

Judge Affirms Denial of Claim Petition and Dismisses Allegation of Ineffective Assistance of Counsel

In an unreported decision from the Appellate Division (*Melendez v. Burger King*, decided on June 23, 2021), the court affirmed the decision of the Judge dismissing the petitioner's Claim Petition finding that she lacked credibility and did not prove she sustained an injury that arose out of and during the course of her employment. They also dismissed her argument that her case should be reversed and remanded due to ineffective assistance of counsel.

The petitioner filed a claim on June 1, 2017, alleging that she injured her back on December 31, 2016. She went on vacation the day after the injury and returned on January 8th and, at that time, first reported the injury to her supervisor.

The claim was denied, and the trial commenced pursuant to a motion filed for medical and temporary benefits. The parties agreed to a "bifurcated" trial to allow the Judge to assess compensability before moving forward with respect to any allegation of permanent injury. This strategy and procedure is one we wholeheartedly recommend and support under similar circumstances.

The trial took place over three days with the petitioner testifying and two witnesses from the employer. Significantly, the general manager of the restaurant testified that the petitioner's work log demonstrated that she had not worked on December 31, 2016, and further that the petitioner had complained to him repeatedly about her back since she began to work at the restaurant in August of 2016. She told the manager that her back problems had "nothing to do with business."

Under the circumstances, the Judge dismissed the petitioner's claim noting that she was not credible and found the general manager to be credible.

Interestingly, the petitioner argued on appeal that the judge's decision should be reversed not only since she had proven compensability, but also since she was "poorly and ineffectively" represented by counsel.

Among other things, she complained that her counsel failed to recommend an interpreter until after her claim was denied. It was also interesting on appeal that the petitioner asserted for the first time that she was actually injured on December 24, 2016, and not December 31st.

On appeal, the Appellate Division first reviewed the case law confirming that with respect to decisions based upon credibility, deference is to be provided for the decision of the Judge so long as the findings could have been reached on sufficient credible evidence present in the record.

The court next turned to the allegation of ineffective assistance of counsel and stated that this basis for appeal was inapplicable to a workers' compensation case where a party does not have a constitutional right to counsel. Additionally, the court noted the petitioner never requested a translator during the trial and never indicated she did not understand the questions posed to her based on a language barrier. The court found nothing "extremely prejudicial" regarding the general manager's testimony which contradicted that of the petitioner **and petitioner's co-employee** and was corroborated by business records clearly establishing the petitioner was not at work on the date of the alleged injury. They also rejected the petitioner's attempt to change her testimony as to the date of injury and that this attempt was not the basis for a reversal.

Comment: The basic tenet that a judge's decision will not be reversed absent an abuse of discretion and so long as there is sufficient credible evidence to support the judge's decision was confirmed once again in this decision. What was somewhat unique is the allegation of ineffective assistance of counsel which the court

06.28.21



summarily dismissed as inapplicable to workers' compensation matters. Additionally, the attempt to change the facts of the case including the date of injury on appeal is not going to be a successful basis for appeal when there was ample opportunity during the course of a trial to present that evidence.