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Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of Anibal BARROS, Claimant,

v

JOHN P. PICONE, INC., et al., Appellants

and

Workers' Compensation Board, Respondent

November 12, 2020

Facts: The employer and its workers' compensation carrier produced surveillance videos depicting claimant's activities over the course of 10 days and raised the issue of whether claimant had misrepresented the extent of his medical impairment in violation of Workers' Compensation Law § 114-a. The Board found that claimant had violated § 114-a by misrepresenting his physical condition as totally disabled to physicians and when he testified. The Board imposed a mandatory penalty disqualifying claimant from receiving benefits for a period of a total of 10.6 weeks and imposed a discretionary penalty equal to the amount of the mandatory penalty, to be deducted from future award payments.

Holding: *Affirmed.*

Discussion: To the extent that the carrier challenged the adequacy of the discretionary penalty, the Court held that judicial review of an administrative penalty is limited to whether the penalty constitutes an abuse of discretion as a matter of law and, as such, a penalty must be upheld unless it is so disproportionate to the offense as to be shocking to one's sense of fairness, thus constituting an abuse of discretion as a

matter of law. After reviewing all the evidence and considering the nature and extent of claimant's misrepresentations, the Court found that the discretionary penalty was so disproportionate to the offense as to constitute an abuse of discretion as a matter of law.

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