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Supreme Court, Appellate Division, Third Department, New York

In the Matter of JOSEPH A. TERRANOVA JR., Appellant

v.

LEHR CONTRUCTION CO. et. Al, Respondents.

WORKERS' COMPENSATION BOARD, Respondent.

May 19, 2016

Facts: This involves an established claim to injuries to the right knee. Claimant also had a third party action and sought the consent of the carrier for proposed settlement amount of \$173,500. The claimant offered to pay the carrier \$14,018.75 in the consent letter, in satisfaction of its lien under WCL Section 29(1) provided that the carrier agreed that any future benefits would be subject to *Burns v. Varriale*. The parties agreed to the proposed settlement and lien amounts. Later, a WCLJ found the claimant had a 10% SLU of right leg and determined that based on the claimant's third party settlement, the carrier was entitled to credit under WCL Section 29(4) and no award was due to claimant. On appeal, the Worker's Compensation Board upheld the schedule loss of use finding but restored the case to the calendar for development of the record on the issue of carrier's credit. Following proceedings, the WCLJ found that *Burns* was inapplicable and the carrier was entitled to a credit that exceeded the amount of the schedule loss of use award. The Worker's Compensation Board upheld the Judge's decision reasoning that *Matter of Kelly* and not *Burns* controlled and claimant was not entitled to ongoing payments for litigation expenses.

Holding: *Affirmed*

Discussion: *Matter of Kelly* controls the apportionment of the carrier's equitable share of litigation expenses in a case such as this where claimant has obtained a schedule loss of use award.

Therefore the Board properly found that claimant was not entitled to ongoing payments for litigation expenses.

*Stewart, Greenblatt, Manning & Báez*