

STEWART, GREENBLATT, MANNING & BAEZ

MADGE E. GREENBLATT (RET.)
ROBERT W. MANNING
RICARDO A. BAEZ
DAVID J. GOLDSMITH
PETER MICHAEL DeCURTIS
LAURETTA L. CONNORS
LISA LEVINE
ANDREA L. De SALVIO
KRISTY L. BEHR
RAYMOND J. SULLIVAN
LUKE R. TARANTINO
THOMAS A. LUMPKIN
DIANE P. WHITFIELD

ATTORNEYS AT LAW
6800 JERICHO TURNPIKE
SUITE 100W
SYOSSET, NY 11791
516-433-6677
FAX 516-433-4342

DONALD R. STEWART (1949-2021)
KAFI WILFORD (2003-2010)
MICHAEL H. RUINA (1992-2016)
JAMES MURPHY
OF COUNSEL

Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of Justo RIOS, Respondent,
v.
ROCKAWAY CONTRACTING CORP. et al., Appellants
WORKERS' COMPENSATION BOARD, Respondent.

February 9, 2023

Facts: This had been a controverted claim that was established with Rockaway Contracting Corp. found to be the proper employer. That decision was appealed to the Board Panel, with affidavits from the president and foreman of Ibanez as new evidence, alleging the claimant was an employee of Ibanez. The Board declined to review this new evidence as no explanation was provided to why it couldn't be produced at the hearing. The decision was affirmed, and the employer then filed an Application for Full Board Review which was denied. The employer then appealed only the denial of Full Board Review to the Appellate Division.

Holding: *Affirmed.*

Discussion: Since the employer had only appealed the denial of Full Board Review, the merits of the claim were not before the Court. The issue before the Court was limited to whether the Board's denial was arbitrary and capricious, or otherwise constitutes an abuse of discretion. The Court noted that under the Board's regulations a party seeking to admit new evidence on appeal must submit a sworn affidavit setting forth why it could not have been presented to the Law Judge. Here the explanation provided was that they were unable to obtain the evidence before the hearing, but the Board found that not to be a credible explanation given that Ibanez had been identified as a potential employer 7 months before the hearing where the Law Judge made that decision. The Court agreed

that the employer failed to sufficiently explain why the evidence could not have been produced and found no abuse of discretion.

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