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Supreme Court, Appellate Division, Third Department, New York

Matter of DANIEL DURKOT, Claimant-Appellant

v

NEWSDAY, Respondent,

and

WORKERS' COMPENSATION BOARD, Respondent

Decided June 1, 2017

Facts: The claimant was found to have hearing loss due to long-term exposure to workplace noise and the claim was established for bilateral sensorineural hearing loss and tinnitus, however the Workers' Compensation Law Judge found that it was premature to set a date of disablement for the purposes of schedule loss of use under Workers' Compensation Law Section 49-bb, because the claimant continued to work in the same position and be exposed to the same workplace noise. The claimant attempted 4 more times to request a schedule loss of use award but each time the Law Judge found nothing had changed and the schedule loss of use was premature. The claimant appealed.

Holding: *Affirmed.*

Discussion: Compensation for occupational loss of hearing shall become due three months after removal from the exposure to harmful noise in the employment. Removal may be achieved by the use of effective ear protection devices. Whether the claimant continues to be exposed to harmful workplace noise is a factual issue for the Board to resolve and its decision will be upheld if supported by substantial evidence. Here, the claimant uses earplugs and headphones provided the employer for protection from the noise, however, these are the same methods of hearing protection that the claimant used when he contracted the occupational hearing loss. As the statute requires the claimant to use effective protection, he has not been removed from the noise for the required time period.

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