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Supreme Court, Appellate Division, Third Department, New York

In the Matter of

THE CLAIM OF DAVID SWIECH, Appellant

v.

CITY OF LACKAWANNA, ET AL, Respondent

and

WORKERS' COMPENSATION BOARD, Respondent

July 3, 2019

Facts: The claimant appealed a decision of the Workers' Compensation Board which ruled that the claimant violated Section 114-a and disqualified the claimant from receiving future indemnity benefits and also appealed from a decision of the Board filed June 20, 2018 which denied the claimant's Application for Full Board Review.

The claimant sustained an injury to the neck in 2007 while performing firematic duties and also had a prior established injury to his back in the 2000. The claimant underwent cervical fusion surgery and retired and in 2010 he had lumbar surgery. In 2016, the issue of permanency and apportionment was addressed. The carrier secured an IME and a functional capacity evaluation was performed. Depositions were completed as well. The carrier then disclosed the existence of an investigation at a hearing in November 2016. The claimant gave testimony and the carrier raised the issue of a violation of Section 114-a. After completing testimony of the claimant and after viewing the testimony and surveillance video, the Judge concluded the claimant did not violate Section 114-a. The Board Panel concluded, upon its review, the claimant had violated Section 114-a and imposed a mandatory penalty and permanently disqualified the claimant from receiving future wage replacement benefits. A dissenting Panel Member agreed the claimant violated Section 114-a but would not have imposed a discretionary penalty of permanent disqualification. The Full Board Denied the claimant's

Application for Full Board Review based upon a failure to comply with governing regulations, specifically 12NYCRR 300.13.

Holding: Both decisions affirmed.

Discussion: The Court went through a thorough review of the record as developed on the issue of a violation of Section 114-a. The Court noted that 114-a provides that if a claimant knowingly makes a false statement or representation as to a material fact shall be disqualified from receiving any compensation directly attributable to such false statement or representation. The Court noted that a finding of a violation of Section 114-a would not be disturbed if supported by substantial evidence. In the case at bar, the Court looked at the functional capacity evaluation that the claimant had undergone wherein the evaluator concluded that the claimant was unable to lift or carry any weighted objects and could not pick up any objects from floor level. The claimant also was unable to kneel, crouch, reach for an object or complete any of the balance tasks. There was limited lumbar flexion and a presentation that the claimant was unable to lift overhead due to restrictions in range of motion. The functional capacity evaluator found the claimant had marked functional limitations regarding the cervical and lumbar spine and was capable of less than sedentary physical demands. The Court noted the surveillance video taken on three separate dates in November 2016 showed the claimant getting in and out of his truck, driving and walking around stores and his property without any apparent difficulty as well as carrying floor boards into and out of the store. The claimant was seen repeatedly bending over at the waist to inspect merchandise and remove items from low store shelves. The claimant was also seen placing objects including floor boards and boxes on the floor, bending over and picking the box up from the floor and things of that sort. The claimant was seen getting down on his knees twice and then on one knee and one foot. The Court found that significantly feigning the extent of disability and pretending to be unable to perform most tasks and body movement for the purpose of influencing any determination regarding Workers' Compensation benefits constitutes false representations of material facts within the meaning of Workers' Compensation Law, Section 114-a. The Court noted the misrepresentation need not affect the dollar value of an award to be material. The Court found the Board's finding that the claimant had made false representations regarding material facts were supported by substantial evidence. The Board also adequately explained the reason for disqualifying the claimant from receiving future benefits.

The Court then addressed the claimant's argument that the Board abused its discretion in denying the Application for Full Board Review based upon non-compliance with rules governing the content of such applications. The Court noted that the Board's regulations noted that an Application for Full Board Review shall be in the format as prescribed by the Chair [of the Board] and where, as here, the appealing claimant is represented, the forum must be filled out completely by the Appellant. The Court noted that coversheets, specifically the RB-89.2 and RB-89.3 had been designated as the proper forms for Applications for Reconsideration/Full Board Review and Rebuttals. The Court also recognized certain Subject Numbers in its decision, specifically Subject Number 046-940 and

noted that the applications must be filled out completely. The Court noted the RB-89.2 filed by the claimant was not filled out completely as it merely stated under Question Number 14 asking for a description of the basis of Appeal to “see attached brief” with no grounds or explanation on the form itself. The Court found the Board did not abuse its discretion in denying the Application for Full Board Review. The Court noted the Application for Full Board Review was filed on December 21, 2017 which is over a year after the adoption of the revised governing regulations and almost eight months after Subject Number 046-940 was issued. The Court was not persuaded by the claimant’s argument that the decision in *Matter of Johnson v. Alltown Cent. Transportation Corp.*, (165 A.D.3d 1574, 1575 [2018]) is analogous or warrants a contrary finding here.

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