

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
THIRD DEPARTMENT**

Southard v. Corning Hotel Corp.

95 A.D.3d 1519, 944 N.Y.S.2d 773 (3d Dep't 2012) · Decided May 17, 2012

SUMMARY

The New York Appellate Division affirmed a Workers' Compensation Board decision discharging the Special Disability Fund from liability under Workers' Compensation Law § 15 (8) (d). The court held that the employer failed to show that the claimant's preexisting arteriovenous malformation materially and substantially increased the disability or compensation liability beyond that caused by her work-related lumbar spine injury.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Third Department
WRITING FOR THE COURT	Kavanagh, J.; Spain, J.E.; Stein, J.; McCarthy, J.; Egan Jr., J.
JURISDICTION	New York
DECIDED	May 17, 2012
DISPOSITION	affirmed
PROCEDURAL POSTURE	The employer and its workers' compensation carrier appealed from a Workers' Compensation Board decision discharging the Special Disability Fund from liability under Workers' Compensation Law § 15 (8) (d).
STANDARD OF REVIEW	Whether substantial evidence supported the Workers' Compensation Board's determination that the employer failed to establish the statutory requirements for Fund reimbursement.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Employer and workers' compensation carrier v. Special Disability Fund

TOPICS

workers compensation

judicial review of agency action

administrative law

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the employer established that claimant's preexisting arteriovenous malformation materially and substantially increased the disability and compensation liability beyond that resulting from the April 2004 work-related injury alone, as required for reimbursement from the Special Disability Fund under Workers' Compensation Law § 15 (8) (d).
2. Whether the Workers' Compensation Board properly discharged the Special Disability Fund from liability.

HOLDINGS

1. The employer failed to prove that claimant's preexisting condition caused a permanent disability materially and substantially greater than the disability caused by the April 2004 work-related injury alone; therefore, reimbursement from the Special Disability Fund was unavailable.

KEY QUOTATIONS

“To obtain reimbursement from the Fund, an employer must establish “that the claimant had a preexisting permanent impairment that hindered job potential, a subsequent injury arising out of and in the course of employment, and a permanent disability caused by both conditions materially and substantially greater than what would have been caused by the work-related injury alone”” (95 A.D.3d at 1519)

“The mere fact that the sum of the disabilities is materially greater than the subsequent disability alone is not sufficient to hold the . . . Fund liable” (95 A.D.3d at 1520)

FACTUAL BACKGROUND

In April 2004, claimant sustained a work-related injury to her back and left hip and received workers' compensation benefits. She had a preexisting arteriovenous malformation for which she underwent brain surgery in 1999, but continued to experience migraine headaches that occasionally caused her to miss work. Although the employer's medical expert characterized the combined conditions as a materially and substantially greater permanent disability, the expert also stated that claimant's headaches did not increase her overall disability, and claimant testified that she did not need to change her job duties.

PROCEDURAL HISTORY

Claimant was awarded workers' compensation benefits after a work-related back and left-hip injury. The employer and carrier sought reimbursement from the Special Disability Fund based on claimant's preexisting arteriovenous malformation. The Workers' Compensation Board found that the statutory requirements were not met and discharged the Fund from liability; the Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- Matter of Sturtevant v. Broome County, 188 A.D.2d 893, 893-94 (1992)
- Matter of Burley v. Theriault Transp., 85 A.D.3d 1423, 1424 (2011)
- Matter of Brown v. Guilderland Cent. School Dist., 82 A.D.3d 1523, 1523 (2011)
- Matter of Saletta v. Allegheny Ludlum Steel Corp., 62 A.D.2d 360, 362 (1978), lv. denied, 45 N.Y.2d 711 (1978)
- Matter of Eimers v. Lee's Rest., 162 A.D.2d 850, 852 (1990)

OPINION

KAVANAGH, J.

Kavanagh, J. Appeal from a decision of the Workers' Compensation Board, filed October 6, 2010, which discharged the Special Disability Fund from liability under Workers' Compensation Law § 15 (8) (d). In April 2004, claimant suffered a work-related injury to her back and left hip and was awarded workers' compensation benefits.* The employer and its workers' compensation carrier (hereinafter collectively referred to as the employer) sought reimbursement from the Special Disability Fund pursuant to Workers' Compensation Law § 15 (8) (d), asserting that claimant's preexisting arteriovenous malformation had contributed to her disability.

The Workers' Compensation Board ultimately determined that Workers' Compensation Law § 15 (8) (d) did not apply and the employer now appeals. We affirm. To obtain reimbursement from the Fund, an employer must establish "that the claimant had a preexisting *1520 permanent impairment that hindered job potential, a subsequent injury arising out of and in the course of employment, and a permanent disability caused by both conditions materially and substantially greater than what would have been caused by the work-related injury alone" (Matter of Sturtevant v Broome County, 188 AD2d 893, 893-894 [1992]; accord Matter of Burley v Theriault Transp., 85 AD3d 1423, 1424 [2011]; Matter of Brown v Guilderland Cent.

School Dist., 82 AD3d 1523, 1523 [2011]). Here, the Board concluded that the employer had not met the third prong of this test. The employer's medical expert opined that claimant suffers from a permanent marked partial disability of the lumbar spine.

The record reflects that claimant also suffered from arteriovenous malformation and underwent brain surgery in 1999. While the surgery alleviated many of her symptoms, claimant still suffers from migraine headaches that cause her to call in sick to work on occasion.

The medical expert concluded that this preexisting condition and the lumbar spine injury constituted a permanent disability that was materially and substantially greater than that caused solely by the lumbar spine injury.

We note, however, that "[t]he mere fact that the sum of the disabilities is materially greater than the subsequent disability alone is not sufficient to hold the... Fund liable" but, instead, the

preexisting impairment “must increase the compensation liability above that which the employer would have incurred as a result of the subsequent injury alone” (Matter of Saletta v Allegheny Ludlum Steel Corp., 62 AD2d 360, 362 [1978], lv denied 45 NY2d 711 [1978]; see Matter of Eimers v Lee’s Rest., 162 AD2d 850, 852 [1990]).

In fact, the employer’s expert stated that claimant’s headaches, which she has suffered from throughout her life, did not increase her overall disability (see Matter of Saletta v Allegheny Ludlum Steel Corp., 62 AD2d at 362). Claimant herself testified that the headaches caused her to call in sick or leave work early at times, but that she did not have to change her job duties.

Inasmuch as there is no evidence in the record that claimant’s preexisting condition resulted in a disability materially and substantially greater than that caused by the April 2004 lumbar spine injury, we conclude that the Board properly discharged the Fund from liability. Spain, J.E, Stein, McCarthy and Egan Jr., JJ., concur. Ordered that the decision is affirmed, without costs.

Claimant also suffered a work-related injury in August 2004. That claim is not a subject of this appeal.