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Supreme Court, Appellate Division, Third Department, New York

Matter of GAMER BUSAT, appellant,
v
RAMAPO MANOR NURSING CENTER, respondent,
And
SPECIAL FUND FOR REOPENED CASES, respondent,
And
WORKERS' COMPENSATION BOARD, Respondent.

Decided June 7, 2018

Facts: Claimant injured his neck, back and right shoulder while working in 1997. Claimant continued working. In January 2014, claimant resumed treatment for the right shoulder and was determined to have a 50% disability. In mid-September 2014, claimant began a one-month vacation and was scheduled to return to work on October 12, 2014. During that period, claimant was scheduled to have causally-related shoulder surgery; instead, he underwent an unrelated cardiac procedure on October 10, 2014. Claimant recovered from the cardiac stent procedure by October 24, 2014, but did not return to work. Claimant sought lost-time awards based upon a November 19, 2014 treating physician report indicated 100% disability regarding the right shoulder. The WCLJ found that labor market attachment was not at issue and made awards at a partial rate to November 19, 2014 and thereafter at the total rate. The Board modified the decision, finding that the claimant's departure from employment was not causally-related to his established medical disability and that he had not remained attached to the labor market.

Holding: *Reversed and remitted for further proceedings.*

Discussion: The Board had found that the claimant did not have his right shoulder surgery even after being cleared to do so by his treating physician. Accordingly, the

Board found that claimant as obligated to show attachment to the labor market. However, the Board's reasoning is contradicted by the medical evidence. Although the claimant had healed from his cardiac procedure by October 24, 2014, the Board erred in concluding that the claimant had now been cleared for the shoulder surgery. There is medical in the file showing that the claimant was unable to gain medical clearance for the shoulder surgery due to the medications prescribed for his heart condition. The basis for the Board's decision was factually incorrect and thus must be remitted to the Board for consideration of all relevant evidence in the record.

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