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State of New York Supreme Court, Appellate Division  
Third Judicial Department  
In the Matter of the Claim of

Michael Linane, Claimant,

v.

Gristede's Food Inc. et al., Appellants,  
Workers' Compensation Board, Respondent

October 3, 2024

Facts: The claimant filed a claim in 2019 which was established for exacerbation of prior injuries to his neck and back. The claimant had prior claims involving the neck in 2014 and 2017 and his back in 2012. While permanency was being litigated in January 2022, the carrier raised § 114-a alleging the claimant misrepresented his physical abilities. Video surveillance was produced ranging between April 2021 and October 2021. All video surveillance dated prior to June 28, 2021, was precluded by the Law Judge based on the failure by the carrier to timely disclose the video evidence. The Law Judge later found the claimant did not violate § 114-a and awards were continued at a tentative rate. The case was continued to address permanency and apportionment. On appeal, the Board found the carrier properly disclosed the surveillance and admitted all the video evidence. However, the Board affirmed the Law Judge's decision finding the claimant did not violate § 114-a and continued the claimants awards at a TR rate. Full Board Review was requested by the carrier and denied. The carrier then appealed both the Board Panel Decision as well as the denial of Full Boar Review.

Decision: *Affirmed.*

Discussion: The claimant testified to being able to take out garbage, grocery shop with his spouse, drive his children to and from the bus stop, swim to a certain extent, remove snow when necessary and do routine home maintenance. However, the claimant maintained not being able to lift anything over 20 lbs. The claimant's doctor was unaware of the claimant's daily activities. His doctor testified the

claimant was capable of driving, grocery shopping, raking leaves, walking, swimming, using a stationary bike, lifting up to 10 lbs. frequently and 20 lbs. occasionally. The claimant was restricted to sedentary work by his doctor. The carrier's consultant testified the claimant reported being unable to lift anything heavy. The claimant was found to have a 75% disability by the carrier's consultant. A second consultant for the carrier had found a 50% disability and assessed a light work capacity. The video surveillance of the claimant depicted him driving or sitting in his vehicle. The claimant was also recorded lifting small and light items in and out of his car. There was additional video of the claimant seemingly doing yardwork. However, the view of the claimant was obscured by a fence with only his shoulders and head visible. In one clip, the claimant was lifting bags of soil outside a home improvement store. At one point he stopped and grabbed his shoulder. When he arrived home, another individual helped him get the bags out of his vehicle. An investigator testified that bags of soil weigh around 40 lbs. but admitted he did not lift the specific bags seen in the video or otherwise observe their weight.

The Court affirmed the Boards finding that the claimant did not violate § 114-a. While they noted the lifting of the soil was more strenuous in nature it was not so inconsistent with the claimant's limitations to constitute a material misrepresentation. Additionally, the claimant's downplaying of his abilities on an intake form did not establish a deliberate misrepresentation in the furtherance of seeking benefits under the WCL.

With regard to the Carriers application for Full Board Review, the court found the full Board did not err in affirming the decision as the carrier did not make a showing of 1. Newly discovered evidence, 2. A material change in condition, or 3. That the Board improperly failed to consider the issues raised in the carrier's application for review.