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Supreme Court, Appellate Division, Third Department, New York.

In the Matter of the Claim of LOUISE CASALE, Appellant,
v.
ST. CATHERINE OF SIENA MEDICAL CENTER et al., Respondents.
and
WORKERS' COMPENSATION BOARD, Respondent.

Decided December 14, 2017

Facts: Claimant appeals from a decision of the Workers' Compensation Board, filed November 25, 2015, which ruled, among other things, that claimant voluntarily withdrew from the labor market.

Claimant sustained an injury when working for the employer after slipping and falling on ice in the employer's parking lot. Subsequently, the claimant was released by her physician to return to work with the limitation of not lifting more than 10 pounds. Approximately 2 years later claimant resigned and made a claim for further causally related disability for the period after she resigned. The employer raised the defenses of voluntary withdrawal from the labor market and no attachment to the labor market. Claimant testified that she resigned because she was "probably going to be terminated" due to absenteeism resulting from her injury. The Workers' Compensation Law Judge found that claimant was entitled to lost wage benefits.

The employer appealed and attached the claimant's resignation letter, which made no mention of retiring due to injuries and which had not been introduced previously. Over claimant's objection, the Board entertained the resignation letter "in the interest of justice" and explicitly stated that, based on that letter, it had concluded that claimant had not informed her employer of any reason for her resignation. The Board went on to conclude, among other things, that claimant had voluntarily withdrawn from the labor market and it rescinded the award of benefits.

Holding: *Reversed.*

Discussion: The Board erred in permitting the employer to introduce the alleged resignation letter for the first time on administrative appeal. If an appellant seeks to introduce additional documentary evidence in the administrative appeal that was not presented before the WCLJ, the appellant must submit a sworn affidavit, setting forth the evidence and explaining why it could not have been presented before the 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. Here, the employer did not submit an affidavit and did not explain why it had failed to introduce the resignation letter to the WCLJ. Accordingly, the Board should not have entertained it.

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