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Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of ZDZISLAW LEWANDOWSKI, Appellant,
v.
SAFEWAY ENVIRONMENTAL CORP., Respondents,
WORKERS' COMPENSATION BOARD, Respondent.

January 7, 2021

Facts:

In 2002 the claimant was part of an asbestos union that performed clean-up work near Ground Zero. In 2004 a union doctor advised the claimant that he had developed lung, stomach and psychiatric problems as a result of the clean-up work. The claimant worked in the union until 2015 when he started having panic attacks. He then filed this claim for depression, breathing problems, rhinitis and GERD as a result of his clean-up work at the World Trade Center. The claim was controverted, *prima facie* medical evidence was found for COPD, GERD and PTSD and the carrier had the claimant examined by a consultant. After medical testimony the claim was disallowed. After the claimant appealed the Board Panel modified the Law Judge's findings to establish the claim for GERD, as well as to note that contrary to the Law Judge's findings, there had been a prior finding of *prima facie* medical evidence for PTSD and the claim was restored to the calendar. The Board Panel did agree with the Law Judge regarding the claim for COPD, noting the claimant's significant history of smoking. The claim was subsequently established for GERD and PTSD and then amended to rescind the establishment for PTSD and replace it with agoraphobia with panic disorder. The date of accident was set at July 1, 2002 and the date of disablement was determined to be April 27, 2009. The average weekly wage was then set based upon the date of disablement. Subsequently, a finding was once again made of *prima facie* medical evidence for COPD and the claim would go on to be established for same. The claimant then filed an RFA seeking to revise his average weekly wage. The claimant argued that his average weekly wage should be based upon his 2015 earnings and the date of disablement should be reset to December 4, 2015. The Law Judge denied these requests noting the claimant had not

previously challenged them. The claimant appealed while at the same time the carrier appealed the establishment of the claim to include COPD.

Holding: Modified to the extent that the decision denying the claimant's request to modify his average weekly wage is reversed and the case is referred for further proceedings on this issue.

Discussion: First, the Board did not abuse its discretion concerning the disallowance of the claim to include COPD. This is a factual issue and the decision rests on substantial evidence. However, regarding the average weekly wage, the Board is statutorily required to apply Section 164 on this issue in 9/11 claims which requires that the date of disablement selected be the one that is most beneficial to the claimant. The record does not contain any evidence supporting the fact that Section 164 was taken into consideration in this case.

Stewart, Greenblatt, Manning & Paez