

Supreme Court, Appellate Division

Third Judicial Department

Decided and Entered: March 31, 2011

510113

In the Matter of the Claim of
KEITH WILKINS,
Respondent,

v

MEMORANDUM AND ORDER

NEW YORK POWER AUTHORITY
et al.,
Appellants.

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: February 9, 2011

Before: Peters, J.P., Spain, Rose, Stein and Egan Jr., JJ.

Falge & McLean, North Syracuse (John I. Hvozda of counsel),
for appellants.

Eric T. Schneiderman, Attorney General, New York City (Iris
A. Steel of counsel) for Workers' Compensation Board, respondent.

Stein, J.

Appeal from a decision of the Workers' Compensation Board,
filed September 28, 2009, which, among other things, ruled that
claimant was entitled to a 45% schedule loss of use award for his
shoulder injury.

Claimant worked as a lineman for the employer and sustained
an injury in July 2007 when a winch line jumped off a drum and
pulled on his shoulder. He was first examined by a physician on
August 1, 2007, who diagnosed him with biceps tendonitis of the

right shoulder and prescribed an anti-inflammatory and physical therapy. Claimant, who did not miss time from work as a result of the injury, declined to take the medication, discontinued physical therapy after just one session and did not follow up with his treating physician. Thereafter, in August 2008, claimant scheduled an independent medical examination and, based on a diagnosis of adhesive capsulitis of his right shoulder resulting in a 45% schedule loss of use, applied for workers' compensation benefits. After another independent medical examination sought by the employer and its workers' compensation carrier, followed by a hearing and deposition testimony of the three physicians who examined claimant, a Workers' Compensation Law Judge denied claimant's requested schedule loss of use, finding that the permanency of his injury was caused by his unreasonable refusal to undergo any treatment. Upon review, the Workers' Compensation Board reversed, finding that claimant's refusal to continue treatment was not unreasonable, and awarded a 45% schedule loss of use. The employer and its carrier now appeal.

We reverse. While ordinarily the reasonableness of refusing medical treatment is a question of fact for the Board, where the record is devoid of substantial evidence to support its conclusion, this Court will determine the issue as a matter of law (see Matter of Langford v William Rogers, Inc., 144 AD2d 785, 788 [1988]; Matter of Zanotti v New York Tel. Co., 48 AD2d 192, 193-194 [1975]). Here, the unanimous medical opinion of the physicians who examined claimant was that claimant had not yet reached maximum medical improvement that could be achieved if he were willing to undergo the recommended treatment. Moreover, an independent medical examiner opined both that a course of treatment involving medication and physical therapy involved little risk and that claimant's refusal to engage in such treatment was unreasonable. While certain of claimant's examining physicians testified that claimant had the right to refuse treatment and/or that the failure to engage in treatment would not be harmful, none of them unambiguously testified that claimant's refusal was reasonable. Under these circumstances, where there is no actual medical conflict, the Board's determination that claimant's refusal to participate in any medical treatment was reasonable is not supported by substantial

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evidence and must, therefore, be reversed (see Matter of Zanoliti v New York Tel. Co., 48 AD2d at 193-194; cf. Matter of Wasyluk v Webb & Knapp, 12 AD2d 555, 556 [1960]).

Peters, J.P., Spain, Rose and Egan Jr., JJ., concur.

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

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