

STEWART, GREENBLATT, MANNING & BAEZ

ATTORNEYS AT LAW

6800 JERICHO TURNPIKE

SUITE 100W

SYOSSET, NY 11791

516-433-6677

FAX 516-433-4342

DONALD R. STEWART (RET.)
MADGE E. GREENBLATT
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
LUKE R. TARANTINO
THOMAS A. LUMPKIN
JONATHAN SO

KAFI WILFORD (2003-2010)
MICHAEL H. RUINA (1992-2016)

RAYMOND J. SULLIVAN
MONICA M. O'BRIEN
MARY ELLEN O'CONNOR
OF COUNSEL

Supreme Court, Appellate Division, Third Department, New York

Matter of SCOTT BLOOMINGDALE, Appellant

v

REALE CONSTRUCTION CO INC. et. al, Respondents

and

WORKERS' COMPENSATION BOARD, Respondent.

Decided May 17, 2018

- Facts:** Claimant had a pre-CAP case for an injury to the lower back wherein he was classified permanently partially disabled. That claim ultimately became the responsibility of Special Funds pursuant to §25-a. Claimant was then involved in a subsequent work accident when he fell off an excavator working for the Respondent Employer. This accident was established for injuries to the neck, back and post-concussion syndrome. The claimant was classified in this claim with a Class 3 Severity B ranking for both the cervical and lumbar spine. He was found to have a 33% loss of wage earning capacity but was not entitled to continuing indemnity benefits based upon a lack of attachment. The claimant appealed the finding of non-attachment and the Board Panel Affirmed. This appeal ensued.
- Holding:** Modified to the extent that the finding of 33% loss of wage earning capacity is Reversed and the case is Remitted for further development of the record.
- Discussion:** The claimant argued that the Board finding of a 33% loss of wage earning capacity did not rest on substantial evidence and the Appellate Division agreed. While the Board has discretion to make credibility decisions regarding medical witnesses, here the claimant's vocational factors including age and education are aggravating factors in assessing his wage-earning capacity.