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Supreme Court, Appellate Division, Third Department, New York

Matter of RICHARD LOVE, respondent,
v
VILLAGE OF PLEASANTVILLE, et. al, Appellants,
and
WORKERS' COMPENSATION BOARD, Respondent.

Decided May 24, 2018

Facts: Claimant alleged a work-related MVA, and the carrier controverted the claim. The pre-hearing conference statement was served on claimant and on a law firm that did not represent claimant. Claimant's counsel filed with the WCB, and served upon the carrier, a notice of retainer. A notice of a scheduled pre-hearing conference date was sent to the parties, and indicated that a copy was sent to claimant's counsel, and further listed his address. The carrier did not file an amended pre-hearing conference statement until the day before the pre-hearing conference. The pre-hearing conference statement was again sent to a law firm that did not represent the claimant. The Board found that the carrier waived its defenses, and carrier appealed.

Holding: *Affirmed.*

Discussion: WCL §25(2-a)(d) requires that a PH16.2 be filed 10 days prior to the pre-hearing conference. Failure to do so shall result in a waiver of defenses to the claim. Here, not only was the amended PH16.2 not filed within the requisite statutory time period, but the carrier also did not serve claimant's counsel with either the PH16.2 nor attempt to correct its erroneous service upon the wrong law firm. Such conduct can only be excused where the legal representative of the insurance carrier submits an affidavit that the error was due to good cause and that the insurance carrier exercised good faith and due diligence. Here, no such affidavit

was submitted. Accordingly, there is no basis to disturb the Board's finding that the carrier waived its defenses by failing to properly serve claimant's counsel.

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