

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: December 27, 2012

515033

---

In the Matter of the Claim of  
NANCY FOWLER,  
Respondent,

v

CROUSE COMMUNITY CENTER et al.,  
Appellants,

and

STATE INSURANCE FUND,  
Respondent.

WORKERS' COMPENSATION BOARD,  
Respondent.

---

MEMORANDUM AND ORDER

Calendar Date: November 20, 2012

Before: Peters, P.J., Rose, Lahtinen, Malone Jr. and  
Garry, JJ.

---

Gitto & Niefer, LLP, Binghamton (Brittany L. Grome of  
counsel), for appellants.

Gregory J. Allen, State Insurance Fund, Liverpool (Charles  
L. Browning of counsel), for State Insurance Fund, respondent.

---

Malone Jr., J.

Appeal from a decision of the Workers' Compensation Board,  
filed December 29, 2011, which, among other things, ruled that  
the employer and its workers' compensation carrier are liable for  
claimant's treatment and awards pending a determination on the  
issue of apportionment.

While working as a cook for a previous employer, claimant sustained a compensable injury to her right knee in 2003. She subsequently underwent arthroscopic surgery and returned to work. Claimant injured the knee again in a 2005 work-related accident for which she lost no compensable time. In April 2009, she injured her right knee once again when, while employed by Crouse Community Center, she twisted the knee while loading a dishwasher. Claimant continued to work until May 2009, when the pain in her knee became unbearable and she sought medical treatment. Thereafter, she underwent total knee replacement surgery in October 2009. When liability was sought to be placed with Crouse and its workers' compensation carrier (hereinafter collectively referred to as the carrier), the carrier did not challenge the need for the surgery, but rather argued that claimant's disability was causally related to the 2003 accident, not the 2009 accident. The Workers' Compensation Law Judge found that the need for knee replacement surgery was precipitated by the 2009 accident and, therefore, placed liability for the surgery and indemnity benefits with the carrier, "without prejudice to potential apportionment upon a finding of permanency." A panel of the Workers' Compensation Board affirmed that determination in a split decision. Thereafter, the full Board affirmed the determination of the Workers' Compensation Law Judge, specifying that the carrier "should be held liable for the cost of the surgery, as well as for any awards following the April 17, 2009 accident, until such time as a determination is made on the issue of apportionment." The carrier now appeals.

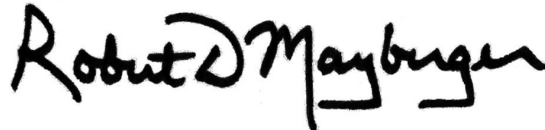
"Board decisions which neither decide all substantive issues nor involve a threshold legal issue are not appealable" (Matter of McClam v American Axle & Mfg., 79 AD3d 1315, 1316 [2010] [internal quotation marks and citations omitted]; see Matter of Bush v Beltrone Constr., 289 AD2d 722, 723 [2001]). Here, the appeal must be dismissed because the issue of apportionment remains unresolved pending a determination on permanency (see id.). Notably, our dismissal of this interlocutory appeal "will further the policy goal of avoiding piecemeal review of issues in workers' compensation cases, without depriving the parties of the ability to appeal the apportionment percentages once they are finally determined" (Matter of McClam v American Axle & Mfg., 79 AD3d at 1316; see

Matter of Walker v Low & Son, 154 AD2d 853, 854 [1989]).

Peters, P.J., Rose, Lahtinen and Garry, JJ., concur.

ORDERED that the appeal is dismissed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger  
Clerk of the Court