

STEWART, GREENBLATT, MANNING & BAEZ

ATTORNEYS AT LAW

6800 JERICHO TURNPIKE

SUITE 100W

SYOSSET, NY 11791

516-433-6677

FAX 516-433-4342

DONALD R. STEWART (RET.)
MADGE E. GREENBLATT
ROBERT W. MANNING
RICARDO A. BAEZ
DAVID J. GOLDSMITH
PETER MICHAEL DeCURTIS
LAURETTA L. CONNORS
JOHN K. HAMBERGER

LISA LEVINE
ANDREA L. De SALVIO
KRISTY L. BEHR
LUKE R. TARANTINO
THOMAS A. LUMPKIN
JONATHAN SO

KAFI WILFORD (2003-2010)
MICHAEL H. RUINA (1992-2016)

RAYMOND J. SULLIVAN
MONICA M. O'BRIEN
MARY ELLEN O'CONNOR
OF COUNSEL

Supreme Court, Appellate Division, Third Department, New York

Matter of BRYON J. MURTHA, Appellant

v

VERIZON NY INC. et. al, Respondents

and

WORKERS' COMPENSATION BOARD, Respondent

and

GREY AND GREY, LLP, Appellant.

Decided May 17, 2018

Facts: Claimant was slipped and fell on ice working as a service technician. The claim was established for injuries to the neck, left shoulder and lower back. The claimant's physician filed a request to perform total disc replacement surgery on the cervical spine, which the carrier denied based upon its consultant's opinion. Depositions were directed. Despite the fact that the treating physicians were subpoenaed, the carrier's consultant was the only one to appear for testimony. The Law Judge denied the request for surgery and assessed a penalty under §25 (3)(c) against the claimant's attorneys noting that the attorney presenting summations for the firm purportedly mischaracterized the consultant's testimony. The claimant and the attorneys appealed and the denial of the surgery was Affirmed but the decision was modified to the extent of which section of the law under which the penalty was imposed upon the attorney finding that the penalty should have been imposed pursuant to §114-a(3)(i). The claimant's attorneys again appealed.

Holding: Modified to the extent that the penalty assessed against the claimant's attorneys is Reversed.

Discussion: Attorneys argue that they were being punished for the failure of the claimant's physicians to comply with the subpoenas. Attorneys further argue that even if the imposition of a penalty was appropriate §114-a(3)(i) does not authorize the Board

to assess a penalty against a party's counsel. The Appellate Division agreed there was no proper statutory authorization to impose the penalty. Proper statute would have been §114-a(3)(ii). The Court went on to further note that had the Board used the proper statute it still would not have agreed that a penalty was appropriate here and agreed that the real issue was that the attorneys should not be penalized for the doctors' failure to appear for testimony.

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