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

Decided and Entered: October 29, 2026 CV-25-0750

In the Matter of the Claim of JASON McDONELL,
Respondent,
v

CJ BANACH INC. et al., MEMORANDUM AND ORDER
Appellants.

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: September 9, 2026

Before: Garry, P.J., Aarons, Pritzker, McShan and Mackey, JJ.

Morrison Mahoney LLP, New York City (*David H. Allweiss* of counsel), for appellants.

Dolce Panepinto, PC, Buffalo (*Holly L. Mannillo* of counsel) for Jason McDonell, respondent.

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

Garry, P.J.

Appeals (1) from a decision of the Workers' Compensation Board, filed March 26, 2025, which ruled, among other things, that the employer and its workers' compensation

carrier waived their defenses to the claim, and (2) from a decision of said Board, filed July 9, 2025, which denied the application of the employer and its workers' compensation carrier for reconsideration and/or full Board review.

Following a slip at work that resulted in a lower back injury, claimant filed a claim for workers' compensation benefits in December 2023. The employer and its workers' compensation carrier (hereinafter collectively referred to as the carrier) controverted the claim. Thereafter, the Workers' Compensation Board issued a notice of pre-hearing conference, advising the parties of the date of the upcoming conference. Claimant's counsel filed a pre-hearing conference statement 10 days before the scheduled conference and served the same upon the carrier. On that same day, the carrier's counsel filed a pre-hearing conference statement, raising several potential defenses, but failed to serve it upon claimant's counsel. At the conference, claimant argued that the carrier's defenses to the claim were therefore waived. The carrier acknowledged the error, allegedly stemming from confusion as to the name of the law firm of claimant's counsel, but asserted that the statement was nevertheless "timely filed and visible to all the parties" via the electronic case file. As relevant to this appeal, the Workers' Compensation Law Judge (hereinafter WCLJ) determined that the carrier's defenses were waived due to its failure to serve the pre-hearing conference statement and continued the case. Upon the carrier's application for Board review and claimant's rebuttal thereto, the Board upheld the WCLJ's determination. The carrier then filed an application for reconsideration and/or full Board review, which was rebutted and, ultimately, denied. The carrier appeals from both decisions.

Pursuant to Workers' Compensation Law § 25 (2-a) (a), "[i]n any controverted case, upon receipt of the notice of controversy, the [B]oard shall schedule a pre-hearing conference before a referee" and "shall give notice of the pre-hearing conference to all parties." Both that statute and the corresponding Board rule regarding pre-hearing conferences require that, "[i]n cases where the claimant is represented by an attorney or a licensed representative, [10] days before the conference, each party shall file a conference statement noting the specific issues in dispute" (Workers' Compensation Law § 25 [2-a] [d]; *see* 12 NYCRR 300.33 [d]). The Board's rules for controverted claims further provide that, "[10] days before the pre-hearing conference, the insurance carrier or its legal representative and legal representative of the claimant shall file with the Board *and serve on all other parties* a pre-hearing conference statement" (12 NYCRR 300.38 [f] [1] [emphasis added]). The same rule mandates that "[f]ailure by the insurance carrier to timely serve upon all other parties . . . the pre-hearing conference statement . . . shall result in a waiver of defenses to the claim," although "[t]here shall be no waiver if the

[WCLJ] finds, based on the affidavit of the insurance carrier's legal representative (or if the insurance carrier does not have a legal representative, then by the insurance carrier), that the conduct at issue was due to good cause and the insurance carrier exercised good faith and due diligence" (12 NYCRR 300.38 [f] [4]).

We disagree with the carrier's contention that the Board had discretion to suspend or modify the foregoing rules under these circumstances. "The mandatory nature of th[e pertinent rule's] language contrasts with the language used in the Board's other rules" regarding hearings, "which afford referees discretion and create exceptions to otherwise mandatory rules" (*Matter of Lazalee v Wegman's Food Mkts., Inc.*, 40 NY3d 458, 461 [2023]; *cf. People v Golo*, 26 NY3d 358, 362-363 [2015]; *Bear Pond Trail, LLC v American Tree Co., Inc.*, 61 AD3d 1195, 1196 [3d Dept 2009]). In view of this mandatory language, the Board had no discretion to disregard the carrier's failure to serve the pre-hearing statement upon claimant's counsel. The absence of prejudice to claimant also will not excuse the carrier's failure to serve claimant's counsel as "[s]uch conduct can only be excused where the legal representative of the insurance carrier submits an affidavit that the error was due to good cause and that the insurance carrier exercised good faith and due diligence" (*Matter of Love v Village of Pleasantville*, 161 AD3d 1477, 1478 [3d Dept 2018], *lv dismissed* 32 NY3d 1079 [2018]; *see* 12 NYCRR 300.38 [f] [4]; *Matter of Cerobski v Structural Preserv. Sys.*, 168 AD3d 1249, 1251 [3d Dept 2019]). Here, no such affidavit was provided. For the same reason, the carrier's argument that its purported substantial compliance with 12 NYCRR 300.33 should have excused its failure to serve the pre-hearing conference statement on claimant's counsel is unavailing. In sum, we see no reason to disturb the Board's finding that the carrier's defenses were waived.[1]

Based on the foregoing, we also find that the Board's denial of reconsideration and/or full Board review was neither arbitrary or capricious nor an abuse of discretion

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[1] The carrier's reliance on this Court's decision in *Matter of Evans v Northeast Logistics, Inc.* (227 AD3d 1246 [3d Dept 2024]), and similar cases, is misplaced. In *Matter of Evans*, we held that a necessary party that was not served with a carrier's application for Board review but was on notice and attended relevant hearings regarding such application was not prejudiced by the Board considering that application on the merits (*id.* at 1248). However, that case involved a different Board rule that provides that "failure to properly serve a necessary party shall be deemed defective service and the application for Board review *may* be rejected by the Board" (*id.* at 1247 [internal quotation marks, brackets and citation omitted]; *see also Matter of Greenough v Niagara Mohawk Power Corp.*, 45 AD3d 1116, 1117 [3d Dept 2007]).

(*see Matter of Shmulsky v Hudson Headwaters Health Network, Inc.*, 233 AD3d 1307, 1309 [3d Dept 2024], *lv denied* 44 NY3d 905 [2025]; *Matter of Snarski v New Jersey Mfrs. Ins. Group*, 20 AD3d 803, 804-805 [3d Dept 2005]). To the extent not otherwise addressed herein, the carrier's remaining arguments have been considered and found to lack merit.

Aarons, Pritzker, McShan and Mackey, JJ., concur.

ORDERED that the decisions are affirmed, with costs to claimant.

ENTER:



Robert D. Mayberger
Clerk of the Court