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Chair

ADMINISTRATIVE REVIEW DIVISION  
WORKERS' COMPENSATION BOARD  
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**State of New York - Workers' Compensation Board**

**In regard to Carlos Nunez (Dec'd), WCB Case #G076 0138**

**MEMORANDUM OF BOARD PANEL DECISION**

*keep for your records*

Opinion By: Loren D. Lobban  
Freida Foster  
Candace K. Finnegan

The Full Board, at its meeting on July 21, 2015, resolved that the Board Panel's Memorandum of Decision, duly filed and served on September 3, 2014, be rescinded, and the matter be returned to this Board Panel for further consideration.

The carrier requests review of the Workers' Compensation Law Judge (WCLJ) decision filed on October 3, 2013. The claimant has filed a timely rebuttal.

ISSUE

The issues presented for administrative review are:

1. whether the death of the decedent arose out of and in the course of providing covered services under the Independent Livery Drivers' Benefit Fund (ILDDBF); and, if so
2. whether the testimony of the lay witness for the ILDBF was properly precluded based on the failure of the witness to timely appear for the hearing held on September 30, 2013.

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Claimant -	Carlos Nunez (Dec'd)	Employer -	Natashas Group
Social Security No. -		Carrier -	Hereford Ins. Co. ILDBF
WCB Case No. -	G076 0138	Carrier ID No. -	W999002
Date of Accident -	04/01/2013	Carrier Case No. -	LDF00144
District Office -	NYC	Date of Filing of this Decision -	08/14/2015

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).

FACTS

This is a controverted claim on behalf of the surviving dependents arising from the death of their decedent, allegedly, as a result of being shot while driving his vehicle in the course of his employment as a livery driver on April 1, 2013. The shooting was unwitnessed.

In a Police Accident Report (NYC), dated April 2, 2013, the responding officer indicated that the decedent was driving a vehicle registered in his name at the time of the accident.

During a hearing held on September 30, 2013, the mother of the decedent's two surviving minor children testified that the decedent was employed as a livery cab driver when he was shot and killed while responding to a dispatch call on April 1, 2013. According to the witness, she has discussed the events of that evening with a detective involved in the investigation of the incident, another unidentified livery driver and the owner of the livery base. The witness acknowledged that the decedent was operating his own vehicle at the time of the shooting, but testified that the decedent was dispatched on the call in response to a telephone call in which the caller used the decedent's driver number and specifically requested to be picked up by the decedent. According to the witness, the shooting occurred while the decedent was responding to the call.

Although the hearing held on September 30, 2013 was scheduled for development of the record with lay testimony on the issues of employer-employee relationship and causally related death, the owner of the employer livery base failed to appear for the hearing at the scheduled time without explanation or excuse. The WCLJ denied a request by the carrier for another opportunity to produce the witness.

In a notice of decision filed on October 3, 2013, the WCLJ found that the decedent had a work-related injury involving death on April 1, 2013.

LEGAL ANALYSIS

the carrier argues that the decedent was not in a for-hire vehicle at the time of the incident and, therefore, the ILDBF does not provide coverage for the incident.

The claimant argues that the uncontroverted evidence establishes that the decedent was operating a livery vehicle when he was shot in the head, causing him to experience a loss of consciousness, to strike several parked cars, and to ultimately die from his injuries. The claimant further argues that the Board Panel decision filed on September 3, 2014, contains neither error of

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fact or error of law and should be affirmed in its entirety.

Executive Law § 160-ddd states that the livery fund is to be used to provide workers' compensation benefits for the death of a livery driver arising out of and in the course of providing covered services while dispatched by an independent livery base, and further states that benefits are provided to a livery driver dispatched by an independent livery base for injuries that occur while providing covered services, "either: (1) resulting from a crime against such livery driver as evidenced by a police report or (2) for the following conditions: (a) the amputation or loss of an arm, leg, hand, foot, multiple fingers, index finger, multiple toes, ear, or nose, (b) paraplegia or quadriplegia, or (c) total and permanent blindness or deafness."

Executive Law § 160-aaa specifies that:

"Livery" means a *for-hire vehicle licensed by a local taxi and limousine commission*, carrying no more than five passengers or such other limited number as set by a local taxi and limousine commission, which charges for services on the basis of flat rate, time, mileage or zones, and which is dispatched by a livery dispatch facility, but shall not include a vehicle owned or driven by a black car operator, as defined in article six-F of this chapter. (Emphasis added); and that

"Livery Driver" means an individual that drives a livery, is dispatched by a livery base, receives compensation for such driving, and is licensed to do so by a local taxi and limousine commission.

In the present case, it is undisputed that the claimant was driving his own personal vehicle at the time of the incident, and not a *for-hire vehicle licensed by a local taxi and limousine commission*. In as much as the claimant was not driving a livery, as defined by Executive Law § 160-aaa, when the incident occurred, it cannot be said that the decedent was providing covered services as a livery driver at the time of the accident.

Accordingly, the Board Panel finds, upon review of the record and based upon a preponderance of the evidence, that the death of the decedent did not arise out of and in the course of providing covered services under the ILDBF.

## CONCLUSION

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ACCORDINGLY, the Worker's Compensation Law Judge's decision filed on October 3, 2013, is rescinded. No further action is planned by the Board at this time.

All concur.



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Loren D. Lobban



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Freida Foster



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Candace K. Finnegan

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