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Supreme Court, Appellate Division, Third Department, New York

Matter of JOEY SMITH, appellant,
v
129 AVENUE D, LLC. et. al, respondents,
and
WORKERS' COMPENSATION BOARD, Respondent.

Decided May 31, 2018

Facts: Claimant, a construction worker, filed a claim alleging work related injuries as the result of a fall from a ladder. At the time of the accident, claimant was assisting a building superintendent employed by 129 AVENUE D, LLC. After considering testimony of the claimant and a principal from the employer, the claim was disallowed, with the Judge finding no employer-employee relationship. The Board affirmed.

Holding: *Affirmed*.

Discussion: Claimant faulted the Board for failing to address whether claimant could be deemed an employee of the superintendent, or whether the superintendent, in turn, could be deemed an agent of the employer. The Court found that the Board is not obligated to consider an issue that was not raised and developed at the hearing before the WCLJ. Inasmuch as these issues were not raised at the hearing or in claimant's application for Board review, they were not properly preserved for the Court's consideration. Furthermore, employer-employee relationship is a factual question for the Board to determine. Claimant was contacted by the employer's principal to perform certain demolition work and while on the premises for that purpose, he noticed two broken lightbulbs that had burned out. Claimant testified that he then sought out the superintendent, who instructed him to replace the lightbulbs, setting into motion the chain of events leading to injury. The employer's principal refuted this, testifying that the claimant was not on the

employer's payroll and that he neither hired the claimant to perform work at 129 AVENUE D nor did he directly assign any tasks to claimant. He further testified that with respect to any repair projects assigned to the super, it was up to him to bring in the resources necessary for the job or to do it himself—a decision over which the principal did not have control. The Court also considered the fact that the claimant was paid in cash or by check from the super. Based upon the foregoing, there is no reason to disturb the Board decision.