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Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of Keith KODRA, Appellant,

v.

MONDELEZ INTERNATIONAL, INC. et al., Respondents

Workers' Compensation Board, Respondent.

December 1, 2016.

**Facts:** The claimant sustained a compensable injury to his shoulder and after undergoing surgery and receiving temporary total disability benefits, video surveillance revealed that the claimant was engaged in work related services for his private landscaping and snow removal business. The video was in August and the claimant was examined by the carrier's IME in July and advised on the intake form that he was not working or volunteering his services in "any manner". Although originally argued that the claimant was limited to supervisory services at his business, he later admitted to performing manual labor. The Workers' Compensation Board found that the claimant had violated Section 114-a of the WCL and disqualified him from receiving future wage replacement benefits. The claimant appealed.

**Holding:** *Affirmed* the finding of fraud; *Modified* with respect to the penalty, without costs.

**Discussion:** The Court found that the claimant's failure to fully disclose his work activities to carrier and the carrier's consultant at the time of the IME constituted a violation of Section 114-a of the WCL. Neither the Board nor the Court credited the claimant's testimony that he misunderstood the intake form, thinking that the question about work activity related to the primary employer and not his private business. With regard to the imposition of a permanent foreclosure of further wage replacement benefits, the Court found an insufficient basis in the record for such a harsh penalty. The Court explained that such a penalty was usually reserved for an egregious deception or where there was a lack of mitigating circumstances. The Court observed that while the claimant was working at his landscaping business and collecting temporary total disability benefits, he twice called the employer seeking to return

to work in a light duty capacity. Finding that the Board's decision lacked an adequate rationale for disqualifying the claimant from all compensation benefits, the penalty was rescinded. The penalty in the amount of those benefits received between August 12, 2013 through October 8, 2013 was affirmed.

*Stewart, Greenblatt, Manning & Báez*