

STEWART, GREENBLATT, MANNING & BAEZ

**ATTORNEYS AT LAW
6800 JERICHO TURNPIKE**

**SUITE 100W
SYOSSET, NY 11791**

**516-433-6677
FAX 516-433-4342**

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

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

**DONALD R. STEWART (RET.)
MADGE E. GREENBLATT (RET.)
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**

Supreme Court, Appellate Division, Third Department, New York

Matter of JAMES K. HORN, Appellant,
v
NEW YORK CITY TRANSIT AUTHORITY, Respondents.
and
WORKERS' COMPENSATION BOARD, Respondent.

October 1, 2020

Facts: The claim is established for injuries to the back, knees and left ankle. Claimant attended multiple Independent Medical Examinations, and in the accompanying questionnaire forms, he indicated that he had not "worked in any capacity for any employer, self-employment or for pay or as a volunteer." The claimant gave 114-a testimony, and then the case appeared in front of a different Judge for a decision based upon the unavailability of the Judge who heard the claimant's testimony. The Judge found a WCL Section 114-a violation based upon the claimant's operation of a garden supply business. The Board affirmed and levied a discretionary lifetime penalty against future wage replacement benefits. Claimant appealed.

Holding: *Affirmed.*

Discussion: Initially, claimant contends that the replacement of the WCLJ who initially presided over the proceedings with a second WCLJ who completed the hearing and rendered the decision constitutes a violation of Workers' Compensation Law Section 20 (1). Here, the record reveals that the original WCLJ was not available to conduct the ultimate hearing, there had been numerous hearings in this case and the case had been reassigned to the second WCLJ "for a good cause in order to deliver a timely decision." The second WCLJ reviewed the minutes of the prior proceedings and rendered an expeditious decision. Under these circumstances, there was no violation of the statute.

Claimant also argued that he did not make a material misrepresentation. Here, claimant represented on the daily activities questionnaires that he had not worked in any self-employment or otherwise. However, the documentary evidence and the testimony of the individuals who were investigating the claim establish that claimant had a garden supply business that was active during the time that he was receiving benefits. In fact, claimant admitted that he had such a business, but stated that he did not disclose it because the employer did not ask, and he did not understand the question on the daily activities questionnaire. As such the finding of a 114-a violation based on substantial evidence and the Board's determination of witness credibility and will not be disturbed.

Stewart, Greenblatt, Manning & Back