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Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of Alastair KENNEDY, Appellant,  
v.  
3RD TRACK CONSTRUCTORS et al., Respondents  
WORKERS' COMPENSATION BOARD, Respondent.

February 2, 2023

Facts: This had been an accepted claim for injuries to the claimant's left foot and ankle. The claimant raised additional sites of injury of the left shoulder and neck which were not accepted. Following litigation on the additional sites, the Law Judge found the claimant's testimony regarding how the accident occurred and prior injuries was not credible and disallowed the claim for the neck and left shoulder. The Judge further found that the claimant's misrepresentations were sufficiently egregious to warrant both the mandatory and discretionary penalty under WCL Section 114-a. The Board affirmed these findings.

Holding: *Reversed in part.*

Discussion: With regard to the additional sites of injury, the Court noted that the Board is empowered to make factual determinations on causal relationship and has broad authority to resolve credibility of witnesses and draw reasonable inferences from the evidence in the record. The Court found that the Board's decision was supported by substantial evidence, and so would not be disturbed. The Court found it relevant that the claimant's testimony was that he had fallen into a gap that was two feet wide and fell all the way down to his armpits, having to be pulled out by his coworkers. The testimony presented by the coworkers had contradicted that, stating the hole six to twelve inches wide, the claimant only had one leg at most fall into it, and he got up on his own. Photographs of the gap were in the record, and the Board was entitled to credit the testimony of the coworkers.

The claimant had also failed to disclose prior neck and left shoulder injuries to the doctors who gave opinions in the case.

The Court had also upheld the Board's determination that the claimant violated Section 114-a, again noting that the record supported the Board's determination that the claimant was misrepresenting the size of the gap and failure to disclose his prior injuries.

However, the Court reversed the finding of a total disqualification from future indemnity benefits. The Court noted that this finding is only appropriate where the underlying deception was egregious or severe, or there was a lack of mitigating circumstances. In this case the Court stated that the total disqualification was "so disproportionate to the offense as to be shocking to one's sense of fairness." They did not elaborate further.

Stewart, Greenblatt, Manning & Peck