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

Decided and Entered: January 26, 2012

512887

In the Matter of the Claim of
JOSEPH CAPALBO,
Respondent,
v

AFFIRMED the Board's denial of Full Board Review due to carrier's failure to establish any issues warranting said FBR.

STONE & WEBSTER CONSTRUCTION
SERVICES et al.,
Appellants.

MEMORANDUM AND ORDER

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: November 17, 2011

Before: Peters, J.P., Malone Jr., Stein, Garry and Egan Jr., JJ.

Morrison Mahoney, L.L.P., New York City (Kimberly N. Coleman of counsel), for appellants.

Law Office of Joseph A. Romano, New York City (Joseph A. Romano of counsel), for Joseph Capalbo, respondent.

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

Garry, J.

Appeal from a decision of the Workers' Compensation Board, filed November 16, 2010, which denied the request of the employer and its workers' compensation carrier for reconsideration or full Board review.

Decedent was employed as a steamfitter at the Indian Point nuclear power plant until September 2007, when he passed away from lymphoma. Claimant, decedent's wife, filed a claim in August 2009 for workers' compensation death benefits, asserting that decedent's lymphoma was the result of his exposure to radioactive agents during his employment. Following a hearing in November 2009, a Workers' Compensation Law Judge found prima facie medical evidence that the death was compensable and ordered that if the employer and its workers' compensation carrier (hereinafter collectively referred to as the carrier) wished to submit an independent medical examination report contesting causality, such report must be submitted within 45 days. At a hearing in February 2010, the Workers' Compensation Law Judge extended the carrier's time for submitting the report. Claimant appealed and, in July 2010, the Workers' Compensation Board reversed, finding that the carrier had waived its opportunity to produce such a report, having failed to do so in the time originally prescribed. The Board further found that the carrier waived its opportunity to cross-examine claimant's medical expert, having failed to make such a request. The carrier's subsequent application for reconsideration or full Board review was denied and this appeal ensued.

We affirm. The merits of the Board's July 2010 decision are not properly before this Court, as the carrier failed to appeal that decision and appealed only from the Board's denial of its request for full Board review and/or reconsideration (see Matter of Dipippo v Accurate Signs & Awnings, 88 AD3d 1044, 1045 [2011]; Matter of Maqsood v McRoberts Protective Agency, 79 AD3d 1547, 1547 [2010], lv dismissed 16 NY3d 871 [2011]). Our analysis is therefore limited to deciding whether the Board's denial was an abuse of discretion or otherwise arbitrary and capricious (see Matter of Siliverdis v Sea Breeze Servs. Corp., 82 AD3d 1459, 1460 [2011]; Matter of Maqsood v McRoberts Protective Agency, 79 AD3d at 1547). We decline to disturb the Board's decision, as the record establishes that it addressed all relevant issues and the carrier did not present any evidence that was previously unavailable (see Matter of Maqsood v McRoberts Protective Agency, 79 AD3d at 1547; Matter of Gentile v Sovereign Motor Cars, 77 AD3d 1027, 1028 [2010], lv dismissed 16 NY3d 824 [2011]).

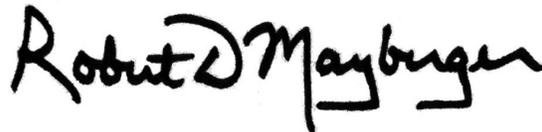
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Peters, J.P., Malone Jr., Stein and Egan Jr., JJ., concur.

ORDERED that the decision is affirmed, with costs to claimant.

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