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DONALD R. STEWART (1949-2021)

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Supreme Court, Appellate Division, Third Department, New York

In the Matter of WILLIAM GRIMALDI, Appellant

v.

SUFFOLK COUNTY DEPARTMENT OF HEALTH, c/o SUFFOLK COUNTY RISK
MANAGEMENT, Respondent

and

WORKERS' COMPENSATION BOARD, Respondent

Decided November 17, 2022

Facts: This is an Appeal from a decision which established the claimant's average weekly wage.

This is an established claim for injuries to the right ankle, right hip and back which the claimant sustained in February of 2007. In 2008, the claimant sustained a compensable injury to the right knee while working for a different employer. Awards were apportioned equally between the two claims. Regarding the 2007 claim, the claimant was found to have a 75% permanent impairment and a 75% loss of wage-earning capacity and a 10% schedule loss of use of the right leg with respect to the 2008 claim. There was a determination that apportionment between the two claims terminated on December 23, 2013, at which time the self-insured employer would be 100% liable for all awards made on the 2007 claim. The Workers' Compensation Board reviewed the decision and determined that awards payable on the 2007 claim should be based upon claimant's average weekly wage at the time of the 2008 injury. The claimant appealed this, and the Court concluded the Board had erred in computing payments to the claimant for the 2007 claim made after December 23, 2013 by using the average weekly wage at the time of the 2008 injury. This matter was sent back to the Board by the Court to compute the

payment rate for the 2007 claim based upon the claimant's average weekly wage at the time of the 2007 injury for awards made subsequent to December 23, 2013.

The Board then indicated and established the claimant's payment rate on the 2007 PPD claim using the earnings at the time of the 2007 injury but limited the application of the rate to the time period of December 23, 2013, to April 26, 2016. The Board did not order that any payments on the 2007 claim be paid at that rate going forward and also rejected the request by claimant's counsel for fees. The claimant appeals.

Holding: *Dismissed.*

Rationale: In the claimant's Appeal, the claimant argued the Board did not follow the Court's direction when it limited the payment of awards on the 2007 claim at the rate based on 2007 earnings to payments made from December 23, 2013 to April 26, 2016 rather than ordering that any future payments on the claim after December 23, 2013 be made at that rate. The attorney's fees requested were also challenged by the claimant. After the instant Appeal was filed, the Board issued a decision amending the May 2021 decision by directing that any continuing awards in the 2007 claim be paid at the rate based on the claimant's 2007 earnings and also grant the claimant's counsel a fee of \$6,613.55. The Board's June 2022 decision amends and supersedes the May 2021 decision rendering this Appeal moot.

Regarding the claimant's request that the Board bear his costs for taking the Appeal, this Court held that the Board's actions in this case warrant the assessment of costs of perfecting the claimant's Appeal which would have been unnecessary had the Board properly followed the Court's direction in the May 2021 decision or granted claimant's timely Request for Reconsideration of that decision.