

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 27, 2017

524416

In the Matter of the Claim of
PETER POMPEO,
Claimant,

v

MEMORANDUM AND ORDER

AUCTION DIRECT USA LP et al.,
Appellants.

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: June 1, 2017

Before: McCarthy, J.P., Lynch, Devine, Clark and Aarons, JJ.

Hamberger & Weiss, Rochester (Stephen P. Wyder of counsel),
for appellants.

Eric T. Schneiderman, Attorney General, New York City (Nina
M. Sas of counsel), for Workers' Compensation Board, respondent.

Clark, J.

Appeal from a decision of the Workers' Compensation Board,
filed May 10, 2016, which ruled that claimant did not violate
Workers' Compensation Law § 114-a.

In 2008, claimant established a work-related injury
involving a low back strain and was awarded workers' compensation
benefits. Claimant continued to receive lost wage benefits
through August 15, 2012, at which time his benefits were
suspended on the basis that there was a lack of up-to-date
medical evidence. In January 2013, claimant pleaded guilty to

violating probation¹ by committing a crime that "involved the sale of a controlled substance or a narcotic." Two days later, in an Alford plea, claimant further pleaded guilty to criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in the fifth degree. In accordance with the terms of the negotiated plea agreements, claimant was sentenced to three concurrent prison terms of three years, followed by a period of postrelease supervision.

In 2014, upon his release from prison, claimant applied for further workers' compensation benefits. The employer and its workers' compensation carrier (hereinafter collectively referred to as the employer) opposed claimant's request, alleging, as is relevant here, that claimant violated Workers' Compensation Law § 114-a (1) by failing to report income that he earned from the sale of controlled substances or narcotics while he was receiving workers' compensation benefits. Following a hearing, the Workers' Compensation Law Judge ruled, among other things, that claimant committed fraud by selling narcotics for money and failing to disclose the income received, and permanently barred claimant from all lost wage benefits after February 21, 2012. The Workers' Compensation Board, with one dissenting panel member, reversed the decision of the Workers' Compensation Law Judge, finding, among other things, that there was insufficient proof that claimant received income from the sale of the narcotics. That determination was affirmed by a vote of 7 to 4 upon full Board review. This appeal by the employer ensued.

Workers' Compensation Law § 114-a (1) provides that, "[i]f for the purpose of obtaining compensation . . . or for the purpose of influencing any determination regarding any such payment, a claimant knowingly makes a false statement or representation as to a material fact, such person shall be disqualified from receiving any compensation directly attributable to such false statement or representation" (see

¹ In 2010, claimant was sentenced to, among other things, five years of probation after having been convicted, upon his plea of guilty, of two counts of criminal sale of a controlled substance in the third degree.

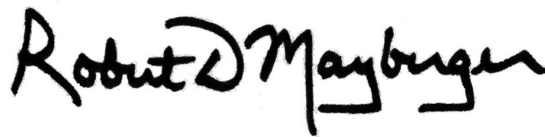
Matter of Hadzaj v Harvard Cleaning Serv., 77 AD3d 1000, 1001 [2010], lv denied 16 NY3d 702 [2011]). In making such a determination, the Board is the sole arbiter of witness credibility and its determination as to whether a claimant violated Workers' Compensation Law § 114-a will be upheld if supported by substantial evidence (see Matter of Cirrincione v Scissors Wizard, 145 AD3d 1325, 1326 [2016]; Matter of Kodra v Mondelez Intl., Inc., 145 AD3d 1131, 1132 [2016]; Matter of Lleshi v DAG Hammarskjold Tower, 123 AD3d 1386, 1387 [2014]).

In support of its assertion that claimant violated Workers' Compensation Law § 114-a (1), the employer submitted the transcripts of the 2012 plea allocutions resulting in claimant's convictions for a violation of probation, criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in the fifth degree. As a result of recording or transcription errors, the transcript of the Alford plea proceeding is, at times, indecipherable. In addition, both transcripts of the 2012 criminal convictions were insufficient to establish that claimant received income while receiving workers' compensation benefits or that he otherwise concealed his work status. Further, the employer did not submit the certificate of conviction for claimant's 2010 convictions or the transcript of that underlying plea allocution. Although we agree with the employer that the Board incorrectly analyzed the 2012 criminal proceedings, we do not find that these inaccuracies warrant reversal and remittal to the Board, given that the Board primarily found that there was insufficient evidence to find a violation of Workers' Compensation Law § 114-a (1) (compare Matter of Gramza v Buffalo Bd. of Educ., 125 AD3d 1074, 1075-1077 [2015]). Accordingly, on this record, we decline to disturb the Board's decision (compare Matter of Adams v Blackhorse Carriers, Inc., 142 AD3d 1273, 1274-1275 [2016]; Matter of Johnson v New York State Dept. of Transp., 305 AD2d 927, 927-928 [2003]). Finally, under the circumstances of this case, the employer's collateral estoppel argument is without merit (see Matter of Howard v Stature Elec., Inc., 20 NY3d 522, 525-526 [2013]).

McCarthy, J.P., Lynch, Devine and Aarons, JJ., concur.

ORDERED that the decision is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court