

**Matter of Bellantoni v. City of N.Y. Sch. Food & Nutrition Servs., 127 A.D.3d 1350**

Supreme Court of New York, Appellate Division, Third Department

April 9, 2015, Decided; April 9, 2015, Entered

Counsel: Zachary W. Carter, Corporation Counsel, New York City (Andrew Tran of counsel), for appellant.

Grey & Grey, LLP, Farmingdale (Kevin Plant of counsel), for Maria Bellantoni, respondent.

Eric T. Schneiderman, Attorney General, New York City (Iris A. Steel of counsel), for Workers' Compensation Board, respondent.

Judges: Before: Peters, P.J., Lahtinen, Garry and Lynch, JJ. Peters, P.J., Lahtinen and Garry, JJ., concur.

Opinion by: Lynch

**Opinion**

Lynch, J. Appeal from a decision of the Workers' Compensation Board, filed July 22, 2013, which ruled that the employer waived the right to raise the defense that claimant provided untimely notice of her injury.

Claimant applied for workers' compensation benefits in 2011, alleging that she suffered a work-related injury to her shoulder in 2009. The employer controverted the claim, but neither filed a timely prehearing conference statement as required by Workers' Compensation Law § 25 (2-a) (d) nor an affidavit demonstrating due diligence and good cause for the delay (see also 12 NYCRR 300.38 [f] [1]). As a result, the Workers' Compensation Board ultimately determined that the employer waived its defenses to the claim pursuant to 12 NYCRR 300.38 (f) (4) (see Matter of Quagliata v Starbucks Coffee, 82 AD3d 1321, 1322, 918 NYS2d 629 [2011], lv denied 17 NY3d 703, 952 NE2d 1089, 929 NYS2d 94 [2011]; Matter of Smith v Albany County Sheriff's Dept., 82 AD3d 1334, 1335, 918 NYS2d 245 [2011], lv dismissed 17 NY3d 770, 952 NE2d 1067, 929 NYS2d 74 [2011]). The employer now appeals.

"Inasmuch as the Board's decision was interlocutory and did not dispose of all of the substantive issues or reach a potentially dispositive threshold legal issue, it is not appealable" (Matter of Lewis v Stewart's Mktg. Corp., 122 AD3d 1048, 1049, 996 NYS2d 762 [2014] [internal quotation marks, brackets and citations omitted]; see Matter of Zaldivar v SNS Org., 119 AD3d 1134, 1135, 989 NYS2d 622 [2014]). We decline to review the Board's decision here, as it continued the case for a determination by a Workers' Compensation Law Judge as to whether claimant has presented sufficient evidence to establish a claim, and the employer may appeal, if necessary, from the Board's final decision on this issue (see Matter of Ortiz v Martin Viette Nurseries, Inc., 82 AD3d 1480, 1480-1481, 918 NYS2d 759 [2011]; Matter of Ogbuagu v Ngbadi, 61 AD3d 1198, 1199, 876 NYS2d 769 [2009]). Accordingly, the appeal is dismissed.

Peters, P.J., Lahtinen and Garry, JJ., concur. Ordered that the appeal is dismissed, without costs.