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Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of Brian DUNLEAVY, Respondent,
v.

FEDERATED FIRE PROTECTION (TURNER CONSTRUCTION), Appellant,

WORKERS' COMPENSATION BOARD, Respondent.

March 11, 2021

Facts: The claimant had an established claim. On both a questionnaire and in his testimony, he indicated that he had no range of motion in his neck and did not engage in any recreational or home maintenance activities. He also stated that he had not worked at all.

When he was questioned after the carrier raised a violation of WCL§114-a he testified that he was unsuccessful in his attempts to play golf post-surgery and was unable to finish 18 holes. He also testified that he did not perform any chores or housework around his home in Florida or "too much" at the house where he summered on Fire Island. He also admitted to being a volunteer fighter. However, surveillance showed him playing 18 holes of golf, carrying his golf bag on his shoulder, squatting, bending, using power tools, and dragging a large tree branch.

The Lase Judge found a 65% LWEC and a violation of WCL§114-a. The mandatory penalty was forfeiture of the benefits for the period from the first IME until the hearing and a discretionary \$10,000 penalty. On appeal, the Board Panel modified the penalty to be a period equal to the mandatory penalty if the claimant ever reattached to the labor market. The carrier appealed arguing for a discretionary permanent forfeiture of benefits.

Holding: *Affirmed.*

Discussion: The Court's review of the Board's disposition of a discretionary penalty under WCL §114-a is limited to instances when the Board's penalty was an abuse of discretion, which was not the case here.

Also, the Court deferred to the Board with respect to the extent that the activities in which the claimant was observed recording factored in to his LWEC.

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