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A Year in Review:
2024 Workers' Compensation Case Law

A review of precedential decisions from the Appellate Division, Third Department and other New York courts.

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APPORTIONMENT

Young v. LP Transportation, 2024 N.Y. Slip Op. 05617 (3d Dept. November 14, 2024)

Decision Below: Apportionment applied to claimant's workers' compensation award.

Affirmed: Apportionment of a workers' compensation award presents a factual issue for resolution by the Board and apportionment between two workers compensation injuries is appropriate where the medical evidence establishes that the claimant's current disability is at least partially attributable to a prior compensable injury.

Here, the claimant injured his back in 1971 and thereafter underwent surgeries, lost time from work and was classified with a permanent partial disability before returning to work as a truck driver. In 2015 claimant again injured his back while working for a new employer, who produced an expert report apportioning 80% of the claimant's disability to the 2015 claim and 20% to the 1971 claim, which the Board later adopted. On appeal from the 1971 carrier, the Board again concluded apportionment consistent 80/20 noting that the claimant testified that it took him a year to recover from his 1971 injuries, during which time the claimant underwent multiple surgeries.

While the claimant eventually returned to work without restrictions, the Board was nevertheless correct to credit the medical opinion of apportion insofar as the claimant's ongoing medical condition – which remained symptomatic and which the treating physicians additionally conceded 'played a role' in claimant's overall disability, provided substantial evidence to support the Board's conclusion that apportionment applied.

N.B.: It appears that the 1971 carrier may have tried to argue the incorrect Bruno v. Kelly standard, though it is only alluded to by the Court's decision.

CAUSAL RELATIONSHIP

Becker v. United Cerebral Palsy Assoc., 231 A.D.3d 1255 (3d Dept October 10, 2024)

Decision Below: The Board denied the claimant's request to amend her 22-year-old claim to include a consequential left elbow injury.

Affirmed: A claimant bears the burden, in the first instance of demonstrating that a consequential injury arose as a "direct and natural" consequence of his or her original injuries/accident. And the Board is "empowered to determine the factual issue of whether a causal relationship exists based upon the record."

Here, the claimant had received an SLU for, among other sites, the right foot, in 2003, following an accident in 2000. Thereafter, while entering a bathtub at her home in 2021, the claimant's right foot gave out, and she fell and fractured her left elbow. Where the claimant produced a report from her doctor which offered no medical opinion on the matter, and where the employer's expert concluded that there was no reason to believe that the claimant's minor isolated right ankle injury from 2000 caused her right foot to give out while entering the bathtub in 2021 the Board properly disallowed the claimed site. Additionally, the Board's reliance on the employer's expert was further bolstered by the expert's assertion that claimant dramatically magnified her symptoms on exam and demonstrated nonanatomic findings on exam.

Bonitto v. Vivid Mechanical LLC, 231 A.D.3d 1222 (3d Dept October 3, 2024)

Decision Below: Claimant's claim for workers' compensation benefits for "spontaneous pneumothorax" was established; the Board properly refused to preclude the reports of certain treating physicians.

Affirmed: The Board is accorded "great deference" in its evaluation of the proofs presented in support of a claim. Moreover, the Board is not bound to preclude the reports of a treating physician upon his or her failure to appear at a properly noticed (via subpoena) deposition unless there is evidence that the party seeking preclusion sought an adjournment and/or extension or otherwise took efforts to find a mutually agreeable date of actually obtaining the testimony of those physicians.

Here, claimant alleged that he a pneumothorax – causing his lung to collapse – shortly after he inhaled an unknown noxious fume while working on a steam pipe. The claimant's doctors reported found that the claimant's pneumothorax was "concomitant with inhalation triggers" and thus related to the fume-exposure given the absence of any previous respiratory pathology.

What is more, the Court rejected the employer's argument that various treating providers' reports should have been precluded for failing to appear to testify on two occasions (i.e., 3/24/22 and 3/25/22). Specifically, the Court noted that the employer never requested an extension, under NYCRR 300.10(c) and otherwise failed to demonstrate that it made any effort to find a mutually agreeable deposition date with the doctors.

N.B.: *Post hoc ergo propter hoc* is a logical fallacy that occurs when someone assumes that one event causes another succeeding event merely due to temporal or "ordered" correlation. This method of reasoning is both logically invalid and certainly not scientific in any fashion, but it is passed off, successful, as expert opinion by treating physicians in this system on a daily basis.

N.B.: Matter of Raymond Desamours, 2017 NY Wrk Comp G1007356 describes clearly the Board's approach to the scheduling/management of depositions in this system. Without belaboring the extensive details discussed in that matter, one point is made very clear overall: the Board wants the parties to make genuine, timely and diligent efforts to *actually arrange a properly noticed deposition*, and wants the party moving for preclusion to have "clean hands" rather than having undertaken any sort of gamesmanship in the scheduling/subpoena process.

Hill-holley v. Kings Cnty. Hosp., 227 A.D.3d 1327 (3d Dept. May 30, 2024)

Decision Below: Claimant did not sustain a causally-related occupational disease and her claim for benefits was disallowed.

Affirmed: An occupational disease is "a disease resulting from the nature of [the] employment and contracted therein," WCL § 2(15), and "does not derive from a specific condition peculiar to an employee's place of work, nor from an environmental condition specific to the place of work," Matter of Patalan v. PAL Envtl., 202 A.D.3d 1252, 1252–1253 (3d Dept. 2022).

Here, the Court affirmed the Board's decision to disallow her bilateral CTS claim where the medical opinions on causation were incredible because they failed to identify with sufficient detail a distinctive feature of claimant's employment and mechanism of injury that caused her condition and because the treating physicians did not address claimant's relevant treatment history.

Interestingly, the Board and Court agreed that beyond the failure of claimant's proofs, her own testimony was incredible insofar as she testified that, when she treated for the condition in 2012, her physician *did not* tell her that her condition was related to her significant underlying diabetes despite documentation to the contrary. Moreover, claimant had filed her claim almost two years *after* she retired from the relevant employment, and she failed to testify that her condition actually occurred while engaging in the work activities which she alleged in the claim to be the cause of her condition.

N.B.: This case is a reflection of solid facts and excellent handling. Employer's counsel elected not to depose the treating physicians, apparently deeming their reports sufficiently inadequate such that they did not wish to give the experts an opportunity to rehabilitate themselves during a deposition; the absence of such testimony was expressly noted by the Court in its ruling.

Fernandez v. New York City Transit Auth., 224 A.D.3d 1066 (3d Dept. February 10, 2024)

Decision Below: The decedent's death was not causally-related to his employment; and the claim for death benefits was disallowed.

Affirmed: A claimant may meet his or her burden with respect to the contracture of COVI-19 in the workplace by demonstrating "either a specific exposure" or "prevalence of COVID-19 in the work environment." As is true in any other claim, the claimant bears this burden in the first instance, and the Board is charged with the authority to resolve questions of fact on these points. Moreover, the presumptions of compensability afforded by WCL § 21 cannot be used to establish that an accident occurred in the first instance, and it does not wholly relieve a claimant of the burden of demonstrating that the accident occurred in the course of, and arose out of his or her employment."

Here, while claimant testified that a nonspecific number of the decedent's coworkers contracted COVID-19 around the same time as the decedent, the claimant could not provide any names, dates, or other details that could have connected the decedent's COVID diagnosis to his employment, nor any testimony to demonstrate that COVID was prevalent in decedent's workplace. Consequently, substantial evidence supposed the Board's disallowance of this COVID death claim.

Morgan v. Kinray, Inc., 226 A.D.3d 1288 (3d Dept. April 25, 2024)

Decision Below: The claimant did not sustain a causally-related occupational disease; claim disallowed.

Affirmed: A claimant must demonstrate "a reasonable link between his or her condition [OD] and a distinctive feature of his or her employment" and a physician opining on this point cannot have only a "limited knowledge" of the claimant's job duties that constitute the "distinctive feature." *Citing* Patalan v. PAL Env't, 202 A.D.3d 1252 (3d Dept. 2022)

While the claimant's physicians did offer opinions linking his extensive orthopedic complaints to his job duties (the claimant alleged pain and injuries to his entire body from, essentially, overwork/heavy work), their testimony demonstrated a complete lack of any information as to the "methods, frequency or repetitiveness with which the claimant performed various tasks, or lifted heavy items" during his employment. Those opinions "likewise. . . did not indicate a correlation or mechanism by which the claimant's specific work activities caused his conditions." Thus, claimant's physician offered an opinion based only upon a "limited understanding" of the claimant's job duties except "in the most generalized sense."

Moreover, claimant's physician conceded it was "possible" claimant's condition, and MRI findings could be due to overuse, repetitive stress, or both, or perhaps degermation, and that claimant's presentation was "very unusual" and various other conditions such as rheumatoid arthritis, lupus, fibromyalgia, or Lyme disease could present similarly, though none were investigated or ruled out.

N.B.: Incidentally, this is a rare Patalan disallowance where the employer took the risk of obtaining an IME. Notably – and thankfully – the IME found no causal relationship, as the doctor did not feel that he received sufficient information to find causation and linked the claimant's complaints to, essentially, aging, noting that the MRI findings he observed did not explain, or correlate with, the claimant's symptoms.

Arce v. Schear Construction, LLC, 2024 N.Y. Slip Op. 05618 (3d Dept. November 14, 2024)

Decision Below: The claimant sustained causally-related injuries to his head, neck, back, left shoulder and both legs.

Affirmed: As the party seeking benefits, claimant bears the burden of establishing, by competent medical evidence, a causal connection or relationship between his employment and the claimed disability, and the Board is the sole and final judge of witness credibility, and it alone can evaluate the factors relevant to determining whether the testimony of a party or witness is worthy of belief.

Where claimant provided detailed testimony describing the happening of his accident, and that testimony is consistent with eyewitness testimony as well as medical histories provided to his physicians, the mere fact that claimant's complaint in a third-party action was "at variance" with this body of proofs, the Board may properly disregard the employer's argument that this inconsistent account renders the claimant's testimony unworthy of belief.

N.B.: While the Court seems to concede the third-party complaint did offer a different account of claimant's accident, it did not discuss or elaborate upon those differences.

Kretunski v. Citywide Environmental Services LLC, 2024 N.Y. Slip Op. 06255 (3d Dept. December 12, 2024)

Decision Below: The claimant's claim for workers' compensation benefits was disallowed as the claimant did not sustain a causally-related occupational disease.

Affirmed: An occupational disease is "a disease resulting from the nature of [the] employment and contracted therein" (*citing* Patalan v. PAL Envtl., 202 A.D.3d 1252 (3d Dept. 2022)) and medical evidence supporting such a claim must demonstrate more than a generalized knowledge of the claimant's job, job duties, and the time spent performing them.

Here, the Board properly credited the employer's lay witness testimony, which substantially refuted claimant's testimony about his job duties, which the employer claimed were significantly exaggerated including the allegation that he and two-to-three colleagues would carry 100-1,000 bags of asbestos refuse, weighing between 60-70 lbs each.

While both the claimant's physician and employer's expert offered opinions relating the claimant's injuries to his work duties, the Board was free to discredit the opinions of both physicians insofar as the treating physician based his opinion upon the claimant's unreliable and exaggerated description of his job duties and the employer's expert issued his opinion without reviewing the claimant's job description instead relying upon "general knowledge of the work;" and in both instances the physician's opinions were rendered insufficient to demonstrate a recognizable link between claimant's specific repetitive job duties and his condition.

N.B.: This is the second appearance of the matter at the Court. *See* 202 A.D.3d 1423, 1423 (3d Dept. 2023), where the Court reversed and remitted this case after the Board initially disallowed this claim as untimely.

COVERAGE

Northrop v. Amphenol Corp., 231 A.D.3d 1267 (3d Dept. October 10, 2024)

Decision Below: Travelers Indemnity Company of America is responsible for claimant's benefits.

Affirmed: "The doctrine of laches can apply in a workers' compensation claim where there has been an inexcusable delay in raising the defense of noncoverage together with actual injury or prejudice."

Here, the claimant began treating for CTS in 2007, when Travelers covered the employer of record. Nevertheless, the claimant continued working until 2020, when the claimant again sought treatment for CTS and arthritis. Travelers then accepted the claim, approved a surgery request, began paying benefits, and a representative later attended a hearing where the claim was established against Travelers requested that the date of disablement to either be set in 2007 or 2008. Nevertheless, the WCLJ and later a Board panel, set the date of disablement in 2020 and directed Travelers to pay the claim. Travelers then filed an RFA and, for the first time, argued that it was not the proper carrier based on the established date of disablement where its coverage concluded in 2009, and Sentry Casualty Company was the proper carrier for the 2020 date set by the panel. Sentry then appeared in the matter and raised laches against Travelers.

Where, as here, Travelers accepted the claim, approved surgery and began paying befits despite its coverage ending in 2009, and argued that the date of disablement should be set during its period of coverage, and where Travelers attending a hearing which covered the issue of date of disablement (presumably signaling or suggesting potential liability of another carrier) its delay in raising the issue of coverage until *after* a Board panel ruling on the proper date of disablement is not excusable. Moreover, there was substantial evidence that Sentry was prejudiced by both Travelers' delay, and its acceptance of the claim, which preventing Sentry "from investigating and presenting its own evidence to challenge the claim."

Singh v. Atlas NY Constr. Corp., 224 A.D.3d 1052 (3d Dept. February 15, 2024)

Decision Below: National Liability & Fire Insurance Company did not properly cancel the workers' compensation policy it issued to the employer.

Affirmed: To effectuate the cancellation of a workers' compensation insurance policy, a carrier must strictly comply with the notice requirements of WCL § 54(5). That is, the carrier must serve the notice of cancellation on the assured, at its last known place of business (or where designated by the assured) via certified mail, return receipt requested at the last known place of business.

Here, the Board properly concluded that the carrier did not meet these requirements where the carrier's representative testified they could *not* link the proof of certified mailing provided with the notice of cancellation. Critically, the carrier's mailing manifest did not reference the certified mail barcode and tracking number, and did not specify that the mailing was sent certified, return receipt requested. While the carrier offered general testimony that it requested a return receipt, the representative of the carrier conceded that he did not have personal knowledge of that statement. Consequently, the Court noted that, "although a contrary conclusion would not have been unreasonable" must nevertheless defer to the Board's credibility determinations and find that substantial evidence supported the Board's finding that the carrier did not properly cancel coverage.

COVID-19

Flores v. Wellwood Cemetery Assoc. Inc., 2024 N.Y. Slip Op. 05609 (3d Dept. November 14, 2024)

Decision Below: The decedent's death was causally-related to his employment.

Affirmed: The contracture of COVID-19 in the workplace reasonable qualifies as an usual hazard, not the nature and unavoidable result of employment, and, thus, is compensable where the claimant demonstrates that either (1) a specific exposure occurred, or; (2) prevalence of COVI-19 in the work environment so as a present an "elevated risk of exposure."

Here, decedent worked as a gravedigger who died from complications of COVID-19. The claimant testified that the decedent told her that he helped bury deceased COVID patients, that he was not provided PPE, and that a coworker also contracted COVID. Additionally, the claimant testified that the decedent told her, before passing, that he had "got himself sick at work" and decent was the first person in her household to contract the disease while decedent did not have hobbies/activities that he attended outside of the home.

Although the claimant "did not establish the precise moment that decedent contracted the illness" such was "of no import" as "the concept of time-definiteness required of an accident can be thought of as apply to either the cause or the result, and it is not decisive that a claimant is unable to pinpoint the exact date on which the incident occurred."

N.B.: Notably absent from this decision is any specific discussion of whether this claim was established on a theory of "specific exposure" or of "prevalence."

Herrera v. Am. Badge, Inc., No. CV-23-0928, 2024 WL 4701796, at *1 (N.Y. App. Div. Nov. 7, 2024)

Decision Below: Claimant did not sustain a compensable injury and his claim for workers' compensation benefits was disallowed.

Affirmed: According to guidance issued by the Board a claimant may meet his or her burden to show that an injury arose in the course of employment by demonstrating either a specific exposure to COVID–19, or prevalence of COVID–19 in the work environment so as to present an elevated risk of exposure constituting an extraordinary event.

Here, the Court agreed that the Board's disallowance of this COVID-19 claim was proper where the claimant did not demonstrate that he was specifically exposed to COVID-19, nor did the claimant submit evidence of prevalence in the workplace at the time he became symptomatic. That is, the claimant testified that two other individuals tested positive for COVID-19 around the same time as him; however, one of them became symptomatic over 10 days after the claimant, and the other did not recall when she became symptomatic. Insofar as an employer witness testified that only two employees tested positive for COVID-19 before the claimant became symptomatic and claimant did not have contact with said employees, and they tested positive well before the claimant became symptomatic the Board's disallowance of the claim was supported by substantial evidence.

Leonard v. David's Bridal, Inc., 224 A.D.3d 1063 (3d Dept. February 15, 2024)

Decision Below: The claimant sustained an accidental injury arising out of and in the course of her employment.

Affirmed: The contracture of COVID-19 in the workplace reasonable qualifies as an usual hazard, not the nature and unavoidable result of employment, and, thus, is compensable where the claimant demonstrates that either (1) a specific exposure occurred, or; (2) prevalence of COVI-19 in the work environment so as a present an "elevated risk of exposure."

Here, the Board concluded that claimant could not demonstrate prevalence because the claimant's job was "in the back" and not public facing, it nevertheless affirmed establishment of the claim by finding that due to "interactions and overlapping shifts with a coworker ("CB') who tested positive for COVID-19" and who did have contact with the public, the claim could be established under a "specific exposure" theory.

Miller v. Transdev Bus on Demand, 231 A.D.3d 1257 (3d Dept. October 10, 2024)

Decision Below: Decedent's death was causally related to his employment.

Affirmed: The contracture of COVID-19 in the workplace reasonable qualifies as an usual hazard, not the nature and unavoidable result of employment, and, thus, is compensable where the claimant demonstrates that either (1) a specific exposure occurred, or; (2) prevalence of COVI-19 in the work environment so as a present an "elevated risk of exposure."

Here, decedent was a public facing bus driver who died of COVID-19 approximately one week after he became symptomatic. In support of her claim, the claimant testified that the decedent frequently complained of people coughing and sneezing on the back of his head, and that his bus did not have any barriers between the front and rear seats. The employer testified that it provided PPE to its drivers beginning of February of 2020, and it also admitted that it could not know whether the drivers ever transported COVID-19 patients. While the Board properly concluded the claimant could not demonstrate a specific exposure, it nevertheless found that the claimant had demonstrated that the decedent was at an increased risk of exposure to COVID-19 in the course of his employment due to the public facing nature of his work and his regular interactions with members of the public, in particular members of the public seeking medical attention.

N.B.: Decedent's medical records indicate he advised the hospital where he was treated, and ultimately died, that he thought he contracted COVID-19 from his pastor, and the IME thought so as well. However, the claimant last saw his pastor outside the incubation period, based on the date that the claimant became symptomatic; thus, the Board did not credit this explanation.

Song v. City of New York Department of Buildings, 2024 N.Y. Slip Op. 05610 (3d Dept. November 14, 2024)

Decision Below: The claim for workers' compensation benefits was disallowed where the claimant did not sustain a causally-related occupational disease or accidental injury.

Affirmed: An occupational disease arises from a "distinct feature of employment" whereas an accidental injury that develops over time (repetitive stress) arises from "unusual environmental conditions or events assignment to something extraordinary."

Where, as here, claimant alleged orthopedic as psychological injuries arising from "working unusually prolonged hours from home in a static position her desk [due to the COVID-19 pandemic]" the Board properly disallowed the claim finding neither the definition of an OD or repetitive stress injury met. While the claimant testified she essentially "burned out" from doing the work of three people, and her symptoms all manifested after she began working from home, her medical records made no reference to the fact the claimant was working from home, how long she worked each day, or when the conditions first manifested, thus her physicians were unaware of the claimant's working conditions when opining that her conditions were relating to her employment, thus failing as an OD.

N.B.: This case is likely NOT dissimilar from many accepted claims filed during the pandemic. However, there is precedent denying "ergonomic ODs" and the Board has repeatedly held that "[a]n occupational disease derives from the very nature of the employment and not a particular environmental or *ergonomic* situation" and claims for an OD stemming from ergonomic conditions are properly disallowed. *See e.g.* Matter of Transportation Department, 2019 WL 3981231 (N.Y.Work.Comp.Bd.)(emphasis added).

Rizzo v. The Springut Group Inc., 2024 N.Y. Slip Op. 05516 (3d Dept. November 7, 2024)

Decision Below: Claim for death benefits was disallowed, as the decedent's death did not arise out of and in the course of his employment.

Affirmed: Where the record contains insufficient evidence that a decedent was in the course of employment at the time of death, the presumptions of WCL § 21 do not apply. In such a case, the claimant must demonstrate, by competent medical evidence, that a causal connection exists between decedent's death and employment.

Here, substantial evidence supported the Board's disallowance of this death claim, where decedent, a bartender, suffered a heart attack while asleep at his mother's home hours after his shift ended. While the claimant produced medical evidence that found causation, the Court agreed with the Board's determination to discredit that evidence, where it was based upon refuted allegations that the claimant performed strenuous lifting on the night of his death whereas the employer's witnesses testified the claimant did not lift, and his duties were "light-duty work and clean up." The Board also determined, consistent with the employer's expert, that where the claimant had significant underlying coronary artery disease, morbid obesity and tobacco use which caused the claimant to go into cardiac arrest, consistent with the death certificate, and where the claimant died at home hours after his shift ended, the claimant "had not established a causal connection with decedent's employment and his death" by substantial evidence.

Rottkamp v. New York University, 2024 N.Y. Slip Op. 05611 (3d Dept. October 7, 2024)

Decision Below: The claim was disallowed as the decedent's death was not causally-related to his employment.

Affirmed: Where it is alleged that the injured worker contracted COVID-19 at work, the claimant bears the burden of demonstrating either a specific exposure to COVID-19 or that COVID-19 was so prevalent in the work environment "as to present an elevated risk of exposure constituting an extraordinary event"

Where claimant neither alleged nor tendered proof that decedent suffered a specific exposure to COVID-19 at his place of work, nor any evidence of prevalence, other than acknowledging that decedent was required to wear a mask at work, the Board properly disallowed this claim for causally-related death. Insofar as claimant relied principally upon decedent's admittedly uncorroborated hearsay statement to his physician that he "got [COVID-19] at work." And where that physician "demonstrated no familiarity with the particular characteristics of decedent's work environment or the prevalence of infection therein and mistakenly believed that no one else in decedent's household was infected with COVID-19 during the same time period" claimant's proof clearly, "as a whole fell short of establishing that COVID-19 was prevalent in decedent's work environment" and the Board therefore properly disallowed this claim.

N.B.: Compare the hearsay in this claim to our gravedigger case, Flores v. Wellwood Cemetery Assoc. Inc., 2024 N.Y. Slip Op. 05609 (3d Dept. November 14, 2024), where hearsay was utilized to establish fundamental elements of a claim for death both due to actual and "prevalence" exposure.

Daniels v. New York City Transit Authority 219 N.Y.S.3d 814 (3d Dept. November 7, 2024)

Decision Below: The claimant did not sustain a causally-related injury to her neck.

Affirmed: Claimant bears the burden, in the first instance, of establishing, by "competent medical evidence, a causal relationship between an injury and his or her employment."

Here, while the Board established the claim for injuries to the right shoulder and right elbow, it properly disallowed a further claim for and injury to the neck even though the claimant's physicians opined that the claimant did, indeed suffer a causally-related neck injury and, presumably, the employer did not obtain an expert opinion on the topic.

Notably, the Board properly discredited the claimant's neck complaints where she did not report neck pain on the incident report or C-3, both of which she completed on the DOA and where, questioned by the WCLJ, the claimant denied injuring any sites other than her right arm. Thus, the Board reasonably discredited the opinion of claimant's physicians which were "based upon a history provided by the claimant" inconsistent with the balance of the record.

Shmulsky v. Hudson Headwaters Health Network, Inc., CV-23-1324 (3rd Dept. December 19, 2024)

Decision Below: Claimant did not sustain a causally-related injury and disallowed the claim for workers' compensation benefits.

Affirmed: In order for an accidental injury to be compensable under the Workers' Compensation Law, a claimant bears the burden of demonstrating that the accidental injury arose out of and in the course of his or her employment by competent medical evidence.

Where it is undisputed that the employer notified its employees of opportunities to

receive the COVID-19 vaccine and encouraged them to do so and offered to arrange for vaccinations at its facilities for those employees who were, interested, the record nevertheless demonstrated that the employer did not require its employees to be vaccinated, did not reprimand or otherwise punish any employee for failing to do so, and there otherwise required to receive the vaccine as a result of her employment, substantial evidence supports the Board's conclusion that her injuries from an adverse reaction to the COVID-19 vaccine "arose out of any in the course of her employment."

N.B.: What? Compare Matter of Pettit v. Scipio Vol. Fire, 95 A.D3d 1545 (3d Dept. 2015)

DEGREE OF DISABILITY

Seide v. Brooklyn Hosp. Ctr., 226 A.D.3d 1187 (3d Dept. April 11, 2024)

Decision Below: The claimant sustained a continuing causally-related temporary partial disability and not a TTD.

Affirmed: It is the Board's province to resolve issues concerning conflicting medical evidence and witness credibility, particularly on the issue of a claimant's level/degree of disability, which will be affirmed if supported by substantial evidence, even if a contrary result would have been reasonable.

While claimant's physician opined she possessed only the ability do, essentially, limited sedentary work and deemed her 100% disabled, the Board was free to credit the conclusion of the employer's expert who found that the claimant had more substantial capacity to work, and after subsequent exams and testimony, the expert concluded that the claimant demonstrated "resolved sprain[s] of the lumbar spine. . . and right shoulder" and had recovered from a knee surgery sufficient to return to work with minimal limitations.

N.B.: A Geoffrey Schotter case.

FRAUD

Deliso v. New York City Transit Auth., 225 A.D.3d 1010 (3d Dept. March 14, 2024)

Decision Below: The claimant violated Workers' Compensation Law § 114–a and is permanently disqualified from future indemnity benefits as a discretionary penalty.

Affirmed: A claimant who, for the purpose of obtaining compensation or influencing any determination relative thereto, knowingly makes a false statement or representation as to a material fact shall be disqualified from receiving any compensation directly attributable to such false statement and may be subject to further additional "discretionary" penalties so long as the imposition of such penalty is not an "abuse of the Board's discretion."

While claimant displayed significant ROM deficits during his permanency evaluation with his treating provider, subsequent surveillance demonstrated multiple instances where the claimant demonstrated far greater planes of motion and undertook activities involving his hands without any evidence of limitation or discomfort. Moreover, the employer's IME concluded that claimant magnified his symptoms dramatically during the examination and did not suffer from any of the conditions (bilateral CTS among others) for which the case had originally been established. Such facts were sufficient to stand as substantial evidence to support the Board's determinations. Moreover, the Board's conclusion that fraud constituted "egregious misrepresentations to the medical providers, which was wholly inconsistent with his actual functional abilities" their determination to impose a lifetime ban was proper.

Brown v. Van Liner Ins. Co., 227 A.D.3d 1331 (3d Dept. May 30, 2024)

Decision Below: The claim was amended the claim to include injuries to claimant's neck, back and right wrist; the claimant did not violate WCL § 114-a.

Affirmed: A claimant who, for the purpose of obtaining workers' compensation benefits or influencing any determination relative thereto, knowingly makes a false statement or representation as to a material fact shall be disqualified from receiving any compensation directly attributable to such false statement or representation.

Here, the Board's decision to amend this claim to include additional injury sites as supported by substantial evidence where claimant's treating physician and the employer's expert both found causal relationship and where the latter expert specifically found that the alleged additional injury sites were "not a mere manifestation of a pre-existing degenerating condition" and that the "natural aging process is not the proximate cause" of claimant's injuries and disability.

On the issue of whether the claimant violated WCL § 114-a, while the employer alleged that the claimant failed to disclose the existence of prior accidents and injuries potentially relevant to those claimed here, he did nevertheless reference those injuries and accidents when providing histories to various physicians, although with limited detail, and he did note on his C-3 that "he could not recall" his prior injuries. Insofar as claimant testified – and presumably records confirmed – the injuries stemming from these accident resolved with only conservative care, and some, if not all of these injuries did not overlap with the current claim, the Board properly concluded that the claimant's actions did not manifest any intent necessary to conclude a violation of WCL § 114-a.

With respect to the allegation of fraud premised upon claimant's post-accident work activity, such activity occurred shortly after the accident, but before the instant claim was filed and the video evidence did "not support the allegation that... claimant misrepresented his condition" such that the Board's conclusion that no fraud was committed was supported by substantial evidence.

Hartman v. Arric Corp., 224 A.D.3d 959 (3d Dept. February 1, 2024)

Decision Below: The claimant did not violate WCL § 114-a.

Affirmed: A claimant who, for the purpose of obtaining compensation or influencing any determination relative thereto, knowingly fails to disclose a material fact about his or her medical history shall be disqualified from receiving any compensation directly attributable to such omission.

Here, the claimant repeatedly failed to disclose a previous 2015 injury to multiple IMEs, though the reports of those examinations contained numerous references to the injury. Although the claimant did, indeed affirmatively deny the existence of this injury in multiple IME-intakes, the fact that the experts were nevertheless aware of the injury and treatment, and that the previous injury was "mild" and "fully resolved" and the claimant's testimony that he therefore felt it "did not pertain to his current injury" are seemingly sufficient to support the conclusion of the Board that no violation of WCL s 114-a occurred.

N.B.: The AD used classic language to point out that the Board's assessment of the evidence, though sufficient, was nevertheless pretty weak; although the record contains evidence that could support a [fraud] violation, it is not the role of this Court to second-guess the Board's resolution of factual and credibility issues . . ."

Linane v. Gristede's Food Inc., 231 A.D.3d 1219 (3d Dept. October 3, 2024)

Decision Below: Claimant did not violate WCL 114-a.

Affirmed: A claimant who, for the purpose of obtaining compensation or influencing any determination relative thereto, knowingly makes a false statement or representation as to a material fact shall be disqualified from receiving any compensation directly attributable to such false statement.

Here, while the employer did produce surveillance footage covering a seven month period, "the majority of the videos depict claimant either driving or sitting in his vehicle an lifting seemingly small and light items. . . there are also videos of claimant performing certain tasks in his backyard, but the nature and extent of that activity is difficult to assess as claimant is obscured by a tall fence." And although one video seems to show the claimant lifting heavy bags of soil, the weight of those bags was not established, and the video seemingly demonstrates the claimant having difficulty doing so and "grabbing his shoulder" in the process. This evidence, in light of claimant's testimony about his physical capabilities – and that of his physicians and the IME- which was largely consistent with the activity demonstrated in the footage was substantial evidence supporting the Board's determination that no material misrepresentation occurred.

N.B.: Footnotes can be a treasure trove, and here they point out that none of the key medical witnesses in this matter seem to have viewed the videos. The result of this case may have been different had the footage been provided to any of the IMEs or the treating physician to offer an addendum or testimony on the consistency (or not) of the footage-activity with their own exams and histories.

McNulty v. Craeco, Inc., 224 A.D.3d 1059 (3d Dept. February 15, 2024)

Decision Below: The Board held in abeyance a determination as to whether claimant violated Workers' Compensation Law § 114–a.

Affirmed: A violation of WCL § 114-a may be premised upon a collateral finding in another matter, such as a criminal conviction, provided that the claimant is given "ample opportunity to address the issue of whether he knowingly misrepresented material facts sufficient to establish the charged violation."

Here, claimant testified at a hearing that he had done no work or earned any income apart from his WC benefits despite being plainly aware he had just recently been pled guilty to several felony weapons charges relating to the unlawful sale of those firearms. However, because the claimant was unable to participate in subsequent hearings – reportedly due to his incarceration – the Board properly held in abeyance further proceedings until the claimant could participate in his own defense.

N.B: It's the 21st century, and prisoners regularly and frequently appear at legal proceedings while incarcerated – perhaps the Board, or the employer, or claimant's counsel simply did not take enough steps to get this guy the capacity to appear.

N.B.: The AD offers some troubling, and frankly inappropriate dicta in this ruling suggesting that perhaps "claimant's guilty plea. . . determined or even contemplated a violation of WCL § 114-a." It's as though the Court wants to short-circuit the well-settled American legal principle that you first prosecute and then sue a criminal wrongdoer. How the facts of this case are any different that Adams v. Blackhorse Carriers, 142 A.D.3d 1273 (3d Dept. 2016) is beyond us.

Yolas v. New York City Transit Auth., 224 A.D.3d 1112 (3d Dept. February 22, 2024)

Decision Below: The claimant violated Workers' Compensation Law § 114–a, and the WCB disqualified him from receiving future indemnity benefits.

Affirmed: A claimant who deliberately misrepresents his or her physical limitations during a permanency evaluation shall be disqualified from receiving any compensation directly attributable to such false statement and may be subject to further additional "discretionary" penalties so long as the imposition of such penalty is not an "abuse of the Board's discretion."

While the claimant informed the employer's expert, during an SLU evaluation, that he experienced ongoing symptoms from his injuries and was retired, the record -including surveillance and claimant's testimony- demonstrated that far from being retired, the claimant continued to work frequently at his sons flooring business performing strenuous and demanding work. Moreover, the employer's surveillance demonstrated no physical limitations in the various members which its own expert had documented motion loss and other limitation. Insofar as the Board's conclusion on fraud rested upon its assessment of claimant's credibility, its conclusions here will not be disturbed.

Inasmuch as the Board disqualified the claimant from receiving any future indemnity benefits in this claim, its determination was not an abuse of its discretion where it concluded that claimant "continued to downplay the activities that he was involved in and provided misleading testimony."

Giesselmann v. Rotterdam Steel, LLC, 2024 N.Y. Slip Op. 06262 (3d Dept. December 12, 2024)

Decision Below: Claimant violated Workers' Compensation Law § 114-a and is disqualified from receiving future indemnity benefits

Affirmed: It is well-settled that feigning the extent of a disability or exaggerating symptoms and/or injuries may constitute a material false representations within the meaning of WCL § 114-a.

Here, the employer obtained surveillance of the claimant shortly after a permanency/SLU evaluation with his treating provider at which exam the provider opined claimant sustained a 70% SLU of the right arm due to claimant's inability to complete the entire examination due to pain, as well as "profoundly limited" ROM. However, where, as here, surveillance footage showed the claimant lifting lawn mowers weighing 45-50 lbs., to at least waist level, and lifting a 10 lb. screen door overhead, the record provided substantial evidence to support the Board's determination that the claimant violated WCL § 114-a.

While claimant disputed the testimony of his own physician describing the inconsistencies between the footage and exam presentation as "misrepresentation of reality," the Board was free to instead credit the physician's testimony that "something was not quite right when he examined claimant and that he was suspicious of claimant's efforts during the examination."

Given the Board's conclusion that claimant's embellishment of his condition and functional abilities to the treating physician was egregious, its determination to impose a discretionary lifetime ban on benefits is supported by the record and will not be disturbed.

Winkelman v. Sumitomo Rubber USA, 228 A.D.3d 1153 (3d Dept. June 20, 2024)

Decision Below: The claimant did not violate Workers' Compensation Law § 114–a.

Affirmed: A claimant who, for the purpose of obtaining workers' compensation benefits, knowingly makes a false statement or representation as to a material fact shall be disqualified from receiving any compensation directly attributable to such false statement or representation. Additionally, an omission of material information may constitute a knowing false statement or misrepresentation.

In this established upper back claim, the Court affirmed the Board's finding that the claimant did not commit fraud, as it felt that substantial evidence supported the Board's conclusion. That is, the claimant's doctor provided the claimant with a return to work note in late 2021, which stated that the claimant could work as long as he did not lift more than 10 to 15 lbs. The claimant alleged that he reported these restrictions to his employer, but that it could not provide work within said restrictions. Shortly thereafter, the claimant disclosed per diem work that he performed in late 2021, and the claimant further disclosed upcoming per diem work in early 2022. Later, the carrier raised fraud, noting that it obtained surveillance of the claimant working. Specifically, the footage showed the claimant lifting and unloading boxes at craft fairs that his wife sold goods at. The footage further showed the claimant carrying plants and bending at the waist; it also showed the claimant making a sale to a private investigator. Nevertheless, the WCB found that the claimant did not violate WCL § 114-a, where the record contained no evidence that the claimant lifted weight that exceeded his work restrictions, and the Court held that substantial evidence supported the WCB's conclusion. The Court further affirmed the WCB's rationale that "sporadic, incidental, and uncompensated assistance to one's spouse, without pay, did not constitute working fraud.

GRAY AREA

Dent v. Amazon.com Servs., Inc., 225 A.D.3d 1075 (3d Dept. March 21, 2024)

Decision Below: The claimant's injuries did not arise out of and in the course of her employment and the claim for workers' compensation benefits is disallowed.

Affirmed: As a general rule, accidents that occur in public areas away from the workplace and outside of work hours are not compensable; and thus injuries sustained during travel to and from the place of employment at not compensable. However, when an accident occurs "near the claimant's place of employment, there develops a gray area where the risks of street travel merge with the risks attendant with employment and the public nature of the location of the accident may not act, on its own, to negate a right to compensation.

Here, claimant was injured after she was "trampled" by coworkers who were boarding the same MTA bus she was attempting to board after ending her shift. Where the record demonstrated, and claimant conceded, she was clocked out of work, the bus stop was not on the employer's premises, there was no employer-subsidy or other incentive to use the bus, and of course the bus was open to the public, there was no "special hazard" of employment, but rather the general hazard of "desperate passengers" pushing onto a crowded public bus – a risk shared by anyone who utilizes public transportation.

N.B.: Another Geoffrey Schotter case?!?

JURISDICTION

Lleshaj v. Delta D., Inc., 231 A.D.3d 1260 (3d Dept. October 10, 2024)

Decision Below: Claim dismissed for lack of subject matter jurisdiction.

Affirmed: For the Board to have jurisdiction over a claim arising from a work-related injury out of New York, it must determine whether there were sufficient and significant contacts between the state and the employer to support a reasonable conclusion that the employment was to some extent sited in the state.

Here, while the claimant was a New York resident, the accident occurred in Pennsylvania while transporting a load of goods from Ohio to Massachusetts for a company based solely out of Illinois. There was no evidence of further business activity in New York beyond this single load and the claimant was hired "online" giving the Board no factual, let alone rational, basis to assert subject-matter jurisdiction over the claim.

LABOR MARKET ATTACHMENT AND VOLUNTARY WITHDRAWAL

Digbasanis v. Pelham Bay Donuts Inc., 224 A.D.3d 1047 (3d Dept. February 15, 2024)

Decision Below: The claimant voluntarily withdrew from the labor market.

Affirmed: While a claimant who is found "entitled to benefits" *at the time of permanency* is excused from any further showings of labor market attachment thereafter (pursuant to WCL s 15(3)(w) – 2017 amendments), a claimant who is not found entitled to benefits at that time is *never* excused from demonstrating attachment.

Here, claimant was classified as permanently-partially disabled and simultaneously found to be unattached to the labor market. Although the claimant did subsequently demonstrate his reattachment to the labor market after classification, such does not retroactively invoke the 2017-amednement to the statute, a holding consistent with the legislative history of the amendment as outlined in the Board's own General Counsel assessment that "a claimant who is not attached to the labor market at the time of classification, but later demonstrates attachment to the labor market and is awarded lost earning, can still be required to demonstrate an ongoing attachment to the labor market."

N.B.: This is one of the big cases of the year, following on the heels of rulings like Matter of O'Donnell v. Erie County, 35 N.Y.3d 14 (2020)(retroactivity of amendment on LMA found to be a "proper" interpretation of the statute) and Matter of Wilber v. Hamister Group, 214 A.D.3d 1280 (3d Dept. 2023)(Refusal of light duty post-classification does not circumvent the post-classification immunity to LMA imposed by the 2017 reforms) which functionally expand the claimant's post-classification immunity to LMA where they are found "entitled to benefits" at that time.

But see Matter of Farrulla v. SUNY at Stony Brook, 193 A.D.3d 1206 (3d Dept. 2021)(Board may refuse to award post-classification RE to claimant, irrespective of the amendments to WCL §15(3)(w) upon a finding that such RE is not causally-related to claimant's established disability). There is still an opening to challenge voluntary removal post-classification for an otherwise LMA-immune claimant if it is properly styled as a challenge to the causal relationship of lost wages ala Zamora.

Losquadro v. Nassau Cnty. Police Dep't, 225 A.D.3d 1083 (3d Dept. March 21, 2024)

Decision Below: The claimant voluntarily removed himself from the labor market.

Affirmed: Generally, a claimant who voluntarily withdraws from the labor market by retiring is not entitled to workers' compensation benefits unless the claimant's disability caused or contributed to the retirement.

Here, claimant did not provide sufficient evidence to support a claim of an involuntary retirement where claimant, before suffering this accident, had two prior claims involving overlapping injury sites of injury where permanency had been established, and where the medical evidence supporting his "decision" to retire came from a physician unaware of the prior claims and therefore included no assessment of whether the current disability bore any relationship to the previously found permanent partial disabilities.

Moreover, while the claimant's physician opined that claimant could no longer work as a police officer, that report did not indicate that the claimant disclosed that he had already worked in a light-duty administrative capacity for over a decade. What is more, the claimant's imaging studies documented degenerative changes, and the claimant's physician only opined that the claimant should stop working due to his work-related injuries *after* the claimant decided to take a regular service retirement.

Vukotic v. Prince Food Corp., 224 A.D.3d 1035 (3d Dept. February 8, 2024), leave to appeal denied, No. 2024-211, 2024 WL 4125739 (N.Y. Sept. 10, 2024)

Decision Below: The claimant failed to demonstrate attachment to the labor market.

Affirmed: A claimant found to have a temporary partial disability must demonstrate labor market attachment within medical restrictions; non-medical vocational factors do not excuse a claimant from seeking work within his or her restrictions.

Where, as here, claimant was found to have an 80% temporary partial disability by a WCLJ after litigation on the issue of degree, and where claimant was thereafter directed to produce evidence of Labor Market Attachment at regular intervals, both that direction, and a subsequent finding of unattachment are supported by substantial evidence that the claimant did not conduct a timely, diligent and persistent job search.

Claimant's argument that non-medical factors may excuse him from a Labor Market challenge are misplaced, as non-medical factors may not be considered until at, and after, the time of classification citing Matter of Franklin v. New England Motor Frgt., 142 A.D.3d 747 (3d Dept. 2016).

N.B.: This is another variation of a common theme of challenges brought by Grey & Grey looking to force, essentially, LWEC factors ala Cameron v. Crooked Lake into temporary disability awards. Despite losing several previous appeals addressing this concept, they continue to push the matter.

Sanchez v. Baldor Specialty Foods Inc., 2024 N.Y. Slip Op. 05619 (3d Dept. November 14, 2024)

Decision Below: Claimant failed to demonstrate attachment to the labor market and awards of workers' compensation benefits were suspended.

Affirmed: "Implicit in the Board's . . . finding of [a] temporary partial disability is the requirement that [the] claimant provide evidence of his [or her] attachment to the labor market." Whether a claimant has met his or her burden to demonstrate an attachment to the labor market is a factual issue for the Board to resolve. Whether a claimant has voluntarily withdrawn from the labor market by failing to accept a light-duty assignment is a factual determination to be made by the Board, which will not be disturbed if supported by substantial evidence.

While claimant here submitted numerous employment applications during the relevant time period, she acknowledged during her hearing testimony that many of the positions that she applied for required work outside of her medical restrictions. Accordingly, notwithstanding proof that could support a contrary conclusion, substantial evidence supports the Board's finding that claimant failed to demonstrate labor market attachment through "an independent job search within [her] medical restrictions"

Moreover, where the employer proffered a written offer for light-duty work which expressly took into consideration her medical restrictions, the Board was free to conclude that the claimant had voluntarily withdraw from the labor market where she refused that offer and testified that, even if within her medical restrictions, she would not accept an offer of light-duty work because of persistent pain.

<u>Lapan v. Trade Winds Environmental</u>, 2024 NY Slip Op 05929 (3d Dept. November 27, 2024)

Decision Below: Claimant failed to demonstrate attachment to the labor market and prior awards of workers' compensation benefits were rescinded.

Reversed and Remitted: It is incumbent upon a claimant to demonstrate attachment to the labor market with evidence of a search for employment within medical restrictions. A claimant remains attached to the labor market when he or she is actively participating in a job location service, a job retraining program or a Board-approved rehabilitation program, or where there is credible documentary evidence that he or she is actively seeking work within his or her medical restrictions through a timely, diligent and persistent independent job search

Here, where claimant submitted extensive evidence of his job search, both through job location services and individually, providing more than 600 pages of proofs, and also applied for vocational rehabilitation services and was advised to enroll in English as a second language classes, which he promptly did, the Board erred in concluding that, despite these efforts, the claimant was not attached to the labor market.

While the Court was "mindful that the Board is the sole arbiter of witness credibility" it nevertheless concluded that "documentary evidence amply demonstrates that claimant has engaged in a "diligent and persistent job search so as to demonstrate attachment to the labor market."

N.B.: Here the Court demonstrated that it can mistake quantity for quality assuming, without analysis, that 600 pages of materials *must* be diligent and persistent *per se*.

Also notable is that the decision drew a dissent – a rare occurrence in WC matters – which concluded that the majority opinion was bound to defer to the Board's factual determination about the nature and sufficiency of claimant's LMA proofs. More specifically, the dissent tells us that although the claimant sought vocational services, when informed he had to attend ESL courses, the claimant "did not see any other job retraining or rehabilitation programs" and though the claimant submitted "over 600 pages of job postings" that "a significant share of those submissions, however, are not in the English language, and no translation is provided. As to the English-language postings, it is unclear whether the jobs fell within claimant's medical restrictions, as the postings were largely devoid of the job requirements and claimant did not otherwise supply such information."

LITIGATION AND APPELLATE PRACTICE

Patterson-Djalo v. Cold Spring Acquisition LLC, 227 A.D.3d 1338 (3d Dept. May 30, 2024)

Decision Below: Rashbi Management Inc. was not a necessary party in interest under 12 NYCRR 300.13(a)(4) and lacked standing to challenge a decision of a Workers' Compensation Law Judge establishing claimant's schedule loss of use award, and imposed a penalty on Oriska Insurance Company for failing to pay an award to claimant.

Affirmed: A "guarantor" of the employer's obligation to pay the final premiums to the carrier for a workers' compensation policy between the employer and the carrier does not qualify under any definition of a party in interest under 12 NYCRR 300.13 (a) (4).

Here, the Court affirmed the Board's finding that Rashibi Management Inc. was not a necessary party in interest in its role as the contractual guarantor of the employer's obligation to pay the final premiums to the carrier for the workers' compensation policy between the employer and the carrier. That is, the employer's policy was a retrospective rating program, under which the final premium due to the carrier from the employer would be based upon the actual claim costs during the policy period. As such, counsel for the Oriska and Rashbi attended a hearing at which the WCLJ excluded Rashbi's counsel from the proceedings and proceeded to award claimant a 40% SLU of the left arm. Both Oriska and Rashbi appealed, separately, and the Board found that the Rashibi was not a party of interest and had no standing to appeal despite Rashibi's contractual obligations to Oriska.

Moreover, the Court affirmed the penalty imposed against Oriska for failing to timely pay the 40% left arm SLU awarded to the claimant. That is, while Oriska did not dispute its requirement to pay the award, nor the timeliness of its payment of the award, Oriska and Rashbi each sought remittal of the underlying workers' compensation claim to Supreme Court for further proceedings to adjudicate the obligation of the employer, as the insured, and Rashibi, as the guarantor, a request with the Court found "entirely unauthorized."

Cala v. PAL Env't Safety Corp., 203 A.D.3d 1367 (3d Dept. March 10, 2022)

Decision Below: The claimant sustained a 25.32% binaural hearing loss; claimant's arguments seeking preclusion of the employer's expert report/testimony is not considered.

Reversed and Remitted: Where an employer's expert conducts audiometric testing on a claimant, a copy of that study must accompany the expert's report, or it will be precluded under WCL § 137. *See generally* Matter of Rebar Lathing Corp., 2015 WL 7294691 (2015 NY Wrk Comp).

Here, despite timely raising the absence of an audiogram at a hearing, and continuing that issue through administrative appeals, the Board failed to address claimant's contentions regarding the omission of the employer's expert-audiogram from the record, and thus has not provided a rational basis for its conclusions regarding permanency/compensability.

N.B.: This case has been to the Third Department before in 2022 (Cala v. PAL Env't Safety Corp., 203 A.D.3d 1367 (3d Dept. 2022)) and the matter has been hotly contested where claimant's physician found a hearing loss exceeding 70% whereas the IME testified he had to conduct the hearing test on claimant three times because claimant was "faking" the loss. Guess the name of the attorney who filed these two AD appeals.

Additionally, there is a great footnote here where the AD calls out the WCLJ who had remarked at the hearing that claimant was clearly able to hear because the WCLJ "did not have to raise [his voice] once" during the proceedings, but claimant later (and in an undescribed manner) demonstrated he was wearing hearing aids during the proceedings, thus allowing him to hear the WCLJ.

So v. Erin's Pharmacy Inc., 228 A.D.3d 1122 (3d Dept. June 13, 2024)

Decision Below: Claimant failed to comply with 12 NYCRR 300.13 (b) and denied review

Reversed and Remitted: Pursuant to WCL § 23-a(1) mistakes, omissions, or defects in a form RB-89 may be excused or returned to the appellant for correction; however, the statute only pertains to RB-89s (or other similar such forms) filed on/after December 22, 2021. A decision by the Board to review, or not, a defective Application for Board Review shall be reviewed only to determine if such decision constituted an abuse of discretion.

Here, the claimant filed an RB-89 version 1-18 after the form had been superseded by a nearly-identical version, 11-18 and upon such basis the Board denied review claimant's appeal.

Insofar as claimant's defective application was file *before* the operative date of WCL s 23-a(1), that provision of the statute could not be employed to save her appeal. However, whereas here version 1-18 and version 11-18 of form RB-89 are substantially identical discretionary denial of claimant's application was not appropriate, particularly where the two forms are distinguishable only by a single character in the version numbers and the slight change to the language of item 15.

Persaud v. Ash & Peterkin Cent. Lock Co., Inc., 227 A.D.3d 1336 (3d Dept. May 30, 2024), leave to appeal dismissed, No. 2024-576, 2024 WL 4886019 (N.Y. Nov. 26, 2024)

Decision Below: Claimant's application for reconsideration and/or full Board review was denied.

Affirmed: Where an appeal is taken only from the Board's decision to deny reconsideration and/or full Board review, the Court's review is limited to whether the Board's denial of the application was arbitrary and capricious or otherwise constituted an abuse of discretion. In such circumstance, the merits of the Board's underlying decision are not properly before the Court.

Here, despite the claimant's contention that the carrier owed benefits awarded in 2012, and that the carrier committed fraud, claimant only appealed the decision denying his application for reconsideration and/or full Board review, and not the underlying panel ruling. Insofar as claimant did not submit any newly discovered evidence or allege a material change and where the underlying panel ruling "considered" all of the issues raised by claimant on appeal, the Board's decision to deny review was neither arbitrary and capricious nor an abuse of discretion.

Evans v. Ne. Logistics, Inc., 227 A.D.3d 1246 (3d Dept. May 16, 2024)

Decision Below: The application for review filed by Northeast Logistics, Inc. and its workers' compensation carrier failed to comply with the service requirements of 12 NYCRR 300.13(b).

Reversed and Remitted: An application for Board review of a decision by a WCLJ shall be filed with the Board within 30 days after notice of filing of the decision of the WCLJ, together with proof of service upon all other parties in interest. The failure to properly serve a necessary party shall be deemed defective service and the application for Board review may be rejected by the Board.

Here, the employer's Application for Board Review which found it partially liable under a general/special employer theory was deemed defective where it did not serve its appeal on the UEF. However, the UEF, despite attending prior hearings and participating in the ongoing development of the case, was not included as a party of interest on the Notice of Decision from which the application was taken. Taken in conjunction with the fact that the UEF filed a rebuttal to the application, and UEF consistently attended the underlying hearings, the Court concluded that the UEF – and therefore the Board – could not reasonably conclude any prejudice upon UEF by not being served the employer's appeal where the pertinent regulations permit, but do not require, the Board to reject an application due to defective service. As such, the Board's refusal to consider the application was an abuse of discretion.

Cross v. New York State Dep't of Corr. & Cmty. Supervision, 224 A.D.3d 1079 (3d Dept. February 15, 2024)

Decision Below: The employer's workers' compensation carrier was not responsible for payment of certain disputed medical bills.

Dismissed: Under WCL §§ 13(a) and 13-f(1) payment for medical care related to a claim cannot be collected from the claimant personally; at the same time the Board may also conclude that the employer is not liable for payment for such services for many and varying reasons. In such cases, while the employer is not responsible for paying those disputed bills, the claimant is likewise not responsible for payment; and in such cases because the medical care was performed, the claimant lacks standing (is not aggrieved) to challenge the Board's conclusion that the employer it not liable to pay for the treatment.

Where, as here, the claimant underwent pre-approved diagnostic testing at the behest of her physician, but those tests were conducted at a facility outside of the employer's contracted (and properly noticed) diagnostic network, the Board properly resolved a subsequent bill objection in favor of the employer, and the Court agreed with the employer, on appeal, that because claimant was not responsible for payment of the bill, and had received the testing, and because any dispute over a particular amount of reimbursement was between the employer and the provider, she was not aggrieved by the ruling and therefore lacked standing to bring the appeal.

N.B.: The Court, in a footnote, rejected claimant's "hook" for standing which was apparently the contention that her future medical care "could possibly be hindered if the dispute . . . resolved in favor of the carrier." The Court called this assertion "mere speculation."

<u>DiPippo v. Accurate Signs and Awnings,</u> 88 A.D.3d. 1044 (3d Dept. October 6, 2011)

Decision Below: Claimant's request to amend this claim to include a consequential right leg amputation was disallowed.

Affirmed: Whether a subsequent disability/condition arose consequentially from an existing compensable injury is a factual question for resolution by the Board. It is claimant who bears the burden of producing competent medical evidence of a casual connection establishing that a consequential condition is a "direct and natural" consequence of an underlying established condition.

Where, as here, the only actual medical evidence adduced by claimant signified a "probability" or "possibility" or that his condition "plausibly" arose as a consequence, the claimant's own personal "non-expert" opinion "gleaned from multiple medical procedures, years of treatment and online research" into the origins of his claimed consequential condition cannot stand as expert proof of anything.

N.B.: This is the second time this claim has appeared in the "Appellate Practice" guide. In 2011 this case went up on appeal with an affirmance where claimant took his appeal only from the Full Board denial. 88 A.D.3d. 1044 (3d Dept. October 6, 2011).

Amusingly, the AD noted that "there is little question that claimant has an opinion as to the cause of the amputation of his right leg . . . he simply fails to qualify as a medical expert."

Ghaffour v. New York Black Car Operators, 224 A.D.3d 1021 (3d Dept. February 8, 2024)

Decision Below: The claimant had no further causally-related disability.

Affirmed: On administrative review, the Board has broad authority, including the power, on its own motion, or upon application, to modify or rescind a WCLJ's decision, including those rulings made earlier in the claim from which no administrative appeal was taken. *See e.g.* WCL §§ 23 and 123. Such authority may be exercised whether such issues was raised, preserved or argued below by either party.

While the employer, during the course of permanency litigation noted an exception to, but did not directly appeal, a finding made at an earlier hearing which rejected its expert opinion of "no disability" in favor of the claimant's physician, the Board was nevertheless entitled to review the matter of permanency at the time the employer filed an appeal of a subsequent ruling, in the course of the same litigation, which awarded reduced earnings benefits to the claimant premised upon those earlier findings.

While the WCLJ reached a contrary determination below, the Board "was not bound by the WCLJ's determinations" and the Board's conclusion that the employer's expert was credible and persuasive was supported by substantial evidence.

Glasgow v. Con Edison, 225 A.D.3d 1063 (3d Dept. March 21, 2024)

Decision Below: The Board directed claimant to produce additional documentary evidence in support of her claim for workers' compensation death benefits.

Dismissed as Interlocutory: The Appellate Division will not conduct piecemeal review of the issues presented in a nonfinal decision in workers' compensation cases.

Where, as here, the claimant was directed to produce additional documentation related to various third-party actions filed and settled during decedent's lifetime relating to his asbestos exposure (before awards would be made), and where the Board later renewed that direction finding the efforts of claimant in response apparently disingenuous, or at least incomplete, the Court refused to consider the claimant's appeal of those directions noting that "none of the arguments raised on this appeal address a potentially dispositive threshold legal question."

N.B.: Interestingly, the attorneys who handled the third-party actions seemed to indicate they no longer had paperwork relating to decedent's various lifetime settlements, and further investigative efforts by WC Counsel and claimant were rejected by the Board where it found they had interpreted the Board's directions for investigation "in the narrowest possible terms." Of course, the underlying issue here is that the claimant wanted awards to run immediately while the employer wanted to assess and establish any WCL § 29 rights so as to either assert a potential lien/credit or perhaps assert settlement was concluded without its consent.

Golisano v. ABX Innovative Packaging Sols. LLC, 224 A.D.3d 1051 (3d Dept. February 15, 2024)

Decision Below: The employer failed to comply with 12 NYCRR 300.13(b) and its application for Board Review was denied.

Affirmed: It is well-settled that an application seeking Board review of a WCLJ's decision must be filed and served upon all parties of interest within 30-days of the filing of said decision. *See* WCL § 23, 12 NYCRR 300.13.

Here, where it is undisputed that the employer's application was filed beyond the 30-day period permitted by statute, it is not an abuse of discretion for the Board to refuse appellate review. The mere fact that the Board had "on prior occasions elected to entertain untimely applications in the interest of justice" does not demand a different result where such decisions by the Board are "inherently discretionary acts" and the employer's vague assertion that somehow the COVID-19 pandemic was "an extraordinary time" that led, in part to its failure to timely appeal was not properly explained.

Hickey v. Skanska-Walsh JV/Pace Car Plumbing LLC, 224 A.D.3d 1018 (3d Dept. February 8, 2024)

Decision Below: The decedent's death was causally-related to his employment, and; the claimant did not violate WCL § 13-a(6) by contacting the treating provider seeking a causal relationship opinion *ex parte*.

Affirmed: The improper influencing, or attempt by any person to impurely influence, the medical opinion of any physician who has treated or examined an injured worker may result in the preclusion of such physician's opinion/reports/testimony and sanctions against the violating party. To avoid even the appearance of impropriety, the Board requires that all communications between such physicians and counsel/parties must be copied to opposing parties. Subject No. 046-124.

Here, after failing to initial submit sufficient evidence to support her claim, claimant, apparently *pro se*, wrote to decedent's physician via *ex parte* email, asking for a causal relationship opinion noting that they sought evidence that the demise of decedent "was at least in part related to the events of work on July 13, 2017" and proceeded to provide the physician with seemingly extensive details of the decedent's "working conditions, his mental and physical stated on the date of his death and the weather conditions that day." It is unclear whether any of these additional details were, at the time conveyed to the physician, contained in the record in some other form of evidence. Despite this laundry list of improper communication and inherent due process violations, the Board concluded no effort was made to improperly influence the physician and the Court, concluded that such a ruling was not an abuse of discretion.

N.B.: We wonder if the Board and Court tried to impose a more liberal view of the claimant's conduct here because she was *pro se.* Certainly, conduct of this nature is decidedly improper on its face and this decision conflicts starkly with Powers v. State Material Mason Supply, 202 A.D.3d 1265 (3d Dep., Feb. 10, 2022) which similarly included an *ex parte* correspondence to a physician that in turn provided additional information not already in the record and asked for an opinion on causation.

Irizarry v. Lopez Matos Constr., Inc., 224 A.D.3d 952 (3d Dept. February 1, 2024)

Decision Below: The claimant did not sustain a causally-related injury to his right great toe, and the Board denied his claim for workers' compensation benefits.

Reversed and Remitted: Where the Board's determinations below simply recite that it "adopts the findings and decision of the WCLJ" without more elaboration on each finding, such a ruling prevents "intelligent appellate review" and the matter must be remitted.

Where the Board's underlying ruling contains no findings of fact, or conclusions of law, but merely "adopts the findings and decisions of the WCLJ" below, such a ruling is insufficient.

N.B.: It appears here the Court is reminding the Board that with the great power of *de novo* appellate review jurisdiction comes great responsibility.

Kaminski v. Integrated Structures Corp., 225 A.D.3d 1077 (3d Dept. March 21, 2024)

Decision Below: The doctrine of *res judicata* barred re-litigation of the finding that claimant was entitled to 24–hour home health care.

Affirmed: In a workers' compensation matter a party may be estopped from revisiting a previously-decided issue in that claim where the issues are identical, was necessarily decided in the first instance and that party previously had a full and fair opportunity to litigate the issues in the first instance.

Here, the claimant was previously found to have a permanent total disability and require 24-hour home health aide services; that decision was not appealed by the employer at the time. Substantially later, the employer produced an expert opinion which, among other topics, opined that the claimant required home care services for only 16 hours a day. On appeal, the Board panel found that the employer was estopped from contesting its earlier rulings which awarded the claimant 24-hour home care services, and the Court agreed that the elements of collateral estoppel (a narrower form of *res judicata*) were met and the Board properly precluded the employer from relitigating the matter.

N.B.: *Compare* Ghaffour v. New York Black Car Operators, *supra* where the Board is vested with authority to address any past rulings it sees fit. Also compare 12 NYCRR 300.14, the process by which the Board's continuing jurisdiction under WCL § 123 may be invoked, for, among other reasons, evidence of a material change in condition. In this case it appears that at the trial level the WCLJ did conclude there was no material change in condition to warrant revisiting the matter of HHA services – a seeming reference to § 300.14 – whereas the panel focused more upon the equitable estoppel remedy; a different paradigm of analysis. It is unclear if the employer below actually followed the proper procedure for invoking the Board's continuing jurisdiction.

Medina v. Am. Maint. Inc., 226 A.D.3d 1282 (3d Dept. April 25, 2024)

Decision Below: The claimant did not give timely notice of injury and her claim for benefits was disallowed; claimant's request for reconsideration and/or Full Board Review was denied.

Affirmed: An appeal taken only from the Board's refusal to grant discretionary Full Board Review is reviewable only for an abuse of discretions, and the merits of any underlying panel ruling are not properly before the Court.

Where, as here, the Claimant properly took appeals to the Court from both the panel ruling and the Full Board denial, but limited "the substantive arguments in her brief . . .only to the Board's [later] decision denying her request for reconsideration and/or full Board review" her appeal of the underlying substantive panel ruling was deemed abandoned. Absent obvious evidence of error, the Board's exercise of discretion denying reconsideration/Full Board review will not be disturbed.

N.B.: The interesting argument made here was actually that claimant felt it was improper for the same three-member panel to assess its own ruling for the purpose of determining whether Full Board review/reconsideration should be granted. That argument was quickly rejected by the Court citing Sparkes v. Holy Family Church, 134 A.D.3d 1188 (3d Dept. 2015).

Talarico v. Niagara County Department of Social Services et al., 225 A.D.3d 1061 (3d Dept. March 21, 2024)

Decision Below: The claimant sustained a compensable injury and was awarded workers' compensation benefits.

Dismissed: An appeal may only be taken by a party who is "aggrieved" which concept is a central and necessary component to invoke the Court's jurisdiction.

While the employer sought appellate review of portions of a Board ruling covering the manner, method and statutory basis of its authority (or not) relating to the ordering of taking depositions, to the extent that any real material dispute about that process in the matter at bar was ultimately resolved by a stipulation/concession by claimant that she was less than totally disabled, the employer was not aggrieved by the Board's ruling below. The Court further noted that "any discussion by the Board regarding subpoenas for deposition testimony of medical providers has no impact under the circumstances here and *is merely advisory.*" (emphasis added).

N.B.: Occasionally there is clear legislative history which demonstrates that the manner and method in which the Board interprets the statute, and thus operates on a day to day basis is *not* as was intended by the legislature. This is one of them; and the Board sought to offer, essentially, dicta, to try and avoid a clearly-aimed effort to match the Board's processes better to the statute. *See e.g.* Matter of Lazalee v Wegman's Food Mkts., Inc., 40 NY3d 458 (2023).

NOTICE

Leon v. Structure Tech New York, Inc., et al., 225 A.D.3d 1071 (3d Dept. March 21, 2024)

Decision Below: The claimant sustained an accidental injury arising out of an in the course of his employment.

Affirmed: A claimant must provide timely written notice to his employer of an accident within thirty days; and the Board is sole arbiter of witness credibility and has broad authority to resolve factual issues based on credibility of witnesses and draw any reasonable inference from the evidence in the record.

Claimant, a Spanish-speaking laborer alleged that he fell into a hole at work while carrying rebar, resulting in extensive injuries of which he notified his employer that day and left work early; the accident witnessed by a co-worker named Louis. While employer witnesses disputed the claimant's testimony, specifically denying notice of any accident, and explaining the claimant left work early to tend to a family member who had a back injury, they conceded claimant did move rebar that day, with a co-worker named Louis, though no injury was observed or reported. Inasmuch as the Board was free to credit claimant's testimony over the employer witnesses, the employer's appeal – asking the Court to override the Board's credibility determinations – was misplaced insofar as the Court lacks the ability to weigh conflicting proofs.

N.B.: This is a classic example of an appeal that had little chance from the outset. Interestingly, the employer did produce a copy of the claimant's timesheet for the day which required claimant to certify that he was not injured during his shift. Unfortunately the certification was in English, and the employer failed to demonstrate the claimant was "able to read it."

There is an outstanding question of "missing evidence" in this case which may be the next phase in litigation where the claimant alleged in testimony and to his physicians he did treat at a hospital on the DOA but he had not yet produced the records of that visit despite a WCLJ's direction to do so. A negative inference, perhaps?

PERMANENCY

Amato v. Patchogue Supermarkets LLC, 2024 N.Y. Slip Op. 05523 (3d Dept. November 7, 2024)

Decision Below: Claimant was entitled to a 20% schedule loss of use award for each of his arms.

Reversed and Remitted: Whether a claimant is entitled to an SLU award an, if so, the resulting percentage are factual questions for the Board to resolve.

Here, the claimant's treating physician and the employer's expert issued SLU opinions exceeding 30% (in some cases exceeding 40%) of each arm based upon range of motion findings measured at their respective examinations of claimant. Where the Board to elected to discredit both doctors' SLU opinions as the record demonstrated a sudden drop in ROM at the time of permanency, it's decision to conclude that the claimant "was not giving his best effort" during the exams, thus rending both expert opinions "wholly unreliable" will not be disturbed.

However, to the extent that the Board proceeded to then "fashion its own SLU percentages" based upon findings contained in earlier reports of examination, its decision must be reversed. While there was an unexplained worsening of the claimant's condition at the time permanency was evaluated, the previous exams "were not conducted for the purpose of evaluating permanency and did not address whether the claimant had reached MMI" instead reflecting "that claimant's condition was improving." Similarly the earlier exams did not triple-measure ROM, nor document use of goniometer and thus the Board's reliance of this evidence to award claimant an SLU was not supported by substantial evidence.

N.B.: There are moments where the AD's lack of practical WC experience really shows; this is one of them. Functionally, the claimant now sits in a posture where his poor ROM has been found to be unreliable – if not fraudulent – and there is no evidence in the record to support ANY SLU. Presumably the employer will use this opportunity to turn up the heat and conduct a thorough – and distraction-test filled – permanency exam it can muster directing the case toward fraud rather than more permanency.

Garofalo v. Verizon New York, Inc., 227 A.D.3d 1350 (3d Dept. May 30, 2024)

Decision Below: The claimant was entitled to an award of workers' compensation benefits based upon a 35% schedule loss of use of his left hand.

Reversed and Remitted: Where the first medical evaluation of permanency occurs on or after January 1, 2018, the question of SLU will be evaluated under the 2018 Guidelines.

The Board's decision to award the claimant a 35% SLU of the left hand was erroneous where such opinion, offered by claimant's treating physician use the incorrect permanency guidelines. That is, while the physician evaluated the claimant on the issue of permanency on May 5, 2021, well after January 1, 2018, that physician utilized the 2012 Impairment Guidelines to form his opinion on an SLU. Under such circumstances, the Court concluded that the Board's SLU decision was not based upon substantial evidence and must be remitted for further consideration.

Garrow v. Lowe's Home Centers Inc., 227 A.D.3d 1242 (3d Dept. May 16, 2024)

Decision Below: The claimant was entitled to a 33% schedule loss of use award for his left arm.

Reversed: The Board's permanent impairment guidelines may not be interpreted so as to irrationally limit the SLU award against a claimant by solely utilizing a "Special Consideration" which presumes to limit the claimant's overall recovery.

Here, where claimant was awarded only a 33.3% SLU for a ruptured biceps tendon pursuant to Special Consideration 6 of the "shoulder "portion of the permanency guidelines, it was improper for the Board to limit the claimant's award only to 33.3% as a matter of law, instead, in the face of evidence from claimant's consultant that he suffered additional functional loss due to a separate injury to the rotator cuff, the Board should have considered both impairments consistent with Matter of Blue v. new York State OCFS, 206 A.D.3d 1126 (3d Dept. 2022).

While the Board any employer seek to limit the Court's analysis of Blue only to the relevant knee injury specifically addressed in that ruling, such a limitation is inappropriate. Indeed, the preliminary instructions for calculating the loss of use of a knee or shoulder are substantially the same, the language governing the application of the respective special considerations is identical and the inequity and/or disparity identify be this Court in Blue is equally evident here."

N.B.: Yet again, the concessions obtained by the our side during significant amendments to the statute – in this case the overall reductions of SLU awards by reflecting "advances and improvements in medical science" is lost to manipulation of case law and word play by the Court. Considering the significant increase in SLU values, no wonder there are constant attacked by claimant's bar on any limitation to SLU awards. Indeed, it will likely be the case soon that the value of an SLU-only claim exceeds the concomitantly-impairment non-schedule claim.

As the reach of Blue expands, so does the cost of this system to employers.

We want to also take a moment to mention to mention Matter of Albany Marble, 2024 WL 397818 (N.Y. Work.Comp.Bd) which now being used heavily by claimant's bar for the proposition that if a claimant would qualified for a "special consideration" but plain-Jane ROM assessment results in a larger SLU than permitted by the special consideration, the claimant gets the larger of the two.

Germano v. Dynamic Appliances, Inc., 231 A.D.3d 1394 (3d Dept. October 24, 2024)

Decision Below: The claimant was not entitled to a 33.33% SLU of the right arm.

Reversed and Remitted: Pursuant to Matter of Johnson v. City of New York, 38 NY3d 431 (2022), an employer may credit any previously awarded SLU to the same member pursuant to Matter of Genduso v. New York City Dept. of Educ., 164 A.D.3d 1509 (3d Dept 2018) unless the claimant can demonstrate that the later schedule is entirely separate and distinct from any previous injury or impairment suffered.

Were, as here claimant received a 27.5% SLU for his right shoulder in 2015, later the claimant injured his right elbow in 2019 and underwent surgery, and ultimately was opined to suffer a 33.3% SLU attributable to that elbow injury with specific notation from his physician that this new schedule was "in addition to the prior injury to the right shoulder" the Board erred in allowing the employer to take credit for the previously awarded 27.5% SLU of the arm.

Insofar as the Board's decision below disregarded the statements of claimant's physician – that the shoulder injury was "unrelated" and that the elbow SLU is "in addition to" the previously-awarded SLU, its conclusion to permit a credit to the employer for that prior schedule was in conflict with the holding in Matter of Johnson, and must be reversed.

N.B.: This is yet another word-play decision that should have resulted in remittal rather than outright reversal. The AD finds that because – in a passing comment in a early visit note – the treating physician reported claimant had an "unrelated" shoulder injury and he stated later, without explanation or analysis, that the new SLU was "in addition" to the prior, that was enough to satisfy Johnson. Such a ruling is childlike in its analysis and is ironic insofar as a paragraph before the Court quote Johnson's analysis discussing the nature of proofs one might expect when denying a Genduso credit such as "separate pathologies that each individually caused a particular amount of loss of use." Instead, having literally written that phrase a paragraph before, the Court settles on "unrelated" and "in addition to" as enough.

Olorode v. Streamingedge Inc., 231 A.D.3d 1245 (3d Dept. October 10, 2024)

Decision Below: Claimant was not entitled to an increase in his Loss of Wage Earning Capacity.

Affirmed: Claimant bears the burden of providing credible evidence to support any claimed increase in classification and Loss of Wage Earning Capacity. Evaluation of such evidence stands squarely within the Board's authority to weight conflicting medical opinions and accept or reject them in whole, or in part.

Where claimant's established OD claim for the neck, back, and bilateral CTS was adjudged, after considering evidence of vocational factors to represent a 25% LWEC, the claimant failed to produce sufficient evidence that is LWEC increased after his claim was later amended to include depressive disorder.

The Board's conclusion, after the submission of medical reports and depositions, that there was insufficient evidence to establish that the claimant's depression presented a "sufficient change in condition" to warrant an increase in the LWEC rate is supported by substantial evidence and will not be disturbed. More specifically, the record demonstrated that claimant worked throughout his time treating with a psychiatrist, and there was evidence that the claimant only stopped working due to not financial reasons, and claimant's psychiatrist documented nonrelated stressors, such as his car being broken into, school issues with his son, and other interpersonal issues the Board's conclusion to reject the claimant's evidence is insufficient to warrant an increase in permanency.

N.B.: 12 NYCRR 300.14 is usually the first procedural bar to attempts of this nature; and now this case stands for the proposition, rightly, that while a claim man be amended to include additional sites of injury, such amendment does not automatically demonstrate a "change in condition" sufficient to revisit permanency. Instead, a more thoughtful analysis must be undertaken to determine if the new condition actually presents any new or different impairment of function than was previously considered during the first "making of the sausage" LWEC assessment.

Schuette v. Consolidated Edison Company of New York et al., 225 A.D.3d 1064 (3d Dept. March 21, 2024)

Decision Below: The claimant was not entitled to a schedule loss of use award.

Affirmed: An SLU award is designed to compensate an injured worker for the loss earning power or capacity that is presumed to result, as a matter of law, from permanent impairments causally-related to established injuries in a claim. Whether a claimant is entitled to an SLU award and, if so, the resulting percentage are factual questions for the Board to resolve.

While the claimant's physician and the employer's expert agreed that the claimant suffered a 73.33% SLU of the right wrist based upon their examinations and known medical history, both testified that at the time of their assessments neither was aware that the claimant had previously been diagnosed with, and filed a claim for, bilateral CTS and that such a condition could overlay into the findings they had reported as a basis for their respective SLU assessment. Moreover, both physicians testified they were unaware that while the claimant was continuing to work light duty for the employer of record, he was also working in a more strenuous positions for his own construction company performing sheet rock repairs and installation, painting and using tools such as hammers, screw guns and circular saws. This activity, according to claimant's physician, was inconsistent with limitations he would expect given the severity of impairment he observed during his evaluation which "would have left [claimant] unable to perform task such as opening contains, handling objects, using a hammer, screwdriver or any instrument."

While the WCLJ – and presumably the Board panel – concluded that this inconsistency did not constitute a fraud under WCL § 114-a, they nevertheless concluded that these inconsistencies, combined with the physician's relative ignorance of the claimant's CTS diagnosis, rendered the medical opinions offered on permanency unreliable and premature. Insofar as the Board's decision to deny the award of an SLU at that juncture is supported by substantial evidence, it will not be disturbed.

Thakkar v. Wal Mart Associates, Inc., 231 A.D.3d 1381 (3d Dept. October 24, 2024)

Decision Below: The claimant sustained a permanent total disability.

Reversed and Remitted: A permanent total disability is established where the medical proof shows that a claimant is totally disabled and unable to engage in any gainful employment. Such a conclusion must be based on competent medical evidence.

Here, the Board concluded that claimant suffered a permanent total disability where it relied on, reports and addenda authored by the employer's expert, who initially reported a permanent total disability, but later, by addendum clarified that he could not properly evaluate the claimant utilizing the Board's permanency guidelines because claimant, during exam, demonstrated "no motion" in all of the sites of injury which he reported as "non-physiologic in nature."

Upon this basis, the Court concluded that the Board's finding of a permanent total disability was not supported by substantial evidence given the "inherent contradictions" in the employer's expert report; such inconsistency suggesting the need for further clarification, or development of the record.

<u>Wright v. Elmer W. David Inc.,</u> 231 A.D.3d 1225 (3d Dept. October 3, 2024)

Decision Below: The claimant was entitled to a 45% schedule loss of use award.

Affirmed: An SLU award is designed to compensate an injured worker for the loss earning power or capacity that is presumed to result, as a matter of law, from permanent impairments causally-related to established injuries in a claim. Where the Board's permanency guidelines provide a series of SLU "ranges" to award based on the loss of varying planes of motion individually (e.g. Table 7.4 for the "Knee") such ranges should not be adjuster proportionally only to the specific ROM measurement, and if awarding a schedule for "both" planes of motion, instead the ranges of SLU assigned by the chart should be awarded without proportional adjustment.

Here, the both claimant's physician and the employer's expert initially agreed claimant suffered a moderate loss of flexion and a moderate loss of extension together totaling a 45% SLU of the leg. However, the treating physician later submitted a letter adjusting his SLU opinion to 52.5% by adding the proportional calculations of the specific deficits in flexion and extension he recorded. The Court agreed with the WCLJ and the panel below where it awarded claimant only a 45% SLU noting that the bottom row of Table 7.4 must be used if an SLU is assessed for a claimant with loss of *both* flexion and extension; and to the extent that the row of that table for "both" does not contain any values for cumulative range of motion deficits that could be adjusted proportionally" and instead provides a specific range of 40-45% for a moderate loss in both planes, "proportional adjustment" and cumulation of the individual planes from the first two rows, as proposed by the treating physicians addendum, was improper.

N.B.: If this blurb is confusing, don't try to read the ruling – it seems like the Court was hanging on by a thread of rational assessment by the last full paragraph where it actually conceded that cumulation of "Row A and Row B" in this case would generate a 50% loss but in the same breath tell us that adding 40% plus 10% "result[s] in a total SLU percentage of 40-45% as per row C of Table 7.4." We'll just put the table below to help you follow along.

Table 7.4 – Knee

Percent Loss of Use of Knee
Instructions: To the extent there are deficits select one from the table below.
Maximum value cannot exceed the value for ankylosis (70%).
Schedule loss of use percentages for ranges of motion values above/below those depicted here should be adjusted proportionally.

ROM	Mild	Moderate	Marked	Ankylosis
Flexion (A) ROM: 0-140°	10% ROM: 120°	40% ROM: 90°	55% ROM: 45°	Ankylosis at 0 degrees equals 70% loss of use of the leg. Higher schedule is given for abnormal flexion ankylosis.
Extension (B) ROM: 0°	7½ - 10% ROM: 10 - 25°			
Both	10 - 15%	40 - 45%	66 ⅔%	

James v. Premier Home Health Care 2024 N.Y. Slip Op. 05616 (3d Dept. November 14, 2024)

Decision Below: Claimant was not entitled to a schedule loss of use award.

Affirmed: Whether a claimant is entitled to an SLU award and, if so, the resulting percentage are factual questions for the Board to resolve. SLU awards are made to compensate for the loss of earning power or capacity that is presumed to result, as a matter of law, from permanent impairments to statutorily-enumerated body members.

Where, as here, the Board credited the employer's expert, who reported that claimant magnified her symptoms at several exams, making it impossible to determine a specific SLU percentage (he testified her SLU could be between 0-30%) it determination to deny claimant's SLU award was supported by substantial evidence. While claimant's treating physician opined that the claimant had a 30% SLU of the shoulder he did not record the use of a goniometer nor use the highest value measured to calculate the SLU, nor compare the claimant's motion measurements to the contralateral extremity. Insofar as the employer's expert did perform these specific elements required of a permanency evaluation, and where the claimant's ROM differed by as much as 40-50% between each of several exams and where the claimant displayed deficits in the contralateral shoulder without prior injuries/issues the Board reasonably concluded that the claimant's evidence of permanency was unreliable and conclude the record failed to support an SLU award.

Webster v. Office of Children & Family Services, 2024 N.Y. Slip Op. 06258 (3d Dept. December 12, 2024)

Decision Below: Claimant was entitled to a 50% schedule loss of use award for his right leg.

Affirmed: The Board may offset an SLU award by previous SLU awards for the same body member, regardless of whether the prior injuries involved the same or separate parts of that member. Matter of Genduso v New York City Dept. of Educ., 164 AD3d 1509 (3d Dept 2018). However, "separate SLU awards for different injuries to the same statutory member are contemplated by WCL § 15 and, when a claimant proves that the second injury, considered by itself and not in conjunction with the previous disability, has caused an increased loss of use, the claimant is entitled to an SLU award commensurate with that increased loss of use." Matter of Johnson v City of New York, 38 NY3d 431(2022).

Where, as here, the Board concluded claimant did offer evidence that the injuries to his right knee and right hip "were separate pathologies that each individually caused a particular amount of loss of use of his [right leg]" it properly denied the employer's application to seek a credit for claimant's previously-awarded SLU of the right leg premised upon a hip injury. Testimony offered by claimant's physician that "he calculated claimant's SLU based solely on [claimant's] hip injury and . . . the resulting percentage was "not related to [claimant's prior] knee injury in any way" was sufficiently clear, contrary to the employer's contention, to satisfy claimant's burden as set forth in Johnson.

N.B.: This is yet another example of the standard in Johnson being watered down to "buzz words" whereas the decision seems to clearly contemplate some more thoughtful medical testimony on the topic of physiology and the interrelation of joints in a complex and inter-related body-system. Apparently, even something as simple as the "knee bone is connected to the hip bone" falls to conclusory assertions from a physician that "one has nothing to do with the other." One may be aware that human locomotion is considered a significantly complex process given intricate interplay between multiple muscle groups, joints, and neural control systems and requires multi-joint coordination. Thus an injury to one part of the leg almost certainly will have an impact, or indeed induce a functional deficit in, another part of the leg.

PSYCH/STRESS

Anderson v. City of Yonkers, 227 A.D.3d 63 (3d Dept. March 28, 2024)

Decision Below: The claimant did not sustain a compensable injury, and his claim was disallowed.

Reversed and Remitted: Psychological injuries resulting from 'the ordinary wear and tear of life" are not compensable, and although claims for purely psychological injuries, such as fear/anxiety of contracting COVID-19 may be experienced by other similarly-situated workers, that additional standard imposed on a claimant in "psych only" claims may not bar the claimant where "even though the cause is common to all similarly employed and adversely affects claimant on because of his or her peculiar vulnerability." All of this "revision" is consistent with the Court's ruling in Matter of Wolf v. Sibley et al., 36 n.Y.2d 704 (1990) which held that "psychological or nervous injury precipitated by psychic trauma is compensable to the same extent as physical injury."

Where, as here, claimant was a public school teacher who developed disabling anxiety after a "near miss" COVID-19 exposure, the Board was wrong to disallow that claim upon a finding that exposure to such was "the new normal" and thus all similarly situated workers were exposed to the same risk/threat, making claimant's claim for benefit unsustainable. The Board, on remittal, was directed to consider" claimant's particular vulnerabilities.

N.B.: This decision overtly and openly guts a primary defense to psych-only claims by performing self-indulgent (the decision contains 5 footnotes, spans 6 pages of cramped text, and over 75 cites/string cites) and overtly-academic legal gymnastics to functionally re-phrase the "similarly situated" defense to mean, functionally, nothing.

There must be politics at work; indeed there was, because on December 6, 2024 the Governor signed S.6635/A.5745 which destroyed the defense altogether: "the board may not disallow [a] claim, upon a factual finding that the stress was not greater than that which usually occurs in the normal work environment." That being said the bill did indicate such a claim had to be premised upon "extraordinary work-related stress" which perhaps was present in this case.

Gorbea v. Verizon New York Inc., 199 A.D.3d 1253 (3d Dept. November 24, 2024)

Decision Below: The claimant did not sustain a causally-related psychological injury;

claim for benefits is disallowed.

Affirmed: For a psychological injury alleged to have stemmed from work-related stress to be compensable, a claimant must establish that such stress amounted to a workplace accident; in other words a claimant must demonstrate that the stress that caused the claimed psychological injury was great than that which other similarly situated workers experienced in the normal work environment. The Board must consider whether the alleged stressor is one the claimant should reasonable and ordinarily be expected to encounter in the normal work environment, and is therefore not an accident, or whether the stressor was instead an unusual, unexpected or extraordinary part thereof, and therefore accidental. *See* Matter of Anderson, *supra*.

While claimant's medical reports "based upon self-reporting" indicated that work-related stress had exacerbated her pre-existing and unrelated PTSD, the Board's determination that the claimant's stressors where not greater than that which other similar situated works experienced was supported by substantial evidence. More specifically, that the claimant alleged she was "overworked and exposed to constant intimidation and harassment" including intimidation to falsify timesheets, where the employer's manager testified to the contrary, and explained that claimant had instead been informed she was using the wrong code on her timesheets, the Board was free to discredit the claimant's testimony in favor of the employer witness.

N.B.: This case has a history back to 2016 and appeared at the Appellate Division back in 2021 on a denied *pro se* appeal by the Board which was *reversed* by the Court, to lead back around against to the Court once the Board reviewed the matter on the merits. *See* Gorbea v. Verizon New York, 199 A.D.3d 1253 (3d Dept. 2021).

N.B. This case perhaps gives us some insight into how S.6635/A.5745 will be assessed by the Board and Court. While it guts the "similarly situated" defense, it nevertheless seems to limit that gutting to cases of "extraordinary work-related stress" rather than the typical case where the "alleged stressor is one the claimant should reasonable and ordinarily be expected to encounter in the normal work environment, and is therefore not an accident." Perhaps our defense did survive…but missing some of its teeth.

Lewis v. NYC Administration For Children Services, 231 A.D.3d 1379 (3d Dept. October 24, 2024)

Decision Below: Claimant did not sustain a compensable psychological injury.

Reversed and Remitted: Where a workplace accident is found to have occurred as a result of a physical impact/trauma, resulting physical *and* psychological injuries are both compensable so long as the claimant establishes the causal connection between the accident and the alleged injures.

Here, while the Board established the claim for physical injuries resulting from a dog jumping on claimant during a home visit, it impurely denied her claim for psychological injuries resulting from the same physical impact, improperly applying the "similarly situated workers" reserved for "work-related stress' claims rather than properly assessing whether the claimant had merely provided competent medical evidence that there was a causal relationship between the accident and the injury.

N.B.: Not quite as bad as Anderson, but certainly the Court cited itself again in this one.

McLaurin v. New York City Transit Auth., 225 A.D.3d 1105 (3d Dept. March 28, 2024)

Decision Below: The claimant did not sustain a compensable injury (i.e., COVID with consequential PTSD and/or a psychological injury due to COVID exposure/prevalence); thus, the Board disallowed the claim for workers' compensation benefits.

Reversed and Remitted: Consistent with the Third Department's monstrous (think Frankenstein) decision in Anderson, *supra* the Court reversed and remitted the matter to determine whether the claimant's alleged COVID exposures, and/or the prevalence of COVID in her work environment, caused her to develop a psych-only injury. As with Anderson, the Court held that "the Board improperly applied a disparate burden in determining whether the psychological injuries alleged to have been sustained by claimant were caused by a workplace accident."

N.B.: This claim was "spaghetti at the wall" by claimant, who alleged both the contracture of COVID-19 at work and both direct *and* consequential psychological injury due to that contracture and the generalized risk of contracture. The Board disallowed everything and the AD was forced to concede "simply put, there is no medical evidence that the claimant in fact contracted COVID-19" and thus that claim remained disallowed for COVID-19 itself, as was the theory that claimant's psychological injuries were consequential thereto. The AD, however, performed another legal-back-bend and remitted the case for the Board to consider the matter as a psych-only claim under their proud new theory of the law expressed in Anderson.

Spillers v. Health & Hosp. Corp., 225 A.D.3d 1100 (3d Dept. March 28, 2024)

Decision Below: The claimant did not sustain a causally-related psychological injury.

Affirmed: For a psychological injury to be compensable, the claimant must demonstrate that he experienced stress greater than that of a similarly situated worker would have experienced in the normal work environment. The Board will consider whether the alleged stressor is one that the claimant should have reasonably and ordinarily expected to encounter in the normal work environment. If so, then no accident occurred; if not, then the claim could be compensable.

Here, while claimant alleged that a coworker verbally assaulted him causing him to fear for his life, the Board was free to conclude such occurrences were ordinarily expected where that co-worker and the claimant had a history of workplace disputes which, when they escalated, were addressed by the employer who eventually removed the coworker from the claimant's work environment and later fired the coworker. As such, the Board was supported by substantial evidence where it concluded that the incidents described by the claimant 'amounted to an ordinary dispute among coworkers to which the employer appropriately responded and the incident was not so improper or extraordinary so as to constitute a work place accident under the WCL."

N.B.: This ruling was handed down *the same day* as Anderson, yet seems to take a more traditional approach to this work-stress claim whereas the latter case sought to re-write the book entirely. Go figure.

SCOPE AND COURSE

Santos v. 77 GP, Inc., 2024 N.Y. Slip Op. 05615 (3d Dept. November 14, 2024)

Decision Below: Claimant's injuries did not arise out of and in the course of his employment

Affirmed: The existence of an employer-employee relationship in a particular case is a factual issue for the Board to resolve and its finding must be upheld if it is supported by substantial evidence.

While claimant testified he fell off his electric bicycle while working as a pizza delivery person from the employer, the Board was free to credit testimony of the employer's owner that, among other things, claimant was discharged from his employment for drinking on the job prior to sustaining his injuries. Where the Court will traditionally not disturb the Board's credibility assessment, its decision to credit the employer's testimony and disallow the claim was proper.

Bonilla v. XL Specialty Ins., 228 A.D.3d 1188 (3d Dept. June 27, 2024)

Decision Below: Claimants (both) sustained accidental injuries arising out of and in the course of their employment.

Affirmed: An injury is only compensable under the Workers' Compensation Law if it arose out of and in the course of a worker's employment and, in general, injuries sustained in the course of travel to and from the place of employment do not come within the statute. However, an exception arises when the employer takes responsibility for transporting employees, particularly where the employer is in exclusive control of the means of conveyance.

Here, two claimants injured in a MVA while traveling to a jobsite in a company provided vehicle, which picked them up for work each day at a predetermined location. At separate hearings in both proceedings, the Board determined that XL Specialty was the proper carrier and XL Specialty never appeared, despite proper notice. Insofar as XL Specialty never appealed the proper carrier finding, and could not note an exception to such finding at the hearing due to its absence, and the Court agreed that it could not contest those findings. XL Specialty, however, nevertheless later appealed those decisions framing such appeal in terms of coverage, arguing that the wrap-up policy for the jobsite only covered on-site accident, and not travel accident; therefore, it contended that it was not the proper carrier. Insofar as the employer provided the transportation to the jobsite and exercised exclusive control over the conveyance the fact that XL Specialty's policy was properly deemed liable where a provision in the policy stated that it covered activity "incidental to the described project" and "other similar areas dedicated to the project"

N.B.: This decision could have qualified for treatment here as a "coverage claim" in addition to the scope/course analysis. What is notable here is that XL's policy did contain an endorsement expressly excluding coverage for accidents travelling to and from the jobsite covered by its wrap-up policy. That being said, the policy nevertheless also contained expressed provisions covering activity "incidental to the described project" and "other similar areas dedicated to the project that are under the control of [XL Specialty]"

While the Board could have precluded coverage here, it instead concluded that the exclusion of travel-accidents did not contemplate travel conducted by and under the control of the employer directly, which is the case here. Almost certainly XL lost here, at least in part, due to its repeated failure to appear at hearings which ultimately led to fines of some $10,000 imposed by the WCLJ.

SECTION 10

Lujan-Espinzo V. Electrical Illuminations by Arnold Inc., 231 A.D.3d 1252 (3d Dept. October 10, 2024)

Decision Below: WCL §10 does not act to bar the claim; the claimant's intoxication was not the sole cause of his accident.

Affirmed: At the time claimant fell from a ladder, sustaining severe injuries, the record established that the claimant was "severely" intoxicated. While WCL § 10(1) provides a presumption of compensability for injuries sustained out of and in the course of employment without regard to fault, it does except the circumstance where the claimant's intoxication was the *sole* cause of the accident.

While the record demonstrated claimant was severely intoxicated, and medical evidence of a blood alcohol level which would significantly impair the claimant's functioning, claimant also testified that usually a spotter was present while an employee climbed a ladder, and that, while descending the ladder, it moved and fell on its side, causing him to fall. Where, as here, the "fall can also be attributed to the absence of another employee holding the ladder, a simple misjudgment of footing, the lack of a safety railing on an elevated surface or the inherent risk of work at height" the Board's determination that claimant's intoxication was not the "sole" cause of his accident is supported by substantial evidence.

NB: In a modern world where marijuana use is legal in NY for recreational purposes, public policy may (or has been for a while) been ripe for efforts to reform this portion of the statute to a stricter standard with respect to impairment due to drug/alcohol intoxication in the workplace.

SECTIONS 11 & 29

Bates v. Gannett Co., 229 A.D.3d 1307 (4th Dept. Jul. 26, 2024)

Decision Below: The order below granted the motion of defendant to stay the actions and for referral to the Workers' Compensation Board.

Reversed: Courts defer to an administrative agency where the issue involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom. However, where the question is one of pure statutory interpretation, courts need not accord any deference to an administrative body's determination and can undertake its function of statutory construction.

Here, the Court held that the matter did not need to be referred to the WCB, where the issues at hand required pure statutory interpretation. In this case, several individuals filed cases under the Child Victims Act, alleging that they were sexually abused by a supervisor while delivering newspapers in the 1980s. While the defendant moved for this to be referred to the WCB given that the alleged acts occurred in the course of employment, the Court reasoned that the question of whether the Child Victims Act revived otherwise time-barred claims for workers' compensation benefits, as well as whether the workers were limited to receiving workers' compensation benefits were questions of law that could, and should, be decided by the Court, not the Board.

NYAHSA Servs., Inc. v. Special Funds Grp., No. 2023-00964, 2024 WL 5063239, at *1 (2d Dept. Dec. 11, 2024)

Decision Below: The carrier's request for *nunc pro tunc* approval of its third-party settlement, under WCL § 29(5) was denied.

Reversed: Where consent was not received for a third-party settlement as outlined in WCL § 29, the offending party may seek *nunc pro tunc* approval of the settlement as outlined in WCL § 29(5). In seeking an order from a court directing consent, a petitioner must first establish that (1) the delay in seeking judicial relief was not caused by the petitioner's fault or neglect; (2) the amount of the settlement was reasonable; and (3) the party whose consent is sought was not prejudiced by the delay. A petition's failure to precisely follow the enumerated criteria of the statute should not, in itself, demand dismissal of the petition.

Here, Special Funds was found liable for this claim under WCL §15-8(d) before the settlement of the third-part action. As such, Special Funds' consent was needed for the third-party settlement, which neither the carrier no claimant did not obtain. Absent such consent the fund refused to reimburse the employer for benefits it paid in the claim pursuant to the statute. The Second Department concluded that, contrary to the Supreme Court's ruling, the evidence demonstrated that the settlement was reasonable, and that there was no evidence that Special Funds was prejudiced and that the carrier's failure to produce certain elements of the petition – e.g. a physician affidavit etc. was not fatal to the petition.

SECTION 21

Timperio v. Bronx-Lebanon Hosp., 42 N.Y.3d 307 (2024)

Decision Below: Claimant did not sustain an injury arising out of and in the course of his employment. 203 A.D.3d 179 (3d Dept. 2022)

Reversed: Under WCL § 21 (1), an injury that arose in the course of employment is presumed to have arisen out of employment as well. In that regard, an award of compensation may be sustained even though the result of an assault, so long as there is any nexus, however slender, between the motivation for the assault and the employment. No additional showing is necessary to trigger the operation of the presumption beyond a showing that claimant was injured during the course of his employment. The Appellate Division's holding that an additional affirmative showing of a "nexus" to employment beyond its mere happening at employment is an erroneous reading of the law and misreading of the text, and proper application of the presumptions of WCL § 21.

Here, claimant was injured when a gunman, a former employee of the claimant's employer, entered the hospital and shot several hospital employees. The claimant had never worked with the shooter, they had not worked for the employer at the same time, and they were unknown to each other otherwise. The Board, having heard the case, concluded that the shooting occurred in, and therefore arose out of, the claimant's employment, rendering it compensable. In particular, the Board noted the shooting was not motivated by personal animosity between claimant and the gunman.

On review before the Third Department, that court concluded that while the claimant was injured at his employment, and although such finding triggered the application of the presumptions under WCL § 21(1), the absence of any evidence demonstrating a "nexus, however slender between the motivation for the assault and the employment" acting to rebut the presumption, rendering the case not compensable.

The Court of Appeals, on further review, agreed it was undisputed that the assault occurred in the course of claimant's employment, and triggered a WCL § 21 (1) presumption, but it noted that the Appellate Division misunderstood the operation of that presumption insofar as the absence of any evidence regarding the motivation for the assault or personal animus could not constitute "substantial evidence" to overcome the presumption; indeed the Appellate Division's reading of the law suggesting the absolute need for evidence of a "nexus" between the assault and employment was entirely erroneous. There mere happening of the assault in the claimant's workplace while he was working, absent substantial evidence that the assault was due purely to personal animosity, demands the

application of the WCL § 21(1) presumption that such assault "arose out of" that employment.

N.B.: The Appellate Division's ruling in this matter was truly out of left field and left this author wondering whether it was an exercise in outcome-determined legal rationale. Notably, on oral argument before the Court of Appeals the actual, real issue was brought out fully: that claimant sought to proceed in tort against his employer on a theory of negligence and believed such a recovery would far exceed any WC recovery. Looking to avoid the exclusivity provision of WCL § 11 claimant took the unique step of arguing against the compensability of his own WC claim to reach that goal. The Judges of the Court openly questioned the parties about this element of the case whereas the Appellate Division was silent on that point beyond noting that, procedurally, lawsuits had been filed in Federal court.

Bosque v. Prime Support Inc., 226 A.D.3d 1280 (3d Dept. April 25, 2024)

Decision Below: The claimant sustained an accidental injury arising in and out of the course and scope of her employment, and was awarded workers' compensation benefits.

Affirmed: Under WCL § 21, a claimant is entitled to a presumption that an unwitnessed accident that occurred during employment arises "out of" or from that employment, absent substantial evidence to the contrary. Moreover, an employer who fails to timely file a Pre-Hearing Conference Statement pursuant to 12 NYCRR 300.38 is barred from raising, among other defenses, "scope and course." A claimant must still demonstrate that an accident actually occurred in the first instance (*see e.g.* Hill v. Shoprite), and upon doing so shifts the burden to the employer to rebut the now-active presumption with substantial evidence to the contrary.

Here, the claimant, an HHA, suffered an unwitnessed fall inside her patient's home and was found bleeding and unresponsive by the patient's mother, and the employer failed to timely file a Pre-Hearing Conference Statement, barring it from contesting "scope and course." Based on testimony from the patient's mother, the claimant met her burden of demonstrating that an unwitnessed accident occurred at work, entitling claimant to the presumption, under WCL § 21 that her fall arose "out of" her employment.

While the employer argued that the claimant's fall was idiopathic in nature, no medical evidence was adduced to support this "speculative assertion" and, moreover, the employer's attempt to "sidestep" the bars imposed on certain defenses by its failure to file a PHCS, were deemed immaterial as the record demonstrated an unwitnessed fall occurred, thus triggering the burden shifting process of WCL § 21 and leading to a resolution of factual issues by the Board.

N.B.: *Compare* Love v. Village of Pleasantville, 161 A.D.3d 1477 (3d Dept. 2018) and 189 A.D.3d 1946 (3d Dept. 2020) for an example of an employer successfully overcoming the regulatory bars imposed as a result of an untimely/late PHCS.

N.B.: It is not a good idea to rely upon a medical theory in defense of a case without an expert opinion on point in the record – either contained an IME or a deposition transcript. This employer *may* have had more traction at the trial level had it obtained an IME on its "idiopathic" theory – particularly given the very significant nature of the injuries sustained in a simple fall.

Lebeau v. Meet Caregivers Inc., 231 A.D.3d 1262 (3d Dept. September 6, 2024)

Decision Below: The claim for workers' compensation benefits was disallowed.

Affirmed: When assessing testimony and evidence presented, the Board "has broad authority to resolve factual issues based on credibility of witnesses, and draw any reasonable inference from the evidence in the record."

Here, while the claimant alleged that she injured her right leg and knee after a coworker assaulted her by hitting her with a chair following a verbal altercation, the Board was free to credit the testimony of employer witnesses.

Specifically, the Board was free to credit the coworker's testimony that she had never communicated with the claimant before the alleged altercation, let alone had a prior verbal altercation with claimant and testimony from a supervisor that no physical altercation occurred. Moreover, the Board was free to discredit the claimant's testimony where medical records from immediately after the alleged accident described a significant altercation with significant injuries which left her "unable to leave or walk or move or anything else" whereas her testimony about the accident described "limited transitory contact" with the coworker.

N.B.: This claimant was certainly facing a fraud claim had this matter been established. It is also a reminder of the premise of Hill v. Shoprite, 140 A.D.3d 1564 (3d Dept. 2016) that sometimes the Board simply does not believe that any accident occurred in the first instance where there are numerous or substantial inconsistencies in the claimant's proofs.

SECTION 24

Gonzalez v. Northeast Parent & Child Society, 2024 N.Y. Slip Op. 05612 (3d Dept. November 14, 2024)

Decision Below: Counsel's application for attorney's fees was denied.

Affirmed: Workers' Compensation Law § 24 was recently amended to provide, in relevant part, that "[c]laims of attorneys and counselors-at-law for legal services . . . shall not be enforceable unless approved by the board" and "[t]he board shall approve such written and submitted fee application[s] in an amount commensurate with the services rendered and the amount of compensation awarded, having due regard for the financial state of the claimant in accordance with each applicable provision of the . . . schedule" set forth therein. Nothing in that statutory provision provides for the award of counsel fees payable from a penalty imposed upon the employer.

Here the Board properly denied claimant's counsel's request for a fee payable out of, and in respect to, a penalty imposed upon the employer was therefore properly denied as inconsistent with the statute.

N.B.: The bigger issue here is fees payable out of employer reimbursement. Initially, upon issuance of the amended statutory language, many practitioners believed that the "schedule" of fees was written such that it was silent upon reimbursement and thus it was not available as a fee source. Early Board panel rulings vacillated on this point, but now seem to have settled in favor of employers – no fee may be awarded in consideration of employer reimbursement. Matter of South Brooklyn Renewal Housing, 2024 WL 5003685 (N.Y.Work.Comp.Bd.).

AMENDMENTS AND SUBJECT NUMBERS OF NOTE

Statutory Amendments

WCL § 10(3) is amended to include the following (effective 1/1/25):

Section 1. Paragraph (b) of subdivision 3 of section 10 of the workers' compensation law, as added by section 1 of subpart I of part NNN of chapter 59 of the laws of 2017, is amended to read as follows:

(b) Where a [police officer or firefighter subject to section thirty of this article, or emergency medical technician, paramedic, or other person certified to provide medical care in emergencies, or emergency dispatcher] WORKER files a claim for mental injury premised upon extraordinary work-related stress incurred [in a work-related emergency] AT WORK, the board may not disallow the claim[,] upon a factual finding that the stress was not greater than that which usually occurs in the normal work environment.

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.

Regulatory Amendments

- DME schedule updated
- 325-1.26. Telehealth. → made the telehealth provisions, implemented during COVID, permanent
- Subdivision (a) of Section 324.2 of Title 12 NYCRR was amended to state the dates on which certain editions of the MTGs are applicable
- Emergency amendment to Section 329-1.3, to allow OT assistants and PT assistants to treat NY WC patients under the supervision of an Board authorized OT or PT

Subject-Numbers of Note

- Subject No. 046-1678 – new max rate from July 1, 20254 to June 30, 2024 is $1,171.46
- Subject No. 046-1649 – new min rate effective January 1, 2025 of $325/week
- Subject No. 046-1683 – expanded desk review of WCL § 32 Agreements (up to $10K)
- Subject No,. 046-1704 – enhanced WCB effort to index claims
- Subject No. 046-1715 – electronic submission of RFA-2 form
- Subject No. 046-1726 – electronic submission of RFA-1 form
- Subject No. 046-1718 – in-person attendance requirements for counsel/party who requests an in-person hearing.