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Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of JAMES O'FLAHERTY, Appellant,

v.

MRZ TRUCKING CORP. et al., Respondents,

WORKERS' COMPENSATION BOARD, Respondent.

May 13, 2021

Facts: In 2014, the claimant was classified with a permanent partial disability and overall 81% loss of wage-earning capacity. On April 3, 2015, that decision was ultimately modified to find the claimant sustained only a 30% loss of wage-earning capacity and directed payments at the rate of \$252.68. The claimant underwent lumbar fusion surgery on October 1, 2015 and after several years the case became ripe on permanency again. At the permanency hearing, the Judge entered awards from 10/6/16 to 1/19/18 at \$600 temporary partial disability and classified the claimant with an 81% LWEC. On appeal to the Board Panel reduced the LWEC to 75% and modified the award from 10/6/16 to 6/25/18 at the prior classification rate of \$252.68. The claimant appealed the portion of the Board's decision regarding the period of awards from 10/6/16 to 6/25/18.

Holding: *Modified, by reversing the permanent partial disability rate for the period of 10/6/16 to 6/26/18 and remitted to the Workers' Compensation Board.*

Discussion: The Court found that after the claimant's surgery on 10/1/15, the claimant's medical documentation found a 100% temporary total disability. The carrier's independent medical examiners, up until January of 2018, had found that the claimant's disability was a "marked partial temporary disability." It was not until January of 2018 that the carrier's consultant found the claimant's condition had reached maximum medical improvement and classified the claimant's condition as a permanent partial disability. Therefore, absent medical proof that the claimant did in fact have a permanent partial disability

between 10/6/16 and 6/26/18, the Board's decision to award benefits at the prior permanent partial disability rate was not supported by substantial evidence.

Stewart, Greenblatt, Manning & Báez