

Decided and Entered: May 16, 2013

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In the Matter of the Claim of  
LINDA M. DENMAN, Now Known  
as LINDA MUTHIG,

Appellant,

v

COBBLER'S RESTAURANT et al.,  
Respondents.

WORKERS' COMPENSATION BOARD,  
Respondent.

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**AFFIRMED** Board ruling that claimant  
had committed §114-a fraud

MEMORANDUM AND ORDER

Calendar Date: March 21, 2013

Before: Rose, J.P., Lahtinen, McCarthy and Egan Jr., JJ.

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Mark Lewis Schulman, Monticello, for appellant.

Michael Miliano, State Insurance Fund, Endicott (Mark A. Kenyon of counsel), for Cobbler's Restaurant and another, respondents.

Steven M. Licht, Special Funds Conservation Committee, Albany (Jill B. Singer of counsel), for Special Disability Fund, respondent.

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Lahtinen, J.

Appeal from a decision of the Workers' Compensation Board, filed December 1, 2011, which ruled that claimant violated Workers' Compensation Law § 114-a and imposed a penalty.

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Claimant sustained a work-related injury in 2003, which resulted in an award of workers' compensation benefits of \$359.41 per week based on a total disability rate. In July 2011, after hearing testimony and viewing surveillance videos taken of claimant on March 17 and 18, and April 1, 2011, a Workers' Compensation Law Judge (hereinafter WCLJ) concluded that, although claimant was totally disabled, she nevertheless had misrepresented her disabilities in an effort to influence determinations made in connection with her claim. The WCLJ thus found that claimant had violated Workers' Compensation Law § 114-a and imposed a discretionary penalty of reducing her weekly benefits by \$89.85 to \$269.56 for a period of one year beginning June 15, 2011. The Workers' Compensation Board affirmed the WCLJ's determination, and claimant now appeals.

While there is a mandatory penalty under Workers' Compensation Law § 114-a where compensation directly attributable to a false statement or representation is received, a discretionary penalty may be imposed "regardless of whether the false statement or representation enabled the claimant to receive compensation" (Matter of Michaels v Towne Ford, 9 AD3d 733, 734 [2004], quoting Matter of Losurdo v Asbestos Free, 1 NY3d 258, 266 [2003]). "A determination by the Board that a claimant violated Workers' Compensation Law § 114-a will not be disturbed if supported by substantial evidence" (Matter of Poli v Taconic Correctional Facility, 83 AD3d 1339, 1339-1340 [2011] [citation omitted]; see Matter of Martinez v LeFrak City Mgt., 100 AD3d 1110, 1111 [2012]). "The Board is the sole arbiter of witness credibility" (Matter of Hammes v Sunrise Psychiatric Clinic, Inc., 66 AD3d 1252, 1252 [2009] [citations omitted]; see Matter of Hadzaj v Harvard Cleaning Serv., 77 AD3d 1000, 1001 [2010], lv denied 16 NY3d 702 [2011]).

Claimant testified that she uses a walker some of the time (such as when she has "a long day"), otherwise uses her cane, "always ha[s] a limp," is not supposed to drive when taking her medications and, at the relevant time, was basically restricted from any activity. Video evidence revealed that when claimant was at a Board location for a hearing (March 17, 2011) or a medical facility for an independent medical examination (April 1, 2011), she walked laboriously and very slowly, had an obvious

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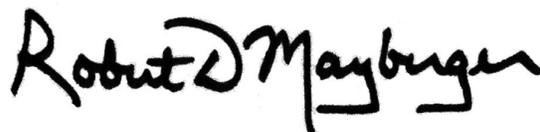
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limp, and used her walker or cane. However, later those same days, she was recorded moving notably faster with little discernible limp while in parking lots of stores. She was recorded driving and was also recorded on another occasion (March 18, 2011) standing outside her vehicle moving around without assistance while talking on a cell phone and smoking. She was further recorded – albeit with her cane – walking without apparent difficulty down steps in a store as she carried a bag. Her explanations regarding her changing mobility were not credited. The physician who conducted the independent medical examination on April 1, 2011 stated that, after viewing the videos, he would change his opinion from total disability to a moderate, partial disability. Although the WCLJ declined to change claimant's disability, the WCLJ did decide that a discretionary penalty was warranted. The Board affirmed, concluding that the reasonable inferences from claimant's testimony and the surveillance videos established that claimant had attempted to misrepresent her condition to influence the determination regarding benefits. The Board's decision is supported by substantial evidence in the record and, accordingly, we affirm.

Rose, J.P., McCarthy and Egan Jr., 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