

STEWART, GREENBLATT, MANNING & BAEZ

ATTORNEYS AT LAW

MADGE E. GREENBLATT (RET.)
ROBERT W. MANNING
RICARDO A. BAEZ
DAVID J. GOLDSMITH
PETER MICHAEL DeCURTIS
LAURETTA L. CONNORS
JOHN K. HAMBERGER
LISA LEVINE
ANDREA L. De SALVIO
KRISTY L. BEHR
RAYMOND J. SULLIVAN
LUKE R. TARANTINO
THOMAS A. LUMPKIN
DIANE P. WHITFIELD

6800 JERICHO TURNPIKE

SUITE 100W

SYOSSET, NY 11791

516-433-6677

FAX 516-433-4342

DONALD R. STEWART (1949-2021)

KAFI WILFORD (2003-2010)

MICHAEL H. RUINA (1992-2016)

JAMES MURPHY
OF COUNSEL

Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of Mark MOGILEVSKY, Appellant,

v.

New York City Transit Department, Respondent

WORKERS' COMPENSATION BOARD, Respondent.

February 17, 2022

Facts: The claimant worked as a train car inspector for twenty years and, after retiring, filed a hearing loss claim. Testimony regarding schedule loss of use was taken from the experts of both sides. The Law Judge found, and the Board Panel affirmed, a 3.3% SLU for binaural hearing, based on the self-insured employer's expert. This finding was based on the fact that the Board could not understand how the claimant would have been able to continue working as a train car inspector for so long with the 45.3% loss of hearing found by his own doctor. The claimant appealed.

Holding: *Reversed.*

Discussion: The Court found the Board's decision was not based on substantial evidence as there was no evidence that the claimant's doctor was ever asked how the claimant could have continued working with such a severe loss of hearing, nor was there any evidence that this issue was ever raised by either party.