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SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT, NEW YORK

Matter of Portlette, Claimant

v.

MABSTOA, Appellant

Workers' Compensation Board, Respondent

Decided March 22, 2018

Facts: Claimant reported she sustained multiple injuries after a bus backed into the bus she was standing in, while preparing to start her shift. The employer initially accepted the claim but then raised fraud under § 114-a after producing surveillance video from the bus and of the claimant's daily activities. After reviewing the video, the carrier's consultant revised his opinion and found no causally related injury. The Board credited the carrier's consultant's testimony, found a violation of § 114-a, and disallowed the claim. The Board Panel affirmed. Claimant appealed.

Holding: Affirmed.

Discussion: The Court rejected the claimant's argument that the carrier's consultant's testimony should not have been considered for failure to file a notice of controversy. The claimant never raised the issue and proceeded with deposition testimony following the production of the surveillance video. The employer had "good cause" and a reasonable excuse for not filing a notice of controversy, namely, the claimant's misrepresentation. The Court did not consider the claimant's argument that the surveillance video was not properly authenticated because it was not raised at the Board level. The Court found no basis to disturb the Board's determination that the carrier's consultant, who had actually seen the surveillance video, was more credible.