



WORKERS' COMPENSATION CASE
LAW
(2025 Year in Review)

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Supplement (12/31/2025):

“New Issue”: ABATEMENT OF CLAIM:

Brady v. Town of Warwick, 2025 N.Y.App.Div.LEXIS 7401 (12/31/2025)

- **FACTS:** On 4/26/2023, Scott T. Brady (hereinafter decedent), a heavy equipment operator, was injured in the course of his employment when the excavator he was operating flipped onto its right side. Thereafter the self-insured employer (SIE) accepted some physical injuries, but disputed claims for some additional physical injuries and consequential psychiatric conditions. Based on the controversy, the decedent requested a hearing on the controverted injuries/conditions, but the decedent died on 9/26/2023 before he could attend an independent medical examination (IME) or ensuing hearing.

At the hearing, the SIE accepted injuries to the neck, right shoulder and right leg, but argued the controverted claims were abated by the decedent’s death due to the SIE’s inability to develop the record on the disputed conditions. The WCLJ rejected the SIE’s argument, found prima facie medical evidence for the controverted conditions (i.e. post-traumatic concussion, headaches, amnesia, adjustment disorder with mixed anxiety, and insomnia) and continued the case for further proceedings. The SIE appealed and the Board modified the decision to reflect the abatement of the claim with respect to those disputed sites/conditions.

The decedent’s widow/executor appealed.

- **HOLDING:** The Court affirmed the Board’s finding of abatement of the claim with respect to those disputed sites/conditions and declined the widow’s request to proceed with resolving the decedent’s claim because there was no abuse of the Board’s discretion.

However, the Court did note that the Board has discretion in claims of this nature not only to find a claim abated, as was done here, but to also continue proceedings, resolve controversies and, if appropriate, direct awards. In short, the Court’s dicta suggests the death of a claimant does not automatically require pending controverted claims to be abated and the decision to abate a claim is left to the Board’s discretion.

SECTION I: ACCIDENT

Balseca v. Hudson Concrete Inc., 238 AD3d 1415 (3rd Dept. 2025)

- **FACTS:** The claimant alleged that he sustained multiple injuries when he fell off a ladder at work. There was contradictory testimony on the alleged accident with the claimant testifying that he fell from a 4-foot ladder that wobbled and the claimant's supervisor testifying that the claimant stated that he was quitting his job before he left on the date of the alleged accident and went home without mentioning anything about a fall.

After a hearing and testimony, the WCLJ disallowed the claim finding that the claimant's testimony regarding his alleged accident to be incredible. On appeal the Board reversed and credited the claimant's testimony and established the claim.

The carrier appealed.

- **HOLDING:** The Court affirmed. In this regard, the Court deferred to the Board's assessment of credibility and its finding that the claimant's accident arose out of and in the course of employment. The Board did not elaborate on why its assessment of credibility differed from the WCLJ.
- **PRACTICE TIP:** This case highlights that even though the WCLJ may be in the best position to assess credibility, that the Board may have an entirely different view and may overturn the WCLJ's finding without providing an explanation as to its contrary opinion.

See Also:

Duta-Zumba v. Urban Atelier Group, LLC, 242 AD3d 1264 (3rd Dept. 2025)

SECTION II: ACCIDENT V. OCCUPATIONAL DISEASE

Badzio v. New York City Health and Hospital Corporation, 240 AD3d 982 (3rd Dept. 2025)

- **FACTS:** The claimant was employed as a nurse for her employer for 14 years. She filed a claim alleging injuries to her right shoulder, right knee and left wrist as a result of repetitive use in performing her job duties. The employer controverted the claim. The claimant submitted medical records and reports from her treating physician. At a hearing, only the claimant testified. The WCLJ disallowed the claim stating that the claimant failed to meet her burden of establishing her injuries were the result of an *occupational disease*. The Board affirmed, finding the claimant had not demonstrated that she had sustained a causally related *accidental* injury.

The claimant appealed.

- **HOLDING:** The Court reversed the Board for applying the incorrect legal standard for disallowance (i.e. accident as opposed to occupational disease) and remanded the case to the Board to review the matter and apply the proper legal standard of analysis for the controverted occupational disease claim.
- **PRACTICE TIP:** Language matters no matter who is writing, therefore be mindful of the terms of art used in anything submitted to the Board in writing because even the Board can be reversed for what appears to be a typographical error.

SECTION III: ARTICLE 8A (STATUTE OF LIMITATIONS)

Francisca Garcia (Miguel Garcia, Dec'd) v. WTC Volunteer, 2025 N.Y. LEXIS 1910 (11/20/2025)

- **FACTS:** The decedent had an established claim for multiple medical conditions that he contracted through exposure to toxins while volunteering with the American Red Cross in the September 11th recovery efforts. The decedent died in July 2016 and, in February 2020, the claimant filed a claim for death benefits with the Workers' Compensation Board. The WCLJ initially established the claim and awarded death benefits. On appeal, the Board concluded that as the claim was not filed within 2 years of the decedent's death, that it was time-barred and the claim was disallowed pursuant to Section 28 of the WCL. The Appellate Division affirmed and rejected the claimant's argument that Section 168 of the WCL extends the time for asserting a claim for death benefits beyond the 2-year statute of limitations provided in Section 28 of the WCL. A dissent, however, would have remitted this matter to the Board for further proceedings to determine if the claimant timely filed her claim within 2 years of when she knew or should have known that the decedent's death resulted from a qualifying condition based on Section 163 of the WCL which addresses notice requirements for injuries or deaths resulting from a qualifying condition for a participant.

The claimant appealed.

- **HOLDING:** The Court of Appeals granted the claimant's motion for leave to appeal and affirmed. The Court noted that the claimant did not challenge the Board's determination that this was not an occupational disease. Likewise, the Court noted that the claimant did not challenge the determination that, if no extensions were available and Section 28 of the WCL applies, that the claim would be untimely. The Court noted that the claimant focused her argument on whether Article 8-A applies to death benefit claims, while asserting that "Section 168 provides that for participants whose disablements occurred in 2016 – the year of [decedent's] death – a claim must be filed on or before September 11, 2022."

The Court rejected this argument and agreed with the Appellate Division that Section 168 of the WCL, by its plain language, does not apply to claims brought by anyone other than a statutorily defined participant and did not encompass claims by surviving beneficiaries of those individuals. Thus, the Court found this claim untimely and barred pursuant to Section 28 of the WCL.

SECTION IV: ARTICLE 8A (PARTIES COVERED)

Goss v. WTC Volunteer, 236 AD3d 1162 (3rd Dept. 2025)

- **FACTS:** The claimant, a crisis response provider, was retained to provide services to first responders to the September 11, 2001 terrorist attacks on the World Trade Center (WTC). She initially provided these services from 9/12/01 through 9/22/01 and mainly worked at a command center set up by her employer at a hotel near the World Trade Center. During that period of time the claimant was paid for her services. After that paid assignment ended, a rescue and recovery coordinator for the New York State Police Department asked the claimant to continue to provide services as a volunteer for 20 days, supporting rescue, recovery and cleanup operations at a command center 600 feet from the WTC site. The claimant returned and worked as a volunteer for 10 days in October of 2001 and 10 days in December of 2001.

In 2018, the claimant filed a workers' compensation claim alleging injuries due to exposure to toxins at the WTC site. The WCLJ found the claimant's activities were covered by Article 8-A of the Workers' Compensation Law, that the Uninsured Employer's Fund (UEF) was the liable carrier and established the claim for sarcoidosis. The Board reversed stating, among other things, that the claimant's activities were not covered by Article 8-A of the WCL because she was not a participant in the WTC rescue, recovery and clean-up operations and, as such, disallowed the claim. The Board also denied the claimant's application for reconsideration and/or a full Board review.

The claimant appealed.

- **HOLDING:** The Court reversed, noting that Article 8-A was enacted to remove statutory obstacles to timely claims filing and notice for latent conditions resulting from hazardous exposure for those who worked in rescue, recovery or clean-up operations at the WTC. The Court noted that the command center where the claimant worked was only 600 feet from the WTC site and that the claimant would respond to distressed workers either at the command site or she would go to the rubble pile where they were working. The rescue and recovery coordinator for the NYPD testified that the claimant provided support to those working in rescue, recovery and clean-up operations and identifying those individuals who needed to be taken off line for treatment was instrumental in continuing the operation and that many of the individuals were able to return after receiving such treatment.

Significantly, the Court stated the following with respect to Article 8-A:

"It is undisputed that this legislation was intended to be liberally construed to provide a potential avenue of relief for workers and volunteers suffering ill health as a result of their efforts in the aftermath of the terrorists' attacks."

SECTION V: ATTORNEY FEES (FEES ON PENALTIES)

Clifton v. Research Foundation of SUNY, 234 AD3d 1235 (3rd Dept. 2025)

- **FACTS:** The parties negotiated a Section 32 settlement whereby the claimant waived all future rights to workers' compensation in connection with this claim in exchange for a lump sum, minus the requested attorney's fee and the Section 32 was approved by the Workers' Compensation Board.

Thereafter, the claimant filed a request for action alleging that the settlement was not paid in a timely manner and sought a penalty and the WCLJ found that a portion of the settlement award was untimely and imposed a 20% penalty on that unpaid amount to be paid to the claimant. The WCLJ, citing recent amendments to Section 24 of the Workers' Compensation Law, denied a request by the claimant's attorney for a fee related to his efforts to secure the late payment penalty.

The Board modified the WCLJ's Decision by assessing a 20% penalty on the entire settlement amount payable to the claimant and affirmed the denial of the requested attorney's fees on the late payment penalty.

The claimant's attorney appealed.

- **HOLDING:** The Court affirmed the Board's determination and stated that based upon recent amendments to Section 24 of the Workers' Compensation Law and the Court's decision in Gonzalez v. Northeast Parent and Child Society, 232 AD3d 1011 (3rd Dept. 2024), *leave dismissed in part and granted in part* 43 NY3rd 937 (2025) that there was no basis to disturb the Board's denial of requested attorney fees.

See Also:

Cabrera v. New York City Housing Authority, 241 AD3d 1680 (3rd Dept. 2025)

SECTION VI: ATTORNEY FEES (EMPLOYER REIMBURSEMENT)

Peralta v. Supreme Court 1st Judicial Department, 234 AD3d 1226 (3rd Dept. 2025)

- **FACTS:** As a result of a work accident that occurred in November of 2021, the claimant, a court officer, was out of work from 11/05/2021 until 4/27/2023 and her employer (New York State) continued to pay her salary pursuant to the terms of a collective bargaining agreement.

At a hearing on 4/27/2023 various awards were made from 11/5/2021 to 4/23/2023, the claimant's attorney requested the \$10,500.00 attorney's fee from the employer reimbursement, and the WCLJ denied the attorney's fee request per the application of Workers' Compensation Law Sec. 24.

One week later, the parties entered a stipulation seeking to modify the WCLJ's decision to reflect certain credits due to the employer. In addition, the claimant's attorney submitted an up-to-date fee application and sought Board review of the WCLJ's Decision that initially denied the attorney fee request. On 7/25/2023 the WCLJ approved the stipulation to amend awards/credits.

Thereafter the Board issued a decision, filed 7/25/2025, granting an attorney fee of \$10,422.27 as a lien on the employer reimbursement.

The carrier appealed.

- **HOLDING:** The Court affirmed the Board's Decision granting the attorney fee out of the employer reimbursement and noted that resolution of that issue related to the statutory interpretation of WCL Section 24(2)(b). In order to ascertain legislative intent, the Court focused on the plain language of the statutory text:

"[w]hen an award is made that increases the amount of compensation *awarded or paid* for a previous period or periods of temporary total or temporary partial disability, the [counsel] fee shall be [15%] of the increased compensation." (emphasis added).

"When so approved, such claim or claims [for a counsel fee] shall become a lien upon the compensation awarded."

The carrier argued that a fee may be awarded pursuant to Section 24(2)(b) of the WCL only when there is an increase in both the amount of compensation awarded and the amount of compensation paid. The Court rejected this interpretation noting that the plain language of Section 24(2)(b) is disjunctive in nature and that a fee may be awarded either where there is an increase in compensation or the amount of compensation paid.

The Court also rejected the carrier's alternative argument that because awards that followed the May 23rd hearing were the first awards made in this matter, that there necessarily was no increase in the amount of compensation previously awarded or paid. The Court found that argument unpersuasive, noting that the Board had consistently held that an award for benefits for previous periods of time, for which benefits had not been previously awarded, is an increase in the amount of compensation awarded to a claimant.

See Also:

Capers v. Jacobi Medical Center, 235 AD3d 1052 (3rd Dept. 2025)

Olivier v. New York State Department of Corrections, 236 Ad3d 1279 (3rd Dept. 2025)

Jehle v. DOCCS Coxsackie Correctional Facility, 237 AD3d 1379 (3rd Dept. 2025)

SECTION VI: ATTORNEY FEES (SCHEDULE LOSS OF USE)

Cooper v. New York City Health and Hospital Corp., 239 AD3d 1184 (3rd Dept. 2025)

- **FACTS:** The claimant sustained compensable injuries when he was attacked by a patient on 8/11/2020 and remained out of work until 8/4/2022. The employer paid wages until 3/22/2022. Following the submission of permanency opinions, the WCLJ awarded a 15% schedule loss of use (SLU) of the right leg and a 15% SLU of the right arm.

The employer applied for wage reimbursement and the claimant's attorney requested a 15% fee from the total/gross SLU awards. The WCLJ directed employer reimbursement for wages paid while the claimant was out of work. This resulted in a payment to the claimant which amounted to approximately 12% of the gross schedule (hereafter, net award). The claimant's attorney was awarded attorney fees of 15% of the net, rather than the gross, award. The Board panel initially agreed with the claimant's attorney, that he should have received 15% of the gross SLU award. The full Board, on its own motion, rescinded and returned this matter to the Board panel. The Board panel then issued an amended decision upholding the WCLJ's decision awarding attorney fees of 15% on the net SLU award payable to the claimant, pursuant to WCL 24(2)(c) and 24(4).

The claimant's attorney appealed contending that his fee should have been 15% of the gross SLU award.

- **HOLDING:** The Court affirmed noting that WCL Section 24(2)(c) provides:

“[w]hen an award is made for [SLU],...the [counsel] fee shall be [15%] of the compensation due *“in excess of the employer’s or carrier’s previous payments* (emphasis added).”

The Court rejected the claimant's attorney's argument that pursuant to Section WCL 24(2)(c) only “previous awards of compensation” should be deducted from the gross SLU award before a counsel fee is calculated. The Court stated that had the Legislature intended to narrow the deductions as alleged, it could have done so by calculating a counsel fee award from any “increased compensation”.

SECTION VI: ATTORNEY FEES (WITHDRAWAL OF REPRESENTATION)

Pandolfi v. Plainedge Union Free School District, 2025 N.Y. App. Div. LEXIS 6516 (11/20/2025)

- **FACTS:** After the work accident that occurred in October 2017, the claimant retained counsel to represent her in April of 2018 and her claim was established in May of 2018. After claim establishment, the claimant expressed dissatisfaction with her attorney's representation and disagreement over her counsel's legal strategy. In May 2022, the claimant's attorney notified the claimant that their relationship had become irreparable and was requesting to be relieved of representation by the Board.

At a hearing held on 5/16/2022, the WCLJ held the claimant's attorney's request to be relieved in abeyance, pending the claimant's attempt to secure new counsel. The claimant appealed the decision arguing that her attorney should not be relieved and this was opposed by her attorney. In a decision, filed 10/3/2022, the Board relieved the claimant's attorney of its obligation to represent the claimant and on 10/7/2022, the attorney filed a fee application listing services that had been provided.

The claimant proceeded without new representation and the WCLJ ultimately directed awards after 1/8/2019 at a temporary partial rate. The WCLJ denied the attorney fee request stating that the Board "generally frowns upon fees to attorneys when the claimant is unrepresented thereafter". The attorney appealed. The Board modified the WCLJ's decision finding that the attorney was not statutorily entitled to attorney's fees pursuant to Section 24(3) of the WCL.

The attorney appealed.

- **HOLDING:** The Court reversed and focused on the legislative intent of Section 24(3) of the WCL. Contrary to the Board's interpretation, the Court found no intent by the Legislature in enacting Section 24(3) to preclude an award of counsel's fees to a prior attorney who has been relieved of representation without subsequent counsel being retained. Instead, the Court noted that the intent of Section 24(3) was to address the situation where an attorney is substituted by another attorney. In those instances, a fee request by the substituted attorney for a fee, if granted, shall not increase the overall fee but will be paid out of the total fees awarded.

As the Court concluded that Section 24(3) of the WCL did not address the situation where, as here, a prior attorney is relieved of representation and there has been no substitution, that the prior attorney should be granted a fee by the Board in an amount commensurate with the services rendered and the amount of compensation awarded, having due regard for the financial state of the claimant.

SECTION VII: CAUSAL RELATIONSHIP

Gunness v. Prime Piping and Heating, Inc., 234 AD3d 1082 (3rd Dept. 2025)

- **FACTS:** The claimant sustained an injury at work in June 2020 in which he reported that a brick fell on his right foot resulting in a fracture and surgery. Although the right foot injury was established, the claimant subsequently alleged injuries to additional body parts including the neck, back and left knee and these were denied by the carrier.

The claimant first treated for the neck, back and left knee on 10/26/2020 and his attending physician provided causal relationship to the June 2020 incident. The claimant's history to the carrier's independent medical examiner (IME), however, mentioned not only his right foot being injured, but also that he had struck his left knee on the ladder on which he was standing. While the IME diagnosed the claimant with back, neck and left knee pain, she was unable to establish causal relationship based upon the four-month gap in treatment following the claimant's June 2020 incident.

The WCLJ denied the claims for the neck, back and left knee based on the claimant's failure to establish causal relationship and disregarded the attending physician's opinion as the claimant never described to his physician how the neck, back and left knee were injured and the doctor did not know what occurred. The Board affirmed the disallowance of the additional injury sites claimed.

The claimant appealed.

- **HOLDING:** The Court affirmed noting that the Board possesses broad authority to assess credibility and to resolve factual disputes, especially in cases with conflicting medical proof. The Court also rejected the claimant's reliance on §21 presumptions noting that such presumptions do not entirely relieve the claimant of the burden of proving his injuries and that the issue of causal relationship was to be addressed based upon the medical evidence and testimony.

See Also:

Stabile v. Catholic Health Systems of Long Island, Inc., 238 AD3d 1235 (3rd Dept. 2025), lv. denied, 44 NY3d 906 (2025)

Spada v. Keeler Construction Company, 2025 N.Y. App. Div. LEXIS 5683 (10/9/2025)

McGann v. Suffolk County Water Authority, 2025 N.Y. App. Div. LEXIS 6534 (11/20/2025)

Howard v. New York City Department of Education, 2025 N.Y. App. Div. LEXIS 7102 (12/11/2025)

SECTION VIII: COMING AND GOING

Ericson v. FOJP Service Corporation, 242 NYS3d 133 (3rd Dept. 2025)

- **FACTS:** The claimant filed a claim for workers' compensation benefits alleging that she sustained various injuries when she tripped and fell on a public sidewalk on her way to work. The carrier controverted the claim contending that the claimant's injuries did not arise out of and in the course of employment. The WCLJ established the claim. The Board, however, reversed and disallowed.

The claimant appealed.

- **HOLDING:** The Court affirmed despite arguments by the claimant that her employer was obligated to maintain the sidewalk where she was injured due to certain municipal code provisions.

In rejecting the claimant's argument and affirming the Board, the Court noted for an injury to become compensable it must arise out of and in the course of employment. The Court also stated that:

“Generally, accidents that occur outside of work hours and in public areas away from the workplace are not compensable and, consequentially, injuries sustained during travel to and from the place of employment are not compensable.”

While recognizing that there is a “gray” area where the risks of street travel merge with the risk attendant with employment and where the mere fact that the accident took place on a public road or sidewalk does not negate the right to compensation, the Court stated however that in such a situation, there must be a special hazard at the particular off-premises point and a close association with the access route to the premises. The Court noted that there was nothing in the record indicating that such a special hazard existed at the site of the claimant's fall or that the claimant accessed her work site via an entrance not used by the general public. The Court also stated that while the claimant's employer may have been obligated under certain municipal requirements to shovel the sidewalks in front of the premises during inclement weather, this did not demonstrate that the sidewalks were controlled by the employer or obviate the claimant's need to demonstrate that her injuries arose out of and in the course of employment.

SECTION IX: COVID 19

Aungst v. Family Dollar, 2025 N.Y. LEXIS 1917 (11/24/2025)

- **FACTS:** The claimant, a store manager, contracted Covid-19 in April 2020, shortly after the onset of the global Covid-19 pandemic. Approximately one week later the claimant suffered a stroke. Thereafter, he filed a claim for workers' compensation benefits alleging that he contracted Covid-19 due to exposure at his job site and that his stroke was a direct result of the disease. The employer controverted the claim.

At a hearing the claimant testified that he worked full time in a high-volume store during March and April of 2020. The claimant stated that he had almost constant contact with the public and that his employer did not provide protective masks or sneeze guards. He also testified that while the employer had a policy requiring customers to socially distance themselves and to wear masks, that management advised employees not to enforce that policy. The claimant stated that many customers did not wear masks and he recounted several specific instances of close contact with customers, despite the employer's social distancing policy.

The claimant testified that in the two-to-three-week period leading to his positive Covid test and hospitalization, he worked fifty or more hours a week, drove alone to work, did not leave the country, did not visit friends or family and did not use public transportation. The claimant testified that he lived alone, did very little shopping and only attended medical appointments where Covid-19 safety protocols were in place. The claimant's vascular neurologist, among other medical professionals, provided causal relationship between the Covid-19 diagnosis and the claimant's stroke.

The WCLJ established the claim and the Board affirmed noting a prevalence of Covid-19 in the workplace. The Appellate Division affirmed.

The employer appealed and the Court of Appeals granted leave to appeal.

- **HOLDING:** The Court of Appeals affirmed the Appellate Division's decision to affirm the Board's establishment of this claim for an accidental exposure to Covid-19.

In affirming the establishment of the claim for an accidental injury/exposure, the Court rejected the employer's argument that the Board's "prevalence" framework was inappropriate as it improperly relieved the claimant of identifying a specific workplace exposure that caused his injuries per the precedent established in Lerner v. Rump Bros., 241 N.Y. 153 (1925).

In rejecting the employer's argument, the Court of Appeals relied upon the holding in Middleton v. Coxsackie, 38 N.Y.2d 130 (1975), which in the Court of Appeal's analysis repudiated the narrow reading of the Lerner decision by the employer. Specifically, the Court of Appeals recognized that the persistent exposure to harmful conditions could result in a compensable accident even if a claimant is unable to pinpoint the exact date on which the incident occurred per the holding in Middleton and based upon the same held as follows:

“As applied to Covid-19, the “prevalence” framework specifically requires the claimant to demonstrate an “extraordinary” level of exposure through evidence of frequent contact with the public or co-workers “in an area where Covid-19 is prevalent”. It thus recognizes, as have our prior cases, that persistent, high-risk exposure to a disease in the workplace culminating an infection can constitute a compensable accident.”

The Court of Appeals concluded that substantial evidence supported the Board’s finding that the claimant’s Covid-19 was an accidental injury arising out of the claimant’s employment. As such, the Appellate Division decision was affirmed.

See Also:

Martinez v. Domino Foods, Inc., 234 AD3d 1069 (3rd Dept. 2025)

Angelo v. Southwestern Central School, 2025 N.Y. App. Div. LEXIS 6123 (10/30/2025)

SECTION X: DEGREE OF DISABILITY – PERMANENT TOTAL DISABILITY

Serrano v. Bay Park Center For Nursing and Rehabilitation, 236 AD3d 1256 (3rd Dept. 2025)

- **FACTS:** The claimant, a housekeeper, sustained an accident in 2014 resulting in injuries to the left shoulder and low back with consequential depression.

In a March 2023 decision, the WCLJ found that the claimant could not do sedentary, light duty or part-time work, that he was temporary totally disabled from 8/27/2020 to 3/10/2023 and had a permanent total disability subsequent to 3/10/2023. The Board reversed noting that the claimant had submitted insufficient evidence of a permanent total disability. The claimant sought reconsideration and/or full Board review which was denied.

The claimant appealed both the initial Board Panel decision and the denial of the application for reconsideration and/or full Board review.

- **HOLDING:** The Court affirmed the Board's decision noting that resolution of conflicting medical evidence is within the province of the Board. The Court noted that the Board credited the testimony of the claimant's treating physician and carrier's consultant, each of whom concluded that the claimant was capable of some form of gainful employment. The Board also found it significant that the claimant had not sought medical treatment for more than a year which called into question the severity of the claimant's symptoms.

The Court also found that the Board had not erred in denying the claimant's application for reconsideration and/or full Board review as the claimant had failed to meet his burden of proof with respect to the same.

See Also:

Brickner v. Medtronics, Inc., 241 AD3d 1637 (3rd Dept. 2025)

SECTION XI: EMPLOYER/EMPLOYEE RELATIONSHIP (PROPER EMPLOYER)

Fonseca v. Platinum Carpentry, Inc., 238 AD3d 1444 (3rd Dept. 2025)

- **FACTS:** The claimant, a carpenter, was injured on the job after a ceiling collapsed and he fell from a ladder. At the time of his injuries, the claimant testified that he was employed and performing remodeling work for Platinum Carpentry, Inc. (Platinum), which had a contract with a professional employer organization (PEO), Cornerstone Underwriters, LLC that provided workers' compensation coverage to employees leased from Cornerstone to Platinum and such coverage was furnished by United Wisconsin Insurance Company (UWIC).

The contract between Platinum and Cornerstone contained several provisions including requirements that had to be met, including Platinum providing certain paperwork to Cornerstone at least 48 hours before a prospective employee started work. Failure to comply would result in such individual remaining an employee of Platinum and such individual would not be covered under Cornerstone's workers' compensation policy.

UWIC denied coverage stating that the claimant was not listed on Platinum's payroll and was, therefore, not covered under their policy. The WCLJ found that notwithstanding the language of the PEO agreement, that the claimant was a dual employee of Platinum and Cornerstone and that UWIC was the proper carrier.

The Board modified the WCLJ's decision and found that the claimant was not a leased employee and was not covered by the UWIC policy. The UEF was placed on notice and this matter was remitted to the trial calendar for the imposition of appropriate penalties against Platinum.

Platinum appealed.

- **HOLDING:** The Court affirmed and noted that the claimant's name was not listed in the payroll history of Platinum which purported to be a complete list of employees covered under the PEO agreement and, hence, subject to the UWIC workers' compensation policy. The Court also noted that the claimant had been paid by Platinum and Platinum acknowledged that they had failed to submit the required paperwork. Thus, the Court stated that the Board's decision that the claimant was not a lease/worksites employee of Cornerstone and not covered by the workers' compensation policy was supported by substantial evidence.

SECTION XI: EMPLOYER/EMPLOYEE RELATIONSHIP (INDEPENDENT CONTRACTOR)

Trickey v. Black River Plumbing, Heating & Air Conditioning, Inc., 241 AD3d 1690 (3rd Dept. 2025)

- **FACTS:** In June 2020, the claimant was installing roof trusses on a pole barn on property owned by Black River Plumbing, Heating & Air Conditioning, Inc. (Black River) when one of the trusses collapsed causing the claimant to fall 40 feet to the ground resulting in multiple injuries.

The claimant filed a personal injury action against Black River in Supreme Court for his injuries. Black River's workers' compensation carrier requested a hearing to establish the claim and to find that at the time of the accident, that the claimant was an employee of Black River in order to make workers' compensation his exclusive remedy. The claimant filed a "negative C-3 form" contending that he was not an employee of Black River, but was instead, an independent contractor and that he did not wish to pursue a workers' compensation claim. The WCLJ, based upon the presumption of employment in the Construction Industry Fair Play Act (See Labor Law Section 861-c) found the claimant to be an employee of Black River and the Board affirmed.

The claimant appealed.

- **HOLDING:** The Court reversed. The Court stated that pursuant to the Construction Industry Fair Play Act that:

"[t]here is a statutory presumption that a person performing services for a construction contractor shall be classified as an employee unless it is demonstrated that such person is an independent contractor in accordance with three criteria [known as] the ABC test set forth in Labor Law Section 861-c(1) or a separate business entity, which is established by satisfying all 12 criteria set forth in Labor Law Section 861-c(2)."

The Court stated that although the Board determined that the claimant's framing business did not satisfy the 12 factor criteria to demonstrate a separate business entity to rebut the presumption of employer/employee relationship, that the Board failed to set forth sufficient findings of facts with respect to the three-part ABC test to determine if the claimant was an independent contractor. The Court stated that the Board never resolved conflicting testimony over who actually controlled and/or directed installation of the trusses (the first part of the three-part ABC test) and, as such, the Board's decision was not supported by substantial evidence.

Notably, the claim was remanded to the Board for resolution of the issues raised by the Court.

SECTION XII: EMPLOYER REIMBURSEMENT

Schulze v. City of Newburgh Fire Department, 44 NY3d 45 (2025)

- **FACTS:** Claimant began working as a firefighter for the City of Newburgh (City) in 2001. On 4/30/2012 he suffered work-related injuries to his neck while putting out a fire, went out of work, and thereafter was advised by his attending physician that he could never be a firefighter again due to post-operative limitations.

After the claimant stopped working, the City paid him full salary as required by Section 207-a of the General Municipal Law (GML) from May 2012 to December 2015. The claimant also received workers' compensation benefits. Because he continued to receive his full salary, the City received reimbursement from those awards towards Section 207-a salary payments. In that way, the City's total payments were effectively reduced and the claimant did not receive more than his salary as a firefighter.

In April 2016 the claimant's application for a performance of duty (POD) retirement under Retirement and Social Security Law Section 363-c was approved, entitling him to a 50% pension for life. Once he was approved for his POD retirement, he left the City's payroll and his last day on the payroll was 4/30/2016. From that point forward, the State paid his pension and, as required by General Municipal Law Section 207-a(2), the City paid the claimant the difference between his POD retirement pension and his salary. Thus, he continued receiving an amount equal to his salary.

In February 2015, the claimant was classified with a permanent partial disability (PPD) and a loss of wage-earning capacity (LWEC) which made him eligible for up to 375 weeks of workers' compensation indemnity payments.

In December of 2019, the WCLJ made awards from 12/15/2015 to 4/30/2016 (the day the claimant left the City's payroll) and granted the City's request for reimbursement. The WCLJ, however, denied the City's reimbursement request after 4/30/2016 and the Board affirmed. The City appealed that denial and the Appellate Division affirmed.

The City appealed and the Court of Appeals granted leave.

- **HOLDING:** The Court of Appeals affirmed and ruled that the City could only recover pre-retirement benefits paid under GML Section 207-a(1), but could not recover supplemental benefits paid post-retirement under GML 207-a(2). The Court of Appeals stated that post-retirement benefits under 207-a(2) are not "wages" under Workers' Compensation Law (WCL) Section 25(4)(a) and Section 30(2) and thus fall outside the scope of reimbursable payments.

SECTION XIII: LABOR MARKET ATTACHMENT

Jover v. Alba Demolition, 2025 N.Y. App. Div. LEXIS 6157 (10/30/2025)

- **FACTS:** In August 2025, the claimant sustained a work-related accident which was established for the neck, back, right shoulder and right wrist. In September 2018, the claimant was classified with a permanent partial disability (PPD), and a 75% loss of wage-earning capacity (LWEC). Awards, however, were held in abeyance pending additional evidence as to whether or not the claimant was attached to the labor market. Following a hearing, it was ultimately determined, by Board Panel Decision in February 2019, that the claimant had produced insufficient evidence of a search for employment within his restrictions.

In June 2019, the claimant underwent a spinal fusion which resulted in a 10-pound lifting restriction. From November of 2022 through March of 2023, the claimant submitted a series of C-258.1 forms as evidence of his job search efforts. Following a March 2023 hearing, the WCLJ found the claimant had failed to demonstrate attachment to the labor market. The Board affirmed.

The claimant appealed.

- **HOLDING:** The Court affirmed and noted that according to the VDF-1S form that the claimant's work experience was in construction, cooking, dishwashing and deliveries. The claimant had also stated, through a translator, that he could not read or speak English. However most, if not all, of the positions that the claimant applied for required some degree of proficiency in the English language. Moreover, many of the jobs he applied for required specialized qualifications and education that the claimant did not possess. Such jobs included optometrist, paralegal, social worker and a Bengali-speaking marketing specialist.

The Court concluded that there was substantial evidence to support the Board's determination that the claimant neither demonstrated a diligent and persistent independent job search within his restrictions nor did he participate in any job location services, retraining programs or rehabilitation programs to obtain employment.

See Also:

Quinzo v. Millenium Services, LLC, 2025 N.Y. App. Div. LEXIS 6509 (11/20/2025)

SECTION XIV: MEDICAL TREATMENT

Cahill v. New York State Department of Mental Hygiene, 238 AD3d 1456 (3rd Dept. 2025)

- **FACTS:** The claimant sustained a work-related left knee injury in 1992 and underwent multiple surgeries including a 2012 total left knee replacement. By 2020, a periprosthetic infection was diagnosed, Antibiotics were prescribed, and surgery was contemplated, but deferred by the claimant based upon both medical advice and personal concerns.

On 9/28/2022, the claimant's orthopedic surgeon observed an acute worsening of the chronic infection and recommended immediate hospitalization informing the claimant that she was no longer amenable to antibiotic therapy and that there was a risk of amputation. The doctor strongly recommended surgery and made an "urgent request" for the carrier's authorization. The following day, the carrier notified the claimant that it would schedule an IME, and file the results in 30 days. That day the claimant was examined by an infectious disease physician who advised the claimant that if she developed certain symptoms such as a fever, increased pain and redness or swelling to immediately go to the emergency room.

On 10/1/2022, the claimant went to the emergency room with complaints of increased pain, redness of the knee and increased drainage. The claimant was admitted and cement spacer surgery was performed on 10/4/2022. The claimant remained hospitalized until 10/21/2022.

The carrier objected to being responsible for the treatment from 10/1/2022 to 10/22/2022, including the surgery, because the carrier had not provided authorization.

The WCLJ found the surgery performed in October 2022 was done on an emergency basis and resolved C-8.1s in favor of the medical providers. The Board modified the WCLJ's decision but affirmed that the carrier was responsible for the cost of surgery.

The carrier appealed.

- **HOLDING:** The Court affirmed stating that despite the understanding that surgery may have been required at some point, it found that the acute worsening of the claimant's condition in September 2022 was unforeseen and constituted an emergency that necessitated surgery prior to awaiting the carrier's authorization. As such, the Court found substantial evidence to support the Board's determination that the claimant's condition presented an emergency situation obviating the need for the carrier's prior authorization.

SECTION XV: PERMANENCY (SCHEDULE LOSS OF USE)

Brooks v. New York City Transit Authority, 234 AD3d 1072 (3rd Dept. 2025)

- **FACTS:** This case involves an established occupational disease involving the right shoulder, right elbow, right hip, right knee and right ankle.

The claimant's treating physician filed a report noting that the claimant had a 30% schedule loss of use (SLU) to the right shoulder, a 2.5% SLU of the right elbow, a 15% SLU of the right hip, a 17.5% SLU of the right knee and a 30% SLU of the right foot. The claimant's treating physician testified that he had not tested the limits in range of motion of the contralateral left side because the claimant had previously injured those body parts while working in 2014.

In contrast, the employer's independent medical examiner (IME) found that comparison of range of motion to the claimant's contralateral body parts was indicated and found a 0% SLU of all subject body parts because the measured range of motion of the subject body parts was identical or nearly identical to that of the contralateral body parts.

Following depositions, the WCLJ awarded a 32.5% SLU of the right arm, a 40% SLU of the right leg and a 30% SLU of the right foot. The employer appealed and the Board reversed finding that a comparison to the contralateral body parts was indicated and accepted the IME's conclusion that the range of motion of the subject body parts and the contralateral body parts were almost identical and found 0% SLU of the right arm, right leg and right foot.

The claimant appealed.

- **HOLDING:** The Court reversed and found that the Board erred in finding 0% schedule loss of use based upon a comparison to the contralateral body parts. The Court stated that while Section 1.3(3)(b) of the New York Workers' Compensation Guidelines for Determining Impairment (2018) state that deficits in range of motion should be measured by comparing the baseline reading of the contralateral member, this is not appropriate where the opposite side has previously been injured. The Court noted that the above Guidelines do not indicate what constitutes a previous injury or the extent of such an injury necessary to render comparison to the contralateral member inappropriate. Although the Board's interpretation was that such a comparison is only inappropriate where there is evidence of a permanent physical or functional impairment to the contralateral side, the Court disagreed and took a broader view and stated that comparing contralateral members that have even a temporary physical or functional impairment would also be inappropriate as such comparisons could eventually result in inequitable range of motion findings. As such, the Court held that the Board's interpretation of Section 1.3(3)(b) was unreasonable and could not be upheld.

Johnston v. Howmet Aerospace, Inc., 234 AD3d 1220 (3rd Dept. 2025)

- **FACTS:** The claimant, a factory worker, sustained a compensable injury to the left shoulder as a result of an accident in June of 2020. In September of 2020, the claimant's attending orthopedist, Dr. Bakirtzian, performed a surgical arthroscopic SLAP repair debridement of the rotator cuff and resection of the long head of the biceps, transplantation and tenodesis of the long head of the biceps in the bicipital, resection of the distal clavicle and acromioplasty. In August of 2021 a second surgery was performed.

The carrier obtained an independent medical examination (IME) with Dr. Michaels in November of 2021. He found flexion to 120 degrees and abduction to 90 degrees.

On January 4, 2022 (the date he last treated the claimant), Dr. Bakirtzian took range of motion measurements of 90 degrees for forward flexion and abduction of the left shoulder. He also reported normal range of motion with respect to elbow and wrist and recommended that the claimant be evaluated for schedule loss of use.

In August of 2022 the claimant retained an attending consultant, Dr. Kaufman, to perform a permanency evaluation. Dr. Kaufman noted deficits of 55 degrees for abduction and 50 degrees for flexion and reported a 70% schedule loss of use (SLU) of the left arm.

In September of 2022 the carrier obtained an IME with Dr. Haheer who stated that the claimant had yet to reach maximum medical improvement.

In October of 2022, following the claimant submitting an affidavit stating that she did not plan on any further surgery, the WCLJ awarded a 50% SLU of the left arm (left shoulder) based upon range of motion deficits and Special Consideration No. 5 of the 2018 Workers' Compensation Guidelines for Determining Impairment. The Board affirmed citing the January 2022 report of Dr. Bakirtzian and his range of motion findings which were consistent with the 11/29/2021 range of motion findings of Dr. Michaels.

The claimant appealed.

- **HOLDING:** The Court reversed the finding that the claimant sustained a 50% SLU of the left arm and remitted this matter to the Workers' Compensation Board.

The Court acknowledged that whether a claimant is entitled to an SLU and, if so, the resulting percentage are factual questions for the Board to resolve and will be upheld if supported by substantial evidence. The Court also stated that it is equally clear that the Board is not bound to accept the opinion of an expert and may reject such an opinion if it is incredible, speculative or lacks evidentiary support in the record. The Court noted that absent an explanation from either Dr. Kaufman or Dr. Haheer concerning the unexplained increase in range of motion deficits at the time of their permanency evaluations, the Court was unwilling to disturb the rejection of Dr. Kaufman's opinion regarding schedule loss of use.

However, the Court stated that it was improper for the Board to fashion its own SLU percentage based upon range of motion measurements from Dr. Michaels and Dr. Bakirtzian that were obtained in November of 2021 and January of 2022, respectively. The Court noted that these exams were performed only months after the claimant's August 2021 surgery and did not sufficiently address whether the claimant had reached maximum medical improvement.

See Also:

Vujeva v. Dairy Conveyor Corp., 237 AD3d 1433 (3rd Dept. 2025)

SECTION XV: PERMANENCY (CLASSIFICATION AND SCHEDULE LOSS OF USE)

Romero v. Akorn, Inc., 241 AD3d 1676 (3rd Dept. 2025)

- **FACTS:** In 2015, the claimant was injured at work resulting in injuries to her right knee, head, neck and back. In 2017 the claimant underwent a total right knee replacement. Subsequently the claimant was evaluated for permanency by both her attending physician and the carrier's consultant and both agreed that she was at maximum medical improvement (MMI) and sustained a permanent partial disability (PPD) amenable to classification. Although both the physicians considered permanency to the right knee, neither assigned a schedule loss of use (SLU) because the claimant's injuries were amenable to classification.

Following depositions, the WCLJ at a hearing in March of 2019 classified the claimant with a PPD and a 75% loss of wage earning capacity (LWEC). He also found that the claimant was not entitled to awards as she failed to demonstrate labor market attachment.

In October 2021, the claimant's attending physician filed an EC-4.3 form and reported a 65% SLU of the right leg. A hearing ensued and the claimant sought the SLU award based upon a change in the law which stated that where a claimant has both schedulable and non-schedulable injuries in the same accident and no initial award is made based on the non-schedule classification, that the claimant may be entitled to receive the schedule award.

The WCLJ denied the claimant's request and the Board affirmed stating the claimant's PPD already considered her right knee and that the claimant failed to submit medical evidence of a potential SLU when permanency was addressed in 2019.

The claimant appealed.

- **HOLDING:** The Court modified, by reversing that portion of the decision which found the claimant may not receive a schedule award. The Court noted that when the claimant was classified she did not receive an award because she failed to demonstrate attachment to the labor market. The Court noted that based on Taher v. Yiota Tax, Inc., 162 AD3d 1288 (3rd Dept. 2018), lv dismissed, 32 NY3d 1197 (2019) and Arias v. City of New York, 182 AD3d 170 (3rd Dept. 2020), that the claimant would be entitled to an SLU as she did not receive awards in connection with her classification. The Court further questioned the Board's reliance on the fact that there was no opinion on SLU at the time of classification. In this regard, the Court noted that the claimant would have had no reason to obtain such an opinion as, prior to the Taher decision, the claimant's injuries were only amenable to classification.

The Court also noted that the Board's failure to retroactively consider the impact of Taher on its prior decision was inconsistent with its own policy governing procedures for determining certain SLU's which states that if the Board has issued a prior decision contrary to the newly issued decisions (Taher and its progeny) that the Board would reopen such cases, upon request. See Subject No. 046-1211 (3/13/2020).

**SECTION XVI: PROCEDURAL ISSUES
(ADJOURNMENT REQUEST ON EXPEDITED
CALENDAR)**

Herrera v. Tempo Carpentry, LLC, 242 AD3d 1285 (3rd Dept. 2025)

- **FACTS:** The claimant alleged a fall from a ladder at work on 8/23/2022 resulting in multiple injuries. The carrier controverted the claim.

At a hearing on 4/17/2023 the WCLJ reminded the parties that the case had been transferred to the expedited calendar. The carrier informed the WCLJ that it intended on calling the claimant's foreperson as a witness at the expedited hearing scheduled on 6/30/2023.

Two days before the hearing, the carrier advised the WCLJ that the foreperson was leaving on a trip the next day and would be unavailable. As such, they requested another opportunity to produce that witness for testimony.

At the hearing, the WCLJ denied the request and established the claim. The Board affirmed.

The carrier appealed.

- **HOLDING:** The Court affirmed and rejected the carrier's contention that the WCLJ abused his discretion by denying the carrier's request for additional time to present its witness. The Court stated that as part of the expedited hearing process, that if a party's witness does not appear at the hearing that the party shall have waived its right to have that witness testify unless the moving party can make a showing of good cause and that it acted in good faith and with due diligence.

The Court noted that there were several days between the 4/17/2023 and 6/30/2023 hearings and the request for additional time was made only 2 days before the latter hearing. Furthermore, the affirmation request seeking additional time did not provide any information regarding the reason or timing of the witness' trip, nor did it do so at the hearing.

The Court also affirmed the establishment of the claim stating that the Board's decision was based on substantial evidence and that the Board was entitled to credit the claimant's testimony and the opinions of his physicians over the opinion of the carrier's independent medical examiner (IME), even though there was evidence in the record that the claimant had provided inconsistent accounts of his accident and resulting injuries.

See Also:

Rodin v. Department of Parks & Recreation, 2025 N.Y. App. Div. LEXIS 7207 (12/18/2025)

SECTION XVI: PROCEDURAL ISSUES (EVIDENCE PRECLUSION)

Hanson v. General Electric Co., 236 AD3d 1151 (3rd Dept. 2025)

- **FACTS:** On 1/25/2016, decedent's spouse filed the instant claim. The decedent, a field service technician, collapsed while at a residence repairing a refrigerator. The death certificate indicated that the decedent died from acute aortic dissection because of hypertension, with emphysema as a contributing factor.

Following a hearing, the WCLJ found a presumption of compensability based upon Section 21 of the WCL and established the claim. The Board rescinded that decision and directed development of the record and directed the carrier to obtain a records review of the medical evidence.

The report and testimony of the carrier's consultant, Dr. Sumner, found no correlation between the decedent's employment and his death from aortic dissection. The claimant's physician, Dr. Stern, opined that the aortic dissection was caused by increased blood pressure from moving the refrigerator to make repairs.

The carrier argued that the report of Dr. Stern was not properly served and should be precluded. The WCLJ agreed and precluded the report. The claimant appealed and while the appeal was pending, filed a records review from another physician, Dr. Basri, which provided causal relationship between the decedent's death and his employment.

The Board affirmed the preclusion of Dr. Stern's report noting it was not properly served and lacked a signed certification. The claimant subsequently contacted Dr. Basri and requested an amended report that included the required certification which was lacking in his initial report. That amended report with the proper certification was otherwise identical to his initial report and was filed with the Board. That amended report was admitted into evidence and the carrier appealed. The Board denied that application as interlocutory.

Subsequently, the WCLJ found the presumption of Section 21 applied, but had been rebutted by the death certificate and the carrier's consultant's report. However, the WCLJ, crediting the report of Dr. Basri, established the claim. The carrier appealed and the Board found both the report and testimony of Dr. Basri inadmissible and remanded this matter to the WCLJ, without further hearing, to determine the issue of causally related death without consideration of Dr. Basri's report or testimony. Following remand, the WCLJ found no medical evidence to support the claim and, as such, it was disallowed. The Board affirmed.

The claimant appealed.

- **HOLDING:** The Court reversed. Initially, the Court rejected the claimant's contention that the carrier failed to rebut the presumption of compensability. In this regard, the Court noted that the medical from the carrier's consultant rebutted the presumption and shifted the burden of proof to the claimant.

The Court, however, noted that the Board's Decision to preclude Dr. Basri's amended report relied on its erroneous belief that the WCLJ had already precluded Dr. Basri's initial report, a belief that had no support in the record. In addition, the Court noted inconsistency between the Board's preclusion of claimant's evidence due to the lack of any direction by the Board to submit such evidence and its determination that the claimant had been provided "ample opportunity" to submit such proof.

Pressimone v. New York City Housing Authority, 238 AD3d 1231 (3rd Dept. 2025)

- **FACTS:** The claimant sustained a compensable injury to his left shoulder in 2020. In 2022, the claimant's treating physician reported a 45% schedule loss of use (SLU) of the left arm. The carrier's independent medical examiner (IME) reported a 20% SLU of the left arm. The parties were directed to depose both doctors and to produce deposition transcripts within 90 days with a deadline of 9/28/2022. The deposition of the IME was timely filed.

The carrier had issued three subpoenas for the deposition of the attending physician: 9/19/2022, 9/23/2022 and 10/31/2022. The deposition was ultimately done after the deadline on 10/31/2022. No extension request had been made.

The WCLJ precluded the report and testimony of the attending physician and awarded the claimant a 20% SLU per carrier's IME. The Board affirmed the preclusion of the attending physician's report and testimony. The claimant requested reconsideration and/or a full Board review which was denied.

The claimant appealed.

- **HOLDING:** The Court modified and reversed that portion of the Board's decision which precluded the attending physician's report and testimony. The Court noted that the first two subpoenas were issued on dates that the doctor was known to be unavailable. The doctor was available on the date provided in the third subpoena but after the deadline. The Court also stated that a review of the record disclosed that the carrier stated that it would request an adjournment to cross-examine the attending physician but failed to do so.

See Also:

Troiano v. New York City Housing Authority, 2025 N.Y. App. Div. LEXIS 6526 (11/20/2025)

Petti v. Asplundh Construction Corp., 2025 N.Y. App. Div. LEXIS 7202 (12/18/2025)

SECTION XVI: PROCEDURAL ISSUES (EFFECTIVE DATE FOR RATE REDUCTION)

Juncal v. Maspeth Remodeling, 238 AD3d 1441 (3rd Dept. 2025)

- **FACTS:** The claimant was injured at work in November of 2021. He had an established claim and a Notice of Decision filed on 7/13/2012 directed awards from 11/7/2021 to 7/13/2022 and continuing at a temporary total rate.

On 8/31/2022 the carrier obtained an independent medical examination (IME) who reported a 50% orthopedic degree of disability. Pursuant to 12 NYCRR 300.23(b) the carrier filed an RFA-2 form seeking a reduction of the claimant's weekly benefits as of the IME date. While that request was pending, the claimant was diagnosed with a causally related moderate to severe psychiatric condition.

At a hearing on 3/6/2023, the WCLJ found prima facie medical evidence for a consequential psychiatric condition. In response to the carrier's request to reduce the rate, the claimant argued that awards should be brought to date at the total rate. The carrier argued that awards should be retroactively reduced as of the 8/31/2022 IME date. The parties agreed that after the 3/6/2023 hearing awards would continue at a 60% tentative rate pending further development of the record.

The WCLJ brought awards to date at the total rate and, thereafter, at the agreed upon tentative rate. The carrier appealed awards from the date of the IME (8/31/2022) up to the date of the 3/6/2023 hearing, contending that they should have been reduced as of the date of the IME. Alternatively, the carrier argued that as a hearing to consider its rate reduction request was not scheduled within 20 days pursuant to 12 NYCRR 300.23(b) the payment should be reduced as of 9/16/2022 the date the RFA-2 was filed. The Board affirmed.

The carrier appealed.

- **HOLDING:** The Court affirmed and stated that the Board properly held that 12 NYCRR 300.23(b)(2) does not mandate that a hearing be held within 20 days, although the Board strives to do so, nor that the claimant's benefits must be reduced or suspended after 20 days where a timely hearing is not held. Thus, the Board's determination to award the claimant temporary total benefits up to the date of the hearing was not an abuse of the Board's discretion.

SECTION XVI: PROCEDURAL ISSUES (RB-89 FORM WHEN MULTIPLE CLAIMS INVOLVED)

Sutphin v. UPS, 236 AD3d 1220 (3rd Dept. 2025)

- **FACTS:** The claimant, a package car driver, had three separate workers' compensation cases. The first involved a 1995 established back injury in which no finding of permanency had been made. The second involved a February 2001 established back injury in which no awards or a finding of permanency had been made. Both of these cases became the liability of Special Funds under Section 25-a of the WCL. The third claim (Liberty Mutual) involved an April 2017 incident which was established for the left hip, right buttock and an exacerbation of the back.

In a February 2022 decision, the WCLJ directed the reopening of the earlier two cases to travel with the most recent claim on various issues, including apportionment. A 12/2/22 hearing was conducted and was attended by the claimant, Liberty Mutual and Special Funds. The WCLJ found no basis to legally apportion liability to the first two claims, directed the issues of Section 123 and medical apportionment to be held in abeyance and continued these cases. Liberty Mutual appealed from that Decision and filed an RB-89 form in their case and requested apportionment between all three cases. The Board denied the application for review stating that Liberty Mutual had filed its application for review in only its file and had failed to file a copy of the RB-89 form in the earlier two claims.

Liberty Mutual appealed.

- **HOLDING:** The Court reversed and, notwithstanding the Board's advisory directive provided in Subject No. 046-1106R, stated that:

“[t]he requirement that a party submit a copy of the RB-89 form when referencing multiple claims, or that failing to provide to a copy for each claim could result in review being denied on one of the claims, is not included *on the form*, in the *instructions to the form* or in the Board's *regulations*.”

As the directive to file a copy of the RB-89 form in each case was not stated on the form itself, in the instructions for completing the form or in the Board's regulations applicable to such filings, the Court found that the Board abused its discretion in denying the appeal.

SECTION XVI: PROCEDURAL ISSUES [EVIDENCE TO SUPPORT “SAFETY VALVE” APPLICATION PER WCL §15(3)(W)]

Quoma v. Bob’s Discount Furniture, 241 AD3d 88 (3rd Dept. 2025)

- **FACTS:** The claimant sustained a work-related accident, and his claim was established for the back, thoracic spine and both shoulders. Awards were directed at various rates between December of 2017 and April of 2021. In April of 2021, the claimant’s attending physician opined that the claimant had reached maximum medical improvement (MMI). In November 2021, the carrier’s IME also reported that the claimant was at MMI.

In November of 2022, the WCLJ classified the claimant with a permanent partial disability and a 65% loss of wage-earning capacity (LWEC) entitling him to 375 weeks of indemnity. In addition, a finding was made that the carrier was entitled to a 78.8 week credit against the statutory capped weeks, based on its payments at a temporary partial rate after June 16, 2020 (the 130th week following the date of accident). The Board affirmed.

The claimant appealed.

- **HOLDING:** The Court reversed and remitted. The Court addressed two issues raised by the claimant. The Court rejected the claimant’s contention that the carrier’s credit doesn’t begin until the carrier has actually paid 130 weeks of temporary partial benefits. The Court stated that the clear and unambiguous language of WCL 15(3)(w) provided the credit for any temporary partial benefits made after 130 weeks from the date of accident and does not require that the carrier first pay 130 weeks at the temporary partial rate.

The Court also addressed the four requirements for the “safety valve provision” to apply so as to prevent implementation of the carrier’s credit. These requirements are as follows:

1. Permanency is at issue;
2. The claimant has submitted evidence that he is not at MMI;
3. The carrier has produced or has had a reasonable opportunity to produce an IME regarding the issue of MMI; and
4. The Board has determined that the claimant is not yet at MMI.

The Court stated that the Board had expressly clarified its policy as to whether a claimant is at MMI for purposes of determining safety valve relief. Under the clarified policy the claimant would no longer be required to request a hearing at the 130-week mark to preserve his or her ability to invoke the safety valve provision. Instead, the Board stated that if the issue was not raised until permanency is ripe, that it would look back and analyze the record around the 130th week date to make a finding as to whether or not the claimant was or was not at MMI. Upon undertaking that review the Board had determined that there was insufficient evidence in the record to support the determination that the claimant had not reached MMI as of 6/16/2020 and that all four statutory requirements were not satisfied.

The Court noted that the Board’s decision was based solely upon the lack of a C-4.3 having been filed as of 6/16/2020. The Court, however, noted that there was ample evidence concerning a pre-authorized surgery to the right shoulder on 6/24/2020. While the Court recognized that the mere assertion of further surgery is not a bar to MMI, it found that the Board’s silence on that issue coupled with its emphasis on the lack of a form not required by statute led the Board to impermissibly impose a burden on the claimant well after the time he could have satisfied the same. Because the Board failed to make any clear findings as to the safety valve factors, the decision was reversed and remitted for a new determination.

SECTION XVI: PROCEDURAL ISSUES (TIMELY NOTICE OF CONTROVERSY)

Collins v. New York City Transit Authority, 237 AD3d 1328 (3rd Dept. 2025)

- **FACTS:** On 3/7/2022, the claimant, a cleaner, reported to her employer that she sustained injuries at work the day before when the bench she went to sit on tilted, causing her to fall backwards to the floor. On 3/8/2022 the employer filed a FROI form listing the claim type as “W-Lost Time With No Paid Indemnity” and the Agreement to Compensate as “L-With Liability”.

A Notice of Case Assembly was issued, and the claimant submitted a claim alleging causal relationship. The claimant remained out of work, and the claimant filed a request for further action for lost wage benefits in May of 2022.

In June of 2022, the carrier filed a SROI form and pre-hearing conference statement that supported the carrier’s controversy.

At an ensuing hearing, the claimant argued that the claim should be established as the claim had not been denied timely and because the employer had filed two FROI forms, accepting the claim with liability.

By Notice of Decision filed on 7/18/2022, the WCLJ found the employer had failed to timely controvert the claim, waived any defenses and found prima facie medical evidence, findings the employer appealed.

By Notice of Decision filed on 8/29/2022, the WCLJ established the claim for the right arm/right shoulder and directed awards. The employer appealed arguing that it was premature to establish the case pending the outcome of their first appeal.

A Board Decision filed on 2/9/2023 modified the WCLJ’s decisions noting that the employer did not waive its defenses, the provisions of Section 25(2)(b) were inapplicable as the matter was not indexed by the Board, and the pre-hearing conference statement was timely filed. As such, the Board rescinded the 8/29/2022 decision and returned the case to the calendar for further development of the record in response to the carrier’s controversy.

The claimant appealed.

- **HOLDING:** The Court reversed and remitted this matter to the Board. The Court noted that while the Board concluded that Section 25-2(b) did not apply, it did not address related arguments raised by the claimant as to whether the employer’s Report of Injury forms, which indicated acceptance to the claim with liability, were binding or whether the employer’s subsequent actions in controverting the claim violated 12 NYCRR 300.37(c).

SECTION XVI: PROCEDURAL ISSUES [APPLICATION FOR REOPENING AND/OR REHEARING PER 12 NYCRR 300.14(A)]

Fuller-Astarita v. ABA Transportation Holding Co., 2025 N.Y.App.Div. LEXIS 7087 (12/11/2025)

- **FACTS:** The claimant, a bus driver's assistant, sustained injuries after being struck by a bus owned by her employer. The claimant asserted that her injuries did not arise out of and in the course of her employment and contended that she was unemployed and collecting unemployment benefits on the date of the incident. The WCLJ established the claim filed by the employer. The Board denied the claimant's application for review concluding that the RB-89 form was not filled out completely by counsel. The Appellate Division affirmed, finding that any challenge to the application for review was abandoned as the claimant only raised a challenge to the underlying merits of the WCLJ's decision, which was not properly before the Court as the Board's decision was limited to failure to follow procedural rules and regulations (176 AD3d 1531).

Subsequently, the claimant filed an application for rehearing and/or reopening alleging, among other things, that the Board lacked subject matter jurisdiction over the claim. The Board denied this application and the Appellate Division affirmed (201 AD3d at 1108-1110). Thereafter, the claimant filed another application with the Board seeking reconsideration in the interests of justice and on the merits. The Board denied this application.

The claimant appealed.

- **HOLDING:** The Court remitted this matter to the Board. The Court stated the following:

“An application for reopening and/or rehearing of a case may be made upon the presentation of material evidence not previously available, where there is proof of a change in condition or in the interest of justice (*see* 12 NYCRR 300.14 [a]). The Board's interpretation of a request for reopening, and its decision about whether to reopen a case are matters within its discretion, and the Board's decision will not be disturbed absent an abuse of discretion.”

Although the Court noted that the Board had found no new material evidence and that the Board had found that the issue of subject matter jurisdiction had been fully litigated, the Court stated that the Board failed to address the claimant's request that she nevertheless be granted relief in the interest of justice based upon the unique circumstances presented. As the Board failed to address that issue, the Court stated that meaningful review of the propriety of the Board's exercise of discretion was precluded.

Accordingly, the Court remitted this matter for the Board to address this issue and to provide a detailed explanation for its determination.

Coyle v. W&W Erectors, LLC, 238 AD3d 1302 (3rd Dept. 2025)

- **FACTS:** The decedent, Michael Coyle, had an established workers' compensation claim and in 2020 he was classified with a permanent partial disability (PPD) and loss of wage earning capacity (LWEC) entitling him to a maximum of 375 weeks of indemnity. Following the decedent's unrelated death in January of 2021, a request for action on behalf of the claimant's minor son (born in 2008) sought a hearing to determine his entitlement to unpaid amounts of the decedent's lost wage benefits.

Relying on Green v. Dutchess County, 183 AD3d 23 (3rd Dept. 2020), *reversed* 39 NY3d 35 (2022) the WCLJ decided that the decedent's son was entitled to unpaid lost wage benefits. The carrier did not appeal that December 2021 decision.

In October 2022, the Court of Appeals reversed Green v. Dutchess County, *supra*, and concluded that unaccrued portions of a non-schedule award may not pass posthumously.

Based upon this reversal, the carrier sought to suspend payments to the decedent's son. The WCLJ suspended payments. The Board, however reversed and denied the carrier's request to reopen.

The carrier appealed.

- **HOLDING:** The Court affirmed stating that the Board did not abuse its discretion. In this regard, it noted that the carrier had an ample opportunity to file an application for review of the WCLJ's December 2021 decision challenging the decedent's son's entitlement to benefits but no appeal had been filed. In addition, the Court stated that had such an appeal been filed awards would have been stayed.

See Also:

Sylvester v. Department of Corrections and Community Supervision, 2025 N.Y. App. Div. LEXIS 7217 (12/18/2025)

SECTION XVI: PROCEDURAL ISSUES (APPLICATION FOR RECONSIDERATION AND/OR FULL BOARD REVIEW)

Sanders v. NYU Langone Hospitals, 235 AD3d 1073 (3rd Dept. 2025)

- **FACTS:** The claimant, a utility worker, filed a claim for workers' compensation benefits alleging neck and back injuries from an alleged work-related accident that occurred while he was standing on a trash compactor sweeping debris. Following hearings and depositions from two treating physicians and an independent medical examiner (IME), the WCLJ disallowed the claim noting that the testimony of the claimant's treating physicians was not credible and was inconsistent with the claimant's testimony. The Board affirmed based on a finding that the claimant was not credible. In this regard, the Board noted that the claimant did not submit a medical report from his primary care physician with whom he first sought treatment and the initial report from the claimant's orthopedic surgeon indicated that the claimant did not recall a trauma to his neck. The claimant appealed, proceeding pro se, and sought reconsideration and/or full Board review based on additional medical reports including those from both his primary care physician and orthopedic surgeon. The Board denied the claimant's application.

The claimant appealed.

- **HOLDING:** The Court affirmed the Board's disallowance of the claim. The Court in addressing the claimant's application for reconsideration and/or full Board review stated:

"To succeed on an application for reconsideration and/or full Board review, the applicant must demonstrate that newly discovered evidence exists, that there has been a material change in condition or that the Board improperly failed to consider the issues raised in the application for review in making its initial determination."

The Court noted that although additional medical reports offered by the claimant were recently obtained, it was insufficient to establish that such evidence constituted new evidence that was unavailable at the time of the hearing.

PRACTICE TIPS:

The standard for reconsideration and/or full Board review is clearly stated by the Court. Note the distinction the Court draws between recently obtained evidence and newly discovered evidence that was unavailable at the time of the hearing.

See Also:

Pinson v. North Gate Healthcare Facility, 2025 N.Y.App.Div.LEXIS 7407 (12/31/2025)

SECTION XVI: PROCEDURAL ISSUES (INTERLOCUTORY APPEAL)

Sessa v. Allen Health Care Service, 234 AD3d 1190 (3rd Dept. 2025)

- **FACTS:** This claim was established for the neck and back arising out of a 2006 work-related accident. At a hearing conducted in December of 2020 awards were directed from 11/25/2020 through 12/20/2020 and continuing at a temporary partial rate.

At a hearing on 9/15/2022, the parties were directed to complete the depositions of both the attending physician and independent medical examiner (IME) regarding permanency, and the claimant, who had not worked since 2006, was directed to produce documentation of her job search.

At a subsequent hearing on 2/2/2023, an additional deposition was directed and the WCLJ, at the request of the claimant's attorney, updated awards from 2020 to date and continuing at a temporary partial rate. The carrier appealed those awards contending that its right to due process was violated by directing awards before the record was fully developed and a determination made regarding labor market attachment. The Board modified the WCLJ's Decision by holding awards in abeyance subsequent to 9/15/2022 (the date on which labor market attachment was raised) pending further development of the record.

The claimant appealed.

- **HOLDING:** The Court dismissed the claim's appeal as interlocutory, stating that the issue presented by the claimant could be reviewed once a final determination is made. The Court also stated the following:

"The Board's decision here is interlocutory in nature as it does not dispose of all the substantive issues or reach a potentially dispositive threshold legal question...It would be inappropriate for this Court to undertake a review of the sole argument claimant presents, regarding her labor market attachment and/or involuntary withdrawal therefrom, as the Board itself has withheld a final determination of labor market attachment pending further development of the record."

SECTION XVII: PSYCHIATRIC / STRESS CLAIMS

McLaurin v. New York City Housing Authority, 2025 N.Y. LEXIS 1918 (11/24/2025)

- **FACTS:** The claimants, three transit workers and one teacher, filed claims for workers' compensation benefits alleging psychological injuries – e.g., post-traumatic stress disorder (PTSD) resulting from workplace exposure to Covid-19.

The WCLJ found that the claimants were exposed to similar stress as their co-workers and disallowed the claims. The Board affirmed noting that the claimants failed to demonstrate that the stress they experienced constituted a compensable “accident” within the meaning of the WCL.

The Appellate Division reversed contending that the Board erred for 2 reasons. First, the Appellate Division contended that the Board failed to consider each claimant’s “particular vulnerabilities” and that the Board applied disparate burdens to claimants seeking benefits for contracting physical injuries from the virus as compared to those seeking psychological injuries alleged to stem from exposure to the virus in the workplace.

The employer appealed.

- **HOLDING:** The Court of Appeals reversed and reinstated the Board’s decision disallowing the claims. The Court of Appeals first noted that the Board was not required to consider each claimant’s “particular vulnerabilities”. The Court of Appeals further stated that the Board had not applied disparate burdens to these claims as opposed to Covid-19 contraction claims. In this regard the Court stated the following:

“While psychological and physical injury are “compensable to the same extent” (id.), neither is compensable unless the claimant satisfies the separate elements that the injury was “accidental” and that it “ar[ose] out of and in the course of employment.”

The Court of Appeals noted that at the time of the Board’s decisions, emotional stress-induced psychological injury was considered accidental only if the claimant established that the stress they experienced in the workplace was “greater than that which other similarly situated workers experience in the normal work environment.” By disallowing the claims on that basis, the Board, in effect, concluded that the claimants had failed to establish that the injuries were accidental. Because they were non-accidental, the Court of Appeals indicated that it was irrelevant that the injuries may have arisen “in the course of employment”.

Moreover, the Court of Appeals stated that evidence of Covid-19’s prevalence in the workplace does not relieve a claimant of the burden of establishing that the injury was accidental which in the case of emotional stress-induced psychological injury, has involved a demonstration by the claimant of something greater than the stress experienced by similarly situated workers in the normal environment.

Thus, the Court of Appeals reversed the Appellate Division decision and noted that there was substantial evidence to support the Board’s determination that the stress of workplace exposure experienced by the claimants was comparable to the stress experienced by similarly situated co-workers in the normal work environment during the Covid-19 epidemic. The Court of Appeals recognized that the impact of their decision was not likely to have a significant impact on the development of law, as they noted that the Legislature had

subsequently amended the statute to provide a more favorable standard to claimants pursuing claims involving certain psychological injuries, including post-traumatic stress disorder, acute stress disorder and/or major depressive disorder.

A dissenting opinion stated that it would have remitted this matter to the Board to reconsider the claims and to determine whether the claimants had shown that they were subject to extraordinary stress as compared to similarly situated workers in a normal work environment pre-pandemic and whether they demonstrated the existence of psychological injuries as related to workplace stress.

See Also:

**Waddy v. Manhattan and Bronx Surface Transit Authority, 234 AD3d 1141 (3rd Dept. 2025),
lv. denied, 43 N.Y.3d 906 (2025)**

Tudor v. Whitehall Central School District, 235 AD3d 1075 (3rd Dept. 2025)

Cho v. New York City Transit Authority, 242 NYS3d 136 (3rd Dept. 2025)

SECTION XVIII: SCHEDULE LOSS OF USE (I.E. CREDIT FOR PRIOR SLU)

Krein v. Greenhaven Correctional Facility, 2025 N.Y. App. Div. LEXIS 6374 (11/13/2025)

- **FACTS:** In 1999, the claimant sustained a work-related injury to the right knee and in 2000 was awarded a 12.5% schedule loss of use (SLU) of the right leg. In 2003, the claimant sustained another work-related injury to the right knee and no finding of permanency was rendered.

In March 2020, the claimant sustained another compensable injury to the right knee. Following permanency evaluation by both the treating physician and the carrier's IME, the WCLJ found an overall 25% SLU of the right leg of which 2.5% was found caused by the 1999 injury and 22.5% caused by the 2020 injury.

The carrier appealed the WCLJ's decision based on an argument that it should receive a 12.5% offset or reduction based upon the 12.5% SLU awarded in the 199 claim. The Board agreed with the carrier and awarded an overall 25.0% SLU of the right leg of which 12.5% was caused by the work accident of 1999 and 12.5% caused by the work accident of 2020 based on the holding in Genduso v. New York City Department of Education, 164 AD3d 1509 (3rd Dept. 2018) that "an SLU must always be reduced by the amount of any prior SLU to the same statutory member."

The claimant appealed.

- **HOLDING:** The Court reversed finding it was improper for the Board to impose the standard that an SLU *must always* be reduced by the amount of the prior SLU to the same statutory member and citing Matter of Johnson v. City of New York, 38 NY3d 431, 436-437 (2022):

"[s]eparate SLU awards for different injuries to the same statutory member are contemplated by [workers' compensation law §] 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."

As the Board did not consider the conflicting medical evidence regarding the extent to which the claimant's injuries were "separate pathologies that each individually caused a particular amount of loss of use" the Board's finding was reversed and the matter remitted for further consideration by the Board in accordance with the Johnson decision.

SECTION XVIII: SCHEDULE LOSS OF USE (PROPER PERCENTAGE LOSS OF USE)

Maini v. Nassau County Police Department, 2025 N.Y. App. Div. LEXIS 7199 (12/18/2025)

- **FACTS:** The claimant sustained a compensable injury involving his left Achilles tendon while working in June of 2022. In August 2023, the claimant's treating physician concluded that the claimant had reached maximum medical improvement (MMI) and had a 40% schedule loss of use (SLU) of the left foot. An independent medical exam (IME) was performed on behalf of the employer who opined that the claimant had a 22.5% schedule loss of use of the left foot. Following the depositions of both medical experts, the WCLJ awarded a 40% schedule of the left foot. The carrier appealed and the Board modified the WCLJ's decision and found a 22.5% schedule of the left foot.

The claimant appealed.

- **HOLDING:** The Court affirmed noting that whether a claimant is entitled to an SLU award and, if so, the resulting percentage are factual questions for the Board to resolve and the Board's determination, if supported by substantial evidence in the record as a whole, will not be disturbed.

The Court noted that the 2018 Workers' Compensation Guidelines for Determining Impairment lists seven special considerations applicable to the foot, including special consideration No. 6 which provides that "[r]upture of the Achilles tendon equals an average 20-25% loss of the foot. The Court also stated that the 2018 Guidelines only permit other deficits to be added to the SLU values enumerated in the special considerations for the foot "when specified or when no schedule value is provided." Range of motion deficits solely attributable to a condition included in the special considerations may not be used to increase the SLU. Thus, the Court noted that the treating physician adding for range of motion deficits in connection with the Achilles rupture was an incorrect application of the 2018 Guidelines. Instead, the Court stated that the IME's interpretation of special consideration No. 6 was properly credited by the Board and supported by substantial evidence.

SECTION XIX: VOLUNTARY WITHDRAWAL FROM THE LABOR MARKET

Hurley v. Lawrence School District, 239 AD3d 1172 (3rd Dept. 2025)

- **FACTS:** The claimant, a special education teacher, had his case established for causally related asthma, taught remotely during the COVID-19 pandemic, but was subsequently directed by his employer to return to in-person classroom instruction. The claimant's physician advised that the claimant should not be exposed to dust, mold and pollen due to his condition. The employer offered accommodation, but the claimant did not acknowledge the accommodation and never reported back to work.

In response to the failure to return to work, the carrier raised voluntary removal from the labor market and testimony was taken from medical witnesses.

The claimant's treating physician testified that he had not conducted any objective functional testing to determine whether the claimant could return to work. Likewise, the physician had reviewed the claimant's medical records and did not see any reports of objective testing with respect to the claimant's limitation. He further testified that he had no opinion on whether the claimant could return to work and emphasized that it was the claimant's subjective feelings that he could not return to work.

The carrier's independent medical examiner (IME) concluded that the claimant had only a mild disability and could return to full duty work if not exposed to mold in the workplace.

Following hearings, the WCLJ found that the claimant's contention that he was too ill to return to work was not supported by the medical evidence and, by failing to report to work, had voluntarily withdrawn from the labor market by unreasonably refusing a job offer. The Board affirmed the voluntary withdrawal finding.

The claimant appealed.

- **HOLDING:** The Court affirmed and noted that pursuant to Rosario v. AIG, 96 AD3d 1111, 1112 (3rd Dept. 2012), whether a claimant has voluntarily withdrawn from the labor market is an issue of fact for the Board to resolve, and its resolution will not be disturbed if supported by substantial evidence.

In light of the medical evidence and recognizing the Board's broad authority to make credibility determinations, the Court concluded that there was substantial evidence to support the Board's decision that the claimant voluntarily withdrew from the labor market.

See Also:

Ryan v. City of Albany Water Department, 2025 N.Y. App. Div. LEXIS 7100 (12/11/2025)

SECTION XX: WCL §10(1) – INTOXICATION DEFENSE

Ferra v. Paramount Global, 236 AD3d 1267 (3rd Dept. 2025), lv denied, 44 NY3d 906 (2025)

- **FACTS:** The claimant, a sound engineer, was traveling for his employer on the highway from his home in New Jersey to a job assignment in the City of Buffalo when he was involved in a motor vehicle accident without injury. While the claimant was pulled over to exchange information with the other driver and sitting in his vehicle with his left leg against the open driver's door, his vehicle was rear ended by another vehicle. Although the claimant indicated that he was uninjured as a result of the initial accident, he sustained injuries in the second accident which included the neck, back and left leg, as well as additional injury sites that were later asserted.

A toxicology screening at the hospital disclosed that the claimant had a blood alcohol level of .18 reflecting that he was legally intoxicated. The carrier denied his claim for workers' compensation benefits relying on the intoxication defense under Section 10(1) of the Workers' Compensation Law.

In rejecting the controversy and establishing the claim, the WCLJ noted that the accident in which the claimant was injured (the second accident) occurred during a work-related trip, arose out of and in the course of employment, and the carrier had failed to show that intoxication was the sole cause of that accident. The Board affirmed.

The carrier appealed.

- **HOLDING:** The Court affirmed the Board's decision and noted that the Board had found that while it could be reasonably argued that the claimant's high blood alcohol content may have caused the first accident when he attempted to pass the second vehicle, that neither could be considered the actual cause of the second accident. In this regard, the Board indicated that there was no showing that the claimant was engaged in any intoxication-induced activity at the time of the second accident.

The Court concluded that the record supported the finding that at the time of the second accident, the claimant was engaged in a reasonable activity gathering information while pulled over on the side of the road regarding the initial accident and his prior actions did not cause the second accident. The Court further stated that the contact of the third driver who struck the claimant's vehicle caused or contributed to the second accident. As such, the Court stated that the carrier did not overcome the presumption of Section 21(4) of the WCL as it failed to show that intoxication was the sole cause of the second accident.

See Also:

Ramales v. Frank & Nino's Pizza, 238 AD3d 1454 (3rd Dept. 2025)

SECTION XXI: WCL §28 (AKA STATUTE OF LIMITATIONS)

Davenport v. Oxford Central School District, 236 AD3d 1264 (3rd Dept. 2025)

- **FACTS:** The claimant has two established workers' compensation claims involving the low back for dates of accident in 1998 and 2008, but on 2/7/2020 sustained a "new" injury to the low back while shoveling snow at work.

On 2/18/2020, the claimant sought treatment with a physician's assistant (PA) who opined that the snow shoveling incident caused the need for treatment and disability, a report filed with the Workers' Compensation Board in the 2008 claim.

In December 2020, the claimant's supervisor completed an accident report and acknowledged that he was aware that the claimant injured his back shoveling snow in February of 2020. The employer denied the new claim and the Board then assembled the case and advised the claimant that a C-3 should be completed if he wished to pursue the same.

At a hearing on 3/25/2021, The WCLJ found no new accident and that the shoveling incident was an exacerbation of the 2008 claim. That decision was appealed and the Board remanded for the parties to submit clarifying medical on causal relationship and whether the 2020 shoveling incident constituted a new accident and/or exacerbation of either the 1998 and/or 2008 compensable back injuries.

At the remanded hearing in April of 2022, the WCLJ found, among other things, that the claimant's failure to file a C-3 within 2 years of the 2/7/2020 shoveling incident did not render the claim untimely under Section 28 of the WCL, a finding affirmed by the Board.

The employer appealed.

- **HOLDING:** The Court affirmed and noted that the timely filing of a claim is not dependent on the filing of a C-3 form, as other documents such as medical reports and the employer's injury report may be considered in determining if a claim is timely filed.

The Court stated that the PA's report filed shortly after the shoveling incident reflected the date, mechanism of injury, diagnosis and that the incident was the competent producing cause of the claimant's injury. Thus, although the Court stated that that report was filed in the 2008 claim, that medical report reflected the claimant's intention to file a new claim for compensation. As such, the Court found that substantial evidence supported the Board's determination that it received sufficient notice of the claimant's claim for compensation within 2 years of the alleged accident.

SECTION XXII: WCL §29 (AKA CONSENT TO THIRD PARTY ACTION)

Rorapaugh v. New Penn Motor Express, LLC, 2025 N.Y. App. Div. LEXIS 6541 (11/20/2025)

- **FACTS:** In July 2019, the claimant's spouse (decedent) was killed in a motor vehicle accident (MVA) while working. The claimant filed a workers' compensation claim in August of 2019 and, in July 2020, also commenced a third-party action in U.S. District Court for the Northern District of New York.

In February 2021, the parties to the third-party action filed a stipulation to dismiss the action in District Court without carrier's consent for gross payment of \$9 Million and net payment to the claimant of \$5.9 Million, a stipulation approved by the Court.

Thereafter, the carrier argued to the Board that it had not consented to the settlement of the third-party action and requested that payments to the claimant be discontinued and all future payments be barred pursuant to Section 29 of the WCL.

In response to the carrier's position, the WCLJ found the carrier's consent was not necessary because the amount the claimant received in the third-party settlement exceeded the total amount of workers' compensation benefits to which the claimant was entitled and directed awards subject to the carrier's holiday/credit rights.

The Board modified the WCLJ's decision, affirming that part of the decision which found that the carrier's consent was not necessary, but directed the carrier to pay the claimant \$113,631.55 in fresh money as the difference between the carrier's lien of \$109,402.81 and the carrier's apportioned share of the claimant's third-party action litigation expenses of \$223,934.36.

The carrier appealed.

- **HOLDING:** The Court affirmed the Board's decision that carrier's consent to the settlement agreement was not necessary because the Board's valuation of the claimant's lifetime benefits (i.e. \$1.2 Million) would not exceed the net settlement value of \$5.9 Million per Section 29(5) of the WCL, which requires the carrier's consent "only if the settlement is for less than the statutory amount of compensation benefits."

The Court reversed the Board's award of \$113,631.55 in fresh money to the claimant because the ultimate determination with respect to the equitable apportionment of legal expenses resides in the Court in which the third-party action was instituted per Section 29(1) of the WCL and without carrier consent the claimant's only recourse in obtaining equitable apportionment of her legal expenses in the third-party action was to move for such an order in District Court.

SECTION XXIII: WCL §35 – SAFETY NET (AKA EXTREME HARDSHIP REDETERMINATION)

Ackerler v. Asplundh, 236 AD3d 1271 (3rd Dept. 2025)

- **FACTS:** The claimant sustained a compensable injury to his back with consequential depressive disorder in 2012. In 2014, the claimant was classified with a permanent partial disability (PPD) and an 82% loss of wage-earning capacity (LWEC), entitling him to up to 450 weeks of indemnity benefits.

Prior to the exhaustion of his indemnity benefits in December of 2022, the claimant filed a request (C-35 form) for an extreme hardship redetermination and provided testimony that his household included his wife, sister and two sons (ages 20 and 25). The claimant testified that his wife, sister and older son all had income but did not testify to the amount of same or why they were not contributing to household expenses. The claimant asserted that his monthly income prior to exhaustion of his indemnity benefits, consisted of the subject indemnity benefits, social security and a pension that was approximately \$1,300.00 less than his monthly expenses. Following the record development, the WCLJ denied the claimant's request and the Board affirmed.

The claimant appealed.

- **HOLDING:** The Court affirmed, noting that in order to establish extreme hardship:

“The claimant must demonstrate financial hardship beyond the ordinary and existing in a very high degree.”

The Court noted that the expenses listed by the claimant included auto loans and insurance payments for three vehicles including one driven by his wife and one driven by one of his sons. The claimant's monthly expenses also included his adult children's cell phone bills, the cost of a lawn sprinkler system and payments on a home equity loan used to remodel his kitchen. Although he claimed to make up the monthly deficit with his credit card, the claimant failed to provide any credit card statements.

The Court noted that the Board had concluded that the claimant's reported income was not credible due to his failure to provide specific amounts earned by other family members and also because several monthly expenses were either unnecessary and were solely for the benefit of other household members who had their own income.

As such, the Court found that there was substantial evidence to support the Board's determination that the claimant had not demonstrated hardship beyond the ordinary and existing in a very high degree to meet the extreme hardship threshold.

See Also:

Mystowski v. Monpat Construction, Inc., 236 AD 3d 1254 (3rd Dept. 2025)

Epstein v. Waldbaums, 238 AD3d 1242 (3rd Dept. 2025)

Martin v. D'Agostino Supermarkets Inc., 240 AD3d 971 (3rd Dept. 2025)

SECTION XXIV: WCL §114-A (FRAUD) - MISREPRESENTATION OF DISABILITY

Carpenter v. Albany Dialysis Center, 235 AD3d 1048 (3rd Dept. 2025)

- **FACTS:** The claimant, a registered nurse, was injured at work in 2014 when a patient fell on her. A claim for workers' compensation ensued and was established and amended to include complex regional pain syndrome (CRPS) involving the right foot, left leg and both upper extremities. As of August 2021, the WCLJ directed awards at a temporary partial rate and directed continuing awards at a high marked rate.

In December 2021 the carrier raised Section 114-a of the WCL and provided notice that it possessed surveillance video depicting the claimant's functional abilities. The WCLJ permitted the carrier to obtain an independent medical examination (IME) to assess the claimant's degree of disability. Based upon the IME findings, the carrier requested a suspension of benefits as well as the disqualification from further indemnity benefits based on the claimant misrepresenting her functional abilities and disability.

Following medical testimony and a review of the surveillance video, the WCLJ found that the claimant had materially misrepresented her degree of disability and found that the claimant had violated Section 114-a of the Workers' Compensation Law. The WCLJ imposed a mandatory penalty and rescinded awards from 4/22/2021 to 7/14/2022. In addition, the WCLJ imposed a discretionary permanent disqualification from receiving further indemnity benefits subsequent to 7/15/2022. The Board affirmed and also denied the claimant's request for reconsideration and/or full Board review.

The claimant appealed.

- **HOLDING:** The Court affirmed the Board's decision and found substantial evidence to support the Board's determination that the claimant's affirmative misrepresentations and/or omissions constituted a violation of Section 114-a as well as the imposition of both the mandatory and discretionary penalties. The Court noted that while the claimant had reported constant and severe pain, balance issues and the need to use a cane for ambulation, multiple surveillance videos of the claimant showed her walking in sneakers for long periods of time without a cane or an altered gait. In addition, the surveillance videos showed that the claimant had the ability to hold a large bag of recyclables around shoulder level while talking to others. At no time during the surveillance videos did the claimant appear to be in any pain or discomfort.

See Also:

DeBryne v. Pittsford Mercury Inc., 236 AD3d 1165 (3rd Dept. 2025)

Tirado v. Symphony, Inc., 236 AD3d 1250 (3rd Dept. 2025)

Harmon v. Faxton Sunset St. Luke's Health Care Center, Inc., 242 AD3d 1288 (3rd Dept. 2025)

Qureshi v. Rite Aid Corp., 2025 N.Y. App. Div. LEXIS 6383 (11/13/2025)

SECTION XXIV: WCL §114-A (FRAUD) - OMISSION/MISREPRESENTATION OF MEDICAL HISTORY

Augone v. The Stop & Shop Supermarket Company, 236 AD3d 1283 (3rd Dept. 2025)

- **FACTS:** This case was an established claim for a neck injury sustained at work in 2021. After claim establishment, an issue arose regarding the need for surgical intervention and during medical testimony an attending physician referenced a pre-2021 MRI study of the neck despite the claimant's denial of prior neck injuries.

Thereafter the carrier produced medical records from 2017 which referenced neck pain following a fall, the carrier raised Section 114-a of the WCL, and thereafter the claimant testified before the Board that he did not consider the 2017 incident to be significant as he neither lost time from work nor had any follow-up treatment.

The WCLJ found no violation of Section 114-a because the carrier had failed to establish that the claimant's omission of the 2017 incident was intentional. The carrier appealed and the Board Panel affirmed, but with a split decision, which resulted in a mandatory Full Board review that also affirmed the WCLJ's decision, but was also split by vote of 8 to 4.

The carrier appealed.

- **HOLDING:** The Court affirmed the Board finding even though there was no dispute that the claimant neglected to mention his 2017 emergency room visit and, instead, denied any prior neck injury before the instant (2021) claim. When questioned regarding the omission, the claimant explained that he did not consider the 2017 incident to be significant as it involved no lost time and no follow-up treatment. He further testified that as time passed he simply forgot about the 2017 incident. The claimant also expressly denied intentionally trying to deceive the carrier.

The Court noted that the Board had found the claimant's explanation to be plausible and, based upon the nature of the prior incident, concluded that the claimant's failure to disclose the 2017 incident did not constitute a material misrepresentation of fact.

PRACTICE TIPS:

In cases involving a claimant's failure to disclose and/or omission, there may be circumstances where it makes sense to waive the claimant's testimony.

Query: Would the outcome in this case have been the same if claimant didn't testify and have the opportunity to minimize his prior injury?

See Also: **Alzate v. Quality Building Services, Inc., 238 AD3d 1437 (3rd Dept. 2025)**