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Supreme Court, Appellate Division, Third Department, New York

In the Matter of VINCENT PRAVATO, Appellant

v.

TOWN OF HUNTINGTON et al., Respondents.

WORKERS' COMPENSATION BOARD, Respondent.

November 17, 2016

Facts: The claimant, a laborer and sanitation truck driver, worked for the Town for approximately 32 years injured his back on January 3, 2011 emptying a garbage can into the hopper. This claim was established for a back injury. Claimant was out of work from January 10, 2011 to January 2, 2012 and returned to work from January 3, 2012 to May 18, 2012 at which time he resigned from his position at age 57. Awards were made at the temporary total disability rate after the claimant's resignation and this decision was appealed by the carrier. This decision was upheld by the Board Panel and the carrier's request for reconsideration/Full Board review has been denied. In January 2015, a permanency hearing was held and the claimant was classified with a 70% loss of wage earning capacity and found attached to the labor market. On appeal, a Board Panel found the claimant capable of performing sedentary work, found the claimant to have a 40% loss of wage earning capacity and found the claimant unattached to the labor market. The claimant now appeals.

Holding: *Modified.*

Discussion: It is well settled in determining loss of wage earning capacity for purposes of establishing the duration of permanent partial disability benefits not amenable to a schedule loss of use award, the Board relies on various factors including nature and degree of work related permanent physical and/or mental impairment, work restrictions and claimant's age. The Board held that the carrier's consultant stated the claimant could work in a modified duty capacity but did not perform an exertional ability analysis in arriving at that conclusion while the claimant's treating physician indicated the claimant could not

even work in a sedentary capacity. The court found that there was a lack of medical evidence indicating the claimant could work in a sedentary capacity and as this was the basis at least in part for the Board Panel reducing to a 40% loss of wage earning capacity, the Court modified the Board Panel decision to find as the Workers' Compensation Law Judge did that the claimant has a 70% loss of wage earning capacity. As claimant testified he did not submit job applications or go on interviews since October 2014 and only went to One-Stop on one occasion for a half hour and testified prospective employers contacted him but he did not elaborate the Court affirmed the Board Panel decision finding the claimant did not demonstrate sufficient evidence of attachment to the labor market. It is incumbent on a claimant to demonstrate attachment to the labor market with evidence of a search within medical restrictions.

*Stewart, Greenblatt, Manning & Back*