

Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: December 26, 2013

516812

In the Matter of the Claim of  
EDDIE WEST,  
Appellant,  
v

**ABEYED Decision as Board, during  
the appeal, changed its reason for  
denying a medical variance.**

MEMORANDUM AND ORDER

TITAN EXPRESS, INC., et al.,  
Respondents.

WORKERS' COMPENSATION BOARD,  
Respondent.

Calendar Date: November 13, 2013

Before: Rose, J.P., Stein, Spain and Garry, JJ.

Law Offices of Joseph A. Romano, Yonkers (Anthony Brooks-Morgese of counsel), for appellant.

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

Garry, J.

Appeal from a decision of the Workers' Compensation Board, filed November 6, 2012, which denied claimant's request for a variance.

Claimant sustained a work-related back injury in 1995. A claim was established in 2005, and liability was shifted to the Special Fund for Reopened Cases. Thereafter, claimant was determined to have a permanent total disability, and reasonable treatment was authorized. The Special Fund authorized several

series of trigger point injections until January 2012, when it denied the request of claimant's treating physician for further injections on the ground that they were inconsistent with the Workers' Compensation Board Medical Treatment Guidelines and the opinion of the independent medical examiner. Following a hearing, the Workers' Compensation Law Judge concluded that a variance from the Guidelines was appropriate and authorized further injections. In November 2012, the Workers' Compensation Board reversed this determination, finding that a variance is not required for repeat injections when they are linked to subjective and objective improvements that materially affect a claimant's condition, but that here, claimant's physician had failed to sufficiently document the requisite improvements. Claimant appeals.

In April 2013, during the pendency of this appeal, the Board issued a new decision that "amends and supersedes" the November 2012 decision (Employer: Titan Express Inc., 2013 WL 1784247, \*1, 2013 NY Wrk Comp LEXIS 3364, \*1 [WCB No. 3041 0151, Apr. 17, 2013]). The April 2013 decision finds that a variance is required before claimant can receive additional injections, and that the variance request should not have been granted because claimant's physician did not demonstrate that injections were medically necessary to maintain his level of functionality.<sup>1</sup> This Court did not learn that the April 2013 decision had been rendered until after the arguments upon this appeal were completed. There are unaddressed issues arising from these unusual procedural circumstances, specifically including the extent of the Board's continuing jurisdiction to render the April 2013 decision, and whether this appeal has been rendered moot. We thus direct the parties to submit briefs on these issues, during which time the appeal will be held in abeyance.

Rose, J.P., Stein and Spain, JJ., concur.

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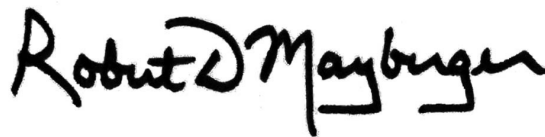
<sup>1</sup> Both the decision on appeal and the April 2013 decision additionally found that claimant's physician had failed to demonstrate that alternative treatments were inappropriate.

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ORDERED that the decision is withheld, and the parties are directed to file briefs within 30 days in accordance with this Court's decision.

ENTER:



Robert D. Mayberger  
Clerk of the Court