

Supreme Court, Appellate Division

Third Judicial Department

Decided and Entered: January 12, 2012

511766

In the Matter of the Claim of  
BENI ENGOLTZ,  
Appellant,

v

STEWART'S ICE CREAM et al.,  
Respondents.

WORKERS' COMPENSATION BOARD,  
Respondent.

REVERSED the Board, by finding that the claimant did not misrepresent his work status, thus there was no §114-a fraud.

MEMORANDUM AND ORDER

Calendar Date: November 18, 2011

Before: Mercure, Acting P.J., Lahtinen, Spain, Malone Jr. and  
Kavanagh, JJ.

Law Office of Mary J. Mraz & Associates, Albany (Mary J. Mraz of counsel), for appellant.

Walsh & Hacker, Albany (Sean F. Nicolette of counsel), for Stewart's Ice Cream and another, respondents.

Malone Jr., J.

Appeal from a decision of the Workers' Compensation Board, filed April 29, 2010, which ruled that claimant violated Workers' Compensation Law § 114-a and was disqualified from receiving additional wage replacement benefits.

Claimant injured his back and head in May 1994 and, as a result, was classified with a permanent partial disability that was 90% work-related and he began receiving lost wage replacement benefits. In 2008, the self-insured employer's risk management

company investigated claimant's activities and an issue arose regarding whether claimant was working. Following a hearing at which the employer raised a Workers' Compensation Law § 114-a issue, a Workers' Compensation Law Judge determined that the employer had not demonstrated that claimant had knowingly made false statements about employment and continued claimant's award of benefits. Upon appeal, the Workers' Compensation Board found that claimant's statements regarding his interest in and activities on behalf of a sporting goods company amounted to knowingly false statements and disqualified claimant from receiving benefits. Claimant appeals and we reverse.

Prior to the hearing, the employer's risk management company sent claimant, who now resides in Israel, a questionnaire that asked if he had been "receiving any earnings," to which he responded in the negative.<sup>1</sup> Because he was not asked about such activities, claimant did not report on the questionnaire that he performed duties, without receiving pay or other monetary benefit, on behalf of various organizations that support competitive swimming in Israel, including a corporation that he had formed with two others in order to legally import swimming gear accessories from the United States. However, at the ensuing hearing, when he was asked about them, claimant was forthright about the activities that he performed in Israel, testified that he received no compensation in any form as a result of those activities and provided his tax returns as proof. Inasmuch as the record is devoid of any evidence that claimant actually received any earnings or was otherwise compensated in any way for

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<sup>1</sup> It is notable in this case that, instead of asking whether claimant was or had been employed or had returned to work in any capacity (see e.g. Matter of Bottieri v New York State Dept. of Taxation & Fin., 27 AD3d 1035 [2006]), the questionnaire here asked only whether claimant had been receiving "earnings," which was specifically defined as "cash, wages, or salary received from self-employment, any employer other than the employer where you were injured, commissions or bonuses, cash value for all payments received in any other method other than cash (such as a building custodian receiving an apartment rent free)."

-3-

511766

his efforts, and considering claimant's complete candor at the hearing regarding his activities, the record does not support a finding that claimant "knowingly [made] a false statement or representation as to a material fact" for the purpose of receiving benefits (Workers' Compensation Law § 114-a [1]; see generally Matter of Passari v New York City Hous. Auth., 13 AD3d 853 [2004]; cf. Matter of Dory v New York State Elec. & Gas Corp., 64 AD3d 848 [2009]). Instead, the record reveals that claimant responded honestly to the questions asked of him, both on the questionnaire and at the hearing.

Mercure, Acting P.J., Lahtinen, Spain and Kavanagh, JJ.,  
concur.

ORDERED that the decision is reversed, with costs, and matter remitted to the Workers' Compensation Board for further proceedings not inconsistent with this Court's decision.

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