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Supreme Court, Appellate Division, Third Department, New York

In the Matter of DONALD MCANDREWS, Appellant  
v.

BUFFALO SEWER AUTHORITY, Respondent  
and  
WORKERS' COMPENSATION BOARD, Respondent

April 25, 2019

Facts: The claimant alleged a slip and fall involving the knees and ankles. His accident report only listed the the right ankle and knee, though the C-3 listed both knees and ankles. The carrier failed to file a timely notice of controversy. The judge found the notice was untimely filed and precluded the carrier from raising any defense, except for contesting causal relationship, under WCL § 25(2)(b). The claimant testified he reported an injury involving both knees and ankles to his doctor. He additionally believed he claimed both knees and ankles in his accident report, though he could not explain why the accident report only listed the right knee and ankle. The carrier raised WCL § 114-a based on the discrepancy, which the judge denied. The judge additionally denied further questioning regarding § 114-a pursuant to the prior ruling regarding § 25(2)(b). The Board Panel affirmed.

Holding: Affirmed.

Discussion: The Third Department noted the carrier was prohibited from offering testimony to dispute the claimant's testimony regarding causation based on its untimely fling of its notice of controversy. The claimant still bore the burden of demonstrating causal relationship, which was done in this case based on the claimant's undisputed medical evidence. Additionally, the incident report appeared to have been altered by someone with different handwriting. The claimant testified he

thought he put down both knees and ankles on the incident report. The Board credited the claimant's testimony and there was no basis to disturb the decision. The carrier additionally raised the issue of cross-examination of the treating physician for the first time in its appeal to the Third Department and the Third Department found the issue was not preserved for review.

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