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Supreme Court, Appellate Division, Third Department, New York

In the Matter of RICHARD MAFFEI, Respondent,

v.

RUSSIN LUMBER CORP. et al., Appellants,

WORKERS' COMPENSATION BOARD, Respondent.

January 19, 2017

Facts: The case was established for occupational disease of asthma and consequential atrial fibrillation in 2010. In 2013, expedited hearings were ordered for issues of permanency. In a September 4, 2013 hearing notice, parties were advised claimant was scheduled to testify at the September 25, 2013 hearing and that there would be no adjournment, or continuance unless of an emergency. At said hearing employer and carrier provided notice of video surveillance and the claimant testified as to daily activities and medical limitations. Following the testimony, the carrier requested a continuance to produce video surveillance which depicted claimant in activities that he had been cross-examined on. The WCLJ denied that adjournment, finding that the medical evidence established claimant was totally disabled. In the decision issued, the claimant was classified with a permanent total disability, awarded compensation and the carrier's request was formally denied. The Board modified the ruling on the carrier's appeal and rescinded the classification and found that the video surveillance should've been admitted into the record. Upon the mandatory Full Board review the WCLJ's decision was upheld finding that there was no emergency to justify a continuance, instead the carrier should've brought the video surveillance to the scheduled expedited hearing.

Holding: *Affirmed.*

Discussion: The Court outlined the facts that supported the Board's finding. All parties were notified in advance of the expedited hearing and adjournments would only be granted for emergency's. The record reflects that it was the carrier's choice to not bring the video to the hearing. In addition, to not having a valid exception to the no-adjournment rule for expedited hearings, the adjournment request also lacked the required affidavit. Further, the carrier's argument that such preclusion prejudiced them from raising §114-a was waived by them, for in both the hearing record and the administrative appeal the carrier stated that it was not raising §114-a. The Court found that the Board did not abuse its discretion and the carrier was not deprived of its due process.

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