

STEWART, GREENBLATT, MANNING & BAEZ

DONALD R. STEWART (RET.)
MADGE E. GREENBLATT
ROBERT W. MANNING
RICARDO A. BAEZ
DAVID J. GOLDSMITH
PETER MICHAEL DeCURTIS
LAURETTA L. CONNORS
JOHN K. HAMBERGER
LISA LEVINE
ANDREA L. De SALVIO
KRISTY L. BEHR
LUKE R. TARANTINO
THOMAS A. LUMPKIN
JONATHAN SO

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

KAFI WILFORD (2003-2010)
MICHAEL H. RUINA (1992-2016)

RAYMOND J. SULLIVAN
MONICA M. O'BRIEN
MARY ELLEN O'CONNOR
JAMES MURPHY
OF COUNSEL

Supreme Court, Appellate Division, Third Department, New York

In the Matter of MAREK CEROBSKI, Claimant
v.
STRUCTURAL PRESERVATION SYSTEMS, et al, Appellant
and
WORKERS' COMPENSATION BOARD, Respondent.

Decided January 17, 2019

Facts: The claimant filed a claim for benefits. The carrier failed to file a pre-hearing conference statement and at the hearing only raised issues of causal relationship. The Board affirmed the Law Judge's decision that the carrier was precluded from raising defenses because it failed to file the pre-hearing conference statement, and the case remained established. In addition, the Board refused to consider the carrier's arguments regarding the claimant's alleged violation of WCL Section 114-a, as it was raised for the first time in the appeal. However, it indicated that the carrier could seek to litigate the issue later, after showing why it failed to make this allegation in a timely manner.

At a subsequent hearing scheduled on another issue, the carrier raised the fraud issue again. The Law Judge found that the issue could be litigated. After the testimony was complete, the claimant was found to have violated WCL Section 114-a and was barred from future indemnity payments. On appeal by the claimant, the Board found that the carrier could not relitigate the issue of accident and notice and further that the carrier had failed to make an offer of proof regarding why it had not timely produced witnesses to testify on the fraud issue. It also found that there were insufficient grounds to justify the fraud finding. This appeal ensued.

Holding: Affirmed.

Discussion: Under WCL Section 25 (2-a) (d), if the carrier does not file the pre-hearing conference form 10 days before first hearing, it cannot raise any defenses. Accordingly, the carrier was properly precluded from raising defense to the establishment of the claim and the untimely raised fraud defense. Also, while the Board had indicated that, if the carrier showed that it acted diligently and could provide a good excuse why the pre-hearing conference statement was not filed, why the witness statements regarding the fraud issue were not submitted earlier, or why the witnesses were not identified on the pre-hearing conference statement, it may be able to avoid preclusion of these issues, it did not do so.

Stewart, Greenblatt, Manning & Báez