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Supreme Court, Appellate Division, Third Department, New York

In the Matter of KEVIN KRAZIT, Appellant,

v.

SKI WINDHAM OPERATING CORPORATION et al., Respondents.

WORKERS' COMPENSATION BOARD, Respondent.

November 17, 2016

Facts: In January 2013, claimant injured right shoulder while working as ski patrol supervisor and his claim was established. Claimant was subsequently found to have a 15% schedule loss of use of his right arm and the average weekly wage was set. Claimant thereafter requested calculation of average weekly wage be modified to include concurrent earnings from NJ contracting business. WCLJ found concurrent employment did not constitute covered employment for purposes of Workers' Compensation Law Section 14(6) and denied claimant's request to modify his average weekly wage. The Board affirmed and claimant now appeals.

Holding: *Affirmed.*

Discussion: Workers' Compensation Law Section 14(6), "an employees average weekly wages shall be calculated on the basis of all concurrent employment covered under this chapter." A covered concurrent employer refers to an employer who falls within the purview of the Workers' Compensation Law. An out of state employer is not considered to be a covered employer within the meaning of the Workers' Compensation Law. Claimant resides in NJ and works at the ski resort annually from December to April. The remainder of the year he operates his wholly owned contracting business which is incorporated in NJ and carries a NJ workers' compensation policy that includes coverage in NY. Claimant testified despite his business being in NJ approximately 75% of his contracting work for 2012 took place in NY the year prior to his injury. Claimant testified he has a home improvement contractor license in NY issued in Rockland County for 20 years. A review of claimant's 2012 tax returns indicates \$3,860 declared earning in NY that year

corresponding to his income working as a ski patrol supervisor. Inasmuch as the Board is vested with discretion to weigh conflicting evidence and evaluate credibility of its witnesses and its resolution of such matters must be afforded great deference.” Substantial evidence supports determination that claimant’s contracting business constituted an out of state employer and therefore was not a covered employer within the meaning of the Workers Compensation Law. The fact that claimant would have been entitled to workers’ compensation benefits if he had been injured performing contracting work in NY and that he possesses a NY Home Improvement Contractor License does not compel a different result.

*Stewart, Greenblatt, Manning & Báez*