

Supreme Court, Appellate Division

Third Judicial Department

Decided and Entered: January 5, 2012

512770

In the Matter of the Claim of  
CHARLES A. CATAPANO,  
Respondent,

AFFIRMED Board's ruling on 3rd Party  
Consent, after having it earlier contrary  
decision rejected by this same Court.

v

Correct spelling is JAW

~~JOW~~, INC., et al.,  
Appellants,

MEMORANDUM AND ORDER

and

SPECIAL DISABILITY FUND,  
Respondent.

WORKERS' COMPENSATION BOARD,  
Respondent.

Calendar Date: November 22, 2011

Before: Spain, J.P., Malone Jr., Stein, McCarthy and  
Egan Jr., JJ.

Gregory J. Allen, New York State Insurance Fund, Melville  
(Janis M. Riekstins of counsel), for appellants.

Steven M. Licht, Special Funds Conservation Committee,  
Albany (Jill B. Singer of counsel), for Special Disability Fund,  
respondent.

Malone Jr., J.

Appeal from a decision of the Workers' Compensation Board,  
filed September 28, 2010, which, upon remittal, found that the  
Special Disability Fund's consent to a third-party settlement was  
required.

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Claimant was injured at work and a workers' compensation claim was established. Liability of the Special Disability Fund pursuant to Workers' Compensation Law § 15 (8) (d) was thereafter established. Claimant settled a third-party personal injury action arising out of the accident with the consent of the employer's workers' compensation carrier. However, the consent of the Fund to the settlement was not obtained. As a result, the Fund refused to reimburse the carrier for payments of deficiency compensation. The Workers' Compensation Board initially held that the Fund's consent was not required. However, on appeal we determined that this decision was inconsistent with Board precedent and, because the Board did not set forth its reasons for deviating from the precedent, we remitted the matter for further proceedings (73 AD3d 1361 [2010]). Upon remittal, the Board held that the Fund's consent to the settlement was required and the carrier's failure to obtain such consent resulted in a forfeiture of further reimbursement from the Fund. The employer and its carrier now appeal.

As noted in our prior decision, "[t]he Board has previously held that where the Fund has been found liable for reimbursement to the carrier under Workers' Compensation Law § 15 (8) (d), the carrier waives its right to that reimbursement if it does not obtain the Fund's consent to a settlement" (*id.* at 1362; see Matter of Care Diagnostic Laboratory, 2006 WL 832793, \*2, 2006 N.Y. Wrk. Comp. LEXIS 2612, \*4 [WCB No. 29317021, Mar. 28, 2006]; Matter of Brigotta Farmland, 2006 WL 1064007, \*2-\*4, 2006 N.Y. Wrk. Comp. LEXIS 3343, \*5-\*10 [WCB No. 80213739, Apr. 18, 2006]). Upon remittal, the Board found that this case is factually indistinguishable from its prior decisions and, therefore, treated it consistently therewith. Inasmuch as the Board's decision represents a rational, consistent interpretation and application of the relevant statute, we will not disturb it (see Workers' Compensation Law § 29; see also Matter of Drewes v Guterl Steel, 305 AD2d 769, 770 [2003]; Matter of State Farm Mut. Auto. Ins. Co. v Levin, 263 AD2d 233, 237 [2000], lv denied 95 NY2d 754 [2000]).

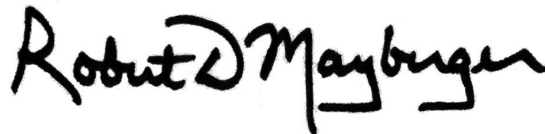
Spain, J.P., Stein, McCarthy and Egan Jr., JJ., concur.

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ORDERED that the decision is affirmed, 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