No.:_____

In The
Supreme Court of the United States

IN THE MATTER OF THE CLAIM OF
FRANK DeLUCIA,

Petitioner,

v.

GREENBUILD, LLC, et al.,

Respondent,

-and-

WORKERS' COMPENSATION BOARD,

Respondent.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

APPENDIX FOR A WRIT OF CERTIORARI

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[REPRODUCED ON RECYCLED PAPER]

TABLE OF APPENDIX

Page

State of New York
Court of Appeals

Decided and Entered on the tenth day of September, 2020

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

Mo. No. 2020-394
In the Matter of the Claim of Frank DeLucia,
Appellant,
v.
Greenbuild, LLC, et al.,
Respondents.
Workers' Compensation Board,
Respondent.

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

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is denied.

John P. Asiello
Clerk of the Court

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

Decided and Entered: April 23, 2020 528344

In the Matter of the Claim of
FRANK DeLUCIA,
Appellant,
MEMORANDUM & ORDER

v.

GREENBUILD, LLC, et al.,
Respondents,

WORKERS' COMPENSATION BOARD
Respondent.

Calendar Date: February 18, 2020
Before: Egan Jr., J.P., Lynch, Mulvey, Devine and Colangelo, JJ.

John F. Clennan, Ronkonkoma, for appellant.

Vecchione, Vecchione, Connors & Cano, LLP, Garden City Park (Brian M. Anson of counsel), for Greenbuild, LLC and another, respondents.

Foley, Smit, O'Boyle & Weisman, Hauppauge (Warren J. Fekett of counsel), for ACE American Ins. Co., respondent.

Mulvey, J.

Appeal from a decision of the Worker's Compensation Board, filed July 12, 2018, which ruled, among other things, that claimant did not sustain casually-related injuries and denied his claim for worker's compensation benefits.

Claimant submitted a worker's compensation claim for various injuries that he attributed to repetitive motion while working in construction as a drywall finisher. The claim was controverted by claimant's employers and their worker' compensation carriers (hereinafter collectively referred to as the carriers). Following a hearing, by decision filed in June 2017, the case was transferred to a special part for expedited hearings (see Worker's Compensation Law § 25 [3] [d]), and the parties were directed to submit – within 55 days – transcripts of depositions of three of claimant's treating physicians, George Kakoulides, Bennett Brown and Robert Lippe (see 12 NYCRR 300.38 [g] [11]). Depositions were not completed within the required 55 days. Between August 2017 and January 2018, attorneys for the carriers served a series of five subpoenas duces tecum, with notices to take depositions, on each of the three physicians,

directing them to appear on specified dates after the deadline – in October 2017 and December 2017 – a Workers' Compensation Law Judge (hereinafter WCLJ) essentially granted extensions of time in which to complete the depositions, apparently due, in part, to notice of the claim being provided to an additional employer and its carrier. At the December appearance, the WCLJ indicated that he would issue a reserved decision after the depositions were completed.

Brown and Lippe ultimately failed to appear on any of the dates repeatedly rescheduled for their depositions, and they were never deposed. After four nonappearances, Kakoulides, claimant's neurosurgeon, ultimately testified in February 2018, opining that claimant's diagnosis was "severe degenerative disc disease" but conceding that he was unable to offer an opinion regarding causation. With one exception, the only reason given for the physicians' nonappearances is the general statement that they were not available on scheduled dates. The orthopedic surgeon who conducted an independent medical examination of claimant for the carriers submitted a report finding no evidence that claimant's diagnosis of generalized degenerative idiopathic osteoarthritis was causally related to his employment.

The WCLJ issued a reserved decision disallowing the claim, finding that Brown and Lippe had failed to make themselves available for testimony and that Kakoulides was unable to

provide evidence of causation. On claimant's administrative appeal, the Workers' Compensation Board affirmed. The Board found, among other things, that the testimony and reports of Brown and Lippe were properly precluded, rejecting claimant's request for additional time to arrange for their depositions. Claimant appeals.

We affirm. We are not persuaded by claimant's argument that the Board erred either in precluding the testimony and reports of Brown and Lippe or in disallowing the claims. Claimant's contentions are premised upon the erroneous supposition that the carriers were obligated to enforce the subpoenas of these witnesses through court action pursuant to 12 NYCRR 300.10 (c), rather than moving to preclude. To begin, it was claimant who bore "the burden of establishing, by competent medical evidence, a causal relationship between [his] injur[ies] and his…employment" (Matter of Cartafalsa v Zurich Am. Ins. Co., 175 AD3d 1762, 1763 [2019] [internal quotation marker and citation omitted]). The parties, all of whom intended to conduct those depositions within 55 days, which did not occur; at least two extensions were granted to accomplish this and, although the physicians were subpoenaed on five separate occasions, Brown and Lippe failed to attend any of the scheduled dates. No valid explanation or sufficient excuse was ever provided by claimant for their failure to appear, and no "extraordinary circumstances" were shown to warrant further

extension of time for depositions in this expedited case (12 NYCRR 300.10 [c]). Even when the physicians failed to appear for a fourth and fifth scheduled subpoenaed deposition on February 13, 2018 and February 16, 2018, respectively, claimant's attorneys merely requested further extensions, stating that the law firm would continue its unspecified efforts to obtain physicians' testimony and follow up with their medical offices to determine the reasons for their nonappearances. Although the carriers requested preclusion on several occasions, claimant merely generically opposed that request with no indication that the physicians' testimony could be procured. Even in February 2018, almost seven months after the depositions were ordered, the affirmation of claimant's attorney requesting another extension only conclusorily alleged that the two physicians "are not available within the [time frame] requested" due to their "limited availability."

While claimant is correct that the carriers could have invoked court action to enforce and compel compliance with their subpoenas in order to cross-examine the treating physicians (see 12 NYCRR 300.10 [c]; CPLR 2308 [b]), the carriers were not obligated to do so. Indeed, the Board has addressed the effect of the regulation addressing adjournments of carrier-requested depositions on preclusion of physician testimony and reports, and has interpreted the regulation as requiring a review of the carrier's compliance with any direction by the WCLJ when an extension of time was granted (see Employer: Town of Hempstead Dept. of San., 2017

WL 2714073, *3, 2017 NY Wrk Comp LEXIS 8594, *7-9 [WCB No. G079 9815, June 19, 2017]; Employer: Raymond Desamours, 2016 WL 7494019, *5-7 , 2016 NY Wrk Comp LEXIS 13667, *15-18 [WCB No. GlOO 7356, Dec. 22, 2016]). Notably, "[t]he directions set forth in the WCLJ ' s decision are to specify the terms of the additional adjournment (i.e . the deadline and whether the filing of an affidavit of service or enforcement of a subpoena is required)" (Employer: Raymond Desamours, 2016 WL 7494019 at *5). Specifically, the Board has determined that, "[w]ith respect to enforcement of a subpoena, if the WCLJ's decision granting a[n additional] adjournment required the carrier to enforce a subpoena, then the failure to do so should result in a finding that the carrier has waived its right to cross-examine [the] claimant's doctor. If the WCLJ's decision granting a[n additional] adjournment is silent as to enforcement of a subpoena, however, no such obligation exists. While 12 NYCRR 300.10 (c) notes only that the obligation to invoke court action is that of the carrier, the regulation does not specifically require that this occur" at any specific time (Employer: Raymond Desamours, 2016 WL 7494019 at *6). Inasmuch as the WCLJ did not direct the carriers to enforce their subpoenas when permitting additional time for the depositions, the carriers had no obligation to seek court orders to compel the attendance of claimant's treating physicians rather than to seek preclusion of their testimony and reports (Employer: Town of Hempstead Dept. of San., 2017 WL 2714073 at *3; Employer: Consolidated Edison Co. of NY, 2017 WL 2714035,

*5, 2017 NY Wrk Comp LEXIS 8556, *11-12 [WCB No. G129 7812, June 15, 2017]).

Contrary to claimant's argument, the presumption contained in Workers' Compensation Law§ 21 (5) for medical reports does not limit the Board's authority to preclude the testimony and reports of treating physicians who fail to appear for depositions under subpoena.[1] By ordering, seven months earlier, that the case be expedited and transcripts of the depositions be produced, a WCLJ had put the parties on notice that, "[a]bsent good cause shown as to why a deposition was not taken and the transcript(s) filed as directed, the record may be closed and a decision rendered." Under these circumstances, we discern no basis upon which to conclude that the Board erred in resolving the claim on the record before it, without the testimony or reports of the two physicians who failed to appear for any of the scheduled depositions (see 12 NYCRR 300.10 [c]; Matter of Feliciano v Copstat Sec. Corp., 29 AD3d 1243, 1243-1244 (2006]). Given the absence of evidence of causation, the claim was properly denied (see Matter of Kaplan v New York City Tr. Auth., 178 AD3d 1262, 1264 [2019]).

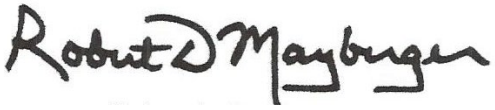
Egan Jr., J.P., Lynch, Devine and Colangelo, JJ., concur.

---

[1] Claimant's argument that he was entitled to the statutory presumption in Worker's Compensation Law § 21 is unpreserved, as he did not raise this issue before the WCLJ or the Board.

ORDERED that the decision is affirmed, without costs.

ENTER:



Robert D. Mayberger
Clerk of the Court

Clarissa M. Rodriguez
Chair

ADMINISTRATIVE REVIEW DIVISION
WORKERS' COMPENSATION BOARD
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State of New York – Workers' Compensation Board

In regard to Drank Delucia, WCB Case #G177 9309

MEMORANDUM OF BOARD PANEL DECISION
keep for your records

Opinion By: Steven A Crain
Mark R. Stasko
Ellen O. Paprocki

By an application dated January 29, 2019 the appellant requests that the Workers' Compensation Board (Board) settle the record on appeal to the Appellate Division, Third Department (Third Department), from the Board Panel's Memorandum of Decision filed on July 12, 2018. The Board Panel's decision determined that the testimony and reports of Dr. Lippe and Dr. Brown were properly precluded and denied claimant's request for cross-examination of Dr. D'Ambrosio.

12 NYCRR 300.18(e) provides that "[t]he board, upon request of any party, shall render a written decision in the event that there is an unresolved dispute as to

the record list or the contents of the file" *(see also* 22 NYCRR 800.18[4]).

FACTS

On November 21, 2018, the appellant served a proposed record list on the parties of interest. The proposed record list identified 81 documents to be included in the record on appeal and framed the issue on appeal as:

Was the decision made July 12, 2018 precluding the testimony and reports of Dr. Lippe and Dr. Brown and denying the right to cross-examine Dr. D'Ambrosio made in violation of lawful procedure, affected by an error of law or arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the extent of the penalty of the preclusion and/or forfeiture of right of cross-examination, or unsupported by substantial evidence on the record as a whole.

By a letter dated December 11, 2018, the respondent-carrier, Phoenix Insurance Company c/o Travelers Insurance Company, requested that the following changes be made to the proposed record list:

> 1. correct item #42 to reflect the actual date of filing (11/ 28/2017) and Doc ID# (295096465);
>
> 2. that the following documents be removed from the record list:

- Items #71 and #72 as they are medical reports which were received in evidence at the time the Law Judge rendered his decision and are relevant to the issues on appeal;
- Item # 73 as it was not available for review by the Law Judge at the time of his decision and is not relevant to the issues on appeal;
- Items #76 and #79 as they are medical reports not available to the Law Judge at the time of his decision and therefore have no bearing on the issues on appeal; and
- Item #77 as it post-dates the Law Judge's decision and bears no relevance to the issues on appeal.

3. that the following documents be included in the record list:
- RB-89.2, dated 8/10/2018 (Doc ID 309312347);
- RB-89.3, dated 8/27/2018 (Doc ID 310060885);
- RB-89.3, dated 9/10/2018 (Doc ID 310843501); and
- EBRB-5, dated 9/26/2018 (Doc ID 311531478).

The Office of the Attorney General (OAG) stipulated to the proposed record list on January 4, 2019.

On January 15, 2019, the respondent-carrier, Phoenix Insurance Company c/o Travelers Insurance Company, withdrew their request to include the 4 documents listed on page 2 of their 12/11/2018 correspondence and renewed their request for

corrections to Item # 42 and for removal of Items #71-73, 76, 77 and 79.

In a letter dated January 24, 2019, the respondent-carrier, ACE/USA/ESIS, requested that the medicals generated after the Law Judge's decision, which were not referenced or relied on in the 4/4/2018 appeal which was addressed by the EBRB-1 dated 7/12/2018, be removed from the record list. The respondent argued that while those documents may have been in the case folder prior to the Board Panel decision being appealed, the appeal from the Law Judge's decision does not reference them, nor is there any supplementary appeal application seeking to incorporate them into the record.

On January 29, 2019, appellant submitted an application to the Board, seeking Board resolution of the record list on appeal. Appellant argues that with respect to respondent-carrier, Phoenix Insurance Company c/o Travelers Insurance Company, the record should be deemed as correct as the respondent did not provide objections within 20 days. Appellant notes that respondent-carrier, ACE/USA/ESIS, objects to the inclusion of:

— C-4.2 (Dr. Brown dated 4/26/18 - Doc ID 304164876);
— PD-NSL dated 4/26/18 (Doc ID 303264217); and
— C-4.2 (Dr. Lippe dated 5/21/18 - Doc ID 305368346.

Appellant argues that all documents that were in the board file on the date of filing of the Board Panel decision being appealed should be permitted to be included in the record on appeal.

In a letter dated February 20, 2019, respondent-carrier, ACE/USA/ESIS, reiterated its position that Items # 76, 77 and 79 should be excluded from the record list.

LEGAL ANALYSIS

22 NYCRR 800.18(1) provides that the record on appeal from a decision of the Board shall "contain a copy of each item of the record necessary to consider the questions raised, including those items appellant reasonably assumes will be relied upon by a respondent."

The Board Panel finds that all 81 of the of the documents contained in appellant's proposed record list, dated November 21, 2018, were properly included in the record list as the documents were all in the case file and available for consideration when the Board issued its decision on July 12, 2018.

CONCLUSION

Accordingly, the appellant's request that the Board settle the record on appeal pursuant to 12 NYCRR 300.18(e) and 22 NYCRR 800.18(4) is resolved as indicated above.

All concur.

Steven A. Crain | Mark R. Stasko | Ellen O. Paprocki

Claimant – Frank Delucia
Social Security No. –
WCB Case No. – G177 9309
Date of Accident –
District Office – NYC
Employer – GREENEBUILD LLC
Carrier – Phoenix Insurance Company
Carrier ID No. – W177000
Carrier Case No. – E9W5385
Date of Filing of this Decision – 04/30/2019

ATENCION:
Pueder 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).

EBRB-1 (4/99)
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Clarissa M. Rodriguez
Chair

ADMINISTRATIVE REVIEW DIVISION
WORKERS' COMPENSATION BOARD
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State of New York – Workers' Compensation Board

In regard to Frank Delucia, WCB Case #G177 9309

MEMORANDUM OF BOARD PANEL DECISION
keep for your records

Opinion By: Steven A. Crain
Mark R. Stasko
Ellen O. Paprocki

The claimant requests review of the Workers' Compensation Law Judge (WCLJ) Reserved Decision filed on March 7, 2018. ACE American Insurance Company c/o ESIS, on behalf of CBI Drywall Corp., filed a timely rebuttal. Phoenix Ins. Co. on behalf of Greenebuild, LLC, filed a timely rebuttal.

ISSUES

The issues presented for administrative review are:

1. Whether the testimony and reports of Dr. Lippe and Dr. Brown were properly precluded; and

2. Whether the claimant is entitled to cross-examination of Dr. D'Ambrosio, the carrier's consultant.

FACTS

This is a claim for injuries to the claimant's right shoulder, left shoulder, back, neck, right hand and right knee resulting from repetitive motion while working for the employer in construction as a dry wall finisher.

By Notice of Decision filed on July 27, 2017, the parties were directed to depose Dr. Kakoulides, Dr. Brown and Dr. Lippe. The deposition transcripts were due within 55 days for further adjudication. The claimant was directed to produce union records. The carriers raised issues of controversy and the C-8. ls were held in abeyance. The WCLJ found prima facie medical evidence for the neck (Dr. Kakoulides 6/14/ 17). PFME had already been found for the right wrist/hand, left ring trigger finger, right middle and ring trigger fingers (Dr. Brown 10/6/16). The case was continued on the question of ANCR.

On August 8, 2017, subpoenas were issued for the testimony of Dr. George Kakoulides, Dr. Bennett Brown, and Dr. Robert Lippe on September 5, 6 and 8, 2017. Drs. Kakoulides, Brown, and Lippe failed to appear at their depositions.

A hearing was held on October 25, 2017 at which the WCLJ granted the parties an extension to depose the three physicians.

Drs. Brown, Lippe and Kakoulides were subpoenaed and schedule to testify on December 18, 2017, however on that date, all three doctors indicated that they were unavailable and their testimonies were not taken.

Drs. Brown, Lippe, and Kakoulides were subpoenaed and scheduled to testify, once again, on December 20, 2017, however on that date, all three doctors failed to appear for their depositions.

A hearing was held on December 29, 2017, the claimant provided testimony regarding his claim. At the conclusion of the hearing, the WCLJ allowed the parties additional time to complete the depositions. Upon receipt of the depositions, a reserve decision would be issued. Subpeonas were issued for the testimony of Dr. Kakoulides, Dr. Lippe, and Dr. Brown for February 13, 2018, however they failed to appear for their depositions.

Subpeonas were issued for the testimony of Dr. Kakoulides, Dr. Lippe, and Dr. Brown for February 16, 2018, however Dr. Lippe and Dr. Brown failed to appear.

Deposition testimony was provided by Dr. Kakoulides regarding the claimant's condition. He testified that he examined the claimant twice, once on June 14, 2017 and the second time on October 17, 2017. Dr. Kakoulides testified that the releveant history is the claimant presented with years of increasing neck pain, neck stiffness, pain in his

shoulders. He could not comment on what these symptoms are attributable to as he did not have that in his notes.

The claimant underwent an independent medical examination on February 1, 2018 with Dr. Philip D'Ambrosio.

By Reserved Decision filed on March 7, 2018, the WCLJ noted that Dr. Lippe and Dr. Brown were each served with a subpoena, but both physicians failed to make themselves available for testimony. It was further noted that Dr. Kakoulides failed to satisfy a reasonable degree of medical certainty on the issue of causation. The claim was therefore disallowed.

LEGAL ANALYSIS

The claimant asserts in the application for review that the disallowance of the claim was improper. It is argued that the claimant should not be punished for the nonappearance of Dr. Lippe and Dr. Brown. It is asserted that the claimant did not have the opportunity to request cross-examination of Dr. D'Ambrosio. The claimant requests that the disallowance of the claim be rescinded and the parties be allowed a further opportunity to schedule depositions for Dr. Lippe and Dr. Brown. The claimant further requests the opportunity to cross-examine Dr. D'Ambrosio. The claimant attached new/additional evidence in the form of emails to his application.

In rebuttal, ACE American Insurance Company c/o ESIS, on behalf of CBI Drywall Corp., contends that Drs. Lippe and Brown failed to appear for depositions on different occasions. While Dr. Kakoulides did make himself available for testimony, he concluded that he really did not have an opinion on causality. Furthermore, it is noted that there was no request to cross-exaimine Dr. D'ambrosio before the record closed in the matter.

In its rebuttal, Phoenix Ins. Co. on behalf of Greenebuild, LLC, adopts the rationale advocated by ACE American Insurance Company and further notes that the claimant has failed to meet his burden in establishing a causal relationship between his employment and his disability by the submission of adequate medical evidence. Alternatively, the carrier argues that the claimant's application does not meet the requirements ofl2 NYCRR 300.13 in that the answer to #13 (Hearing dates, transcripts, documents, exhibits, and other evidence) on the RB-89 is deficient. The carrier requests that the decision be affirmed in full.

RB-89-12NYCRR 300.13

12 NYCRR 300.13(b)(l)(iii) provides that if the appellant seeks to introduce additional documentary evidence in the administrative appeal that was not presented before the Workers' Compensation Law Judge, the appellant must submit a sworn affidavit, setting forth the evidence, and explaining why it could not have been presented before the Workers' Compensation Law Judge. The Board has discretion

to accept or deny such newly filed evidence. Newly filed evidence submitted without the affidavit will not be considered by the Board Panel.

The Board Panel notes that, with the application for review, the claimant submitted documentation that was not submitted before the WCLJ. These documents were not before the WCLJ at the time of the hearing, and the record does not contain a sworn affidavit from the appellant, setting forth the evidence, and explaining why it could not have been presented before the WCLJ.

The Board Panel notes that the claimant's response to #13 in the RB-89 is adequate and the carrier's assertion to the contrary has no merit.

Therefore, the Board Panel finds, upon review of the record and based upon a preponderance of the evidence, that the newly filed evidence, submitted without an affidavit, will not be considered by the Board Panel, in accordance with 12 NYCRR 300.13(b)(l)(iii). The Board Panel will, nevertheless, consider the remainder of the Application for Board Review.

Preclusion of Dr. Lippe and Dr. Brown's Testimony/Reports

If the request for a second adjournment to take the testimony of the treating physician was granted, but the cross-examination of the doctor still does not occur within the timeframe provided for in the decision granting the second adjournment, the

carrier must comply with all of the WCLJ's directions for requesting a further extension of time (Matter of Raymond Desamours, 2016 NY Wrk Comp Gl007356). If the extension was properly requested, the carrier must then demonstrate that it served a subpoena, as directed in the decision granting a second adjournment (*id*).

If the claimant's doctor has demonstrated extraordinary circumstances for his or her non-appearance, a subsequent adjournment should be granted (12 NYCRR 300.l0[c]). This regulation allows for a further adjournment, and in any decision granting the request for a third adjournment, the WCLJ must specify the terms of the additional adjournment (i.e. the deadline and whether the filing of an affidavit of service or enforcement of a subpoena is required) (Raymond Desamours, 2016 NY Wrk Comp G1007356).

In the instant case, the parties were granted two extensions to obtain the deposition testimony of Dr. Kakoulides, Dr. Lippe and Dr. Brown. Dr. Kakoulides eventually provided testimony in this case, however Dr. Lippe and Dr. Brown did not. It is noted that during the course of the claim, Dr. Lippe and Dr. Brown were subpoenaed on five separate occasions and failed to attend all five depositions. The only excuse provided was that they were not available. The Board Panel finds that as there were no extraordinary circumstances demonstrated which prevented Drs. Lippe and Brown from appearing for their depositions, and as such, they were properly precluded.

Cross-Examination of Dr. D'Ambrosio

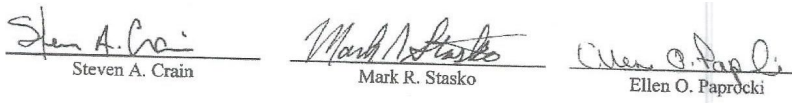
The claimant's opportunity to cross-examine a carrier's consulting physician is not specifically provided in 300.10(c), but is permitted under tenets of due process. The carrier's consultant's report is subject to scrutiny akin to the report of any expert, as it does not enjoy the presumption accorded to the reports introduced into evidence by claimants under WCL § 21(5).

Here, the claimant argues that he should be granted a further opportunity to cross-examine Dr. D'Ambrosio, the carrier's consultant. However, there is no indication in the record that a request for cross-examination was made prior to the issuance of the March 7, 2018 Reserved Decision. The claimant was made aware at the December 29, 2017 hearing that a reserved decision would be issued upon receipt of the deposition transcripts of the treating physicians. Between the time of the IME examination of February 1, 2018 and the date of the decision, the claimant had a month to request the opportunity to cross-examine Dr. D'Ambrosio, but failed to do so. Thus, the Board Panel finds that the claimant's request for cross-examination of Dr. D'Ambrosio is denied as it was not made in a timely manner.

CONCLUSION

ACCORDINGLY, the WCLJ Reserved Decision filed on March 7, 2018 is AFFIRMED. The claim is disallowed and the case is closed.

All concur.



Claimant – Frank Delucia
Social Security No. –
WCB Case No. – G177 9309
Date of Accident –
District Office – NYC
Employer – GREENEBUILD LLC
Carrier – Phoenix Insurance Company
Carrier ID No. – W177000
Carrier Case No. – E9W5385
Date of Filing of this Decision – 04/30/2019

ATENCION:
Pueder 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).

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Chair

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State of New York – Workers' Compensation Board

In regard to Frank Delucia, WCB Case #G177 9309

RESERVED DECISION
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Based upon a review of the evidence in the record involving the claim for benefits relative to Frank Delucia, Judge Peter Georgalos made the following decision, findings and directions:

This is a controverted matter involving an occupational claim for the claimant Frank Delucia. The record having been developed the following decision is rendered:

The matter was set for the testimony of the claimant, Frank Delucia and 2 lay witnesses Charles Ohlimiller and John Donahue. Depositions were directed od Dr. George Kakoulides and Dr. Robert Lippe and Dr. Bennet Brown.

The claimant testified on September 4, 2017 and December 29,2017. The claimant testified he was a Dry Wall Finisher and had been doing this

employment around 35 years. The last time the claimant did work as a Dry Wall finisher was August of 2017 for the company Donninger Construction. There were 2 lay witnesses a Mr. Charles O. and a Mr. John D. who testified on September 14, 2017. The witnesses coraberated the testimony of the claimant on work duties.

The claimant's neuro-surgeon, Dr. George Kakoulides was deposed on February 16, 2018. Dr. Kakoulides examined the claimant on June 14, 2017 and October 17, 2017. Dr. Kakoulides testified that he reviewed the MRI of the cervical spine performed on February 1, 2017. The MRI revealed severe disc degeneration throughout. Most severe was C4-5, C5-6 and C6-7 and evidence of cord compression at C6-7. Dr. Kakoulides testified the claim ant had neck pain and stiffness radiating down both shoulders. Dr. Kakoulides did not obtain any information on work related duties. Dr. Kakoulides when asked what where the claimant's complaints attributable to, he was unable to answer.

Dr. Robert Lippe and Dr. Bennet Brown were each served with a subpoena. Both physicians failed to make themselves available for testimony.

The testimony of Dr. Kakoulides failed to satisfy a reasonable degree of medical certainty on the issue of causation. The claim is therefore disallowed.

Summery of Findings

DECISION: claim disallowed. No further action is

planned by the Board at this time.

Claimant – Frank Delucia
Social Security No. –
WCB Case No. – G177 9309
Date of Accident –
District Office – NYC
Employer – GREENEBUILD LLC
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Pueder 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).

EC-23R (4/98)
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Clarissa M. Rodriguez
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State of New York – Workers' Compensation Board

In regard to Frank Delucia, WCB Case #G177 9309

NOTICE of RESOLUTION regarding TREATMENT
Variance Request
keep for your records

This resolution is being issued in the above cited case in accordance with the Board's Medical Treatment Guidelines for work-related injuries involving the knee, shoulder, neck, mid and low back, and carpal tunnel syndrome.

The issue under review is whether the provider should be granted a Variance from the Medical Treatment Guidelines to provide the following treatment/test: "MRI CERVICAL SPINE W/O CONIRAST".

Based upon a review of the applicable Medical Treatment Guidelines and the Board's file pertaining to the above cited case, the Workers' Compensation Board finds as follows:

The treatment/test is **not approved.** The Board has reviewed the carrier's (or employers or self-insured employer's) report denying the request for a Variance from the Medical Treatment Guidelines and such treatment/test and payment thereof is not approved because a cervical MRI provided consistent with the guidelines would not require a variance. The provider failed to indicate why the proposed treatment would fall outside the recommendations of the guidelines requiring an MG-2 form to vary, and failed to provide rationale of why treatment outside the recommendations would be appropriate.

PLEASE NOTE: The carrier is not liable for payment unless and until the case is established to the applicable injury site.

The above finding is the final decision of the Board.

Medical Treatment Guidelines Reference:
N-C.l.a

The first letter indicates body part: K = Knee, S = Shoulder, B = Mid and Lower Back, N = Neck, C = Carpal Tunnel
The last four characters indicate the corresponding section of the WCB Medical Treatment Guidelines.

Claimant – Frank Delucia
Social Security No. –
WCB Case No. – G177 9309
Date of Accident –
District Office – NYC
Employer – GREENEBUILD LLC

Carrier – Phoenix Insurance Company
Carrier ID No. – W177000
Carrier Case No. – E9W5385
Date of Filing of this Decision – 04/30/2019

ATENCION:
Pueder 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).

EC-71 (6/12)
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NEW YORK STATE Workers' Compensation Board
Clarissa M. Rodriguez
Chair

STATE OF NEW YORK
WORKERS' COMPENSATION BOARD
PO BOX 5205
BINGHAMTON, NY 13902-5205
www.wcb.ny.gov
(877) 632-4996

State of New York – Workers' Compensation Board

In regard to Frank Delucia, WCB Case #G177 9309

NOTICE OF DECISION
keep for your records

At the Workers' Compensation hearing held on 10/25/2017 involving the claim of Frank Delucia at the Hempstead hearing location, Judge Peter Georgalos made the following decision, findings and directions:

DECISION: C-8.1's Held In Abeyance pending testimony. Case is continued.

Claimant – Frank Delucia
Social Security No. –
WCB Case No. – G177 9309
Date of Accident –
District Office – NYC
Employer – GREENEBUILD LLC

Carrier – Phoenix Insurance Company
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NEW YORK STATE Workers' Compensation Board
Clarissa M. Rodriguez
Chair

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State of New York – Workers' Compensation Board

In regard to Frank Delucia, WCB Case #G177 9309

NOTICE OF DECISION
keep for your records

At the Workers' Compensation hearing held on 09/14/2017 involving the claim of Frank Delucia at the Hempstead hearing location, Judge Peter Georgalos made the following decision, findings and directions:

DECISION: During todays testimony claimant testified to another company he last worked for CBI 67 B Otis Street B West Babylon NY 11704 and their carrier for August 2017. Case is continued.

Claimant – Frank Delucia
Social Security No. –
WCB Case No. – G177 9309
Date of Accident –

District Office – NYC
Employer – GREENEBUILD LLC
Carrier – Phoenix Insurance Company
Carrier ID No. – W177000
Carrier Case No. – E9W5385
Date of Filing of this Decision – 04/30/2019

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Pueder 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).

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State of New York – Workers' Compensation Board

In regard to Frank Delucia, WCB Case #G177 9309

NOTICE OF DECISION
keep for your records

At the Workers' Compensation hearing held on 07/24/2017 involving the claim of Frank Delucia at the Hempstead hearing location, Judge Carol Bretscher made the following decision, findings and directions:

DECISION: This claim has been designated by the chair as a matter to be transferred to the special part for expedited hearings pursuant to Workers' Compensation Law Section 25(3)(d) and 12 NYCRR 300.34 and/or 300.38. The purpose of this Expedited Hearing is to resolve any and all outstanding issues. If a further hearing is required, the case shall be continued to the earliest possible date, but no later than thirty days following this Expedited Hearing.

Once the expedited hearing date is set there shall be no adjournments, except in case of an emergency. Any request for adjournment deemed frivolous by the chair shall result in a penalty up to one thousand dollars. The employer, carrier, attorney or licensed representative who requested an adjournment deemed frivolous will be held responsible for payment of the penalty. No penalty, however, shall be imposed on an unrepresented claimant who requests an adjournment.

Parties are directed to submit deposition transcript(s) of Dr. Kakoulides, Dr. Brown, Dr. Lippe, pursuant to Sections 121 and 142 of the New York State Workers' Compensation Law. Deposition transcript(s) should be submitted by 55 days for further adjudication by a WC Law Judge. To insure the timely submission of the deposition transcript(s), the party requesting the cross-examination shall, as soon as possible and after consulting with the deponent and other parties to the extent possible, arrange for and schedule the deposition(s), giving notice to the deponent and complying with the provisions of 12 NYCRR 300. l 0. The carrier is directed to provide a copy of the deposition transcript to the Board. Requests for extension of time to file a deposition transcript(s), if any, must be filed prior to the date upon which the transcripts are due and must be in the form of an affirmation or affidavit with copies forwarded to the claimant, employer/carrier, and all representatives. Absent good cause shown as to why a deposition was not taken and the transcript(s) filed as directed, the record may be closed and a decision rendered. A

medical witness is entitled to a witness fee pursuant to Part 301 of Title 12 of the Official Compilation of Codes, Rules and Regulations of the State of New York. Within ten days of the completion of a witness's deposition, the party responsible for such witness's fee, if any, pursuant to the Workers' Compensation Law and regulations, shall remit payment of the fee to the witness. The fee is to be awarded in like manner as a witness fee, awarded for attendance at a hearing, irrespective of the location where the deposition takes place (including telephone and video testimony). If the witness believes that a fee in excess of that set in Part 301 is warranted, such witness must submit a request to the Board within ten days of the deposition. The Board will review such request and issue a subsequent decision concerning whether an additional fee is warranted.

Claimant is directed to produce union records. Carriers raise issues of controversy. C-8.lBs are Held In Abeyance.

I find Prima Facie Medical Evidence for the neck (Dr. Kakoulides 6/14/17). PFME had already been found for the right wrist/hand, left ring trigger finger, right middle and ring trigger fingers (Dr. Brown 10/6/16). The case is continued to address the following issue(s): Failure To Report Accident Timely, No Causal Relationship (No Injury Per Statutory Definition), No Causal Relationship (No Medical Evidence of Injury), No Compensable Accident/Not in Course and Scope of Employment (Not WCL Definition of Accident), No Compensable

Accident/Not in Course and Scope of Employment (Presumption of compensability, as defined by the jurisdiction, does not apply).

Information about Next Hearind/Meeting
Question of ANCR

Claimant – Frank Delucia
Social Security No. –
WCB Case No. – G177 9309
Date of Accident –
District Office – NYC
Employer – GREENEBUILD LLC
Carrier – Phoenix Insurance Company
Carrier ID No. – W177000
Carrier Case No. – E9W5385
Date of Filing of this Decision – 04/30/2019

ATENCION:
Pueder 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).

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BINGHAMTON, NY 13902-5205
www.wcb.ny.gov
(877) 632-4996

State of New York – Workers' Compensation Board

In regard to Frank Delucia, WCB Case #G177 9309

NOTICE OF DECISION
keep for your records

At the Workers' Compensation hearing held on 06/19/2017 involving the claim of Frank Delucia at the Hempstead hearing location, Judge Carol Bretscher made the following decision, findings and directions:

DECISION: This claim has been designated by the chair as a matter to be transferred to the special part for expedited hearings pursuant to Workers' Compensation Law Section 25(3)(d) and 12 NYCRR 300.34 and/or 300.38. The purpose of this Expedited Hearing is to resolve any and all outstanding issues. If a further hearing is required, the case shall be continued to the earliest possible date, but no later than thirty days following this Expedited Hearing.

Once the expedited hearing date is set there shall be no adjournments, except in case of an emergency. Any request for adjournment deemed frivolous by the chair shall result in a penalty up to one thousand dollars. The employer, carrier, attorney or licensed representative who requested an adjournment deemed frivolous will be held responsible for payment of the penalty. No penalty, however, shall be imposed on an unrepresented claimant who requests an adjournment. Carrier raises issues of controversy.

I find Prima Facie Medical Evidence for right the wrist/hand, left ring trigger finger and right middle and ring trigger fingers (Dr. Brown 3/30/17).

CLAIMANT to produce Prima Facie Medical Evidence for the neck, back, shoulders, left wrist and right knee.

CLAIMANT alleges a date of disablement in October 2016 while working for Donninger Construction. Board to investigate coverage in October 2016 for Donninger Construction located at 211 Holly Lane, Smithtown, NY for coverage at the following locations: Syosset Fire Depatment house on So Oyster Bay Road and Jericho Quadrange. Board to Place on notice: Donninger Construction and ther appropriate carrier or carriers.

C-8.1Bs are Held In Abeyance. The case is continued to address the following issue(s): Failure To Report Accident Timely, No Causal Relationship (No Injury

Per Statutory Definition), No Causal Relationship (No Medical Evidence of Injury), No Compensable Accident/Not in Course and Scope of Employment (Not WCL Definition of Accident), No Compensable Accident/Not in Course and Scope of Employment (Presumption of compensability, as defined by the jurisdiction, does not apply).

Information about Next Hearing/Meeting
Question of coverage, proper employer, DOD and ANCR/OCNCR.

Claimant – Frank Delucia
Social Security No. –
WCB Case No. – G177 9309
Date of Accident –
District Office – NYC
Employer – GREENEBUILD LLC
Carrier – Phoenix Insurance Company
Carrier ID No. – W177000
Carrier Case No. – E9W5385
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ATENCION:
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APPENDIX -- RELEVANT STATUTES

Civil Practice Law and Rules

§ 2302. Authority to issue. (a) Without court order. Subpoenas may be issued without a court order by the clerk of the court, a judge where there is no clerk, the attorney general, an attorney of record for a party to an action, an administrative proceeding or an arbitration, an arbitrator, a referee, or any member of a board, commission or committee authorized by law to hear, try or determine a matter or to do any other act, in an official capacity, in relation to which proof may be taken or the attendance of a person as a witness may be required; provided, however, that a subpoena to compel production of a patient's clinical record maintained pursuant to the provisions of section 33.13 of the mental hygiene law shall be accompanied by a court order. A child support subpoena may be issued by the department, or the child support enforcement unit coordinator or support collection unit supervisor of a social services district, or his or her designee, or another state's child support enforcement agency governed by title IV-D of the social security act.

(b) Issuance by court. A subpoena to compel production of an original record or document where a certified transcript or copy is admissible in evidence, or to compel attendance of any person confined in a penitentiary or jail, shall be issued by the court. Unless the court orders otherwise, a motion for such subpoena shall be made on at least one day's notice to the person having custody of the record, document

or person confined. A subpoena to produce a prisoner so confined shall be issued by a judge to whom a petition for habeas corpus could be made under subdivision (b) of section seven thousand two of this chapter or a judge of the court of claims, if the matter is pending before the court of claims, or a judge of the surrogate's court, if the matter is pending before the surrogate's court, or a judge or support magistrate of the family court, if the matter is pending before the family court, or a judge of the New York city civil court, if the matter is pending before the New York city civil court and it has been removed thereto from the supreme court pursuant to subdivision (d) of section three hundred twenty-five of this chapter. In the absence of an authorization by a patient, a trial subpoena duces tecum for the patient's medical records may only be issued by a court.

§ 2308. Disobedience of subpoena. (a) Judicial. Failure to comply with a subpoena issued by a judge, clerk or officer of the court shall be punishable as a contempt of court. If the witness is a party the court may also strike his or her pleadings. A subpoenaed person shall also be liable to the person on whose behalf the subpoena was issued for a penalty not exceeding one hundred fifty dollars and damages sustained by reason of the failure to comply. A court may issue a warrant directing a sheriff to bring the witness into court. If a person so subpoenaed attends or is brought into court, but refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book, paper or other thing which he or she was directed to

produce by the subpoena, or to subscribe his or her deposition after it has been correctly reduced to writing, the court may forthwith issue a warrant directed to the sheriff of the county where the person is, committing him or her to jail, there to remain until he or she submits to do the act which he or she was so required to do or is discharged according to law. Such a warrant of commitment shall specify particularly the cause of the commitment and, if the witness is committed for refusing to answer a question, the question shall be inserted in the warrant.

(b) Non-judicial. (1) Unless otherwise provided, if a person fails to comply with a subpoena which is not returnable in a court, the issuer or the person on whose behalf the subpoena was issued may move in the supreme court to compel compliance. If the court finds that the subpoena was authorized, it shall order compliance and may impose costs not exceeding fifty dollars. A subpoenaed person shall also be liable to the person on whose behalf the subpoena was issued for a penalty not exceeding fifty dollars and damages sustained by reason of the failure to comply. A court may issue a warrant directing a sheriff to bring the witness before the person or body requiring his appearance. If a person so subpoenaed attends or is brought before such person or body, but refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book, paper or other thing which he was directed to produce by the subpoena, or to subscribe his deposition after it has been correctly reduced to writing, the court, upon proof by affidavit, may issue a warrant directed to the sheriff

of the county where the person is, committing him to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law. Such a warrant of commitment shall specify particularly the cause of the commitment and, if the witness is committed for refusing to answer a question, the question shall be inserted in the warrant.

(2) Notwithstanding the provisions of paragraph one of this subdivision, if a person fails to comply with a subpoena issued pursuant to section one hundred eleven-p of the social services law by the office of temporary and disability assistance or a social services district, or its authorized representative, or another state's child support enforcement agency governed by title IV-D of the social security act, such office or district is authorized to impose a penalty against the subpoenaed person. The amount of the penalty shall be determined by the commissioner of the office of temporary and disability assistance and set forth in regulation, and shall not exceed fifty dollars. Payment of the penalty shall not be required, however, if in response to notification of the imposition of the penalty the subpoenaed person complies immediately with the subpoena.

(c) Review of proceedings. Within ninety days after the offender shall have been committed to jail he shall, if not then discharged by law, be brought, by the sheriff, or other officer, as a matter of course personally before the court issuing the warrant of commitment and a review of the proceedings shall then be held to determine whether the offender shall

be discharged from commitment. At periodic intervals of not more than ninety days following such review, the offender, if not then discharged by law from such commitment, shall be brought, by the sheriff, or other officer, personally before the court issuing the warrant of commitment and further reviews of the proceedings shall then be held to determine whether he shall be discharged from commitment. The clerk of the court before which such review of the proceedings shall be held, or the judge or justice of such court in case there be no clerk, shall give reasonable notice in writing of the date, time and place of each such review to each party or his attorney who shall have appeared of record in the proceeding resulting in the issuance of the warrant of commitment, at their last known address.

Rule 3107. Notice of taking oral questions. A party desiring to take the deposition of any person upon oral examination shall give to each party twenty days' notice, unless the court orders otherwise. The notice shall be in writing, stating the time and place for taking the deposition, the name and address of each person to be examined, if known, and, if any name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. The notice need not enumerate the matters upon which the person is to be examined. A party to be examined pursuant to notice served by another party may serve notice of at least ten days for the examination of any other party, his agent or employee, such examination to be noticed for and to follow at the same time and place.

State Administrative Procedure Act

§ 301. Hearings. 1. In an adjudicatory proceeding, all parties shall be afforded an opportunity for hearing within reasonable time.

2. All parties shall be given reasonable notice of such hearing, which notice shall include (a) a statement of the time, place, and nature of the hearing; (b) a statement of the legal authority and jurisdiction under which the hearing is to be held; (c) a reference to the particular sections of the statutes and rules involved, where possible; (d) a short and plain statement of matters asserted; and (e) a statement that interpreter services shall be made available to deaf persons, at no charge, pursuant to this section. Upon application of any party, a more definite and detailed statement shall be furnished whenever the agency finds that the statement is not sufficiently definite or not sufficiently detailed. The finding of the agency as to the sufficiency of definiteness or detail of the statement or its failure or refusal to furnish a more definite or detailed statement shall not be subject to judicial review. Any statement furnished shall be deemed, in all respects, to be a part of the notice of hearing.

3. Agencies shall adopt rules governing the procedures on adjudicatory proceedings and appeals, in accordance with provisions of article two of this chapter, and shall prepare a summary of such procedures in plain language. Agencies shall make such summaries available to the public upon request, and a copy of such summary shall be provided to any party cited by the agency for

violation of the laws, rules or orders enforced by the agency.

4. All parties shall be afforded an opportunity to present written argument on issues of law and an opportunity to present evidence and such argument on issues of fact, provided however that nothing contained herein shall be construed to prohibit an agency from allowing parties to present oral argument within a reasonable time. In fixing the time and place for hearings and oral argument, due regard shall be had for the convenience of the parties.

5. Unless precluded by statute, disposition may be made of any adjudicatory proceeding by stipulation, agreed settlement, consent order, default, or other informal method.

6. Whenever any deaf person is a party to an adjudicatory proceeding before an agency, or a witness therein, such agency in all instances shall appoint a qualified interpreter who is certified by a recognized national or New York state credentialing authority to interpret the proceedings to, and the testimony of, such deaf person. The agency conducting the adjudicatory proceeding shall determine a reasonable fee for all such interpreting services which shall be a charge upon the agency.

Workers' Compensation

§ 20. Determination of claims for compensation. 1. At any time after the expiration of the first seven days of disability on the part of an injured employee,

or at any time after the employee's death, a claim for compensation may be presented to the employer or to the chair. The board shall have full power and authority to determine all questions in relation to the payment of claims presented to it for compensation under the provisions of this chapter. The chair or board shall make or cause to be made such investigation as it deems necessary, and upon application of either party, shall order a hearing, and within thirty days after a claim for compensation is submitted under this section, or such hearing closed, shall make or deny an award, determining such claim for compensation, and file the same in the office of the chair. Immediately after such filing the chair shall send to the parties a copy of the decision. Upon a hearing pursuant to this section either party may present evidence and be represented by counsel. The decision of the board shall be final as to all questions of fact, and, except as provided in section twenty-three of this article, as to all questions of law. Except as provided in section twenty-seven of this article, all awards of the board shall draw simple interest from thirty days after the making thereof at the rate provided in section five thousand four of the civil practice law and rules. Whenever a hearing or proceeding for the determination of a claim for compensation is begun before a referee, pursuant to the provisions of this chapter, such hearing or proceeding or any adjourned hearing thereon shall continue before the same referee until a final determination awarding or denying compensation, except in the absence, inability or disqualification to act of such referee, or for other good cause, in which event such hearing or

proceeding may be continued before another referee by order of the chair or board.

2. (a) Notwithstanding subdivision one of this section, any claim for compensation by (i) judges, conciliators, and managerial or confidential employees of the workers' compensation board and state insurance fund who are allocated to a grade M1 or above pursuant to section one hundred thirty of the civil service law, (ii) the chair, vice-chair and members of the workers' compensation board, and (iii) the executive director, deputy executive directors and members of the board of commissioners of the state insurance fund shall not be within the jurisdiction of the workers' compensation board but instead shall be determined by a neutral outside arbitration process as provided by regulations promulgated by the chair. Such claims shall be filed in the same manner as any other claim for compensation under this chapter.

(b) All issues and questions of law or fact pertaining to such claims shall be resolved by the arbitrator appointed pursuant to this paragraph. Arbitrators shall be appointed by the chair to adjudicate claims under this paragraph. Such arbitrators shall have the same powers and duties as those accorded referees under this chapter, including powers delegated by the chair. The provisions of this chapter shall be applicable to claims under this paragraph insofar as they are not inconsistent herewith.

(c) An award or decision by an arbitrator pursuant to this paragraph is deemed to be a final decision of the board except if review of such decision is sought

as provided in paragraph (d) of this subdivision. No modification, rescission or review of such award or decision may be entertained by the board, notwithstanding any provision of this chapter to the contrary.

(d) Within thirty days after notice of the filing of an award or decision by an arbitrator, any party in interest may request review of the arbitrator's decision by a panel of three arbitrators in the same manner and to the same extent as the decision by a referee may be reviewed by the board pursuant to section twenty-three of this article. The arbitration panel shall consist of one arbitrator nominated by the chair, one arbitrator nominated by a recognized alternative dispute resolution organization and one arbitrator nominated by an employee organization certified pursuant to article fourteen of the civil service law to represent the collective bargaining unit of the injured employee or, if the injured employee is not represented by a collective bargaining unit, by the recognized alternative dispute resolution organization. A party in interest may seek review of such award or decision of an arbitration panel only by taking appeal therefrom to the appellate division of the supreme court, third department and the court of appeals as provided for decisions of the board pursuant to section twenty-three of this chapter.

(e) The powers and jurisdiction of the arbitration panel established pursuant to this subdivision shall be continuing in the same manner and to the same extent as provided under this chapter to the board.

(f) All fees, costs and expenses of arbitration shall be borne by the board and the state insurance fund as administration expenses pursuant to sections eighty-eight and one hundred fifty-one of this chapter.

(g) Any claim for compensation by an officer or employee of the board or state insurance fund not required to be determined by a neutral outside arbitration process pursuant to paragraph (a) of this subdivision shall be determined initially by a referee with review of such determination available pursuant to section twenty-three of this chapter.

(h) For any claim for compensation by an officer or employee of the workers' compensation board or the state insurance fund whether or not such claim is required to be determined by a neutral outside arbitration process pursuant to paragraph (a) of this subdivision, the referee or arbitrator making the initial finding of fact concerning any medical issue present in the case shall develop the record with opinion evidence from an impartial specialist who is an expert in the appropriate medical specialty. Such impartial specialist shall be subject to cross-examination at the request of any party in interest.

(i) The state insurance fund shall administer the claim of any officer or employee of the state insurance fund at an office of the state insurance fund other than the office which was, at the time of injury, disablement or death of such officer or employee, his or her principal workplace.

(j) The chair shall promulgate regulations necessary to implement this subdivision. Such

regulations shall include provisions in relation to this subdivision for a single arbitrator to determine a claim in the first instance and a panel of three arbitrators to review such decision upon the application of any party in interest prior to judicial review. Such regulations shall also include all special procedures relating to the handling of claims of officers or employees of the workers' compensation board and the state insurance fund pursuant to paragraph (f) of this subdivision.

3. Notwithstanding any other provision of law to the contrary, a member of the workers' compensation board, a referee or any arbitrator in connection with the adjudication of any claim arising under this chapter shall recuse himself or herself on any ground a judge may be disqualified pursuant to section fourteen of the judiciary law.

§ 23. Appeals. An award or decision of the board shall be final and conclusive upon all questions within its jurisdiction, as against the state fund or between the parties, unless reversed or modified on appeal therefrom as hereinafter provided. Any party may within thirty days after notice of the filing of an award or decision of a referee, file with the board an application in writing for a modification or rescission or review of such award or decision, as provided in this chapter. The board shall render its decision upon such application in writing and shall include in such decision a statement of the facts which formed the basis of its action on the issues raised before it on such application. Within thirty days after notice of the decision of the board upon such application has been served upon the parties, or within thirty

days after notice of an administrative redetermination review decision by the chair pursuant to subdivision five of section fifty-two, section one hundred thirty-one or section one hundred forty-one-a of this chapter has been served upon any party in interest, an appeal may be taken therefrom to the appellate division of the supreme court, third department, by any party in interest, including an employer insured in the state fund; provided, however, that any party in interest may within thirty days after notice of the filing of the board panel's decision with the secretary of the board, make application in writing for review thereof by the full board. If the decision or determination was that of a panel of the board and there was a dissent from such decision or determination other than a dissent the sole basis of which is to refer the case to an impartial specialist, or if there was a decision or determination by the panel which reduced the loss of wage earning capacity finding made by a compensation claims referee pursuant to subparagraph w of subdivision three of section fifteen of this article from a percentage at or above the percentage set forth in subdivision three of section thirty-five of this article whereby a claimant would be eligible to apply for an extreme hardship redetermination to a percentage below the threshold, the full board shall review and affirm, modify or rescind such decision or determination in the same manner as herein above provided for an award or decision of a referee. If the decision or determination was that of a unanimous panel of the board, or there was a dissent from such decision or determination the sole basis of which is to refer the case to an

impartial specialist, the board may in its sole discretion review and affirm, modify or rescind such decision or determination in the same manner as herein above provided for an award or decision of a referee. Failure to apply for review by the full board shall not bar any party in interest from taking an appeal directly to the court as above provided. The board may also, in its discretion certify to such appellate division of the supreme court, questions of law involved in its decision. Such appeals and the question so certified shall be heard in a summary manner and shall have precedence over all other civil cases in such court. The board shall be deemed a party to every such appeal from its decision upon such application, and the chair shall be deemed a party to every such appeal from an administrative redetermination review decision pursuant to subdivision five of section fifty-two of this chapter. The attorney general shall represent the board and the chair thereon. An appeal may also be taken to the court of appeals in the same manner and subject to the same limitations not inconsistent herewith as is now provided in the civil practice law and rules. It shall not be necessary to file exceptions to the rulings of the board. An appeal to the appellate division of the supreme court, third department, or to the court of appeals, shall not operate as a stay of the payment of compensation required by the terms of the award or of the payment of the cost of such medical, dental, surgical, optometric or other attendance, treatment, devices, apparatus or other necessary items the employer is required to provide pursuant to section thirteen of this article which are found to be fair and reasonable. Where such award is

modified or rescinded upon appeal, the appellant shall be entitled to reimbursement in a sum equal to the compensation in dispute paid to the respondent in addition to a sum equal to the cost of such medical, dental, surgical, optometric or other attendance, treatment, devices, apparatus or other necessary items the employer is required to provide pursuant to section thirteen of this article paid by the appellant pending adjudication of the appeal. Such reimbursement shall be paid from administration expenses as provided in section one hundred fifty-one of this chapter upon audit and warrant of the comptroller upon vouchers approved by the chair. Where such award is subject to the provisions of section twenty-seven of this article, the appellant shall pay directly to the claimant all compensation as it becomes due during the pendency of the appeal, and upon affirmance shall be entitled to credit for such payments. Neither the chair, the board, the commissioners of the state insurance fund nor the claimant shall be required to file a bond upon an appeal to the court of appeals. Upon final determination of such an appeal, the board or chair, as the case may be, shall enter an order in accordance therewith. Whenever a notice of appeal is served or an application made to the board by the employer or insurance carrier for a modification or rescission or review of an award or decision, and the board shall find that such notice of appeal was served or such application was made for the purpose of delay or upon frivolous grounds, the board shall impose a penalty in the amount of five hundred dollars upon the employer or insurance carrier, which penalty shall be added to the compensation

and paid to the claimant. The penalties provided herein shall be collected in like manner as compensation. A party against whom an award of compensation shall be made may appeal from a part of such award. In such a case the payment of such part of the award as is not appealed from shall not prejudice any rights of such party on appeal, nor be taken as an admission against such party. Any appeal by an employer from an administrative redetermination review decision pursuant to subdivision five of section fifty-two of this chapter shall in no way serve to relieve the employer from the obligation to timely pay compensation and benefits otherwise payable in accordance with the provisions of this chapter. Nothing contained in this section shall be construed to inhibit the continuing jurisdiction of the board as provided in section one hundred twenty-three of this chapter.

§ 121. Depositions. The chairman or board may cause depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the supreme court.

§ 141. General powers and duties of the chair. The chair shall be the administrative head of the workers' compensation board and shall exercise the powers and perform the duties in relation to the administration of this chapter heretofore vested in the commissioner of labor by chapter fifty of the laws of nineteen hundred twenty-one, and acts

amendatory thereof, and by this chapter excepting article six thereof, and except in so far as such powers and duties are vested by this chapter in the workers' compensation board. The chair shall preside at all meetings of the board and shall appoint all committees and panels of the board; shall designate the times and places for the hearing of claims under this chapter and shall perform all administrative functions of the board as in this chapter set forth. The chair, in the name of the board, shall enforce all the provisions of this chapter, and may make administrative regulations and orders providing for the receipt, indexing and examining of all notices, claims and reports, for the giving of notice of hearings and of decisions, for certifying of records, for the fixing of the times and places for the hearing of claims, and for providing for the conduct of hearings and establishing of calendar practice to the extent not inconsistent with the rules of the board. The chair shall issue and may revoke certificates of authorization of physicians, chiropractors and podiatrists as provided in sections thirteen-a, thirteen-k and thirteen-I of this chapter, and licenses for medical bureaus and x-ray and other laboratories under the provisions of section thirteen-c of this chapter, issue stop work orders as provided in section one hundred forty-one-a of this article, and shall have and exercise all powers not otherwise provided for herein in relation to the administration of this chapter heretofore expressly conferred upon the commissioner of labor by any of the provisions of this chapter, or of the labor law. The chair, on behalf of the workers' compensation board, shall enter into the agreement provided for in section one hundred

seventy-one-h of the tax law, and shall take such other actions as may be necessary to carry out the agreement provided for in such section for matching beneficiary records of workers' compensation with information provided by employers to the state directory of new hires for the purposes of verifying eligibility for such benefits and for administering workers' compensation.

12 NYCRR-NY 300.10
300.10 Adjournment of hearings.

(a) If the claimant or his or her attorney or representative fails to appear at the first hearing, the referee may adjourn the hearing, except that the referee may decide an uncontroverted claim if there be in the file a claim and substantial evidence supporting such claim and the referee finds that the information therein is sufficient. The notice to the claimant for the second hearing shall inform him or her that such adjourned hearing is being held because of his or her failure to appear at the first hearing, and that if he or she or his or her attorney or representative fails to appear the case may be decided in his or her absence. If the claimant or his or her attorney or representative again fails to appear at the second hearing, the referee shall then proceed to make a decision unless he or she finds sufficient basis for further adjournment, which reasons shall be noted on the record. Where the claim has been controverted the case may be adjourned and the file referred to the supervising referee for investigation as to the cause of the claimant's nonappearance.

(b) If the employer or its carrier, or a special fund created under the Workers' Compensation Law, fails to present evidence including the testimony of witnesses as directed or scheduled by the board or chair, the referee, upon request of such party, may adjourn the hearing and reschedule the case. If the employer or its carrier or a special fund again fails to present or submit evidence at the second hearing, the referee shall proceed to make a decision unless he or she finds upon extraordinary circumstances shown at such hearing that a further adjournment is warranted. The denial of adjournments under this rule shall not be grounds for application for review to the board.

(c) When the employer or its carrier or special fund desires to produce for cross-examination an attending physician whose report is on file, the referee shall grant an adjournment for such purpose. If the physician is not produced at such adjourned hearing, a further adjournment shall be granted only when the referee finds there is sufficient excuse for the physician's nonappearance, which excuse shall be noted on the record and conditioned upon the resort by the employer or its carrier, or special fund to a subpoena for the next hearing. If such adjournment is granted and the physician does not appear, unless extraordinary circumstances are shown, the referee shall proceed to determine the claim upon the evidence in the record. The obligation to invoke court action for the enforcement of the subpoena shall be that of the employer or its carrier or special fund.

(d) Whenever the records in a claim clearly indicate that the claim is not within the jurisdiction of New York State the referee may at the first hearing disallow the claim for lack of jurisdiction and shall state the reasons for his action.
12 NYCRR-NY 300.10