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Supreme Court, Appellate Division, Third Department, New York.

Matter of the Claim of ROBERT PONTILLO, Claimant,  
v.  
CONSOLIDATED EDISON OF NEW YORK, INC., et al., Appellants  
and  
WORKERS' COMPENSATION BOARD, Respondent.  
Decided December 14, 2017

Facts: Employer and carrier appeal from a decision of the Workers' Compensation Board, filed August 25, 2015, which ruled, among other things, that claimant was entitled to wage replacement benefits due to his reattachment to the labor market. Claimant established a claim for pulmonary fibrosis and lung cancer due to exposure to asbestos while working for Consolidated Edison of New York, Inc. Thereafter, Consolidated Edison provided claimant with a light-duty position, at which claimant worked for two days before he retired, thereby voluntarily withdrawing from the labor market. A hearing was subsequently held to determine whether claimant had reattached to the labor market. Upon a finding that, among other things, claimant had reattached to the labor market as of April 21, 2015, a Workers' Compensation Law Judge directed awards from May 7, 2015 onwards and continued the case for further development. Upon review, the Workers' Compensation Board affirmed.

Holding: Reversed

Discussion: The Board failed to address the carrier's argument that claimant had not satisfied his burden of establishing that his inability to find work, and the related loss of earnings, was causally related to his disability. In order to be entitled to benefits, a claimant who has previously voluntarily retired, but claims to have subsequently reattached to the labor market, must demonstrate that his earning capacity and his ability to find comparable employment had been adversely affected by his disability. This burden requires a claimant to demonstrate that other factors totally unrelated to his disability did not have an adverse effect on his earning

capacity. The Board did not discuss or make findings as to whether claimant had established a relevant nexus between his work-related disability and his unsuccessful job search.

*Stewart, Greenblatt, Manning & Báez*