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Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of NAYYAR NASIR, Appellant,
v.
BJS WHOLESALE CLUB INC., Respondent,

WORKERS' COMPENSATION BOARD, Respondent.

December 24, 2020

Facts: This involves an established claim for injuries to the head, neck, back, right shoulder, right elbow and right hip. After both sides produced opinions concerning schedule loss of use, the Law Judge directed a schedule loss of use award. This award was appealed and rescinded, and a finding was made that the claimant's injuries were amenable to classification. The claimant's subsequent Application for Reconsideration and/or Full Board Review was denied, and the claimant never perfected an appeal to the Court. Thereafter the claimant was ultimately classified permanently partially disabled and found to have a 15% loss of wage-earning capacity but no entitlement to causally related lost earnings as she had suffered no compensable lost time as a result of the accident. Claimant then filed an Application for Board Review arguing that the finding that the claim was amenable to classification was merely the grant of additional future wage loss benefits and not a preclusion of the Law Judge's schedule findings. In reviewing the claimant's Application, the Board Panel noted that the claimant had not appealed the denial of her Application for Reconsideration and/or Full Board Review, and therefore, the Law Judge's subsequent classification of the claimant with a permanent partial disability was proper.

Holding: Reversed.

Discussion: First, the Court held that the claimant was not required to perfect an appeal denying her Application for Reconsideration and/or Full Board Review, as the findings in that decision simply continued the case for further development of the record as to loss of

wage earning capacity. Second, the Board is now aware that a claimant can be entitled to a simultaneous schedule and non-schedule award. It is certainly true that the discretion to assess credibility of medical witnesses lies with the Board, but here the record is not clear as to whether the Board was exercising such discretion or mistaken about the state of the law under the *Taher* decision.

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