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Supreme Court, Appellate Division, Third Department, New York

In the Matter of James FOSTER, Respondent

v

FEDEX FREIGHT INC., Appellant

and

Workers' Compensation Board, Respondent

November 12, 2020

Facts: The Board established claimant's average weekly wage at \$1,198.37 using a 260 multiple because claimant worked substantially the whole of the year immediately preceding the injury as a five-day worker (see Workers' Compensation Law § 14[1]). The Board found, based upon the record evidence before it, that claimant, by working 225 days, worked substantially the whole of the year as a five-day worker.

Holding: *Affirmed.*

Discussion: Although the C-240 form states that working a substantial part of the year would constitute 234 days, a guideline that the Board acknowledged that it traditionally applies, the statute does not require any particular number of days worked for a finding that an injured employee worked “substantially the whole of the year immediately preceding [the] injury”. The Court noted that claimant worked the majority of the 52 weeks preceding his injury as a five-day worker for a total of 225 days and the employer regarded claimant as a full-time worker who worked a standard work week. The Court held that the Board's calculation of claimant's

average weekly wage using the 260 multiple was supported by substantial evidence.

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