational basis, that indicates sufficient probability as to the cause of the injury (id.). "[M]ere surmise, or general expressions of possibility, are not enough to support a finding of causal relationship" (Matter of Mayette v Village of Massena Fire Dept., 49 AD3d 920 (2008) [citations and internal quotation marks omitted]). Even an opinion "that it was 'highly possible' that the injury was causally related to work, falls short of the reasonable probability that is required to establish a causal relationship between claimant's employment and his injury" (Matter of Johnson v Borg Warner, Inc., 186 AD3d 1772 [2020]).

"A claimant bears the burden of establishing, by competent medical evidence, a causal relationship between a ... disability and the established work-related injury' (Matter of Campito v New York State Dept. of Taxation & Fin., 153 AD3d 1063 [2017] [citations omitted])" (Matter of Hughes v World Trade Ctr. VolW1teer Fund, 166 AD3d 1279 [2017]).

Here, I find claimant's medical evidence fails to establish a causally related aero toxic syndrome through bleed air exposure during his employment with Jet Blue. On cross-examination, Dr Ploss conceded that there are many causes of headaches other than bleed air exposure. Dr. Ploss' assessment

relies too heavily upon claimant's self reports rather than on specific incidences of work place exposure..

I find more compelling is the testimony of LME doctors which, in pertinent part, do not find the alleged condition in the claimant per the records provided. No further action is planned by the Board at this time.

Claimant - David Dunlap
Social Security No. -
WCB Case No. - G258 9047
Date of Accident – 11/03/2017
District Office – NYC

Employer – JETBLUE AIRWAYS CORPORATION
Carrier – New Hampshire Insurance Co.
Carrier ID No. – W154009
Carrier Case No. – 555278711
Date of Filing of this Decision – 07/22/2021

ATENCION:

Puede llamar a la oficina de la Junta de Compensacion Obrera., en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclarnacion(caso).

APPENDIX – RELEVANT STATUTES

New York Constitution

ARTICLE 1 Bill of Rights

§1. No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his or her peers, ...

§6. ...In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions ... No person shall be deprived of life, liberty or property without due process of law.

§11. No person shall be denied the equal protection of the laws of this state or any subdivision thereof.

§ 18. Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or herself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his or her employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to.

New York Worker's Compensation Law

§20. Determination of claims for compensation. 1. At any time after the expiration of the first seven days of disability on the part of an injured employee, or at any time after the employee's death, a claim for compensation may be presented to the employer or to the chair. The board shall have full power and authority to determine all questions in relation to the payment of claims presented to it for compensation under the provisions of this chapter. The chair or board shall make or cause to be made such investigation as it deems necessary, and upon application of either party, shall order a hearing, and within thirty days after a claim for compensation is submitted under this section, or such hearing closed, shall make or deny an award, determining such claim for compensation, and file the same in the office of the chair.

Immediately after such filing the chair shall send to the parties a copy of the decision. Upon a hearing pursuant to this section either party may present evidence and be represented by counsel. The decision of the board shall be final as to all questions of fact, and, except as provided in section twenty-three of this article, as to all questions of law. Except as provided in section twenty-seven of this article, all awards of the board shall draw simple interest from thirty days after the making thereof at the rate provided in section five thousand four of the civil practice law and rules. Whenever 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 board.

§23. Appeals. An award or decision of the board shall be final and conclusive upon all questions within its jurisdiction, as against the state fund or between the parties, unless reversed or modified on appeal therefrom as hereinafter provided. Any party may within thirty days after notice of the filing of an award or decision of a referee, file with the board an application in writing for a modification or rescission or review of such award or decision, as provided in this chapter. The board shall render its decision upon such application in writing and shall include in such decision a statement of the facts which formed the basis of its action on the issues raised before it on such application. Within thirty days after notice of the decision of the board upon such application has been served upon the parties, or within thirty days after notice of an administrative redetermination review decision by the chair pursuant to subdivision five of section fifty-two, section one hundred thirty-one or section one hundred forty-one-a of this chapter has been served upon any party in interest, an appeal may be taken therefrom to the appellate division of the supreme court, third department, by any party in interest, including an employer insured in the state fund; provided, however, that any party in interest may within thirty days after notice of the filing of the board panel's decision with the secretary of the board, make application in writing for review thereof by the full board.

If the decision or determination was that of a panel of the board and there was a dissent from such decision or determination other than a dissent the sole basis of which is to refer the case to an impartial specialist, or if there was a decision or determination by the panel which reduced the loss of wage earning capacity finding made by a compensation claims referee pursuant to subparagraph w of subdivision three of section fifteen of this article from a percentage at or above the percentage set forth in subdivision three of section thirty-five of this article whereby a claimant would be eligible to apply for an extreme hardship redetermination to a percentage below the threshold, the full board shall review and affirm, modify or rescind such decision or determination in the same manner as herein above provided for an award or decision of a referee. If the decision or determination was that of a unanimous panel of the board, or there was a dissent from such decision or determination the sole basis of which is to refer the case to an impartial specialist, the board may in its sole discretion review and affirm, modify or rescind such decision or determination in the same manner as herein above provided for an award or decision of a referee. Failure to apply for review by the full board shall not bar any party in interest from taking an appeal directly to the court as above provided.

The board may also, in its discretion certify to such appellate division of the supreme court, questions of law involved in its decision. Such appeals and the question so certified shall be heard in a summary manner and shall have precedence over all other civil cases in such court. The board shall be deemed a party to every such appeal from its decision upon such application, and the chair shall be deemed a party to every such appeal from an administrative redetermination review decision pursuant to subdivision five of section fifty-two of this chapter. The attorney general shall represent the board and the chair thereon. An appeal may also be taken to the court of appeals in the same manner and subject to the same limitations not inconsistent herewith as is now provided in the civil practice law and rules. It shall not be necessary to file exceptions to the rulings of the board. An appeal to the appellate division of the supreme court, third department, or to the court of appeals, shall not operate as a stay of the payment of compensation required by the terms of the award or of the payment of the cost of such medical, dental, surgical, optometric or other attendance, treatment, devices, apparatus or other necessary items the employer is required to provide pursuant to section thirteen of this article which are found to be fair and reasonable.

Where such award is modified or rescinded upon appeal, the appellant shall be entitled to reimbursement in a sum equal to the compensation in dispute paid to the respondent in addition to a sum equal to the cost of such medical, dental, surgical, optometric or other attendance, treatment, devices, apparatus or other necessary items the employer is required to provide pursuant to section thirteen of this article paid by the appellant pending adjudication of the appeal. Such reimbursement shall be paid from administration expenses as provided in section one hundred fifty-one of this chapter upon audit and warrant of the comptroller upon vouchers approved by the chair. Where such award is subject to the provisions of section twenty-seven of this article, the appellant shall pay directly to the claimant all compensation as it becomes due during the pendency of the appeal, and upon affirmance shall be entitled to credit for such payments. Neither the chair, the board, the commissioners of the state insurance fund nor the claimant shall be required to file a bond upon an appeal to the court of appeals.

Upon final determination of such an appeal, the board or chair, as the case may be, shall enter an order in accordance therewith. Whenever a notice of appeal is served or an application made to the board by the employer or insurance carrier for a modification or rescission or review of an award or decision, and the board shall find that such notice of appeal was served or such application was made for the purpose of delay or upon frivolous grounds, the board shall impose a penalty in the amount of five hundred dollars upon the employer or insurance carrier, which penalty shall be added to the compensation and paid to the claimant. The penalties provided herein shall be collected in like manner as compensation. A party against whom an award of compensation shall be made may appeal from a part of such award. In such a case the payment of such part of the award as is not appealed from shall not prejudice any rights of such party on appeal, nor be taken as an admission against such party. Any appeal by an employer from an administrative redetermination review decision pursuant to subdivision five of section fifty-two of this chapter shall in no way serve to relieve the employer from the obligation to timely pay compensation and benefits otherwise payable in accordance with the provisions of this chapter. Nothing contained in this section shall be construed to inhibit the continuing jurisdiction of the board as provided in section one hundred twenty-three of this chapter.

§23-a. Mistakes, defects and irregularities.

1. Notwithstanding anything contained in 12 NYCRR 300.13(b) as or further defined in Subject Number 046-878 and Subject Number 046-940 issued by the board, a mistake, omission, defect and/or other irregularity in a cover sheet (currently known as form RB-89) accompanying an application for administrative review or a cover sheet (currently known as RB-89.2) accompanying an application for full board review shall not be grounds for denial of said application for administrative review or full board review.

2. Notwithstanding anything contained in 12 NYCRR 300.13 (b) or (c) as or further defined in Subject Number 046-878 and Subject Number 046-940 issued by the board, a mistake, omission, defect and/or other irregularity in a cover sheet (currently known as form RB-89.1) accompanying a rebuttal to an application for administrative review or a cover sheet (currently known as RB-89.3) accompanying a rebuttal to an application for full board review shall not be grounds for denial of said rebuttal to an application for administrative review or an application for full board review.

3. The board shall permit any such mistake, omission, defect and/or other irregularity to be corrected within twenty days of written notice by the board of such mistake, omission, defect and/or other irregularity or if a substantial right of either the party filing the application or the party filing the rebuttal is not prejudiced, such mistake, omission, defect and/or other irregularity shall be disregarded.

4. This section shall apply to any and all forms prescribed by the board with respect to said applications for board review or full board review or rebuttals to said applications subsequent to the effective date of this section.

§150. Referees and secretary.

(a) The chair shall appoint as many persons as may be necessary to be referees to perform the duties prescribed by this section. All positions of referee now in existence shall remain in the exempt class of the classified civil service, except as otherwise provided herein. The term of referees appointed to positions in the exempt class shall be seven years from the date of appointment; provided, however, that referees may be removed by the chair for cause after notice of charges and an opportunity to be heard.

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A newly created position of referee, or one that has been vacated, shall be classified in the competitive class of the classified service, and the term of office prescribed herein shall not apply to such appointments; provided, however, that those who are serving in referee positions on the date that this act becomes effective whose term has already expired or whose term expires on or after such effective date may, in the discretion of the appointing authority, be retained in that position until the expiration of the eligible list established as the result of the next competitive examination appropriate for such title, held after January first, nineteen hundred ninety-one or may, before such time, be appointed from such eligible list. A referee shall devote his or her entire time to the duties of that office and shall not hold any other public office or public employment for which compensation is received, other than necessary travel or other expenses incurred in the performance of the duties of such office or employment, and may engage in any employment that does not conflict with the proper performance of the duties of his or her office and is not inconsistent with the public officers law. Referees shall receive an annual salary to be fixed by the chair within the appropriation made therefor.

(b) It shall be the duty of a referee, under rules adopted by the board, to hear and determine claims for compensation, and to conduct such hearings and investigations and to make such orders, decisions and determinations as may be required by any general or special rule or order of the board under the provisions of this chapter. The decision of a referee on such a claim shall be deemed the decision of the board from the date of the filing thereof in the office of the secretary of the board unless the board, on its own motion or on application duly made to it, modify or rescind such decision. Whenever any deaf person is a party to a hearing conducted before a referee, or a witness therein, the referee shall in all instances appoint a qualified interpreter who is certified by a recognized national or New York state credentialing authority to interpret the proceedings to and the testimony of such deaf person. The board shall determine a reasonable fee for all such interpreting services, the cost of which shall constitute an administrative expense.

REGULATIONS

12 NYCRR 300.13 Administrative review, full board review, and applications for board reconsideration.

(b) Requests for administrative review and requests for full board review filed pursuant to Workers' Compensation Law section 23, and requests for reconsideration of a board panel decision pursuant to section 300.14 of this Part.

(1) Application format. Unless submitted by an unrepresented claimant, an application to the board for administrative review of a decision by a Workers' Compensation Law judge shall be in the format as prescribed by the chair. The application in the format prescribed by the chair must be filled out completely by the appellant, except that the requirement to utilize the application format shall not be imposed upon a claimant who is unrepresented.

(i) Unless otherwise specified by the chair, the appellant may attach a legal brief of up to eight pages in length, in 12-point font, with one inch margins, on 8.5 inch by 11 paper. A brief longer than eight pages will not be considered, unless the appellant specifies, in writing, why the legal argument could not have been made within eight pages. In no event shall a brief longer than 15 pages be considered.

(ii) Documents that are present in the board's electronic case folder at the time the administrative review is submitted shall not be, included with or attached to the application. The board may reject applications for review by an appellant, or an attorney or licensed representative of the appellant, who attaches documents that are already in the case folder at the time of the application.

(iii) If the appellant seeks to introduce additional documentary evidence in the administrative appeal that was not presented before the Workers' Compensation Law judge, the appellant must submit a sworn affidavit, setting forth the evidence, and explaining why it could not have been presented before the Workers' Compensation Law judge. The board has discretion to accept or deny such newly filed evidence. Newly filed evidence submitted without the affidavit will not be considered by the board panel.

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- (2) The application for administrative review:
- (i) shall specify the issues and grounds for the appeal;
 - (ii) shall specify the objection or exception that was interposed to the ruling, and when the objection or exception was interposed;
 - (iii) shall, when filed by an employer or carrier, specify which payments are continuing pending resolution of the administrative appeal, and which payments are stayed pursuant to section 23 and subdivision (3)(f) of section 25 of the Workers' Compensation Law;
 - (iv) shall include proof of service upon all necessary parties of interest, in the format prescribed by the chair. Service upon a party who is not adverse to the interest of the appellant may not render the appeal defective as such party is not a necessary party of interest. Failure to properly serve a necessary party shall be deemed defective service and the application may be rejected by the board.