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Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of JEFFERY KELSEY, Respondent,

v.

DEAN TRANSPORTATION, et. al., Appellants,
WORKERS' COMPENSATION BOARD, Respondent.

October 5, 2023

Facts: The claimant, who sustained an injury to the right wrist, had two prior claims established for abdominal hernia and one subsequent claim for left inguinal hernia. When the claimant sought to have the right wrist, claim amended to include consequential bowel obstruction and abdominal hernia without prejudice to apportionment, litigation ensued. Initially the Board held that the doctor opining to these conditions was not qualified to give such an opinion as an occupational medicine specialist. Thereafter the claimant filed to have benefits on the right wrist claim reinstated at the total rate. In response, the carrier raised defenses including *laches* and attachment. After depositions and the production of additional updated medical evidence the Law Judge found the claim should now be amended to consequential bowel obstruction and continued the case for claimant testimony regarding entitlement to benefits. After the claimant's testimony the Law Judge found that *laches* did bar the claimant from benefits prior to the date of the request for further action but directed awards at the total rate subject to apportionment after that date thereby making the issue of attachment moot. The Board Panel affirmed on appeal noting that there had been no prior finding of voluntary removal. The carrier now appeals to the Court.

Holding: *Affirmed.*

Discussion: In arguing that the claimant should have been required to prove attachment prior to being awarded benefits at the total rate, the carrier misapplied the decision in *Bacci v. Staten Is. Univ. Hosp.*, 32 AD3d 582 (2006). The *Bacci* decision only applies if there has been a prior finding of voluntary removal. Here, the claimant's removal from the labor market was found by the Board to be involuntary. Such a decision is a factual one for the Board to decide.

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