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Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of Marc R TROMBINO, Claimant,

v.

FMB Inc., Respondent,

and

Liberty Insurance Corp., Appellant,

and

Ace American Insurance Co., Respondent

and

WORKERS' COMPENSATION BOARD, Respondent.

November 10, 2022

Facts: In September 2016, claimant, an iron-worker, filed a claim for various work-related lung conditions including silicosis and COPD, and reference FMB Inc as his employer. The case was initially indexed against Phoenix Insurance Co. as the responsible carrier. Phoenix disputed coverage, and after an investigation, the Board's Bureau of Compliance Enforcement Unit identified Ace American and Liberty Insurance Corp as potential carriers for FMB. In response, a notice of indexing was issued naming Liberty Insurance as the responsible carrier for FMB. Liberty appeared, raising issues including no prima facie medical, no occupational disease, and lack of coverage. At a hearing in July of 2017, claimant testified that FMB was his last employer, and he outlined the time period and location that he last worked for FMB. Importantly, not only was Liberty precluded from producing a witness based upon inexcusable failure of said witness to appear, but Liberty also failed to raise any issue regarding coverage at this hearing. The WCLJ found prima facie medical evidence and the case was continued for medical testimony.

Following completion of the testimony, Liberty filed a written summation, arguing that the record did not support establishment of a claim for pulmonary impairment. Liberty again failed to raise any issue of coverage in their summation. After the claim was

established, Liberty filed an appeal, and for the first time they raised the issue that its policy did not cover the location where claimant was working for FMB. The Board Panel accepted Liberty's documentary evidence of lack of coverage as an application to reopen, and remitted the matter for a hearing on the issue of coverage. In doing so, the Board placed on notice Ace American as a potential carrier. Ace raised the doctrine of laches as a bar against Liberty's denial of coverage, and both the WCLJ and the Board accepted this argument. Liberty appealed.

Holding: *Affirmed.*

Discussion: "The doctrine of laches can apply in workers' compensation cases when there has been an inexcusable delay in raising the defense of noncoverage together with actual injury or prejudice." The record reflects that documents filed in the Board's electronic case file in February 2017 identified Ace American as a potential responsible carrier for the claim. Claimant testified in July 2017 that he was working for FMB at the Hudson Yards construction project in Manhattan at the time of his last exposure to toxic materials. Although Liberty's policy with FMB did not include coverage of work conducted at the Hudson Yards location, Liberty did not dispute coverage until November 2017, after the WCLJ had established the claim. Liberty failed to adequately explain why it waited until after the claim had been established before arguing that it was not the proper carrier, and the Board's decision that Liberty has not demonstrated an excusable delay in contesting coverage is supported by substantial evidence. Further, substantial evidence also supports the Board's finding that Ace American was prejudiced by Liberty's delay in disputing coverage. Because Liberty did not dispute coverage until after the claim was established, Ace American was prevented from presenting its own evidence to challenge the claim.