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

Decided and Entered: May 30, 2024

CV-23-0571
CV-23-1310

In the Matter of the Claim of JUDITH PATTERSON-DJALO,
Claimant,
v

COLD SPRING ACQUISITION LLC,
Respondent,
and

ORISKA INSURANCE COMPANY,
Appellant.

WORKERS' COMPENSATION BOARD,
Respondent.

MEMORANDUM AND ORDER

Calendar Date: April 25, 2024

Before: Egan Jr., J.P., Aarons, Fisher, McShan and Mackey, JJ.

Michael Joseph Garcia, Utica (*Daniel Hitzke* of *Hitzke & Ferran, LLP*, Long Beach, California, of counsel, admitted pro hac vice), for appellant.

Letitia James, Attorney General, New York City (*Marjorie S. Leff* of counsel), for Workers' Compensation Board, respondent.

Mackey, J.

Appeals (1) from an amended decision of the Workers' Compensation Board, filed February 21, 2023, which ruled, among other things, that Rashbi Management Inc. was not a necessary party in interest under 12 NYCRR 300.13 (a) (4) and lacked standing to challenge a decision of a Workers' Compensation Law Judge establishing claimant's schedule loss of use award, and (2) from a decision of said Board, filed July 10, 2023, which, among other things, imposed a penalty on Oriska Insurance Company for failing to pay an award to claimant.

Claimant has an established claim for work-related injuries to her left shoulder, head and back for an incident that occurred on October 10, 2017 when she was working for the employer, whose workers' compensation coverage at the time was provided by Oriska Insurance Company (hereinafter the carrier). The workers' compensation insurance policy between the carrier and the employer was a retrospective rating program pursuant to which the final premium due to the carrier from the employer would be based upon actual claim costs during the policy period (*see e.g. Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 767-768 [2012]; *Commissioners of State Ins. Fund v Hallmark Operating, Inc.*, 61 AD3d 1212, 1212 [3d Dept 2009]). Claimant's injuries were determined to be permanent and conflicting opinions were submitted regarding the extent of her schedule loss of use (hereinafter SLU). After unsuccessful settlement discussions, a hearing was scheduled for June 15, 2022 to determine claimant's SLU. At the hearing attended by counsel for the carrier and employer, and claimant, claimant's counsel objected to the appearance and presence of counsel for Rashbi Management Inc. who, according to the parties, is the contractual guarantor of the employer's premiums to be paid to the carrier, pursuant to a trust agreement between Rashbi and the carrier of which the carrier is the beneficiary. The Workers' Compensation Law Judge (hereinafter WCLJ) agreed, finding that Rashbi was not a necessary party of interest and precluded its counsel from the hearing. On claimant's consent, the WCLJ adopted the opinion of the carrier's independent consultant that she had sustained a 40% SLU of her left arm and issued a decision reflecting that SLU award.

Both the carrier and Rashbi filed applications for Workers' Compensation Board review. By amended decision filed February 21, 2023, the Board affirmed the WCLJ's decision, finding that the carrier, not Rashbi, was the party liable for all of the indemnity and medical costs connected to this claim under its workers' compensation policy with the employer and, as such, the carrier was the interested party to this claim. The Board

further determined that Rashbi, as the guarantor of the *employer's* obligation to pay the final *premiums* to the carrier for the workers' compensation policy between the employer and the carrier,[1] had no responsibility to pay and did not pay any indemnity or medical costs associated with this claim; thus, the Board ruled that Rashbi is not a necessary party of interest to this claim under 12 NYCRR 300.13 (a) (4). The Board found that Rashbi had been properly excluded from the SLU hearing and lacked standing to appeal the WCLJ's decision, and denied its application for review. The Board further explained that any dispute between Rashbi and the carrier regarding the carrier's handling of this underlying claim as the liable carrier would be "heard in another forum" – and not by the Board – and that, regardless of any such related outside proceedings, the carrier is liable to pay all costs/benefits to claimant under the workers' compensation policy issued to the employer. The Board otherwise affirmed the WCLJ's SLU award. The carrier appeals from that Board decision. The carrier failed to timely pay the full award to claimant as directed and, after a hearing,[2] the Board ordered it to pay a penalty to claimant (*see* Workers' Compensation Law § 25 [3] [f]) and a fine to the Board. The carrier also appeals from that decision.

We affirm. On appeal, with regard to the Board's February 21, 2023 decision, the carrier expressly states that it is not challenging either the decision that Rashbi is not a necessary party of interest, or the SLU award. Instead, the carrier seeks "remittal" of the underlying workers' compensation claim to Supreme Court or another court for further proceedings to adjudicate the obligation of the employer, as the insured, and Rashbi, as guarantor, to pay the retrospective premiums assertedly due to the carrier. That is, the carrier seeks remittal to a court (not the Board) for a determination related to the premiums due it on the retrospective rating policy between it and the employer, for which premiums Rashbi was a guarantor and obligated to pay the carrier.

Initially, contrary to the carrier's repeated misrepresentations, the issues regarding retrospective premiums due to the carrier, if any, and the respective obligations of the employer and Rashbi to pay those premiums to the carrier, were never before the WCLJ

---

[1] The Board agreed to consider new evidence submitted to it by Rashbi, consisting of the trust agreement between Rashbi and the carrier and a stipulation of settlement to which they were parties.

[2] The carrier did not include the transcript from the July 3, 2023 penalty hearing in the record on appeal.

or the Board and were not addressed and, thus, they are not properly before this Court on appeal (*see Matter of Murrah v Jain Irrigation, Inc.*, 157 AD3d 1088, 1089 [3d Dept 2018]). The Board resolved only matters related to claimant's workers' compensation claim for which the carrier was held to be the liable carrier – liability that, significantly, the carrier does not contest. The Board did not, as the carrier asserts, adjudicate the employer's liability for premiums to it or the guarantor's liability for premiums or, indeed, whether any such premiums were due. In the context of this claim, the Board did not and could not address a premium or contractual dispute between the employer, its carrier and the nonparty guarantor Rashbi. Notwithstanding the carrier's arguments, the intent and clear import of the Board's reference to "another forum" were that any dispute between Rashbi and the carrier, including with regard to the carrier's handling of this claim, would have to be addressed in another forum outside of the Board's administrative proceedings and not in the context of an injured worker's claim for a workers' compensation award; the Board further made clear that, regardless of any such outside proceedings, the carrier was liable for this claim under its workers' compensation policy with the employer. As such, neither the administrative proceedings before the Board nor this appeal is the proper forum to litigate a contract or premium claim between the carrier, Rashbi and the employer. By distinction, the Board properly exercised its exclusive jurisdiction over claimant's claim for a workers' compensation award and benefits, the appeal therefrom was properly brought in this Court, and the request that this Court remit to Supreme Court or another trial court any aspect of these administrative proceedings is entirely unauthorized (*see* Workers' Compensation Law §§ 23, 142 [1]).

The carrier also appeals from the subsequent decision of the Board, filed July 10, 2023, which imposed a penalty on the carrier pursuant to Workers' Compensation Law § 25 (3) (f) for failing to pay the February 21, 2023 award to claimant. It asks this Court to hold this penalty in abeyance pending a remittal of this proceeding to Supreme Court. As noted, such remittal would be improper and unauthorized. The carrier makes no arguments that it timely (or untimely) paid the full award to claimant within 10 days as ordered by the WCLJ and affirmed by the Board, or that the penalty was not authorized or correctly computed. Given that "[t]he penalty provisions of Workers' Compensation Law § 25 (3) (f) are self-executing, and the penalty is mandatory and automatic if the award is not timely paid" in order to "deter[ ] carriers from delaying award payments" (*Matter of Szymanski v ABA Tech Indus., Inc.*, 204 AD3d 1281, 1282 [3d Dept 2022] [internal quotation marks and citations omitted]), and the carrier has not raised any valid arguments that the Board erred in imposing the penalty, the Board's decision will not be

disturbed. We have examined the remainder of the carrier's claims and find that they also lack merit.

Egan Jr., J.P., Aarons, Fisher and McShan, JJ., concur.

ORDERED that the decisions are affirmed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court