

Supreme Court, Appellate Division

Third Judicial Department

Decided and Entered: January 5, 2012

511783

In the Matter of the Claim of
ALISON CARY,
Appellant,
v

REVERSED Board's ruling which, in reversing the Law Judge Court found Board had insufficient evidence to disapprove add'l benefits.

SALEM CENTRAL SCHOOL DISTRICT
et al.,
Respondents.

MEMORANDUM AND ORDER

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: November 18, 2011

Before: Mercure, Acting P.J., Lahtinen, Spain, Malone Jr. and
Kavanagh, JJ.

Lemire & Johnson, L.L.C., Malta (Christopher R. Lemire of
counsel), for appellant.

Walsh & Hacker, Albany (Sean F. Nicolette of counsel), for
Salem Central School District and another, respondents.

Kavanagh, J.

Appeals (1) from a decision of the Workers' Compensation Board, filed May 20, 2010, which ruled that claimant's reduced earnings awards for various periods of time between April 2005 and July 2009 should be rescinded, and (2) from a decision of said Board, filed March 22, 2011, which denied claimant's application for full Board review.

In June 2003, claimant, a substitute school bus driver and cafeteria worker, suffered work-related injuries to her neck, back and head and received workers' compensation benefits. She returned to work, with restrictions, in November 2003. In August 2009, a Workers' Compensation Law Judge (hereinafter WCLJ) awarded claimant reduced earnings benefits from January 2004 to July 2009, with the awards to continue forward. On review, the Workers' Compensation Board concluded that claimant had not submitted medical evidence in the form of progress reports from her treating physician supporting a finding of a continuing causally related disability every 45 days as required. Accordingly, the Board rescinded claimant's reduced earnings awards for various time periods between April 11, 2005 to July 10, 2009, totaling approximately 18 months, which represented the gaps between the submission of the progress reports that were greater than 45 days.

At a subsequent hearing, claimant presented clarifying opinions of her treating physicians who opined that claimant was suffering from a causally related disability during the disputed time periods. The WCLJ thereafter awarded reduced earnings awards for the time periods that the Board had previously rescinded and, based upon a stipulation of the parties, classified claimant as permanently partially disabled due to the 2003 accident. On review, the Board found that there was insufficient medical evidence to support a reinstatement of the reduced earnings for the disputed time periods and again rescinded the related reduced earnings awards, but otherwise affirmed the WCLJ's decision. Claimant now appeals both the underlying decision and the Board's denial of her application for full Board review.

Inasmuch as we conclude that substantial evidence does not exist to support the Board's determination that there was insufficient medical evidence of a continuing causally related disability, the decision must be reversed. The record reflects that claimant returned to work in November 2003 and that, due to her injuries, she was unable to continue her work as a bus driver and was limited only to work in the cafeteria. In support of a continuing causally related disability, claimant submitted numerous medical reports of her treating physicians dating from

February 22, 2005 to April 23, 2010, all of which indicate that claimant remained temporarily disabled throughout that period. Notably, during this time, the employer's workers' compensation carrier did not question claimant's entitlement to reduced earnings, but only questioned the amount of the award for the various years. Further, the carrier's medical expert determined that claimant suffered from a causally related permanent mild disability in September 2009 and that she is unable to perform the duties of a school bus driver. In sum, there is no evidence in the record that calls into question claimant's entitlement to reduced earnings awards based upon her 2003 accident.

We recognize that "there is no presumption of continuing disability under the Workers' Compensation Law" (Matter of Rothe v United Med. Assocs., 2 AD3d 1264, 1265 [2003]) and that a claimant's treating physician is required to submit progress reports reflecting a continuing disability "at intervals of not less than three weeks apart or at less frequent intervals if requested on forms prescribed by the [C]hair" (Workers' Compensation Law § 13-a [4] [a]).¹ Moreover, a 22-day interval is required by regulation (see 12 NYCRR 325-1.3 [b]), and the Board requires C-4 reports to be submitted every 45 days (see Matter of Rothe v United Med. Assocs., 2 AD3d at 1265). While there were gaps of greater than 45 days between the submissions of the reports of claimant's physicians between April 2005 and July 2009, the unequivocal and unchallenged medical evidence in the record establishes that claimant was disabled during that entire time period. The gaps in the reports, standing alone, do not constitute substantial evidence supporting the recision of claimant's reduced earnings awards under these circumstances.

Mercure, Acting P.J., Lahtinen, Spain and Malone Jr., JJ.,
concur.

¹ We also note that "[t]he [B]oard may excuse failure to give such notices within the designated periods when it finds it to be in the interest of justice to do so" (Workers' Compensation Law § 13-a [4] [a]).

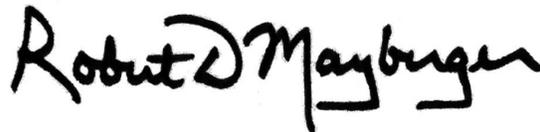
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ORDERED that the decision filed May 20, 2010 is reversed, without costs, and matter remitted to the Workers' Compensation Board for further proceedings not inconsistent with this Court's decision.

ORDERED that the appeal from the decision filed March 22, 2011 is dismissed, as academic, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court