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Supreme Court, Appellate Division, Third Department, New York

In the Matter of

STEPHEN FERGUSON, Appellant

v.

EALLONARDO CONSTRUCTION, INC. ET AL, Respondent

and

WORKERS' COMPENSATION BOARD, Respondent

June 27, 2019

Facts:

The claimant injured his right shoulder in August 2016 and underwent surgery in October, 2016. In October 2017, the claimant was examined by an IME who submitted an opinion that the claimant had a 40% schedule loss of use of the right arm. A notice dated November 30, 2017 advised the claimant and counsel of the consultant's conclusions and directed the claimant to produce medical evidence of permanency within 60 days from his physician or his "opportunity to submit medical evidence on permanency may be deemed waived by the Workers' Compensation Board." Negotiations took place in an effort to resolve the claim but the claimant's attorney did not have success in resolving the claim amicably. The claimant was evaluated by the treating physician on January 31, 2018. That report which was dated February 13, 2018 did not contain an opinion on permanency. The claimant's attorney asked for cross-examination of the independent medical examiner. The carrier opposed that request and noted it was untimely, as there was no C-4.3 form ever filed and there was no attempt to cross-examine the IME doctor within the time frame set up by the Workers' Compensation Board. A final opportunity to file a C-4.3 form was granted by the Judge but the request to cross-examine the independent medical examiner was denied. The claimant appealed. Before the Appeal was reviewed, a hearing was conducted at which time the claimant renewed his request to cross-examine the consultant. The Judge denied the request finding the claimant had waived his opportunity to submit the C-4.3 form and entered a finding of a 40% schedule loss

of use of the right arm as well as directed awards accordingly. The claimant appealed these findings as well. The claimant argued to the Board that he had been denied his right to cross-examine the carrier's consultant. The Board affirmed the Judge's prior decision and concluded that the claimant's request for cross-examination of the IME was untimely and that the claimant waived his opportunity to submit evidence on the issue of permanency. The claimant appealed.

Holding: *Reverse.*

Discussion: The Court essentially held that the claimant's request for cross-examination of the IME doctor was not invalidated by the failure to produce the C-4.3 form. The Court noted that if the request is not made in a timely manner, the right may be waived. It also noted that the only requirement is that the request for such cross-examination be made at a hearing prior to the Judge's ruling on the merits. The Court noted that the claimant's right to cross-examine the IME doctor was not predicated upon the filing of a competing report. The Court found that the Board abused its discretion in denying as untimely the claimant's request to cross-examine the IME doctor.

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