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Supreme Court, Appellate Division, Third Department, New York

In the Matter of FERNANDO CALDERON, Appellant,

v.

NEW YORK CITY DEPARTMENT OF CORRECTIONS, Respondent.

WORKERS' COMPENSATION BOARD, Respondent.

November 17, 2016

Facts:

Claimant was awarded workers' compensation benefits based upon injuries suffered at work to both his hands and his right foot in October 2012. His physician found a 15% schedule loss of use of each hand and a 22.5% schedule loss of use of the right foot. An Independent Medical Examiner found claimant had a 15% schedule loss of use of his left hand and a 10% schedule loss of use of his right hand and foot. The employer raised the issue of a violation of Section 114-a for failure to disclose prior injuries and schedule loss of use awards on his application for benefits or to his physician. Claimant's counsel thereafter submitted an addendum from claimant's treating physician who reevaluated claimant in light of the prior injuries maintained a 15% schedule loss of use of both hand but apportioned 3.5% of the loss of use of the right hand and 2.5% loss of use of the left hand to the October 2012 injury with the remainder apportioned to prior injuries. A second addendum was then produced where the claimant's physician opined the claimant had a total schedule loss of use of 26.5% of the right hand and 33% of the left hand of which, 15% is attributable to the October 2012 injury. WCLJ held claimant had 15% schedule loss of use of both hands and 10% schedule loss of use of the right foot and determined claimant violated Workers' Compensation Law Section 114-a by failing to list his prior injuries on his application or inform the medical providers of the injuries and disqualified him from receiving current and future compensation benefits. The WCLJ also assessed a \$500 penalty against claimant and counsel pursuant to Workers' Compensation Law Section 114-a(3)(i) and (ii) for continuing the proceeding without reasonable grounds based upon the treating physicians second addendum with knowledge it contained bogus figures. Claimant's counsel was also assessed two other \$500 penalties for raising allegations the employer should be assessed a penalty pursuant to Workers'

Compensation Law Section 114-a(3)(ii) and for counsel's actions regarding the deposition of the Independent Medical Examiner. Workers' Compensation Board affirmed and claimant now appeals.

Holding: *Affirmed in part modified in part.*

Discussion: The Board's determination whether claimant has made a material misrepresentation in violation of Workers' Compensation Law Section 114-a will not be disturbed if supported by substantial evidence. Claimant admitted nondisclosure of prior injuries and schedule loss of use awards on benefits application or when asked by doctors. Accordingly, finding of violation of Section 114-a is supported by substantial evidence. Board may assess costs and fees against a party who continues proceeding without reasonable grounds and will not be disturbed if supported by substantial evidence. Here, penalties for submitting the second addendum and continuation of the matter without reasonable grounds are rescinded as they are not supported by substantial evidence. The penalty assessed against claimant's counsel for unsupported and unsubstantiated allegations that the employer by accusing claimant of making misrepresentations by failing to inform medical providers of prior injuries should be assessed a penalty pursuant to Section 114-a (3)(ii) and requesting a hearing on that issue is affirmed.

Stewart, Greenblatt, Manning & O'Neil