

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

Matter of Tenecela v. Vrapo Construction

146 A.D.3d 1217, 45 N.Y.S.3d 678 (N.Y. App. Div. 2017) · No. 523441 · Decided January 19, 2017

SUMMARY

The New York Appellate Division, Third Department, affirmed a Workers' Compensation Board decision classifying the claimant as permanently partially disabled with a 98% loss of wage-earning capacity. The court held that the claimant's argument for total industrial disability was unpreserved because it had not been raised before the Workers' Compensation Law Judge or the Board. The court also upheld the reduction of counsel fees from \$4,000 to \$450 because the required OC-400.1 form was illegible and deficient.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Third Department
WRITING FOR THE COURT	Clark, J.; McCarthy, J.P.; Egan Jr., J.; Lynch, J.; Aarons, J.
JURISDICTION	New York
DECIDED	January 19, 2017
DOCKET	523441
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from a Workers' Compensation Board decision determining that claimant sustained a permanent partial disability with a 98% loss of wage-earning capacity and reducing the workers' compensation attorney-fee award from \$4,000 to \$450.
STANDARD OF REVIEW	The court reviewed the Board's determinations for abuse of discretion and for arbitrariness and capriciousness with respect to the counsel-fee decision. Unpreserved issues were not considered for the first time on appeal.
PRECEDENTIAL VALUE	Published New York Appellate Division memorandum decision; precedential within the scope of applicable New York law.
PARTIES	Daniel Guamantario Tenecela, Joseph A. Romano v. Vrapo Construction, Workers' Compensation Board

TOPICS

workers compensation

appellate procedure

preservation of error

standard of review

PRACTICE AREAS

workers' compensation

employment law

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QUESTIONS PRESENTED

1. Whether claimant's contention that he was totally industrially disabled was preserved for appellate review.
2. Whether the Workers' Compensation Board properly reduced the attorney-fee award because the required OC-400.1 form was deficient.
3. Whether the Board abused its discretion or acted arbitrarily and capriciously in limiting counsel fees to \$450.

HOLDINGS

1. The claim that claimant should have been classified as totally industrially disabled was unpreserved because claimant did not raise that issue before the Workers' Compensation Law Judge or the Workers' Compensation Board.
2. The Board properly reduced the counsel-fee award to \$450 because the OC-400.1 form was not accurately completed and did not permit evaluation of the services rendered and time spent.

KEY QUOTATIONS

“a claimant who has a permanent partial disability may nonetheless be classified as totally industrially disabled where the limitations imposed by the work-related disability, coupled with other factors, such as limited educational background and work history, render the claimant incapable of gainful employment” (146 A.D.3d at 1218)

“counsel fees must be approved by the Board in the exercise of its broad discretion” (146 A.D.3d at 1219)

“in an amount commensurate with the services rendered and having due regard for the financial status of the claimant and whether the attorney . . . engaged in dilatory tactics or failed to comply in a timely manner with [B]oard rules. In no case shall the fee be based solely on the amount of the award” (146 A.D.3d at 1219)

FACTUAL BACKGROUND

In 2011, while working as a carpenter, Daniel Tenecela fell from a roof and sustained established injuries to his neck, back, knees, head, nose, right shoulder, and right wrist. After ongoing treatment and receipt of temporary total-disability benefits, medical evidence and testimony addressed permanency, impairment, and loss of wage-earning capacity. The Workers' Compensation Law Judge found a permanent partial disability and a 98% loss of wage-earning capacity, and awarded counsel fees of \$4,000. The Board reduced the fee to \$450 because the attorney's OC-400.1 form was illegible and did not adequately identify the services performed and time spent.

PROCEDURAL HISTORY

Claimant was injured in a 2011 workplace fall. A Workers' Compensation Law Judge found a permanent partial disability and a 98% loss of wage-earning capacity and awarded \$4,000 in counsel fees. The Workers' Compensation Board upheld the disability determination but sua sponte reduced the fee to \$450 because the required OC-400.1 form was deficient. The Appellate Division affirmed.

DISPOSITION

affirmed

CASES CITED

- Matter of Roman v. Manhattan & Bronx Surface Tr. Operating Auth., 139 A.D.3d 1304 (2016)
- Matter of Barsuk v. Joseph Barsuk, Inc., 24 A.D.3d 1118 (2005), lv. dismissed, 6 N.Y.3d 891 (2006), lv. denied, 7 N.Y.3d 708 (2006)
- Matter of Cedeno v. PACOA, 120 A.D.3d 1458 (2014)
- Matter of Wolfe v. New York City Dept. of Corr., 112 A.D.3d 1197 (2013)
- Matter of Duncan v. John Wiley & Sons, Inc., 137 A.D.3d 1430 (2016)
- Matter of Stewart v. NYC Tr. Auth., 115 A.D.3d 1046 (2014)
- Matter of Brady v. Northeast Riggers & Erectors, 132 A.D.3d 1226 (2015)
- Matter of Rose v. Roundpoint Constr., 124 A.D.3d 1033 (2015)
- Matter of Paez v. Lackman Culinary Servs., 140 A.D.3d 1462 (2016)
- Matter of Hernandez v. Excel Recycling Corp., 31 A.D.3d 1091 (2006)
- Matter of Forte v. City & Suburban, 292 A.D.2d 738 (2002)
- Matter of Kennedy v. New York City Dept. of Corr., 140 A.D.3d 1572 (2016)
- Matter of Pavone v. Ambassador Transp., Inc., 26 A.D.3d 645 (2006)