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Supreme Court, Appellate Division, Third Department, New York

Matter of RAFAEL VILLALOBOS, Claimant-Appellant

v

RNC INDUSTRIES LLC, Respondents,

and

WORKERS' COMPENSATION BOARD, Respondent

Decided June 1, 2017

Facts: This is an established claim for the head, neck and back, and the carrier had produced a permanency report and raised the issue of labor market attachment. In a Decision filed February 12, 2015, the claimant was found unattached, was precluded from producing a permanency report, and the finding of a Class 2, Severity A to the lumbar spine was entered pursuant to carrier's IME. At a subsequent hearing, the claimant was found to have a 73.5% loss of wage earning capacity and to have reattached to the labor market. The Workers' Compensation Board reversed the decision finding the claimant unattached and reducing the loss of wage earning capacity to 40%. The claimant appealed.

Holding: *Affirmed.*

Discussion: Whether a claimant is attached to the labor market is a factual issue for the Board to resolve and its determination in this regard will be upheld if supported by substantial evidence. The Board is vested with the discretion to evaluate witness credibility and to weigh conflicting evidence. The Board's determination finding the claimant was not attached to the labor market was supported by substantial evidence and the Appellate Division will not disturb it. In regard to the loss of wage earning capacity, the Court noted that the claimant is precluded from challenging the medical impairment as he had failed to appeal the February 12, 2015 decision. The Board properly considered the claimant's functional abilities as well as age, work history, educational status, proficiency in the English language and ability to be retrained.