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Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of ROSEMARY L. MILLER, Claimant,

v.

MO MAIER LTD., Appellants,

and

STATE INSURANCE FUND, Respondents,

WORKERS' COMPENSATION BOARD, Respondent.

January 6, 2022

Facts: The claimant filed a claim for benefits alleging her husband's death was due to asbestos exposure at work. Multiple employers were put on notice, including Mo Maier. During litigation, Mo Maier appeared at a hearing where the case was continued to a date certain to address issues of no coverage for a period of time. Neither Mo Maier or the carrier appeared at that hearing and the case was established against them.

After Mo Maier's carrier filed an Application for Board Review it was denied by the Board Panel on procedural grounds, and specifically for using the wrong coversheet. While an appeal on this issue was pending before the Appellate Division, the carrier continued to appear for hearings at the Workers' Compensation Board raising the issue of coverage. After an award was directed to the claimant, the carrier filed an Application for Board Review arguing that the Board should exercise its continuing jurisdiction in the interest of justice and further develop the record on the issue of coverage as well as the fact that the claimant had allegedly settled a third-party action without the carrier's consent. The Board Panel denied the carrier's application for failure to properly answer question 15 of the coversheet but did exercise its discretion in the interest of justice to rescind the awards directed to the claimant pending further development of the record on the issue consent to the third-party settlement.

The carrier did not appeal the Board Panel's decision. The case was restored to the calendar and the carrier again raised the issue of coverage. The Law Judge made no findings regarding coverage and the carrier filed an Application for Board Review. The carrier further applied for reopening on the issue of the initial hearing where it was found to be the proper carrier. The Board Panel denied these applications. Now both Mo Maier and the carrier appeal to the Appellate Division.

Holding: *Affirmed.*

Discussion: The Board retains jurisdiction over the decision to grant or deny an application for reopening. This decision is only subject to judicial review upon an abuse of discretion. Both the employer and carrier were at the hearing where the case was continued to a date certain on the issue of coverage and both failed to appear at the next hearing. Thereafter any appeals made were either untimely or procedurally defective and were properly within the discretion of the Board to deny.

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