

2025 WL 654258 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: VISITING NURSE SERVICE OF NEW

Case No. G317 0907

Carrier ID No. 0035W85955 W565253

February 13, 2025

*1 Visiting Nurse Service of NY

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Date of Accident 11/26/2021

The Full Board, at its meeting held on January 14, 2025, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed on August 22, 2024.

ISSUE

The issue presented for Mandatory Full Board Review is whether this claim should be amended to include [post-traumatic stress disorder](#) (PTSD) and [major depressive disorder](#) (MDD).

The Workers' Compensation Law Judge (WCLJ), among other findings, amended the claim to include causally related PTSD and MDD; made awards for the period from January 5, 2023, to August 11, 2023, and continuing, at the temporary partial rate of \$386.19 per week; and awarded a fee in the amount of \$1, 934.38 to the claimant's attorney. The attorney fee was released for payment in a subsequent decision.

The Board Panel majority reversed the WCLJ and disallowed the claims for PTSD and MDD; found no further causally related disability as of January 6, 2023; rescinded the attorney fee; and resolved C-8.1s pertaining to treatment of PTSD and MDD in favor of the self-insured employer (SIE). The Board Panel majority also modified the awards for the period from November 27, 2021, to January 6, 2023, and the attorney fee made in the WCLJ decision previously filed on March 14, 2023, pursuant to [WCL § 123](#).

The dissenting Board Panel member would find that the claim should be amended to include PTSD and that continuing awards should be directed at the mild-to-moderate disability rate.

The claimant filed an application for Mandatory Full Board Review, and requests that the Board Panel majority decision be reversed, the claim be established for PTSD and MDD, and the case be returned to the calendar on the issue of proper awards. The claimant argues that the dissenting Board Panel member correctly found that the claimant meets the DSM-5 criteria for PTSD, and that the Board Panel majority opinion “may have been based on an inaccurate reading of the record or incomplete facts.”

In rebuttal, the SIE requests that the Board Panel majority decision be affirmed because the record supports the Board Panel majority decision that the claimant's condition does not rise to the level of PTSD or MDD, and the claimant has no further causally related disability due to the established condition of anxiety secondary to trauma. The SIE argues that LCSW Serrett's opinion lacks credibility because she did not know the frequency or duration of the claimant's symptoms, she conceded that the claimant expressed a desire to return to work, and she did not inquire about the death of the claimant's sister that might have affected the claimant's condition. In contrast, Dr. Bienenfeld had more detail about the frequency and duration of the claimant's symptoms, noted that the claimant is independent in carrying out her activities of daily living, and observed an essentially normal mental status exam. Dr. Bienenfeld also only diagnosed the claimant with anxiety secondary to trauma, finding that she does not meet the DSM-5 criteria for MDD or PTSD.

***2** Upon review, the Full Board votes to adopt the following findings and conclusions.

FACTS

On March 17, 2022, the claimant filed an Employee Claim (C-3) to report that she has PTSD and depression from an incident that occurred while she was working as a registered nurse on November 26, 2021. The claimant alleged that while working in a patient's home, she was walking away from the patient, and he grabbed her and sexually assaulted her.

The claimant first sought treatment with Shellawn Serrett, LCSW, who conducted an initial intake evaluation of the claimant on December 13, 2021, and noted a history that, while the claimant was working as a nurse on November 26, 2021, the patient made inappropriate comments about the claimant running away with him (ECF Doc. ID #367456713, p. 2). The claimant told the patient that the conversation was inappropriate and he continued. The claimant felt that the patient was speaking to her with sexual aggression. The claimant further reported that the patient “hugged her from the back and held [] her arms in the back.” She was fearful and left the house quickly. “She feels she is unable to move and is upset and disturbed by the sexual advance.” When she tried to call the employer to report the incident, no one initially responded to her. Upon evaluation, LCSW Serrett observed that the claimant's mood was depressed and anxious, and she reported symptoms of [post-traumatic stress disorder/ acute stress disorder](#), including repeated, disturbing and unwanted memories of the assault, and nightmares and flashbacks of it. The claimant reported that she becomes upset when something reminds her of the assault, she avoids thinking or speaking about it, and avoids situations that remind her of it. She has also lost interest in activities she used to enjoy, she feels distant and cut off from other people, she has difficulty sleeping, is irritable, has difficulty concentrating, and is hypervigilant. She is depressed with loss of libido and loss of motivation. LCSW Serrett noted the symptoms reported by the claimant during psychological testing for depression and anxiety, and noted that the claimant was sexually assaulted on November 26, 2021, and is experiencing significant psychological distress as a result. LCSW Serrett diagnosed causally related PTSD, [acute stress disorder](#), and MDD, and found that the claimant has a temporary disability that is mild to moderate (33-37.5%) in degree.

In reports of continuing treatment, LCSW Serrett noted the claimant's reports of nightmares and sleep disturbance, feeling stressed and anxious, being angry and irritated, self-isolation to cope with anxiety, feeling depressed and overwhelmed, being fearful of returning to work into patient's homes after being sexually assaulted, and hopelessness. Her symptoms were noted to include issues with sleeping, social withdrawal, headaches, memory, interpersonal conflict, depression, anxiety, panic attacks, fatigue, and flashbacks. For all treatment between December 30, 2021, and January 30, 2023, LCSW Serrett continued to find that the claimant has a temporary disability that is mild to moderate (33-37.5%) in degree.

***3** MaryEllen Cunningham, the claimant's Psychiatric Mental Health Nurse Practitioner, conducted an initial intake evaluation of the claimant on March 17, 2022, and noted a history, as reported by the claimant, that on November 26, 2021, while working

as a visiting nurse case manager, she was grabbed from behind and held by a patient (ECF Doc ID #4000939406, pp. 3-7). The patient was saying inappropriate things to the claimant and he asked her for a kiss. The claimant reported that “[a]s the man grabbed her she screamed ‘NO, NO, NO!’ and ran out of the apartment.” The claimant attempted to get help from her manager but no one picked up the phone when she called. The claimant felt abandoned by her employer. The claimant attempted to return to work but was fearful and had difficulty driving. Her last day of work was December 1, 2021, and she has since become guarded and frightened, and is isolating herself. She has “intrusive memories of the man grabbing her” and “experiences physical and emotional reactions of fear, anger, her heart races, her head aches.” She has irritability, loss of libido, problems with concentration, forgetfulness, and has rarely left her home. She is detached from her family and feels disconnected from her body. Her sister died on December 6, 2021, and she has been unable to mourn for her. A past psychiatric history was noted that in 2019, the claimant reported anxiety and poor sleep to her primary care physician, after she was walking into a patient's home for work and was physically pushed. Prior to that, while working for the employer between 2000 and 2006, the claimant was the case manager for a gang member, and a fellow gang member sexually assaulted her and threatened her life. She did not report the incident to her employer because she feared for her life and the lives of her family members. NP Cunningham diagnosed causally related PTSD and panic attack, noting that although the claimant “had an episode of insomnia and anxiety in the past, she was at the time of her sexual assault psychiatrically stable and had no symptoms.”

On June 13, 2022, the Board received the Employer's Report of Injured Employee's Change in Employment Status Resulting from Injury (C-11) to report that the claimant's first full day lost from work was on December 1, 2021, and that on May 24, 2022, she separated from employment.

NP Cunningham examined the claimant again on July 20, 2022, and August 1, 2022, and opined that the claimant's current psychiatric symptoms are causally related to the incident at the workplace. At the examinations on November 28, 2022, and February 15, 2023, NP Cunningham found that the claimant had a 100% temporary impairment, causally related to PTSD and [panic disorder](#).

On January 5, 2023, the SIE's psychiatric consultant, Dr. Bienenfeld, examined the claimant and submitted a Report of Independent Medical Examination (IME-4) in which he noted a history reported by the claimant that on November 26, 2021, she was assaulted by one of her patients. She reported feeling sexually threatened after being grabbed from behind by the patient who was making inappropriate comments to her. The claimant “thinks it lasted for several seconds and then she was able to get away.” When the claimant “called the patient back” to ask why he did that to her, he apologized for his behavior. The claimant has panic attacks approximately two times a month, and reported that she was terminated in June 2022 “and that [it] upset her greatly because she very much wanted to get back to her job.” He diagnosed causally related anxiety secondary to trauma and noted that claimant is responding to [treatment with medication](#) and psychotherapy. However, Dr. Bienenfeld found that she does not meet the DSM-5 criteria for MDD or PTSD because the claimant denied “significantly depressed mood lasting most of the day for two weeks or more, focus and concentration appeared to be normal, energy level is normal, nightmares are only occurring once or twice per month. She is not suicidal. She is not reporting severe [anhedonia](#) or excessive guilt.” Dr. Bienenfeld opined that the claimant was able to return to her job at full unrestricted duty.

*4 In a decision filed on March 14, 2023, the WCLJ established the claim for anxiety secondary to trauma; set the average weekly wage at \$1, 737.86; directed medical testimony on the issues of causally related PTSD and MDD, and further causally related disability, specifying that deposition transcripts should be submitted by May 25, 2023, and noting that any requests for extension must be filed in the proper format prior to May 25, 2023; held awards in abeyance for the period from November 27, 2021, to December 30, 2021, and for the period from January 5, 2023, to March 10, 2023; made awards for the period from December 30, 2021, to January 5, 2023, at the tentative (33.33%) rate of \$386.19 per week; and awarded a fee in the amount of \$1, 400.00 to the claimant's attorney.

On May 24, 2023, LCSW Serrett testified in accordance with the report of initial treatment on December 13, 2021, and stated that the claimant has continued to treat since that date, most recently on March 14, 2023. The claimant's quality of life satisfaction was found to be average and she had “mental anguish, anxiety in the patient's home after the incident, anxiety to sleep, inability

to sleep, depression, hopelessness” and inability to tolerate physical touch (Deposition, LCSW Serrett, 5/24/23, p. 10). The claimant reported difficulty with activities of daily living. LCSW Serrett stated that the claimant's symptoms of being fearful, crying, hopelessness, inability to sleep, “and the trauma from being touched and sexually violated, that falls under PTSD and depression” (id., p. 14). The claimant was also having ““disturbing and unwanted memories of the assault, nightmares, and flashbacks” (id., p. 15). She also avoids speaking about the incident, which is part of PTSD, and has a loss of interest in activities she used to enjoy. LCSW Serrett conceded that there was no evidence of thought disorder, [suicidal ideation](#), hallucinations or delusion, and that claimant displayed intact memory. She indicated a continuing mild-to-moderate disability. The claimant has an interest in returning to the workforce.

Dr. Bienenfeld was scheduled to testify on June 7, 2023, but failed to appear. In an affirmation dated and filed with the Board on June 20, 2023, the claimant's attorney requested that Dr. Bienenfeld's report be precluded based on his failure to appear as scheduled.

On June 9, 2023, Dr. Levinson, the claimant's psychologist, conducted an initial evaluation and noted the claimant's report of the incident at work on November 26, 2021, when a male patient alone in his home asked her for a hug and kiss. She said no and started to leave when the patient grabbed both of her arms and began to pull her back inside. She was afraid he would attack and rape her. After some time, she was able to break free and leave the home. When she told a colleague what happened, the colleague suggested that she call the man to stand up to him. When the claimant called the man, he spoke to her with a sexy voice and innuendo, so she hung up. The employer was not supportive when she reported the incident and the police told her they could not help her. The claimant reported that since the incident, she has experienced images of the incident flashing through her mind during the day, and has nightmares at night. She has difficulty sleeping, has panic attacks, feels sad and down, and feels unsafe when outside of her home. Dr. Levinson diagnosed causally related PTSD, found a 100% disability, and made a treatment plan recommendation because the “symptoms of PTSD, Depression, and Sleeplessness are overwhelming [the claimant].”

*5 In the decision filed on August 15, 2023, the WCLJ found that the deposition of Dr. Bienenfeld is deemed waived but that his report remains in the record, because while the doctor failed to appear for testimony, subpoenas were not properly filed. The WCLJ amended the claim to include causally related PTSD and MDD; made awards for the period from January 5, 2023, to August 11, 2023, and continuing, at the temporary partial rate of \$386.19 per week; awarded a fee in the amount of \$1, 934.38 to the claimant's attorney; and directed the claimant to produce evidence of labor market attachment.

The SIE requested that the WCLJ decision filed on August 15, 2023, be reversed, and the claims for PTSD or MDD be disallowed. The SIE relied on the opinion of Dr. Bienenfeld who explained that the claimant's reported symptoms do not support a diagnosis of either PTSD or MDD under the DSM-5. The SIE further requested a finding of no further causally related disability related to the established anxiety secondary to trauma condition after January 5, 2023, based on Dr. Bienenfeld's opinion.

In rebuttal, the claimant requested that the decision be affirmed, arguing that substantial evidence supports establishment of the claims for PTSD and MDD, and awards for temporary partial disability.

In a decision filed on November 24, 2023, the carrier was directed to release the attorney fee of \$1, 934.38 for payment.

On December 22, 2023, the SIE filed another application for review, noting its prior appeal and stating that if the decision filed on August 15, 2023, is reversed as requested, the decision filed on November 24, 2023, must be rescinded in its entirety.

In rebuttal, the claimant requested that the decision filed on November 24, 2023, be affirmed, reiterating its prior arguments in support of the decision filed on August 15, 2023, and arguing that because the WCLJ properly amended the claim to include PTSD and MDD and made awards for lost time, the decision filed on November 24, 2023, properly released the attorney fee.

LEGAL ANALYSIS

Amendment of claim to include PTSD and/or MDD

“It [i]s claimant's burden to establish a causal relationship between his employment and his disability by competent medical evidence (see Matter of [Sale v Helmsley-Spear, Inc.](#), 6 AD3d 999 [2004]; Matter of [Keeley v Jamestown City School Dist.](#), 295 AD2d 876 [2002]). To this end, a medical opinion on the issue of causation must signify ‘a probability as to the underlying cause’ of the claimant's injury which is supported by a rational basis (Matter of [Paradise v Goulds Pump](#), 13 AD3d 764 [2004]; see Matter of [Van Patten v Quandt's Wholesale Distribs.](#), 198 AD2d 539 [1993]). ‘[M]ere surmise, or general expressions of possibility, are not enough to support a finding of causal relationship’ (Matter of [Ayala v DRE Maintenance Corp.](#), 238 AD2d 674 [1997], affd 90 NY2d 914 [1997]; see Matter of [Zehr v Jefferson Rehab. Ctr.](#), 17 AD3d 811 [2005])” (Matter of [Mayette v Village of Massena Fire Dept.](#), 49 AD3d 920 [2008]).

*6 Initially, it is noted that neither party requested review of the WCLJ finding that the deposition of Dr. Bienenfeld is deemed waived but that his report remains in the record. As such, the issue for review is whether the report of Dr. Bienenfeld in which he opined that there is no causally related PTSD or MDD is more credible than the opinion of causal relationship provided by the claimant's treating providers.

“‘It is well settled that the Board is vested with the discretion to assess the credibility of medical witnesses and its resolution of such issues is to be accorded great deference, particularly with respect to issues of causation’ (Matter of [Peterson v Suffolk County Police Dept.](#), 6 AD3d 823 [2004]; see Matter of [Joyce v United Food & Commercial Workers Local 342-50](#), 307 AD2d 552 [2003])” (Matter of [Provenzano v Pepsi Cola Bottling Co.](#), 30 AD3d 930 [2006]).

The specific DSM-5 diagnostic criteria that apply for PTSD are set forth in § C (Table 2) of the Board's Medical Treatment Guidelines for Post-Traumatic Stress Disorder and Acute Stress Disorder. These criteria include, in relevant part, exposure to actual or threatened sexual violence by direct experience (Criterion A), and symptoms of the following that have lasted more than one month (Criterion F) and have caused significant distress and impairment in social, occupation, or other important areas of functioning (Criterion G): recurrent involuntary, and intrusive distressing memories, and nightmares of the traumatic event, and flashbacks of the event (Criterion B); persistent avoidance of stimuli associated with the traumatic event (Criterion C); negative alterations in cognitions and mood associated with the traumatic event, as evidenced by persistent negative emotional state, and a feeling of detachment or estrangement from others (Criterion D); and marked alterations in arousal and reactivity associated with the traumatic event, as evidenced by irritability, problems with concentration, and sleep disturbance (Criterion E).

The specific DSM-5 diagnostic criteria that apply for MDD are set forth in § B.2 (Table 1) of the Board's Medical Treatment Guidelines for Depression and Depressive Disorders. These criteria include, in relevant part, the absence of any manic episode (Criterion E), and evidence of an episode of a depressed mood or loss of interest or pleasure (Criterion A), which is not attributable to the physiological effects of a substance or to another medical condition (Criterion C) and is not better explained by some psychotic disorder (Criterion D). Further, the claimant must have at least five (out of nine) symptoms that have been present during the same two week period and are not clearly attributable to another medical condition (Criterion A) and have caused clinically significant distress or impairment in social, occupational, or other important areas of functioning (Criterion B).

The symptoms are: depressed mood most of the day, nearly every day (Criterion A-1); markedly diminished interest or pleasure in activities most of the day, nearly every day (Criterion A-2); significant weight loss (Criterion A-3); insomnia or hypersomnia nearly every day (Criterion A-4); psychomotor agitation or retardation nearly every day that is observable by others and not merely subjective feelings (Criterion A-5); fatigue or loss of energy nearly every day (Criterion A-6); feelings of worthlessness or excessive or inappropriate guilt nearly every day (Criterion A-7); diminished ability to think or concentrate, or indecisiveness, nearly every day (Criterion A-8); and recurrent thoughts of death or suicidal ideation, attempt, or plan (Criterion A-9).

*7 Here, the claimant reported to Dr. Bienenfeld and her treating providers that she felt sexually threatened after being grabbed from behind by the patient who was making inappropriate comments to her. In reports of treatment beginning on December 13, 2021, and through January 30, 2023, LCSW Serrett diagnosed causally related PTSD, acute stress disorder, and MDD,

noting continual and ongoing symptoms reported by the claimant that have caused significant psychological distress and social withdrawal, and have caused her to be fearful of returning to work. Symptoms of PTSD noted by LCSW Serrett include repeated, disturbing and unwanted memories of the assault, and nightmares and flashbacks of it; avoidance of thinking or speaking about it, and avoidance of situations that remind her of it; feeling hopeless, and feeling detached from other people; and difficulty sleeping, irritability, and difficulty concentrating. Symptoms of MDD noted by LCSW Serrett include depressed mood; loss of interest in previously enjoyable activities; difficulty with sleeping and concentration; and fatigue. NP Cunningham submitted reports of treatment on dates between March 17, 2022, and February 15, 2023, and diagnosed causally related PTSD and panic attack, noting continual and ongoing PTSD symptoms of self-isolation and detachment from her family, intrusive memories of the assault, emotional reactions of fear and anger, irritability, and problems with concentration. In contrast, Dr. Bienenfeld found that the claimant did not have PTSD or MDD because she denied “significantly depressed mood lasting most of the day for two weeks or more, focus and concentration appeared to be normal, energy level is normal, nightmares are only occurring once or twice per month. She is not suicidal. She is not reporting severe [anhedonia](#) or excessive guilt.”

Based on the DSM-5 diagnostic criteria for PTSD, and the medical evidence as summarized herein, there is sufficient credible medical evidence to support amendment of the claim to include PTSD. Specifically, LCSW Serrett and NP Cunningham have reported all of the necessary DSM-5 diagnostic criteria that are set forth in § C (Table 2) of the Board's MTG for PTSD. While Dr. Bienenfeld found that the claimant did not have PTSD, he did so based on a lack of symptoms that are mostly not those listed in the DSM-5 diagnostic criteria for PTSD. The occurrence of nightmares was the only symptom noted that is relevant to PTSD, and Dr. Bienenfeld found that nightmares that occur only once or twice per month is insufficient. However, the DSM-5 diagnostic criteria for PTSD do not state a frequency for distressing dreams, only that the dreams must be recurrent.

Turning to the DSM-5 diagnostic criteria for MDD and the relevant medical evidence, it is noted that only LCSW Serrett has diagnosed MDD. However, while LCSW Serrett noted five of the nine required symptoms for MDD (i.e. depressed mood; loss of interest in previously enjoyable activities; difficulty with sleeping and concentration; and fatigue), the reports do not confirm that these symptoms were all present during the same two week period as required by § B.2 (Table 1) of the Board's MTG for [depressive disorders](#). As such, Dr. Bienenfeld's opinion that the claimant does not meet the DSM-5 criteria for MDD is more credible than that of LCSW Serrett.

***8** Therefore, the Full Board finds that the evidence in the record supports amendment of the claim to include PTSD, but does not support amendment of the claim to include MDD.

Degree of further causally related disability

“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. Volunteer Fund](#), 166 AD3d 1279 [2017]).

Here, the first date of treatment was on December 13, 2021, and there is no evidence to support awards prior to that date. Thereafter, while Dr. Bienenfeld opined that the claimant was able to return to her job at full unrestricted duty, he did so based, at least in part, on his conclusion that the claimant does not have causally related PTSD. In contrast, both LCSW Serrett and NP Cunningham have found causally related PTSD and found that the claimant is disabled. Although NP Cunningham opined that the claimant had a 100% temporary impairment, LCSW Serrett opined that the claimant has a temporary disability that is mild to moderate (33-37.5%) in degree. The WCLJ relied on the opinion of LCSW Serrett and made awards at the temporary partial (33.33%) rate in the decision filed on August 15, 2023. It is noted that the claimant did not request review of those awards. Further, in the reports of LCSW Serrett, continual and ongoing PTSD symptoms are noted, and have caused significant psychological distress and social withdrawal. The claimant also reported that she was fearful of returning to work. As such, LCSW Serrett's opinion that the claimant has a temporary disability that is mild to moderate (33-37.5%) in degree is supported by sufficient evidence of her ongoing symptoms and fear of returning to work.

Therefore, the Full Board finds that there is insufficient medical evidence in the record to support awards prior to December 13, 2021. The Full Board further finds sufficient medical evidence to make awards for the period from December 13, 2021, to August 11, 2023, and continuing, at the temporary partial (33.33%) rate of \$386.19 per week.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed on August 15, 2023, is MODIFIED to rescind the finding that the claim is amended to include MDD; and to make awards for the period from December 13, 2021, to January 5, 2023, at the temporary partial (33.33%) rate of \$386.19 per week. The rest of the WCLJ decision remains in effect.

The WCLJ decision filed on November 24, 2023, is AFFIRMED in its entirety.

No further action is planned by the Board at this time.

Chair - Clarissa Rodriguez

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