

Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 6, 2011

508587

In the Matter of the Claim of
ANDREW J. DeFAYETTE,
Appellant,

v

MEMORANDUM AND ORDER

VERIZON et al.,
Respondents.

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: November 16, 2010

Before: Mercure, J.P., Peters, Rose, Malone Jr. and Garry, JJ.

Law Firm of Alex C. Dell, Albany (George P. Ferro of
counsel), for appellant.

Stockton, Barker & Mead, L.L.P., Albany (Leith Carole
Ramsey of counsel), for Verizon and another, respondents.

Garry, J.

Appeal from a decision of the Workers' Compensation Board,
filed March 25, 2009, which ruled that claimant is not entitled
to lost time awards from November 18, 2003 to September 13, 2007.

Claimant suffered a compensable injury to his left shoulder
in May 2002.¹ He was awarded workers' compensation benefits for

¹ Claimant also suffered compensable work-related injuries
to his right knee in 2000 and to his back in 2003.

intermittent lost time from May 17, 2002 to November 18, 2003, with subsequent compensable lost time awards held in abeyance. In December 2005, the claim was amended to include an injury to claimant's right shoulder. Thereafter, claimant began filing requests for further action alleging that he was not working and was not receiving benefit payments attributable to this claim. Ultimately, claimant was awarded benefits for compensable lost time for the period from September 13, 2007 to November 5, 2008, but any award for lost time from November 18, 2003 until September 13, 2007 was specifically held in abeyance. Following a hearing, a Workers' Compensation Law Judge denied compensable lost time awards for November 18, 2003 to September 13, 2007. The Workers' Compensation Board affirmed upon review, and claimant appeals.

A decision of the Board cannot be upheld "when it is clearly based on incorrect facts or an inaccurate reading of the record" (Matter of Evans v Jewish Home & Hosp., 1 AD3d 736, 738 [2003], lv dismissed 2 NY3d 823 [2004]; accord Matter of Lopez v Superflex, Ltd., 31 AD3d 914, 914 [2006]). Here, the Board affirmed the Workers' Compensation Law Judge's denial of awards for compensable lost time from November 18, 2003 to September 13, 2007 purportedly based upon findings on this issue in prior decisions of the Board. Our review of the record, however, reveals no prior determinations by the Board regarding this matter. As the Board's determination is not supported by substantial evidence in the record, the decision must be reversed and the matter remitted to the Board to engage in its fact-finding role to resolve the issue (see Matter of Nickel v Kings Park Psychiatric Ctr., 52 AD3d 1130, 1131 [2008]; Matter of Spector v New York City Bd. of Educ., 292 AD2d 741, 742 [2002]).

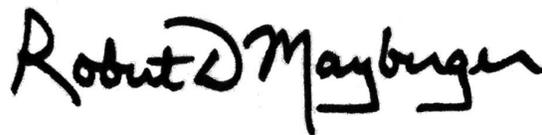
Mercure, J.P., Peters, Rose and Malone Jr., JJ., concur.

-3-

508587

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