

Appendix A

No. 526254. New York Supreme Court Appellate Division Third Judicial Dept..
05-16-2019

included in the Petition for Writ of Certiorari submitted by Guy Cozzi

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 16, 2019

526254

In the Matter of the Claim of
GUY COZZI,

Appellant,

v

MEMORANDUM AND ORDER

AMERICAN STOCK EXCHANGE et al.,
Respondents.

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: March 28, 2019

Before: Garry, P.J., Egan Jr., Lynch, Clark and Aarons, JJ.

Guy Cozzi, Greenwich, Connecticut, appellant pro se.

Fischer Brothers, New York City (Martin Krutzel of
counsel), for American Stock Exchange and another, respondents.

Aarons, J.

Appeal from a decision of the Workers' Compensation Board,
filed January 19, 2018, which denied claimant's application to
reopen his workers' compensation claim.

In 2014, claimant registered as a participant in the World
Trade Center rescue, recovery and/or cleanup operations with the
Workers' Compensation Board (see Workers' Compensation Law §
162) and filed a claim for workers' compensation benefits for
injuries suffered at the site. Following a September 2015

hearing, a Workers' Compensation Law Judge determined that claimant was not a participant in the rescue, recovery or cleanup operations at the World Trade Center site pursuant to Workers' Compensation Law § 161 and, because his claim was not filed by September 11, 2003 – i.e., within two years of September 11, 2001 – it was barred as untimely. The Workers' Compensation Law Judge further found that the exception contained in Workers' Compensation Law article 8-A to the general two-year filing requirement was inapplicable.¹ On review, the Board affirmed in a February 2016 decision, and claimant applied for reconsideration and/or full Board review. The application was denied, and claimant appealed only from that decision. This Court affirmed, finding that the denial was not arbitrary, capricious or constituted an abuse of discretion (148 AD3d 1500 [2017], lv dismissed 30 NY3d 937 [2017]).

In 2017, claimant applied to the Board for a reopening of the claim. In his application, claimant asserted that, in addition to the activities related to the cleanup of the site that he raised in his initial application for benefits, he also voluntarily provided drinks to workers involved in the cleanup of the site. The Board found that "[b]ecause the claim was disallowed by the [Board] after a trial on the merits, a decision which . . . claimant did not appeal to the Appellate Division, and the claim arises out of the events of September 11, 2011 (which occurred more than seven years ago), the Board . . . is divested of jurisdiction." Accordingly, the Board concluded that it did not have the authority to rehear or reopen the claim. Claimant appeals.

¹ "Workers' Compensation Law article 8-A was enacted to remove statutory obstacles to timely claims filing and notice for latent conditions resulting from hazardous exposure for those who worked in rescue, recovery or cleanup operations following the World Trade Center September 11th, 2001 attack" (Matter of Williams v. City of New York, 66 AD3d 1203, 1204 [2009] [internal quotation marks and citation omitted]) and extended the deadlines for claimants to file for coverage so long as a claimant satisfied certain elements.

"Whether to reopen a case is a matter committed to the Board's sound discretion, and its decision will not be disturbed on appeal absent an abuse thereof" (Matter of Pucci v DCH Auto Group, 90 AD3d 1255, 1255-1256 [2011]; see Matter of Thomas v Crucible Materials Corp., 73 AD3d 1323, 1324 [2010]; Matter of Cagle v Judge Motor Corp., 31 AD3d 1016, 1017 [2006], lv dismissed 7 NY3d 922 [2006]). Workers' Compensation Law § 123, however, places limits on that discretion (see Matter of Magidson v Strategic Telemarketing, Inc., 70 AD3d 1217, 1218 [2010], lv dismissed 15 NY3d 867 [2010]). In this regard, Workers' Compensation Law § 123 provides that "no claim for compensation . . . that has been disallowed after a trial on the merits, or that has been otherwise disposed of without an award after the parties in interest have been given due notice of hearing or hearings and opportunity to be heard and for which no determination was made on the merits, shall be reopened after a lapse of seven years from the date of the accident."

We find that the Board did not abuse its discretion in determining that it was without jurisdiction to reopen the claim. The record reflects that claimant's application to reopen his claim was not made within the required time frame as set forth in Workers' Compensation Law § 123. As such, we conclude that the Board's decision was proper (see Matter of Ford v New York City Tr. Auth., 27 AD3d 792, 794 [2006], lv dismissed 7 NY3d 741 [2006]).

Garry, P.J., Egan Jr., Lynch and Clark, JJ., concur.

ORDERED that the decision is affirmed, without costs.

ENTER:

A handwritten signature in black ink, reading "Robert D. Mayberger". The signature is written in a cursive style with a large, stylized "R" and "M".

Robert D. Mayberger
Clerk of the Court

Appendix B

No. G110 9023. Workers' Compensation Board. 01-19-2018

included in the Petition for Writ of Certiorari submitted by Guy Cozzi



Clarissa M. Rodriguez
Chair

ADMINISTRATIVE REVIEW DIVISION
WORKERS' COMPENSATION BOARD
PO BOX 5205
BINGHAMTON, NY 13902
www.wcb.ny.gov

State of New York - Workers' Compensation Board

In regard to Guy Cozzi, WCB Case #G110 9023

MEMORANDUM OF BOARD PANEL DECISION

keep for your records

Opinion By: Fredrick M. Ausili
Linda Hull
Mark R. Stasko

The claimant filed an application for a rehearing/reopening on his own behalf on November 13, 2017. The carrier timely filed a rebuttal.

ISSUE

The issue presented for administrative review is whether a rehearing/reopening of the claim is warranted.

FACTS

Claimant filed a WTC-12 (Registration of Participation in World Trade Center Rescue, Recovery and/or Clean-up Operations) on September 8, 2014, alleging that he worked at the American Stock Exchange and describing the work performed as "Employee, Managing Director Equity Sales, etc." Claimant filed a C-3 (Employee Claim) on September 8, 2014 alleging that claimant was injured/became ill while "At work and going to/from work every day and in the World Trade Center area when looking for other employment. From 09/2001 - 12/2002."

At a hearing held December 11, 2014, claimant was unrepresented by counsel. Claimant was

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Claimant - Guy Cozzi
Social Security No. -
WCB Case No. - G110 9023
Date of Accident - 09/11/2001
District Office - NYC

Employer - American Stock Exchange
Carrier - Pacific Indemnity Company
Carrier ID No. - W168009
Carrier Case No. - 040514060129COZZI
Date of Filing of this Decision - 01/19/2018

ATENCION:

Puede llamar a la oficina de la Junta de Compensacion Obrera, en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclamacion(caso).

not under oath, however, he stated on the record, "I said I worked down there, but I wasn't involved in the recovery." Claimant was then sworn in and testified that he did not believe he was a rescue, recovery, or clean-up worker. The WCLJ found that Article 8-A did not apply. This finding was memorialized in a December 16, 2014 decision. Claimant, through counsel, then filed an appeal, and the December 16, 2014 decision was subsequently rescinded without prejudice by the Board Panel which noted in its March 10, 2015 decision that the WCLJ relied upon the belief of an unrepresented claimant as to the applicability of a statute. The case was returned to the calendar for additional record development.

Additional hearings were held thereafter, including a September 24, 2015 hearing, at which the claimant provided testimony. After hearing the parties' summations, the WCLJ found that claimant was not a rescue, recovery, or clean-up worker as defined by WCL § 161 and that his claim was disallowed as untimely. A September 29, 2015 Notice of Decision was issued finding that claimant was not a clean-up worker and that the claim was not subject to the provisions of Article 8-A. As the claim arose out of the events of September 11, 2001, and the claim was not filed until September 8, 2014, the claim was deemed time-barred.

The claimant filed an appeal of the September 29, 2015 Notice of Decision to the Board Panel, on his own behalf. As a result, the Panel issued a February 5, 2016 Memorandum of Board Panel Decision affirming the WCLJ's decision, finding that the claimant was not a participant in clean-up operations; that the provisions of Article 8-A did not apply; and that the claim was properly deemed time-barred pursuant to WCL § 28. The Panel also declined to consider documentation submitted for the first time on appeal, but did consider the arguments made in the claimant's letter.

The claimant appealed the decision to the Full Board Panel, which issued a Notice of Decision Regarding Application for Full Board Review on May 12, 2016, finding that the Panel's "unanimous MOD considered the evidence in the record relevant to the dispute . . . [and] does not contain any error of law or fact that requires the decision to be modified or rescinded."

The claimant appealed the Full Board's decision to the Appellate Division, which issued a Memorandum and Order on March 30, 2017, finding that "Inasmuch as claimant has only appealed from the decision denying his application for reconsideration and/or full Board review, the merits of the underlying decision are not properly before us" (citations omitted).

LEGAL ANALYSIS

The claimant requests that he be granted a rehearing pursuant to 12 NYCRR 300.14. The

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claimant asserts that a rehearing is required in the interest of justice to allow him to appeal the decision to the higher appellate courts, as the merits of claimant's appeals of the decision disallowing the claim were not heard by higher courts. The claimant submits a signed and notarized statement indicating that he is submitting new and additional evidence to the Board. The new evidence is a statement from the claimant's mother (which is signed but not notarized) who overheard a conversation that the claimant had with an attorney in which the claimant indicated that he sometimes brought drinks to workers at "Ground Zero." Claimant also attaches photographs that he asserts he took of Ground Zero. Claimant states that he did not produce these photographs earlier because he did not think they were important to the claim. The claimant requests that the evidence the Panel previously declined to consider be considered at a rehearing. The claimant argues that his claim meets the requirements of Article 8-A as he was at the covered site and his work had a tangible connection to rescue, recovery, and/or clean-up efforts. The claimant contends that the Workers' Compensation Board is attempting to alter the requirements of Article 8-A by reading a requirement into the law that the subject work occurred at Ground Zero rather than the World Trade Center site as defined by statute. The claimant makes several additional arguments regarding what he deems to be the Board's misinterpretation of statutory and regulatory law and asserts that the Board has a bias against clean-up workers.

In rebuttal the carrier requests that the application be denied. The carrier argues that the Board is divested of jurisdiction to consider the claim pursuant to the restrictions WCL § 123, and that none of the bases for granting a rehearing/reopening are present in the instant claim.

"While the Board retains discretion to reopen its prior determinations, limits are placed on that discretion by Workers' Compensation Law § 123" (*Matter of Magidson v Strategic Telemarketing, Inc.*, 70 AD3d 1217 [2010] [quotation marks and citations omitted]). As an exception to the Board's continuing jurisdiction over workers' compensation claims, Workers' Compensation Law § 123 provides, in relevant part, that "no claim for compensation . . . that has been disallowed after a trial on the merits, or that has been otherwise disposed of without an award after the parties in interest have been given due notice of hearing or hearings and opportunity to be heard and for which no determination was made on the merits, shall be reopened after a lapse of seven years from the date of the accident." "As a factual determination for the Board to make, whether such cases fall within the ambit of this statute depends on whether they were truly closed, that is, if further proceedings, such as the submission of additional medical evidence, were contemplated by the Board" *Matter of Ford v New York City Tr. Auth.*, 27 AD3d 792 [2006], *appeal dismissed* 7 NY3d 741 [2006] [citations omitted]).

A request for reopening of a claim may be made by any party upon an application that indicates that "(1) certain material evidence not available for presentation before the board at the time of

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District Office -	NYC	Date of Filing of this Decision -	01/19/2018

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hearing is now available; or (2) proof of a change in condition material to the issue is involved; or (3) it would be in the interest of justice" (12 NYCRR § 300.14[a]). 12 NYCRR 300.14(b) further requires that "[a]llegations as to newly discovered evidence . . . be substantiated by supporting affidavits."

"Although a request to reopen need not be made in any particular form, it must set forth facts sufficient to establish the [applicant]'s right to reopen . . . The Board's interpretation of a request for reopening, and its decision about whether to reopen a case, are matters within its discretion, and the Board's decision will not be disturbed absent an abuse of discretion (*see* 12 NYCRR 300.14[c])" (*Matter of Ewing v YMCA*, 57 AD3d 1080 [2008] [additional citations omitted]).

In the present case, the claimant's application for a rehearing/reopening is essentially an indictment of the Board Panel's February 5, 2016 decision and an attempt to relitigate issues which were previously decided. Because the claim was disallowed by the Panel after a trial on the merits, a decision which the claimant did not appeal to the Appellate Division, and the claim arises out of the events of September 11, 2001 (which occurred more than seven years ago) the Board Panel is divested of jurisdiction under WCL § 123. The Board Panel does not have the authority to rehear or reopen the claim, and the application for a rehearing/reopening is denied. Even if the Board's jurisdiction was not limited by WCL § 123, however, the Board Panel would not be inclined to grant a rehearing or reopening as the arguments made by the claimant do not warrant a reopening under any of the provisions of 12 NYCRR 300.14.

Therefore the Board Panel finds, upon review of the record and based upon a preponderance of the evidence, that the claimant's application for a rehearing/reopening is denied.

CONCLUSION

ACCORDINGLY, the claimant's application for rehearing/reopening filed November 13, 2017

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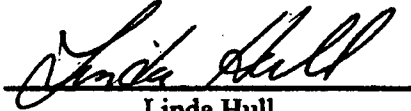
is DENIED.

No further action is planned at this time.

All concur.



Fredrick M. Ausili



Linda Hull



Mark R. Stasko

Claimant - Guy Cozzi
Social Security No. -
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Employer:
Other:

Case #G110 9023
Guy Cozzi
Pacific Indemnity Company

Braunfotel & Frendel LLC
Alan M. Cass & Associates
MedRecovery Management

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Appendix C

No. 2019-584. New York Court of Appeals. 09-10-2019

included in the Petition for Writ of Certiorari submitted by Guy Cozzi

State of New York

Court of Appeals

*Decided and Entered on the
tenth day of September, 2019*

Present, Hon. Janet DiFiore, *Chief Judge, presiding.*

Mo. No. 2019-584

In the Matter of the Claim of Guy Cozzi,
Appellant,

v.

American Stock Exchange et al.,
Respondents.

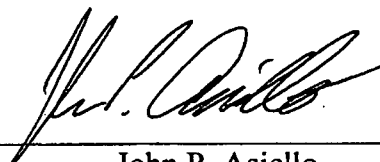
Workers' Compensation Board,
Respondent.

Appellant having appealed and moved for leave to appeal to the Court of Appeals
in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, on the Court's own motion, that the appeal is dismissed, without
costs, upon the ground that the order appealed from does not finally determine the
proceeding within the meaning of the Constitution; and it is further

ORDERED, that the motion for leave to appeal is dismissed upon the ground that
the order sought to be appealed from does not finally determine the proceeding within the
meaning of the Constitution.



John P. Asiello
Clerk of the Court

**Additional material
from this filing is
available in the
Clerk's Office.**