

Matter of Weiler v Capital Dist. Tr. Auth.

2014 NY Slip Op 31624(U)

June 25, 2014

Supreme Court, Albany County

Docket Number: 1834-14

Judge: Joseph C. Teresi

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Claim Under the Workers'
Compensation Law made by

GLENN WEILER,

Plaintiff,

DECISION and ORDER
INDEX NO. 1834-14
RJI NO. 01-14-2014

-against-

CAPITAL DISTRICT TRANSIT AUTHORITY and
LIBERTY MUTUAL INSURANCE COMPANY,

Defendants.

Supreme Court Albany County All Purpose Term, May 20, 2014
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Law Firm of Alex C. Dell, PLLC
Alex C. Dell, Esq.
Attorneys for Plaintiff
450 New Karner Road
Albany, New York 12207

Ryan, Roach & Ryan, L.L.P.
Attorneys for Defendants
William J. Ryan, Esq.
P.O. Box 3153
Kingston, New York 12402

TERESI, J.:

Plaintiff commenced this proceeding seeking an order approving a settlement he entered into in 1999, *nunc pro tunc*, to retroactively comply with Worker's Compensation Law §29(5). Defendants opposed the petition. Because Petitioner failed to demonstrate his entitlement to the relief he seeks, his petition is denied.

The history of this matter stretches back to 1998. While working as a Capital District Transit Authority (hereinafter "CDTA") bus driver on December 9, 1998, Plaintiff's neck and back were injured when his stopped bus was rear ended by Paul Jones (hereinafter "Jones"). At

that time CDTA's worker's compensation insurance carrier was Liberty Mutual Insurance Company (hereinafter "Liberty Mutual"), and Jones was insured by CNA Personal Insurance (hereinafter "CNA"). According to Plaintiff, his injury caused him to miss approximately twenty-one weeks of work (December 10, 1998 through May 10, 1999).

Soon after he was injured Plaintiff made a Worker's Compensation claim. Upon a hearing held on April 9, 1999, the Worker's Compensation Board (hereinafter "Board") found that Plaintiff established "a work related injury... to the back." They found his injuries to be "Temporary total" for 6.8 weeks and "Partial disability" for 10.4. His claim was "continued."

One month later on May 10, 1999, Plaintiff went back to work . While Plaintiff's assertion that he returned to work with "no restrictions or limitations" appears technically true, it is not a full recitation of his physical condition. Plaintiff's doctor's note from June 1999 explained that Plaintiff was "working and has a partial mild to moderate disability." He was to be seen on an "as needed" basis. Plaintiff was also continuing a physical therapy regiment that he started just before going back to work. Defendants submitted Plaintiff's "Physical Therapist's Progress Report[s]/Discharge Note."¹ The June 7, 1999 Report states: "very minimal progress observed." His October 28, 1999 Discharge Note was equally clear: "goals established in last note [Improve Function of Back and Decrease Pain] were not achieved." Moreover, Plaintiff's Orthopaedist's January 18, 2005 assessment noted that Plaintiff was still suffering "some ongoing symptoms [from the 1998 collision]. He feels he really hasn't improved."

In June 1999, Plaintiff had been back to work for approximately one month when he executed a general release in favor of Jones. For \$7,000 he released his personal injury claim

¹ Some of these documents are illegible and most are difficult to decipher.

(hereinafter “1999 settlement”). He was unrepresented in entering the settlement and brought no third party action against Jones. Importantly, Plaintiff did not obtain Liberty Mutual’s consent to the settlement prior to entering into it, as required by Worker’s Compensation Law §29(5).

Then, based upon a hearing held five months later on October 14, 1999, the Board found that Plaintiff suffered from a “Partial disability” for another 4.2 weeks. Within such decision the Board noted that “no further action” was planned on Plaintiff’s claim. In all, the Board found Plaintiff suffered from a “Temporary total” injury for 6.8 weeks and had a “Partial disability” for 14.6 weeks. As set forth in Liberty Mutual’s letter dated June 15, 1999, at that time Plaintiff’s total Worker’s Compensation award (indemnity and medical) was \$9,420.90.

Plaintiff now claims that the injury he sustained in 1998 continues to cause him “neck pain and pain radiating into both of [his] upper extremities with numbness and tingling in both of [his] hands... [and] chronic occipital headaches.” Plaintiff treats these conditions with Dr. Edward Scheid, who has noted the causal connection between the current symptoms and the 1998 collision. Dr. Scheid recommends “surgical intervention... anterior-posterior cervical fusion from C3 to C7.”

At issue in this proceeding is Liberty Mutual’s refusal to grant Plaintiff’s request to authorize such surgery. Based upon Plaintiff’s failure to obtain its consent to his 1999 settlement, Liberty Mutual has declined to pay for the requested surgery as a Worker’s Compensation benefit. The Board, at a hearing held on December 2, 2013, agreed. The hearing officer found for Defendants, noting that “if there is no consent, the [Worker’s Compensation] benefits are forfeited accordingly.”

As is well established, and applicable here, if “court approval of a settlement is not sought within three months of the date of settlement, a plaintiff seeking a *nunc pro tunc* order

must establish the reasonableness of the settlement, the lack of any fault or neglect in applying for approval and the lack of any prejudice to the carrier.” (Lindberg v Ross, 105 AD3d 1186, 1187 [3d Dept 2013]). “A reviewing court should also consider the length of the delay as an additional relevant factor.” (Taylor v Cont. Ins. Co., 9 AD3d 657, 658 [3d Dept 2004])

First, in waiting approximately fifteen years to make this application, the length of delay is extreme and requires denial. (Taylor v Cont. Ins. Co., *supra*).

Plaintiff also failed to demonstrate the reasonableness of his 1999 settlement. His allegation that the “\$7,000 release was substantially similar to the total value of defendant’s liability as of the June 1999 [settlement]” is wholly unavailing and ignores the continuing nature of Worker’s Compensation liability. Moreover, contrary to Plaintiff’s description of his settlement’s timing, his Worker’s Compensation claim was still pending when he entered the 1999 settlement. Such claim remained pending for another five months. While Plaintiff was back at work before he agreed to the settlement, his physical ailments were not resolved. Instead, according to his doctor at the time, he went back to work with a “partial mild to moderate disability.” In addition, because Plaintiff was out of work for approximately twenty one weeks after the 1998 collision, he arguably met Insurance Law §5102(d)’s “serious injury” threshold (a 90/180 day injury) to permit his commencing a “non-economic loss” action against Jones. (Insurance Law §5104). Within such action, because Jones rear ended Plaintiff’s stopped bus, Plaintiff had a “prima facie case of negligence” against Jones. (Grant v Nembhard, 94 AD3d 1397, 1399 [3d Dept 2012]). Despite such potential, Plaintiff offered no proof, expert or otherwise, analyzing the actual value of his claim against Jones. Without which, Plaintiff cannot establish the reasonability of his 1999 settlement.

Nor did Plaintiff demonstrate his lack of fault or neglect. Plaintiff readily admits that he was unrepresented when he entered the 1999 settlement. His affidavits implicitly acknowledge that he was unaware of his obligation to obtain Defendants' consent before entering the 1999 settlement. His attorney tellingly alleges that he "continue[s] to take action to remedy [Plaintiff's] misconstruction of the status of his Worker's Compensation case as it existed at the time of the [1999 settlement]." While Plaintiff's "misconstruction" may have been made in good faith, it neither provides a basis for this Court's *nunc pro tunc* approval nor demonstrates a lack of fault or neglect.

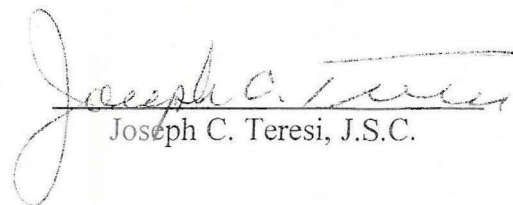
Lastly, Plaintiff failed to demonstrate a lack of prejudice. He offered no proof to demonstrate that Liberty Mutual's right to offset future payments will be covered by the 1999 settlement. Nor did he establish any connection between Liberty Mutual's lack of a Worker's Compensation lien at the time of the 1999 settlement, and his current claim.

Accordingly, the petition is denied.

This Decision and Order is being returned to the attorneys for the Respondent. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
June 25, 2014


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated April 1, 2014; Petition, dated October 3, 2013; Affidavit of Alex Dell, dated March 25, 2014; Affidavit of Edward Scheid, dated January 27, 2014, with attached Exhibits A-F.
2. Affirmation of William Ryan, dated April 18, 2014, with attached Exhibits 1-4.
3. Affidavit of Alex Dell, dated May 12, 2014; Affidavit of Glenn Weiler, dated May 13, 2014, with attached Exhibits G-Q.