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In the Matter of MATTHEW D. POLIZZANO, Appellant

v.

MEDLINE INDUSTRIES et al, Respondents

and

WORKERS' COMPENSATION BOARD, Respondent

May 23, 2022

Facts: Appeal from a Decision of the Workers' Compensation Board which concluded that the claimant had waived the opportunity to testify on Section 114-a issues and suspended the payments of indemnity benefits pending further action under Workers' Compensation Law Section 114-a issue.

This was an established case w injuries to the thoracic spine, lumbar spine and left hip which was accepted and for which indemnity benefits and medical was paid. The Workers' Compensation carrier conducted and disclosed that surveillance was obtained of the claimant and at a hearing in October, 2020 raised the Workers' Compensation Law Section 114-a issue requesting a hearing and requesting that indemnity benefits be suspended pending the hearing, The claimant objected to the discontinuance of benefits and requested that he be provided with any and all documentation of the surveillance including investigative reports and video prior to his testimony. The claimant's request for the investigative documentation prior to his testimony was denied, however, benefits were continued, and the case was scheduled for the claimant's testimony.

At the hearing scheduled for the claimant's testimony, the claimant refused to testify and again requested that he be provided with the surveillance documentation. The request was once again denied at which point the claimant refused to testify and invoked the Fifth Amendment privilege against self-incrimination. The Judge concluded that the claimant waived the opportunity to testify and suspended the indemnity benefits pending further action under Workers' Compensation Law Section 114 issue. The Board Panel affirmed the Law Judge's Decision and continued the case for the resolution of the Section 114-a violation issue requiring that the surveillance material be submitted and providing for the testimony of the investigator or other suitable person to authenticate the material. The claimant's testimony was considered waived. The claimant appealed to the Appellate Division.

Holding: *The Court noted that the Board Decision is interlocutory since it did not dispose of all substantive issues or threshold issues. Accordingly, the appeal was dismissed in accordance with the applicable law.*

Discussion: Since the Board's Decision was considered interlocutory, the Court did not address the issues at hand. The Judge and the Board properly denied the request for the surveillance documentation in accordance with the applicable law which requires the claimant's testimony before releasing the surveillance documents and video to the claimant and claimant's attorney. We anticipate that consistent with the Board Panel Decision, the case will be restored to the calendar for the production of the surveillance documentation and for the testimony of the investigator at which point the Workers' Compensation Law Judge will render a decision which will again be subject to possible appeal to the Full Board and/or the Appellate Division.