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*2007 NY Slip Op 3822, *; 40 A.D.3d 1189, **;
836 N.Y.S.2d 310, ***; 2007 N.Y. App. Div. LEXIS 5447*

[*1] In the Matter of the Claim of STELLA ICKES, Appellant, v SAYVILLE ANIMAL HOSPITAL et al., Respondents. WORKERS' COMPENSATION BOARD, Respondent.

501744

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

2007 NY Slip Op 3822; 40 A.D.3d 1189; 836 N.Y.S.2d 310; 2007 N.Y. App. Div. LEXIS 5447

May 3, 2007, Decided

May 3, 2007, Entered

CASE SUMMARY

PROCEDURAL POSTURE: Appellant claimant sought review of a decision entered by respondent, the Workers' Compensation Board (New York), which ruled that the claimant voluntarily withdrew from the labor market and, thus, was not entitled to further workers' compensation benefits. The claimant had been employed as a veterinary technician and had suffered a work-related injury.

OVERVIEW: After the claimant failed to produce a work status affidavit, respondent insurance carrier requested a suspension of payments on that basis. At a hearing, the claimant indicated that she could not return to work at the present time as her doctor was considering performing surgery on her. The carrier thereafter raised the issue of voluntary removal from the labor market to which the workers' compensation law judge (WCLJ) peremptorily responded, "I find no evidence of voluntary removal from the labor market." The Board subsequently found that the claimant had voluntarily removed herself from the labor market and rescinded awards made after the date of the suspension hearing. On appeal, the court reversed and remanded as the suspension application was premised only upon the claimant's failure to file the work status affidavit. The court found that although a non-noticed subject could be considered and determined at any hearing, in the instant case, the hearing violated [12 NYCRR 300.8\(c\)](#) and [300.9](#) because the claimant was not afforded an opportunity to be heard on the issue of voluntary removal or even to ask for an adjournment for that purpose.


OUTCOME: The court modified the Board's decision by reversing the portion that rescinded the claimant's workers' compensation benefits after the suspension hearing. The court remitted the matter to the Board for the parties to develop their positions on the record on the issue of the claimant's alleged voluntary removal from the labor market. As so modified, the Board's decision was affirmed.

CORE TERMS: claimant's, labor market, removal, carrier, suspension, remitted, per week, workers' compensation, modified, failure to file, adjournment, litigated, rescinded, premised, attended, notice

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Workers' Compensation & SSDI > Administrative Proceedings > Hearings & Review 

HN1  Although the regulations provide that a non-noticed subject may be considered and determined at any workers' compensation hearing, that may be done only if the administration of justice will thereby be substantially served, [12 NYCRR 300.8\(c\)](#), and the hearing is conducted in such a manner as to ascertain the substantial rights of the parties, [12 NYCRR 300.9](#). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HEADNOTES

Workers' Compensation--Voluntary Withdrawal from Labor Market.--It was error to rescind claimant's award after date of hearing on ground that she had voluntarily removed herself from labor market; application to suspend payments was premised only upon claimant's failure to file work status affidavit, and claimant attended hearing without notice that issue of her voluntary removal from labor market would be litigated; claimant had no opportunity to be heard on issue of voluntary removal or to ask for adjournment for that purpose; matter was remitted for further proceedings.

COUNSEL: **Grey & Grey**, L.L.P., Farmingdale (Joan S. O'Brien of counsel), for appellant.

Law Office of Joseph Buttridge, Albany (Joseph Buttridge of counsel), for Sayville Animal Hospital and another, respondents.

JUDGES: Before: [Cardona](#) ▼, P.J., [Mercure](#) ▼, [Carpinello](#) ▼, [Mugglin](#) ▼ and [Kane](#) ▼, JJ. [Mercure](#) ▼, [Carpinello](#) ▼, [Mugglin](#) ▼ and [Kane](#) ▼, JJ., concur.

OPINION BY: [Cardona](#) ▼

OPINION

[1189]** **[***310]** [Cardona](#) ▼, P.J. Appeal from a decision of the Workers' Compensation Board, filed March 29, 2006, which ruled that claimant voluntarily withdrew from the labor market.

Claimant suffered a work-related injury in connection with her employment as a veterinary technician. As a result, the workers' compensation carrier was obligated to pay claimant \$ 106 per week, later reduced to \$ 55 per week. Claimant was thereafter directed to produce a work status affidavit, which she admittedly failed to do, and the carrier subsequently requested a suspension of payments on that basis. At a brief hearing on the suspension application, claimant stated that she had not returned to, or looked for, work, and she testified that returning to work was not yet an option

since her doctor was considering performing surgery on her. At that point, the carrier raised for the first time "the issue of voluntary removal from the [***311] labor market," to which the Workers' Compensation Law Judge (hereinafter WCLJ) peremptorily responded, "I find no evidence of voluntary removal from the labor market." This constituted the entire record discussion of the issue. The WCLJ thereafter continued the \$ 55 per week payment [*2] and closed the hearing. The Workers' Compensation Board modified the WCLJ's decision by rescinding awards made after the date of the suspension hearing, finding that claimant voluntarily removed herself from the labor market.

On this appeal by claimant, we reverse so much of the Board's decision as rescinded her award after the date of the hearing. The carrier's suspension application was premised only upon claimant's failure to file the work status affidavit; thus, claimant attended the hearing without notice that the issue of her voluntary removal from the labor market would be litigated. ^{HNI} Although the regulations provide that a non-noticed subject may be considered and determined at any hearing, that may be done only "if the administration of justice will thereby be substantially served" (12 NYCRR 300.8 [c]) and the hearing is conducted in such a manner as "to ascertain the substantial [**1190] rights of the parties" (12 NYCRR 300.9). In this case, claimant was afforded no opportunity to be heard on the issue of voluntary removal or even to ask for an adjournment for that purpose, since the WCLJ promptly rejected that argument by the carrier and closed the hearing (see *Matter of Hecht v Monaghan*, 307 NY 461, 470, 121 NE2d 421 [1954]). Since the Board decided this issue against claimant under these circumstances, the matter must be remitted to permit the parties to develop their positions on the record (see *Matter of Emanatian v Saratoga Springs Cent. School Dist.*, 8 AD3d 773, 774, 778 NYS2d 218 [2004]; *Matter of Sullivan v Smith's Coll. of Arts & Sciences*, 265 AD2d 767, 767-768, 697 NYS2d 188 [1999]; *Matter of Angelo v New York State Assn. of Learning Disabled*, 221 AD2d 832, 833, 633 NYS2d 693 [1995]).

Mercure, Carpinello, Mugglin and Kane, JJ., concur. Ordered that the decision is modified, without costs, by reversing so much thereof as rescinded claimant's workers' compensation benefits after September 30, 2005; matter remitted to the Workers' Compensation Board for further proceedings not inconsistent with this Court's decision; and, as so modified, affirmed.

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