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Supreme Court, Appellate Division, Third Department, New York

Matter of LYDIA NIKAC, appellant,

v

JOAL RESTAURANT CORP., et al., respondents.

and

WORKERS' COMPENSATION BOARD, Respondent.

Decided October 1, 2020

Facts: The claimant sustained injuries in 2014 while working as a bartender. She stopped bartending but reported to her orthopedist that she engaged in self-employment running a dog walking business. In late 2015, claimant requested a hearing to address reduced earnings; however, when the case came on for a hearing, her 2015 tax returns were not yet available, so the judge held the period of May 31, 2015 to December 31, 2015 in abeyance on the issue of possible reduced earnings. As of January 1, 2016, the claimant stopped working and so she was awarded benefits at the temporary total rate. At a hearing held in April 2017, the claimant testified that she did not do any work since December 2015 and did not continue the dog walking business after that. Accordingly, the Judge awarded the claimant a reduced earnings award for 2015, and from December 31, 2015 to the date of the hearing, awards were directed at the total rate.

The case was continued for permanency, and at a hearing held in June 2018, the carrier raised a violation of WCL Section 114-a based upon her failure to disclose her ongoing business activities with respect to the dog walking business. During the proceedings that followed, documentary evidence was presented, and testimony was taken from various witnesses on this issue. The Judge found no WCL 114-a violation. The carrier appealed, and the Board reversed, finding the

claimant was subject to both a mandatory penalty as well as a discretionary lifetime penalty. Claimant appealed.

Holding: *Reversed.*

Discussion: Here, the carrier conducted an investigation into claimant's activities, specifically with respect to the dog walking business, to ascertain if she was working while receiving benefits. An Internet search of various social media sites revealed that the business was still active and had received customer reviews as well as posts on Facebook. The business was registered with the Department of State and maintained current workers' compensation insurance coverage. The webpage for the business, however, was not active. Moreover, claimant was not recorded on any surveillance videotape walking dogs or doing work associated with the business. Furthermore, the investigators were unable to locate a physical address for the business or ascertain if claimant received compensation. According to an investigative report, when a telephone call was made to the business, claimant answered and stated that she did not walk the dogs, but had employees who did, and proceeded to convey information on the services provided. In addition, the senior investigator testified that when he sent an email to the business posing as a prospective customer, he received a reply signed by claimant offering to give him more information on the services provided. Claimant testified at a November 2018 hearing that she initially opened the business and is still an owner but is not involved in the dog walking activities. She stated that the business is run by her brother and explained that when the investigator called, she answered the phone on behalf of her brother, but did not otherwise answer calls to the business. She further stated that an automated reply with her signature was sent in response to the investigator's email. Claimant's brother corroborated her testimony.

The Court found that the record did not establish that the claimant knowingly made a materially false statement to influence her claim. There is no evidence she actively participated in the business after she began receiving benefits at the temporary total rate. Moreover, there is nothing indicating that the claimant attempted to hide the business. The Board's decision was not based upon substantial evidence and must be reversed.