

STEWART, GREENBLATT, MANNING & BAEZ

ATTORNEYS AT LAW

6800 JERICHO TURNPIKE

SUITE 100W

SYOSSET, NY 11791

516-433-6677

FAX 516-433-4342

KAFI WILFORD (2003-2010)
MICHAEL H. RUINA (1992-2016)

RAYMOND J. SULLIVAN
MONICA M. O'BRIEN
MARY ELLEN O'CONNOR
JAMES MURPHY
OF COUNSEL

DONALD R. STEWART (RET.)
MADGE E. GREENBLATT
ROBERT W. MANNING
RICARDO A. BAEZ
DAVID J. GOLDSMITH
PETER MICHAEL DeCURTIS
LAURETTA L. CONNORS
JOHN K. HAMBERGER
LISA LEVINE
ANDREA L. De SALVIO
KRISTY L. BEHR
LUKE R. TARANTINO
THOMAS A. LUMPKIN
JONATHAN SO

Supreme Court, Appellate Division, Third Department, New York

Matter of JOSEPH FERRARI, Claimant-Respondent

v

FRITO LAY et al., Appellants,

and

CANADA DRY BOTTLING COMPANY OF NEW YORK et al., Respondents

and

WORKERS' COMPENSATION BOARD, Respondent

Decided September 6, 2018

Facts: The claimant injured his back in February 2007 while working for Frito Lay and received Workers' Compensation Benefits, and returned to work for Canada Dry Bottling Company of New York. He had a subsequent back injury in January 2008. In 2014, he was found to have a permanent total disability from the 2008 injury, and the cases were later reopened to address apportionment. The Board precluded the August 2011 Independent Medical Examination of Dr. Corso and then declined to consider the doctor's subsequent November 2011 examination and addendum, finding it was an improper second attempt to proffer an opinion after the initial report was precluded, and that the other parties were deprived of a right to cross examine the doctor as he failed to appear for a scheduled deposition. The Board then apportioned the cases equally, crediting the opinion of a different Independent Medical Examiner. This appeal ensued.

Holding: *Affirmed.*

Discussion: With respect to Dr. Corso's Independent Medical Examination, the Court found that even if the preclusion of the initial Independent Medical Examination would not mandate preclusion of a later examination and addendum, the Board properly precluded the report in light of the inability to depose Dr. Corso (Matter of Campbell v Interstate Materials Corp., 135 AD3d 1276, 1277 [2016]). With

respect to the issue of apportionment, the Board is vested with authority to resolve questions of credibility, and here the Decision was supported by substantial evidence.

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