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Supreme Court, Appellate Division, Third Department, New York

Matter of NICK LALA, Claimant-Respondent

v

SITEWORKS CONTRACTING CORP., Appellants,

and

WORKERS' COMPENSATION BOARD, Respondent

Decided June 1, 2017

Facts: The claimant settled a third-party action with consent for \$100,000.00, net to claimant of \$64,541.51 and the carrier had reserved its rights to take credit for future compensation against the net recovery. The claimant was awarded temporary total disability benefits of \$500, and the carrier was directed to pay 35.46%, or \$177.30, per week as its obligation under Burns v. Varriale 9 NY3d 207 (2007). The Board found the carrier's credit was exhausted on August 20, 2013, and the carrier appeals.

Holding: *Affirmed.*

Discussion: The consent order reserved the carrier's right to take credit but did not clearly set for the manner in which the carrier's equitable share of litigation expenses would be taken into account, and this ambiguity may be resolved against the carrier. The Board determined when the credit would be exhausted by deducting the carrier's share of litigation expenses from the net recovery, and then dividing that total amount of the credit by \$322.70, the amount the carrier was relieved of paying during the holiday. The carrier did not deduct its share of litigation expenses from the net recovery and used the full net recovery as the amount of the credit. The Court found the carrier's calculation to be inconsistent with the case law and purpose of the statute, "which is to stem the inequity to the claimant, arising when a carrier benefits from an employee's recovery while assuming none of the costs incurred in obtaining the recovery." Matter of Kelly v. State Insurance Fund 60 NY2d 131, 138 (1983).