2017: A Case Law Year in Review

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

Prepared and Presented by:

James B. Cousins, Esq.

Robert J. Caggiano, Esq.

The Law Offices of Melissa A. Day, PLLC

636 North French Rd Suite 3

Amherst, NY 14228

TABLE OF CONTENTS

1. WCL § 15-3(v)

Mancini v. Office of Children and Family Services, 151 AD3d 1494 (3d Dept. 2017)

Decision Below: Benefits awarded under WCL § 15-3(v) are subject to the durational caps provided under WCL § 15-3(w); the durational caps for such claims begin to run as of the date a Loss of Wage Earning Capacity is entered by the Board.

***Affirmed*:** There is nothing in WCL § 15-3(w) that indicates any prohibition against imposing durational caps for permanent partial disability benefits awarded pursuant to WCL § 15-3(v), and the Board's determination that these durational caps run as of the date the Board determines the duration (Loss of Wage Earning Capacity) is not arbitrary and capricious. The fact that the Board awarded Reduced Earning benefits to the claimant – and not § 15-3(v) benefits -- as of the date his Schedule Loss of Use award expired, and up to the date of his "classification" is not irrational, and will not be disturbed.

2. WCL § 18

Rydstrom v. Precision Carpentry of Westchester Inc., 150 AD3d 1602 (3d Dept. 2017)

Decision Below: The claimant failed to timely give notice of his work-related injuries to his employer, and his claim was therefore barred under WCL § 18.

***Affirmed*:** Claimant sustained a work-related injury on July 8, 2014, but failed to report this incident to his employer, claiming that he feared termination if he reported the accident, which was caused by a co-worker dropping a heavy object onto him. Three days later the claimant was terminated for cause, and still did not report a work-related injury. Claimant testified that his condition became progressively worse thereafter, and he ultimately sought treatment and reported his claim four months later, in October 2014, and November 2014 respectively.

The Board rationally determined that the claimant certainly could have given notice, and "the claimant offered no plausible explanation for why he did not report the alleged accident even after he was fired days later, or despite the fact that he "continually had pain."

The claimant failed to establish that the employer was not prejudiced by his late notice where medical records demonstrate that "the delay [in obtaining treatment] aggravated the claimant's injury" and the late notice "frustrated" the employer's efforts to interview the individuals who alleged dropped the steel cable which injured the claimant."

NB: Appellate Division restates that where the Board fails to index a file (EC-84), WCL § 25(2)(b) does not apply to impose time limitations on the filing of a controversy, and the evidentiary penalties associated with a late filing.

3. WCL § 25-a

American Economy Insurance Co. v. State, --- N.E.3d --- (N.Y. Ct. of App. 2017)

Decision Below: Appellate Division, First Department, held that statutory amendments closing WCL § 25-a fund for reopened cases impaired contracts of workers' compensation insurance issued before the closure of the fund insofar as WC policies are term/occurrence based, meaning policies written before the fund's closure did not reflect premium costs associated with the fund's closure, which NYS authorized for contracts of insurance written after closure of the fund. Such application is an impermissible retroactive application that impairs an existing contractual obligation, thereby violating the Contracts Clause of the US Constitution.

Reversed: Court of Appeals finds that because the "contract" of insurance in the record does not provide any indication that the presence of the 25-a fund was contemplated as a premium limiting measure, and it was not even mentioned in the contract, there is no therefore evidentiary basis to conclude that the closure of the fund cannot be said to impair a contract of insurance between a carrier and its insured. Carrier's claim that the amendment violated the Takings Clause of the US Constitution is similarly rejected insofar as the carrier could not demonstrate any "vested property interest" that was impaired by the amendment. It is well-settled that legislative changes that that merely "affect the value of one of the parties' contract rights" is not a violation of the Takings Clause, and, moreover, a "right" to apply for relief under WCL § 25-a is not guaranteed, but is instead "inchoate" and therefore cannot be deemed "vested" where it is premised on contingencies.

Misquitta v. Getty Petroleum, 150 AD3d 1363 (3d Dept. 2017)

Decision Below: Claim for death benefits, consequential to established lifetime claim, is properly found to be the responsibility of the § 25-a Fund for Reopened Cases where the underling lifetime claim was already § 25-a, even where the claim for death, a distinct and new claim, was filed after the January 1, 2014 cutoff for newly reopened claims.

Affirmed: While a claim for death benefits is a "separate and distinct legal proceeding brought by the beneficiary's dependents" which is "not equated with the beneficiary's original disability claim" (*citing* Zechmann v. Canisteo Vol. Fire Dept., 85 NY.2d 747 (1995)) "where liability for a claim has already been transferred from the carrier to the Special Find and the employee thereafter dies for reasons causally related to the original claim, the Special Fund remains liable for the claim for death benefits" without regard to the closure of the § 25-a fund.

4. WCL § 29

Pendock v. Matrix Communications Group et al., 148 AD3d 1505 (3d Dept. 2017)

Decision Below: Carrier's payment of its apportioned share of litigation costs pursuant to Burns while exercising its credit rights does not reduce the value of the credit (claimant's third-party net recovery).

***Dismissed*:** After settling a third-party action pursuant to WCL § 29, claimant received a net recovery of $115,700.79. Claimant argued that the carrier's credit should be reduced by the full value of ongoing PPD awards without reduction for that share of the benefit that the carrier was making to the claimant in consideration of its share of litigation costs (e.g. the Burns payment, though made to the claimant directly, should nevertheless be counted as a reduction of the carrier's credit). The Board's determination below was later rescinded, and therefore the appeal was moot.

In Matrix Communication, Case No. 6060 5581, January 6, 2017, the Full Board, *citing* Stenson v New York State Dept. of Transp., 96 AD3d 1125 (2012), held that the full award value, including the Burns share, was the proper method by which the Board should calculate the reduction/consumption of the carrier's credit.

See also **Lala v. Siteworks Contracting Corp., 151 AD3d 1150 (3d Dept. 2017)**(same issue)

Practice Point: Both cases are premised upon the fact that the carrier's consent failed to clearly set forth the manner in which the carrier's equitable share of litigation expenses would be taken into account in calculating the amount of the credit.

Com'rs of the State Ins. Fund v. Gomez, 2017 WL 784687 (Sup. Ct., N.Y. Cty., Mar. 1, 2017)

Decision: Where defendant law firm and claimant failed to obtain consent to settle a third-party action, brought under WCL § 29, from the WC carrier, NYSIF, the carrier is entitled to summary judgement against defendants, jointly and severally, as well as debt collection costs pursuant to NYS Finance Law § 18(5) not to exceed 22% of the judgement value. Defendant law firm/claimant improperly request to reduce the carrier's lien by its equitable share of litigation costs is denied where the request was not made to the Court in which the action was originally instituted.

Castlepoint Ins. Co. v. Marder, 2017 WL 1133448 (Sup. Ct., N.Y. Cty., Mar. 27, 2017)

Decision: Claimant settled a third-party action with consent; the consent noting a reduction in the lien to reflect its equitable share of litigation costs pursuant to WCL § 29 et seq. and stating that disbursement of the settlement proceeds would constitute acceptance of the terms of the carrier's consent.

Third-party counsel disbursed proceeds, but withheld the carrier's lien, without any notice, for at least nine months before being contacted by carrier's counsel. Defendant conceded they were intentionally withholding the lien insofar as they felt it was excessive, and would not release the sum until it was reduced. The carrier filed suit, and which time the defendants tendered payment of the lien; that tender was rejected insofar as it failed to include interest during the term which the lien was withheld.

Plaintiff's motion for summary judgement is properly granted; the lien generated pursuant to WCL § 29 is "inviolate" and the defendants' failure to satisfy the lien violates

both WCL § 29 and the terms of the carrier's consent agreement. Interest was awarded on the lien sum from the likely last date payment could have been timely made under statute, and costs and disbursements are awarded to the plaintiff.

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Also decided this year:

Com'rs of the State Ins. Fund v. Kenneth Sack, Esq., 2017 WL 1537163 (Sup. Ct., N.Y. Cty., April 25, 2017)(Same except counsel for defendant defaulted)

Rochdale Ins. Co. v. Sacks & Sacks, LLP, 2017 WL 4773034 (Sup. Ct., N.Y. Cty., Oct. 17, 2017)

Com'rs of the State Ins. Fund v. Vensaver, Esq., 2017 WL 2998883 (Sup. Ct., N.Y. Cty., July 12, 2017)

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Liu v. Hermitage Ins. Co., 2017 WL 2652876 (Sup. Ct., N.Y. Cty., June 16, 2017)

Decision: Plaintiff's application for an order of consent, *nunc pro tunc* after two-year delay is denied as procedurally defective insofar as it fails to contain an affidavit from a physician pursuant to WCL § 29(5), nor any medical records that may be required thereunder. In the absence of that statutorily required affidavit and annexed evidence, the Court could not assess the reasonableness of the claimant's settlement without knowing the claimant's medical status. Settlement here was "pre-lawsuit."

Terranova v. Lehr Construction Co., --- NE3d --- (Court of Appeals 2017)

Decision Below: Where claimant's WC benefits can be predictably and reliably ascertained, Kelly, and not Burns, is the proper method by which the carrier should contribute to the cost of litigation with respect to it credit against a net recovery by the claimant. Where, as here, the claimant's award was a schedule loss of use, that benefits is sufficiently definite that the carrier is not required to make a Burns contribution to the

award insofar as the cost of litigation share was properly assessed at the time the carrier's lien was reduced and satisfied.

N.B.: (139 AD3d 1309 [3d Dept. 2016]) As claimant's claim involves a scheduled loss of use, Kelly and not Burns is controlling, and therefore claimant was not entitled to ongoing payment for litigation expenses.

***Reversed and Remitted*:** Although the claimant's schedule loss of use award is sufficiently definite, it was not so at the time the parties consented to settlement: "where a particular type of award can be reliably quantified at some point in time does not end the inquiry; rather, a court must determine whether the award is quantified at the time the third-party suit is resolved, such that the litigation expenses associated with that suit can be equitably apportioned in the allocation between claimant and carrier." Insofar as the consent agreement between the parties reserved their rights to apportion litigation costs pursuant to both Burns and Kelly, there is no merit to the carrier's assertion that the plaintiff contracted away his future right to a Burns contribution.

5. WCL § 49-bb

Durkot v. Newsday, 151 AD3d 1152 (3d Dept. 2017)

Decision Below: Claimant's use of hearing protection at employment did not serve to remove him from exposure sufficiently to make any award payable (citing WCL § 49-bb).

***Affirmed*:** Claimant's continued exposure to noise at employment, along with his use of the same hearing protection that was employed at the time he contracted such loss, was insufficient to establish "removal" from exposure for the purpose of setting a date of disablement pursuant to WCL § 49-bb merely where the claimant alleges to have used this same hearing protection continuously for three months.

6. WCL § 114-a

Pompeo v. Auction Direct USA LP, 152 AD3d 1143 (3d Dept. 2017)

Decision Below: Claimant's Alford Plea to the criminal sale of a controlled substance was insufficient, by itself, to establish that the claimant committed workers' compensation fraud under WCL § 114-a. The employer failed to demonstrate that the claimant earned any income from the sale of controlled substances (contrary to the common sense of most human beings) or that he concealed his "work status" from the parties or the Board.

***Affirmed*:** Although the Board clearly misinterpreted the criminal records submitted to it by the employer, because the Board's determination was based upon substantial evidence.

Eardley v. Unatego Cent. School Dist., 153 AD3d 1460 (3d Dept. 2017)

Decision Below: Video footage of claimant doing minor tasks during an amateur football game, including assisting his disabled daughter collect money at an entrance gate, are sufficiently minimal, and are therefore not inconsistent with the claimant's representations about his level of disability/restrictions; no WCL § 114-a violation.

***Affirmed*:** The Board's conclusion that the proofs submitted by the carrier/employer failed to demonstrate a material misrepresentation by the claimant about the level/severity of his disability were reasonable and will not be disturbed.

Harrison v. Town of Cheektowaga, 155 AD3d 1286 (3d Dept. 2017)

Decision Below: Complex fact-pattern. *Pro se* claimant's inconsistent testimony regarding the reasons he stopped work as a bus driver in Arkansas, first claiming it was due to the injuries of the case, but later conceding it was due to termination for cause and subsequent "retirement" was insufficient to establish that the claimant made a knowing misrepresentation for the purpose of obtaining benefits.

***Affirmed*:** That the claimant readily acknowledged that he had both been fired and retired from his job wining a three-month interval, along with the fact that the Board considered

the claimant's "layperson analysis of his entitlement to benefits and the corresponding impact of his termination thereon" as a basis for reconciling the arguable inconsistencies in the claimant's testimony were sufficiently detailed to support that determination by substantial evidence – "notwithstanding other proof in the record that could support a contrary conclusion."

7. WCL § 123 – Continuing Jurisdiction

Fleurissaint v. Lenox Hill Hosp., 147 AD3d 1189 (3d Dept. 2017)

Decision Below: On appeal on the issue of Loss of Wage Earning Capacity, the Board, *sua sponte*, ruled that the claimant suffered no further causally related disability and rescinded ongoing awards. *N.B.* WCLJ awarded a 37.5% LWEC and claimant appealed to the Board Panel, seeking an increase to 50% while carrier sought, apparently affirmance of the LWEC rating below.

***Affirmed*:** The Board properly credited the carrier's IME, which found no objective basis for the claimant's alleged conditions insofar as that expert noted that the claimant attempted to "simulate pathology and exaggerate her symptoms." This evidence, notwithstanding evidence in the file to the contrary, constituted substantial evidence and the Board's ruling was not disturbed.

8. Appellate Process

Administrative Appellate Process & 12 NYCRR 300.13 et seq.

Harrell v. Blue Diamond Sheet Metal, 146 AD3d 1189 (3d Dept. 2017)

Decision Below: The claimant's application for review was defective insofar as he failed to serve all parties in interest.

***Affirmed*:** Although the Board may exercise discretion to modify, suspend or excuse a party's failure to comply with the appellate rules, "the discretion to suspend its own rules

does not apply to situations where a party of interest does not receive notice." *Citing* Matter of Greenough v. Niagara Mowhawk Power Corp, 45 A.D.3d at 1117.

Casale v. St. Catherine of Siena Medical Center, --- NYS3d --- (3d Dept. 2017)

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

***Reversed and Remitted*:** The WCB erred in considering claimant's letter of resignation, submitted for the first time on appeal to the Board Panel, insofar its submission was not accompanied by a sworn affidavit setting for the existence of the evidence and an explanation as to why it could not have been presented to the WCLJ below.

Everett v. Sodexo, Inc., 153 AD3d 1108 (3d Dept. 2017)

Decision Below: Claimant's injury arose in and out of the course of employment; claimant did not violate WCL § 114-a in the process of prosecuting this claim against the employer.

***Dismissed*:** Insofar as the appeal taken to the Court emanated from a Board Panel decision, and insofar as the carrier's right to appeal from that ruling terminated upon the issuance of the Full Board's subsequent ruling, the appeal must be dismissed.

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Also decided this year:

Levine v. Health First, 147 AD3d 1193 (3d Dept. 2017)(unsigned affirmation of service on RB-89, with typed name of LHR defective – denial of review was not an abuse of discretion – appellant tries to slip one by the AG's office in the Record on Appeal)

Turner v. Graphic Paper Inc., 151 AD3d 1127 (3d Dept. 2017)(failure of claimant to specify "issue or grounds for review" on RB-89 sufficient cause to justify denial of review for pro se appeal)

Levine v. Incorporated Village of Freeport, 60 NYS3d 848 (3d Dept. 2017)(SIE's failure to utilize, or file, an RB-89 coversheet when seeking to appeal WCLJ's ruling was sufficient grounds to deny review of that application where RB-89 was ultimately filed *after* 30-day appellate deadline)

Late Appeal

Szokalski v. A-Val Architectural Metal Corporation, --- NYS3d --- (3d Dept. 2017)

Decision Below: Late application for review/request for rehearing is denied insofar as the carrier failed to timely appeal or offer justification for its failure to appear at the underlying hearing.

Affirmed: WCL § 23 requires a party seeking review of a WCLJ decision to file a written application for review with the Board within 30 days of the filing of the decision. Insofar as Arch did not submit its application timely, and insofar as it provided no explanation for its failure to appear and present evidence at the subject hearing the Board's denial of Arch's appeal will not be disturbed.

Proper Appeal

Passero v. Uninsured Employers' Fund, 61 NYS3d 735 (3d Dept. 2017)

Decision Below: 2012 decision discharging NYSIF due to a finding of proper coverage was not properly appealed; although 2014 decision explicitly found UEF liable, UEFs failure to appeal the 2012 ruling precluded Board review – the 2012 ruling determined UEFs liability and was not timely appealed.

Reversed: Although the 2012 decision discharged The State Insurance Fund, that decision did not make any findings therein regarding apportionment, nor did it find that UEF was otherwise liable for the claim. Had UEF appealed the 2012 decision, such appeal would have been decided premature. Insofar as the 2014 decision apportioned liability and found the subject employer uninsured for the liable date, UEF's appeal was properly taken from the 2014 ruling and the Board's conclusion to the contrary is clearly erroneous.

9. Apportionment

Liebla v. GRO Max, LLC, 148 AD3d 1489 (3d Dept. 2017)

Decision Below: Apportionment applies between claimant's 1993 (closed) Connecticut WC claim and his 2007 NY WC claim even though he was working "full duty" and was not actively treating at the time of his 2007 accident.

***Affirmed*:** A claim of apportionment to a pre-existing condition, one which is not work-related, may be properly denied as a matter of law where the claimant was working full duty, without restrictions, at the time of a subsequent workers' compensation injury.

However, where a pre-existing condition is the result of a compensable work-related condition, the claimant's employment status at the time of a subsequent accident is not relevant to the applicability of apportionment. In such matters, "apportionment is appropriate where medical evidence establishes that the claimant's current disability is at least partially attributable to a prior compensable injury" (*citing* Campbell w. Interstate Materials). Where claimant's physician testified that the claimant's prior injuries and spinal surgeries, which had fused the claimant's spine with hardware, led to severe and advanced degenerative disc changes, and that the 2007 injury "was an aggravation of an underlying condition" the Board's determination that apportionment applied was supported by the law, and substantial evidence.

Manocchio v. ABB Combustion Engineering, 150 AD3d 1343 (3d Dept. 2017)

Decision Below: Carrier's claim to apportion liability for claimant's asbestos-related disability to prior employers under WCL § 44 was denied.

***Affirmed*:** That the carrier was unable to establish, by any objective proof, that the claimant's established asbestos disease existed before a 1992 chest x-ray, (which was negative for any findings consistent with asbestos-related disease) was sufficient evidence to justify denying the carrier's claim of apportionment under WCL § 44. Moreover, insofar as carrier's expert testified that the latency period between asbestos exposure and the clinical presentation of any disease process is extremely long, there was no way to

establish when the claimant may have been exposed, and that testimony speaks to exposure, and not contracture, further supporting the Board's determination.

Picone v. Putnam Hosp., 153 AD3d 1461 (3d Dept. 2017)

Decision Below: Carrier was entitled to apportionment between claimant's pre-existing non-work-related knee injury and present work-related claim. SLU reduced from 35% overall to 17.5% causally-related (50/50 apportionment).

***Affirmed*:** Apportionment may properly be applied between a prior non-work-related condition and a subsequent work-related injury in cases where a schedule loss of use is awarded where the prior injury – had it been compensable – would have resulted in a schedule loss of use. *See* Wilcox v. Niagara Mowhawk; Scally v. Ravena. Where claimant's physician opined an overall 40% SLU and testifies that the prior injury would have resulted in a schedule of between 30-40%, had it been compensable, and where carrier's IME opined 60/40 apportionment, Board's conclusion that apportionment applied here is rational and supported by substantial evidence.

Sanchez v. STS Steel, 61 NYS3d 727 (3d Dept. 2017)

Decision Below: Carrier was entitled to apportion 66.6% of the claimant's Schedule Loss of Use award to claimant's pre-existing non-work-related injury.

***Affirmed*:** Apportionment may properly be applied between a prior non-work-related condition and a subsequent work-related injury in cases where a schedule loss of use is awarded where the prior injury – had it been compensable – would have resulted in a schedule loss of use. *See* Wilcox v. Niagara Mowhawk; Scally v. Ravena. Where carrier's IMEs demonstrated that the claimant's preexisting meniscal injury, and surgery, accounted for one-third of the claimant's SLU/permanency. Although one of the carrier's IME only opined that the prior condition, even if it had fully resolved symptomatically, would have accounted for a 7.5% SLU (25% of a 30% SLU), the Board's determination that 33.3% of the claimant's condition was apportionable to the pre-existing condition was supported by substantial evidence.

10. Attorney Fees

Fernandez v. Royal Coach Lines, Inc., 146 AD3d 1220 (3d Dept. 2017)

Decision Below: Claimant's counsel's fee reduced to $450 ($2800 requested) insofar as application for fees did not comply with 12 NYCRR 300.17(d).

Affirmed: Workers Compensation Law § 24 gives the Board broad discretion in approving an award of counsel fees. *See* Matter of Kennedy v. New York City Dept. of Corrections. 12 NYCRR 300.17(d)(1) states that an attorney "shall file an application upon a form OC-400.1 in each instance where a fee is requested pursuant to [WCL § 24]. Here, in reducing claimant counsel's fee, the Board found counsel's OC-400.1 fee application deficient since it failed to indicate the date each service was performed and the specific amount of time for each service. Moreover, the record showed counsel was aware of Subject Number 046-548, issued by the Board May 28, 2013, which states the [OC-400.1] must include the date, description, and amount of time spent on each service. Here, claimant's counsel only listed a starting time for services provided. Given this standard, the Board did not abuse its discretion.

Tenecela v. Vrapo Constr., 146 AD3d 1217 (3d Dept. 2017)

Decision Below: $4000 fee reduced to $450 citing a deficient fee application.

Affirmed: Contrary to the contention of claimant's counsel, the Board did not err in reducing the award of its fee from $4000 to $450. In making its decision, the Board found the OC-400.1 was "illegible", specifically where the portion of the form describing the services rendered. Insofar as the Court agreed that the application was largely illegible, the Board's finding that the fee application did not conform with 12 NYCRR 300.17(d)(1) was supported by the record.

Curcio v. Sherwood 370 Management LLC, 147 AD3d 1186 (3d Dept. 2017)

Decision Below: PTD finding, with $7920 in fees to claimant's counsel are modified to a 90% LWEC and fee reduced to $450 due to a failure to properly complete the OC-400.1.

Affirmed: Insofar as the Court "accords great deference to the Board's resolution of issues concerning conflicting medical evidence and witness credibility, and may accept or reject portions of a medical expert's opinion" the Board was free to determine that a class 4, severity ranking I, is not equivalent to a total disability in light of differing medical opinions in the record from claimant's treating physician and the IME.

Insofar as 12 NYCRR 300.17(d)(1) mandates that when a fee in excess of $450 is requested, an OC-400.1 must be submitted, which indicates the dates and specific time spent for each service provided, where claimant's counsel merely indicated a gross total of "35 hours" for time spent, and failed to indicate any dates or the specific time spent for the services, the Board was free to reject this fee application as defective.

Shiqerukaj v. Gotham Broad, LLC, 147 AD3d 1262 (3d Dept. 2017)

Decision Below: Claimant sustained a 45% loss of wage earning capacity $4,700 attorney's fee reduced to $3,000.

Modified and Remitted: While the OC-400.1 submitted set forth the dates upon which services were rendered to claimant, and the number of hours allocated thereto, the description provided for those services were largely indecipherably. Also, the form allocated "25+" hours to an unspecified date or range of dates, which made it impossible for any assessment of these services to be made by the Board or the Court on appeal.

Insofar as the Board's decision was predicated on "the financial states of claimant" but the Board failed to make reference to the specifics of claimant's financial status the Board's decision lowering the fee awarded to claimant's counsel was incapable of intelligent appellate review.

Jeffrey v. Frontier Cellular Verizon Wireless et al., 148 AD3d 1484 (3d Dept. 2017)

Decision Below: $65,000 attorney fee reduced to $30,000.

Affirmed: WCL § 24 vests in the Board broad discretion with regard to the approval of counsel fees, and such approval will be not be unless it is arbitrary, capricious, unreasonable, or otherwise constitutes an abuse of the Board's discretion. Insofar as the Board appropriately considered relevant factors, including the services rendered by claimant's counsel's firm, the number of hours spent, and the hourly rate, when awarding the $30,000 fee no abuse of discretion occurred.

Jackson v. New York City Dept. of Transp., 149 AD3d 1334 (3d Dept. 2017)

Decision Below: Fee of $28,000, (on SLUs exceeding $200K) reduced to $450.

***Affirmed*:** 12 NYCRR 300.17 states where counsel or a representative seeks an award in excess of $450, he or she must submit a proper OC-400.1 specifying the dates and time spent on each service provided. "A requirement for such specificity is consonant with the Board's obligation to 'approve a fee in an amount of commensurate with the services rendered.'" That the Board found the OC-400.1 deficient where numerous entries were that designated the date as "several" and included blocks of hours with only a generic description of the services rendered and there were discrepancies for the services listed from 2012, which were also listed on a previous OC-400.1 form submitted by the licensed representative earlier in the life of the claim, the Board's reduction of the fee was not arbitrary and capricious or an abuse of discretion.

11. Cancellation of Coverage

Osorio v. M&L Express, Inc., --- NYS3d --- (3d Dept. 2017)

Decision Below: Carrier's proof of cancellation was insufficient where it failed to produce a "nexus" between it cancellation notice and its proof of mailing.

***Reversed and Remitted*:** The carrier met its burden here by producing a copy of its notice of cancellation, accompanied by "certified mail receipt from the United States Postal Service" which specific that "an item was sent to the employer, and the same receipt contain the notation *eff 1/31/14*." The tracking report submitted by the carrier showed that the item in question was delivered to, and signed-for by the employer's principal (even though it lacks an image of the signature or the entirety of the delivery address), at the proper city, state and zip code of the employer. This evidence, considered as a whole, if sufficient to prove the carrier did indeed properly serve the employer; particularly where the "notation" on the receipt contains the same effective date of cancellation listed in the notice of cancellation.

12. Causal Relationship

Qualls v. Bronx Dist. Attorney's Office, 146 AD3d 1213 (3d Dept. 2017)

Decision Below: Reversing WCLJ, claim for work-related ischemic stroke is disallowed insofar as the claimant's evidence of causal relationship was insufficient.

***Affirmed*:** While the WCL does not require that medical opinions be expressed with absolute certainty, opinions that amount to nothing more than speculation may not serve as the Board's basis for a ruling. While claimant alleged his recent testimony in a murder trial was stressful, thus causing his stroke, his physicians could only say that work-related stress was "likely to be a contributory factor" and, in testimony, could say nothing more than the stress "may have been" or "could've been a contributory factor." Insofar as claimant suffered from multiple co-morbid risk factors – particularly hypertension – and given the physician's "equivocal testimony" the Board was free to characterize this evidence as speculative, and reject it as insufficient.

White v. Bethany House, 147 AD3d 1173 (3d Dept. 2017)

Decision Below: The claimant produced sufficient evidence to support amendment of her claim to include a consequential right shoulder injury.

***Affirmed*:** Although the carrier's IME concluded that a consequential injury was not supported on a theory of overuse because the claimant was out of work, and thus performing only ADLs, the Board was free to reject that opinion, particularly where, under cross-examination, the consultant conceded he had no idea about the precise nature of the claimant's ADLs and any ADL requiring the use of both arms would certainly stress the uninjured limb due to favoring.

Campito v. New York State Dept. of Taxation and Finance, 153 AD3d 1063 (3d Dept. 2017)

Decision Below: Claim for consequential right arm injury was not supported by competent medical evidence.

***Affirmed*:** Carrier's IME, who reviewed the claimant's medical records, determined that the claimant's right shoulder complaints were secondary to adhesive capsulitis which was itself secondary to claimant's long-standing diabetes. Insofar as this conclusion was supported by the record, and that conclusion was consistent where claimant had previously reported to her own physicians a history of right arm/shoulder pain secondary to an electrical injury to that limb. Although the claimant's physician found causation on a consequential basis, insofar as that physician "did not thoroughly review the claimant's medical records or obtain an accurate history" it was entirely proper for the Board to discredit that physician's opinion.

Oparaji v. Books v. Rattles, 147 AD3d 1165 (3d Dept. 2017)

Decision Below: Claim for causally-related low back injury was not supported by substantial evidence; attending physician's request for right shoulder surgery should be denied as unrelated to the injuries of the claim.

***Affirmed*:** Although claimant's physicians opined that she sustained both a causally-related low back and right shoulder injury as a result a 2008 work-related "altercation," those physicians premised their theory of causation (and causally-related need for surgery) upon claimant's history of shoulder and back symptoms ongoing since the accident. Where the medical records in the intervening two years (2008, 2009 and part of 2010) failed to record any low back or shoulder symptoms, and where the physicians

treating the claimant during that period did not diagnose either condition, the Board was justified in relying upon the opinion of the carrier's consultant, who concluded that the low back and right shoulder symptoms were due to degenerative changes premised upon his review of the 2008-2010 records that failed to support the claimant's present allegation that these symptoms, and the underlying conditions, were a direct result of her 2008 work accident.

Lovegrove v. Regional Food Bank of Northeastern NY, 148 AD3d 1434 (3d Dept. 2017)

Decision Below: The claimant did not sustain any further causally-related disability.

***Reversed and Remitted*:** Although the carrier's IME opined that there was insufficient evidence to causally-related a claimed left shoulder blade injury to the claimant's work-related accident, in the face of "unequivocal" testimony from claimant's orthopedist that the shoulder-blade injury was related to the accident, where that testimony was premised on a history consistent with the first treatment record in the file and the absence of a prior, or intervening, injury to that body site, particularly where the mechanism of injury involved a direct blow to the claimant's back/shoulder-blade area, the Board's ruling was not supported by substantial evidence.

Richards v. Massena Cent. Schools, 150 AD3d 1349 (3d Dept. 2017)

Decision Below: Claim for consequential neurological injury denied; there is no further causally-related disability.

***Affirmed*:** Although the carrier's IME suggested that there may be a relationship between claimant's cervical surgery and her subsequent neurological complaints, he concluded the only basis for that conclusion was temporal. Insofar as the claimant's many physicians could not provide a diagnosis, let alone a clear opinion on causation, the Board's conclusion that her present neurological complaints were not related to her injury was supported by substantial evidence.

Bland v. Gellman, Brydges & Schroff, 151 AD3d 1484 (3d Dept. 2017)

Decision Below: Five consolidated appeals. Treatment for thoracic outlet syndrome is properly covered under the Board's Shoulder Medical Treatment Guidelines as a brachial plexus injury; MG-2 for aquatic therapy denied; claim for fibromyalgia is not causally-related to the accidents of record (apportioned claims); claimant is only partially impaired, and suffers from a permanent partial disability and 50% loss of wage earning capacity; claimant's numerous requests for reconsideration/rehearing denied.

***Affirmed*:** The Board's treatment of thoracic outlet syndrome as a shoulder condition under those guidelines is squarely within the Board's authority (*citing* Kigin), the Board properly denied the variance request for aquatic therapy where the attending physician failed to demonstrate why other treatment under the MTGs were not appropriate under 12 NYCRR 324.3(a)(3)(i)(c); the claimant's physicians failed to provide evidence of causation between her work injuries and her claimed fibromyalgia, and the claimant abandoned her appeal on this issue in her brief to the Court; and the Board's conclusions about LWEC, and its denial of rehearing/reconsideration were supported by substantial evidence, and the absence of any new evidence, respectively.

Boyuk v. Triad Retail Media, 155 AD3d 1292 (3d Dept. 2017)

Decision Below: Claim for work-related asthma disallowed.

***Affirmed*:** Although the claimant's physician testified that claimant's exposure to "an industrial strength aroma therapy diffuser" at employment in 2014, coupled with diagnostic proof of bronchial asthma, was clear evidence of causation, the Board's conclusion that the condition was unrelated to her employment was nevertheless proper. The Board was free to credit the opinion of the carrier's consultant, who performed diagnostic tests of his own, showing that the claimant lacked any objective findings of respiratory impairment. Insofar as the claimant denied any prior diagnosis of asthma, but medical records reviewed by the consultant demonstrated that she had been diagnosed with asthma in 2012 supported the consultant's opinion that any respiratory complaints were, in fact, secondary to claimant's cohabitation with five cats and three dogs.

Page v. Liberty Central School District, --- NYS3d --- (3d Dept. 2017)

Decision Below: The claimant is not entitled to further development of the record on the issue of a causally-related psychiatric condition/disability on a theory of *res judicata*.

***Reversed and Remitted*:** Claimant, whom the Board previously found suffered from no further causally-related disability, was entitled to development of the record on the issue of a causally-related psychiatric disability which her physicians claimed to be secondary to "longstanding multiple chemical sensitivity syndrome."

The Board's conclusion that its earlier finding (affirmed by the Third Department in a previous ruling) that the claimant suffered from no further causally-related disability, and thus could not suffer from any condition consequential thereto, failed to consider the fact that, prior to its ruling on disability, the Board had accepted, and credited, evidence of disability emanating from that condition from 2004, when the case was established, until 2011, when it ultimately ruled that there was no further causally-related disability. Insofar as the claimant could articulate a claim of consequential injury relating to the disability present during that period, and there was evidence of treatment for these psychiatric conditions during that period, the Board's blanket preclusion of record development by holding that "without a further casually-related disability, there could be no disability from which a consequential condition could arise" was overly broad and was an abuse of its discretion.

13. Death

Lavigne v. Hannaford Bros. Co., 153 AD3d 1067 (3d Dept. 2017)

Decision Below: Death was causally related to decedent's employment.

***Affirmed*:** Although carrier's cardiologist opined that decedent cardiac arrest was due to a preexisting coronary artery disease, which was sufficient to rebut the WCL § 21 presumption, the report and testimony of an internal medicine physician who reviewed decedent's medical records on behalf of the estate, which and concluded that work-related stress was a "significant contributing factor" to her sudden cardiac arrest, was a sufficient basis for the Board to establish the claim.

Bordonaro v. Genesee County Sheriff's Office, 148 AD3d 1507 (3d Dept. 2017)

Decision Below: Claimant's death, at home, in his sleep, neither arose out of his employment, nor was causally-related to said employment; claim disallowed.

***Affirmed*:** Although WCL § 21 affords a presumption that a claimant's death arose out of his employment, where the claimant's death occurred at home, and in the absence of any evidence that any injury occurred at work that led to his death, the claimant could not rely on the § 21 presumption to demonstrate a work-related death. That the record indicated that the claimant had performed his normal activities at work on the day of his death, and that he had been "observed occasionally rubbing his chest, taking antacids and acting lethargic in the days prior to his death was insufficient evidence to establish any relationship between the claimant's employment and his subsequent death at home.

Silvestri ex rel. Silvestri v. New York City Transit Authority, 153 AD3d 1069 (3d Dept. 2017)

Decision Below: Claimant's injuries, and consequential death arose in, and out of, the course of his employment.

***Affirmed*:** Decedent, found in bed at home by his wife one hour after his work shift ended, told his wife that he fell into "the pit" at work and was in severe pain. The decedent went to the hospital shortly thereafter and was diagnosed with fractured ribs and released, but did not improve. At a subsequent hospitalization three days later, decedent was diagnosed with a ruptured spleen and punctured lung secondary to "blunt impact injuries to the trunk" which was the ultimate cause of death.

Although the Board improperly utilized the presumptions under WCL § 21 to reach its conclusion, the Board's conclusion is nevertheless supported by substantial evidence. Wife's testimony about the decedent's statement about "the pit" was sufficient under WCL § 118, as a corroborated "declarations of a deceased employee concerning the accident" where that statement was corroborated by coworker testimony that on the day of the alleged accident, although unwitnessed, the decedent presented at the end of the

first of two scheduled shifts holding his stomach and asking to go home because "he was not feeling well."

14. Employer Reimbursement

Collins v. Sheriff's Dept., 153 AD3d 1453 (3d Dept. 2017)

Decision Below: Stipulation of the parties which permitted the SIE to "take credit for all prior payments" against a Schedule Loss of Use award permitted the SIE to credit not only the value of the workers' compensation award made by the Board, but the differential between that award and the actual wages it paid to the claimant as an advance payment of compensation.

***Affirmed*:** Claimant's (Alex Dell) position that case law supports a contrary result is without merit. Insofar as the stipulation language drew no distinction between wages, awards and compensation, and insofar as the SIE's reimbursement request was timely filed, and where is no evidence that the SIE intended to waive its right to reimbursement, the employer was properly entitled to recoup the entire sum of wages paid to the claimant from the awarded Schedule Loss of Use.

Newbill v. Town of Hempstead, 147 AD3d 1191 (3d Dept. 2017)

Decision Below: Employer is entitled to reimbursement for wages paid to the claimant during the period of work-related disability, regardless of the presence of a formal award from the Board covering the period of wages paid.

***Affirmed*:** The employer's payment of wages to the claimant, along with its timely request for reimbursement, entitles it to such reimbursement, in full, from the claimant's subsequent Schedule Loss of Use award pursuant to WCL § 25(4). Although the employer paid wages to the claimant during two closed-periods of lost time for which the Board could not ultimately make a formal award due to the absence of medical evidence, the employer is nevertheless entitled to full reimbursement from the claimant's SLU award: "The fact that a temporary disability award was denied during part of that period based

upon missing medical evidence in the Board's record is no relevant to the employer's entitlement to reimbursement."

15. Expedited Hearing Process

Maffei v. Russin Lumber Corp., 146 AD3d 1207 (3d Dept. 2017)

Decision Below: Carrier's request for continuance of expedited proceeding in order to produce surveillance video denied; carrier should have brought the surveillance to the hearing.

***Affirmed*:** Pursuant to WCL § 25(3)(d), the Board correctly transferred the hearing to the expedited hearing calendar, and proper notice was provided to the parties well in advance of the hearing. The Board's rules promulgate adjournments in connection with expedited hearings are governed by 12 NYCRR 300.38[j][1], which states adjournments in hearings of a controverted claim will only be granted in an emergency. An emergency is defined by 12 NYCRR 300.38[j][5] as a "serious event that occurs preventing the timely completion of some action ordered or directed" and includes "death in the family, serious illness, significant prior professional or business commitment, and inclement weather that prevents travel. It does not include any event that can be prevented or mitigated by the timely taking of reasonable action." Where the record reflects that claimant's request for an adjournment was not predicated on an emergency, but rather was a consequence of carrier's choice not to bring the video to the hearing because of the belief that they "weren't going to be watching [it] today" the Board properly denied the carrier's adjournment request.

16. Forum

AEE Medical Diagnostic, P.C. v. Travelers Property Cas. Co. of America, 57 Misc.3d 131 (A) (1st Dept. 2017).

Decision Below: Case was directed for trial on the sole issue of whether Workers Compensation was the primary coverage for plaintiff's assignor.

Reversed, vacated and remanded: The Workers' Compensation Board has primary jurisdiction to determine factual issues regarding coverage under the WCL. As such, the factual issues presented in this appeal are properly referred for determination of the Board.

17. GML § 207 Benefits

Lockwood v. City of Yonkers, 57 Misc.3d 728 (Sup. Ct., Westchester Cty., Sept. 12, 2017)

Decision: Plaintiff, receiving benefits under GML§ 207-a, is entitled to pursue a separate action in tort under GML § 205-a against defendant municipality insofar as GML 207 benefits have been "repeatedly recognized to be separate and distinct from workers' compensation benefits." To that end, the "exclusivity" provision of WCL § 11 that bars suit against an employer where plaintiff is in receipt of workers' compensation benefits in inapplicable. To the extent that the employer had actual knowledge of the plaintiff's accident and injury, and in the absence of any evidence of substantial prejudice against the defendant, plaintiff motion to file a late notice of claim was granted.

18. Hearing Protocols

Daniels v. Long Island D.D.S.O., 148 AD3d 1482 (3d Dept. 2017)

Decision Below: Extension request to produce deposition transcript denied; claimant suffers a 66 2/3% SLU of the left arm and no further casually related disability to her neck.

Affirmed: Claimant's sole contention on appeal, that she was denied the right to be present and testify at the hearing due to the early commencement of that proceeding is unpersuasive, specifically because claimant's counsel was present and did not object to the early start of the hearing. Claimant proposed testimony on LWEC would only speak to the number of weeks after the finding of a classification, and insofar as the Board

awarded a SLU based upon the opinions of both the IME physician and the claimant's treating physician, her arguments are without merit.

19. Home Health Aide Reimbursement

Buckner v. Buckner & Kourfofsky, LLP, 152 AD3d 921 (3d Dept. 2017)

Decision Below: HHA services provided to the claimant by a family member are payable directly to that family member.

***Reversed*:** Law firm principle deemed permanently and totally disabled as a result of work-related stroke, was entitled to direct reimbursement for HHA services that were provided – by prior authorization – by claimant's wife. Insofar as the Board found that Matter of Perrin v Builders Resource, Inc. had overruled long-standing Third-Department precedent that such reimbursement must be made directly to the claimant (*citing e.g.* Matter of Manning v Niagara Mohawk Power Corp.) the Board was incorrect; therefore the Board's ruling that reimbursement was payable to claimant's wife directly was improper and must be reversed.

20. Jurisdiction

Barnett v. Callaway, 146 AD3d 1215 (3d Dept. 2017)

Decision Below: Jurisdiction over Florida employer is established; untimely/defective appeals of alleged uninsured employer, and request for reconsideration/review by UEF are denied.

Affirmed: To determine "sufficient contacts" to establish New York jurisdiction, the Board may consider various factors, including where the employee resides, where the employee was hired, the location of the employee's employment and the employment offices, whether the employee was expected to return to New York after completing out of state work for the employer, and the extent to which the employer conducted business in New York. Where claimant had maintained a primary residence in New York since

1983, claimant was interviewed and hired at employer's primary residence located in New York, and her job duties included cooking for that NY residence, the fact that claimant did travel to Florida with her employer for eight months out of the year, and claimant's accident occurred in Florida does not, in itself, divest the Board of jurisdiction.

21. Labor Market Attachment

Hughes v. Coghlin Electric Contractor, 147 AD3d 1168 (3d Dept. 2017)

Decision Below: Claimant, upon leaving his employment on June 3, 2014 voluntarily withdrew from the labor market.

Affirmed: The Board's determination as to whether claimant has demonstrated an attachment to the labor market will be upheld if supported by substantial evidence. Whereas here, claimant was cleared to return to work following his injury as of 06/03/14, but he informed his employer he would not return for reasons unrelated to his disability and/or ability to perform his job duties, the Board's determination that the claimant's separation from employment was unrelated to this claim is supported by substantial evidence. That finding is further supported where the record showed multiple medical reports from June 2014, wherein the treating physicians opined claimant had no more than a 25% mild disability, and also claimant's own testimony revealed he did not seek any employment following his voluntary withdrawal on June 3.

Palmer v. Champlain Valley Specialty, 149 AD3d 1342 (3d Dept. 2017)

Decision Below: Claimant is unattached from 2013 – the date of the first suspension on LMA – to 2015 – the date upon which the claimant failed to establish reattachment.

Affirmed: Although the record showed claimant applied for services at ACCES-VR, where such services did not include a job search due to an indication she was contemplating surgery and where claimant's testimony indicated she opted to not have surgery in 2014, and where she merely met with ACCES-VR in 2015, and did not even

prepare a resume until shortly before the 2015 hearing, the Board's determination that the claimant was not attached to the labor market was supported by substantial evidence.

McKinney v. U.S. Roofing Corp., 150 AD3d 1377 (3d Dept. 2017)

Decision Below: Claimant's benefits are suspended for failure to comply with WCLJ order to produce evidence of labor market attachment.

Affirmed: Insofar as the record reflected that the Board had twice directed claimant to provide evidence of his attachment in December 2013 and again on May 2014, and he received notice of such issue, the Board's determination to suspend the claimant's benefits based upon claimant's failure to comply with that direction/order at the time of the second hearing is supported by the record.

Romanko v. New York University, 61 NYS3d 729 (3d Dept. 2017)

Decision Below: Claimant's separation agreement with employer, which ended claimant's employment constitutes a voluntary withdrawal from the labor market.

Affirmed: Generally, a claimant who voluntarily withdraws from the labor market by retiring is not entitled to workers' compensation benefits unless the claimant's disability caused or contributed to the retirement. *See* Matter of Greco-Meyer v. Nassau County Police Department. While claimant testified her work-related respiratory problems motivated her entered into the separation agreement, the Board's conclusion, based upon medical evidence in the record from this period, is supported by substantial evidence. Insofar as none of the submitted medical reports for the time period surrounding her departure supported the conclusion that her work-related condition was disabling, or that it contributed to her decision to enter the separation agreement and cease working, and where claimant conceded her medical providers never advised her to stop working, the Board's conclusion that her separation from employment was unrelated to the disability/injury of the claim would not be disturbed.

Pontillo v. Consolidated Edison of New York, Inc., --- NYS3d --- (3d Dept. 2017)

Decision Below: Claimant, who voluntarily withdrew from the labor market, successfully demonstrated a reattachment to the labor market.

Reversed and Remitted: Although the employer argued in its papers below the claimant had not satisfied his burden of establishing that his inability to find work, and the related loss of earnings, was casually related to his disability, which requires that the claimant demonstrate "that other factors totally unrelated to his [or her] disability did not [cause the] adverse effect on his [or her] earning capacity" the Board failed to address this contention, and inasmuch as the Board failed to act in its fact-finding role and deprived the employer of consideration of merits of the issue its decision must be reversed.

King v. Riccelli Enterprises, --- NYS3d --- (3d Dept. 2017)

Decision Below: Claimant reattached to the labor market in 2014 and suffers an 81% LWEC. (cross appeals filed)

Modified and Remitted: Although claimant had, earlier, contacted ACCES-VR and the Office of Workforce Development and visited these agencies several times, and attempted to take a high school equivalency test, and began taking part-time classes to prepare himself, the Board's conclusion that the claimant had not successfully demonstrated a reattachment to the labor market was supported by substantial evidence. Where the record revealed, in the midst of these efforts, in 2015, claimant began receiving Social Security Disability, he had not actually taken the high school equivalency test, he stated he had not prepared a resume, nor identified any potential job leads through his online search, nor could describe any specific type of jobs he wished to obtain once he received his high school equivalency diploma, the Board was free to conclude that that the claimant's efforts to reattach were not sufficiently diligent. However, the Court was unable to find substantial evidence existed warranting the reduction in LWEC where there was no medical testimony presented at the hearings regarding claimant's medical impairment or functional ability/loss attributable to the condition of his cervical and lumbar spine.

22. Licensed Hearing Reps – Renewals

Molloy v. New York State Workers' Compensation Board, 146 AD3d 1133 (3d Dept. 2017)

Decision Below: Article 78 petition, seeking, *inter alia*, reversal of the Board's decision to refuse LHR renewal, is denied.

***Affirmed*:** WCL § 24-a[1] allows a non-attorney to represent claimants before the Board provided that he or she has received a license from the Board, issued "in accordance with the rules established by it." In accordance with an order issued per WCL § 141, oral reviews of license applications are conducted by a three-member panel consisting of member of the Board, a representative of the Board's licensing unit and a representative of the Board's office of general counsel. Insofar as Petitioner appeared before this panel in August 2014, and the panel concluded his responses to a series of questions pertaining to the knowledge of workers' compensation and disability topics exhibited a fundamental lack of understanding of key concepts, and insofar as that panel had presented a detailed explanation of their findings for review when it dismissed the Petitioner's application, a rational basis exists to support the Board's determination not to renew the Petitioner's license.

23. Loss of Wage Earning Capacity/Permanency

Lesane v. City of New York Police Dept., 153 AD3d 1112 (3d Dept. 2017)

Decision Below: Claimant sustained a 65% loss of wage earning capacity as a result of established bilateral CTS, consequential major depressive disorder and bilateral DeQuervains disease.

***Affirmed*:** Board's conclusion was supported by substantial evidence. The Board's consideration of the claimant's physical impairment of 50%, and her capacity to perform sedentary work was properly balanced considering aggravating and mitigating factors. Although the claimant would be precluded from performing typing work due to the nature of his injuries, and she did not have a driver's license, the fact that the claimant had

an Associate's degree, was English proficient, had computer knowledge and extensive office experience were sufficiently considered to support the Board's conclusion by substantial evidence.

Golovashchenko v. Asar Intern. Corp., 153 AD3d 1475 (3d Dept. 2017)

Decision Below: Claimant sustained a 65% loss of wage earning capacity.

***Affirmed as Modified and Remitted*:** WCLJ, and Board below, improperly determined that claimant was capable of "light work" insofar as there is no medical opinion in the record stating such. "The WCLJ, who was not a medical doctor, appears to have undertaken his own independent analysis of the medical evidence in concluding that claimant was capable of performing light work."

Martone v. Niagara Frontier Transp. Authority-Metro, 146 AD3d 1191 (3d Dept. 2017)

Decision Below: Claimant suffered from a permanent partial disability and 75% loss of wage earning capacity.

***Affirmed*:** Although claimant utilized a walker, was older, limited in ADLs and had limited education and work experience, the Board's conclusion that the claimant was not permanently and totally disabled is supported by substantial evidence. Board was free to credit the opinion of claimant's physicians, who suggested the claimant demonstrated "submaximal effort with regard to his recovery" and carrier's IME that concluded that the claimant was impaired, in part, due to the use of pain medications in dosages well-above the NYS MTGs and that the claimant showed "strong symptom magnification" and "positive Waddel's maneuvers" and that the claimant ambulated "with relative ease with the use of the walker."

Barrett v. New York City Dept. of Transp., 147 AD3d 1167 (3d Dept. 2017)

Decision Below: Claimant earning full wages nevertheless suffered a 25% loss of wage earning capacity.

***Affirmed*:** The durational caps under WCL § 15-3(w) and a claimant's "wage earning capacity" under § 15-5(a) are mutually exclusive. Although LWEC sets the duration of benefits, and WEC is intended to set the rate of those benefits, the fact that a claimant is working at full pay – thus have a 100% wage earning capacity – does not demand that the LWEC finding be, as a matter of law, the inverse of that finding. *Citing* Matter of Till v. Apex Rehabilitation.

De Ruggiero v. City of New York Dept. of Citywide Administrative Services, 150 AD3d 1493 (3d Dept. 2017)

Decision Below: Claimant suffers from a 35% loss of wage earning capacity.

***Affirmed*:** Although claimant had returned to work without any loss of wages, the Board was free to consider medical evidence from the claimant's physicians that, although the claimant had returned to work without further loss of wages, he was nevertheless limited to medium capacity work, and could properly rely on that finding to set a durational limit on potential future benefits.

Smith v. New York City Housing Authority, 147 AD3d 1184 (3d Dept. 2017)

Decision Below: Claimant suffers from a 60% loss of wage earning capacity.

***Affirmed in Part, Remitted in Part*:** Claimant with a sedentary work capacity, 11th grade education and proficiency in English is properly classified with a 60% LWEC where limitations from established ankle injury, and consequential low back injury, limited only the claimant's ability to stand at work. Although the Board reduced the WCLJ's decision from 90% to 60% LWEC, the Board's concurrent reduction of attorney's fees awarded from $4300 to $3400 without any discussion, and in a "summary" fashion, is not supported by the record and must be remitted; particularly insofar as "in no case shall the fee be based solely on the amount of the award."

Drake v. SRC, Inc., 148 AD3d 1412 (3d Dept. 2017)

Decision Below: Claimant suffered from a 15% loss of wage earning capacity.

***Affirmed*:** 50-year old claimant with a Bachelor's degree in physics and computer science and was pursuing a Master's degree with English-proficiency is properly classified with a 15% loss of wage earning capacity.

Claimant's contention that the claimant's present loss of earnings (RE rate) should be used to determine the durational cap is contrary to the law. A claimant's post-injury loss of earnings is properly used to calculate the rate of pay (wage earning capacity) but is only one of many factors, including age, education, work experience, and other vocational factors, that are considered when assigning a durational cap under WCL § 15-3(w). Moreover, claimant's contention that the Board is required by law to specifically enumerate a physical impairment and specifically how vocational factors were considered is without merit.

Burgos v. Citywide Central Ins. Program, 148 AD3d 1493 (3d Dept. 2017)

Decision Below: Claimant suffers from an 85% loss of wage earning capacity.

***Affirmed*:** Although the Board found that the claimant has a "less than sedentary" work capacity, that finding does not equate to a permanent total disability. A claimant's exertional capacity is one of many factors considered by the Board in reaching a durational cap under WCL § 15-3(w). A permanent total disability is properly found only where the claimant is "unable to engage in an gainful employment" and as such "there is no expectation that the claimant found to have such a disability will rejoin the work force."

The Board reasonably credited the opinions of both claimant's surgeon and the IME that the claimant could sit, stand and walk for up to four hours during an eight-hour day, was in her fifties, had an eighth-grade education from the Dominican Republic and had very limited English proficiency.

***Dissent (Lynch, J.)*:** Where the Board has accepted medical opinions assigning the most severe impairment rating to a claimant, and also finding that claimant is not even capable of sedentary employment, a finding of a permanent total disability is appropriate. "To hold otherwise, one must confront the defining question of what gainful employment

claimant might possibly be able to perform – the record identified no such employment and, to be direct, nothing comes to mind."

Wohlfeil v. Sharel Ventures, LLC, 155 AD3d 1264 (3d Dept. 2017)

Decision Below: Claimant sustained a 75% loss of wage earning capacity.

***Reversed (Lynch, J.)*:** Although the Board's determination regarding loss of wage earning capacity is generally entitled to deference by the Court, where the claimant's physician, and IME, agree that the claimant was not capable of sedentary work (e.g. "less than sedentary capacity") the Board's conclusion that the claimant was capable of sedentary work, and its subsequent reliance on that factor in assessing a 75% LWEC must be reversed.

The Court agrees with the claimant that, insofar as these medical opinions actually reflect a permanent total disability as the record demonstrates that the claimant "is totally disabled and unable to engage in any gainful employment." The Court concluded that "the operative standard here is gainful employment no some undefined type of limited sedentary work."

***Dissent (Aarons, J.)*:** The majority opinion oversteps the proper scope of review: substantial evidence, which is found in the record in support of the Board's determination. Moreover, the legal foundation of the opinion here conflicts with the Court's own precedent, issued earlier this year, in Burgos v. Citywide Cent. Ins. where this very court established that less-than-sedentary work with a 10lb lifting restriction led to a permanent partial disability determination. The majority's reliance on medical opinions of a total disability was discredited by the Board, below, on the grounds that these physicians based their conclusions largely on the claimant's complaints of pain, a credibility determination which must be accorded great deference.

Perez v. Bronx Lebanon Hosp., 151 AD3d 1159 (3d Dept. 2017)

Decision Below: Claimant suffered a 10% loss of wage earning capacity.

***Affirmed*:** Claimant's contention that his return to work at full wages precluded the Board from assigning a loss of wage earning capacity where he was not entitled to any award was meritless. The Board is empowered to establish a loss of wage earning capacity even where the claimant has returned to work without any loss of earnings insofar as LWEC is premised upon factors such as age, education, work experience, English proficiency etc., and such finding merely establishes the duration of "potential benefits in the event that claimant incurs a subsequent reduction of wages as the result of his work-related injury."

24. New Accident

Piorkowski v. Pat Forsha Truck & Auto, 61 NYS3d 715 (3d Dept. 2017)

Decision Below: Claimant did no sustain a "new accident."

***Affirmed*:** The Board's conclusion that the claimant's increased symptoms in 2014 were an exacerbation of the present injury, and not a "new accident" is supported by substantial evidence where the claimant's physician, although opining the increased symptoms were related to work activities at a new employer, could not show that any new knee pathology existed, and where carrier's IME (Faulk) concluded that the present symptoms did not represent a "new accident." As such, the Board's expertise "in delimitating what events are accidents and what events merely constitute exacerbation of prior injuries must be respected . . ."

25. New York State Disability Pensions

Donley v. DiNapoli, 153 AD3d 1104 (3d Dept. 2017)

Decision Below: Plaintiff's application for a "performance of duty disability retirement" is denied.

***Affirmed*:** Although petitioner's experts stated generally that, although the petitioner had full use of his arm/elbow (full ROM and strength), his ongoing complaints of pain

associated with that site rendered him unfit, and unable, to resume full duty employment, the Comptroller's reliance upon the opinion of its own IME wto deny petitioner's application will not be disturbed. Insofar as the Comptroller's IME reported that the plaintiff's ROM and strength was normal and symmetric compared to his uninjured arm, and that there was no evidence of effusion, or other evidence that the claimant suffered a structural defect of the arm that otherwise rendered the plaintiff permanently impaired, the Comptroller's finding that the claimant did not qualify for a disability pension was supported by substantial evidence.

26. No Insurance Penalty

Castillo v. Brown, 151 AD3d 1310 (3d Dept. 2017)

Decision Below: Employer violated WCL § 50, penalty of $86,000 imposed on uninsured employer.

***Affirmed*:** WCL § 26-a(2)(b) provides two alternatives for calculating the penalty to imposed on an employer who has failed to maintain workers' compensation coverage: (1) $1,000 for each 10-day period of non-compliance, or (2) a sum not in excess of two times the amount of the cost of compensation for its payroll for the period of such failure.

Employer's contention that the use of the first method was arbitrary, and unsupported by the record, is insufficient to disturb the decision below where the employer never objected to the penalty, failed to raise the issue during proceedings in front of the WCLJ, and failed to present any testimony or other proof as to their failure to maintain insurance.

27. Occupational Diseases

Simpson v. New York City Transit Authority, 151 AD3d 1160 (3d Dept. 2017)

Decision Below: Claimant's alleged bilateral knee conditions are not causally-related to his employment. *N.B.* In an earlier appeal to the Third Department (136 AD3d 1192

[2016]), the Court reversed and remitted stating the Board inaccurately read the MRI results.

Affirmed: Insofar as the Board relied upon the IME doctor's opinion that the claimant did not sustain an injury at work, and that his knee condition would not have resulted from repeatedly bending and straightening his leg, the decision below is supported by substantial evidence. The IME opinion met the required basis of "probability of the underlying cause [of claimant's knee condition] that is supported by a rational basis" and the Board was within its power to credit the IME opinion over the other medical testimony in the record.

Tucker v. City of Plattsburgh Fire Dept., 153 AD3d 984 (3d Dep.t 2017); motion for leave to appeal denied, 30 NY3d 906 (2017)

Decision Below: Claimant evidence supporting causal relationship between toxic fume exposure and prostate cancer was unconvincing and speculative; claim disallowed.

Affirmed: Although the record contained a thorough analysis of the claimant's employment as a firefighter, including a specific number of calls he responded to in the line of duty, and the number of reports he filled out where he felt he was exposed to hazardous materials, there was nevertheless sufficient evidence to support the Board's disallowance. Insofar as the carrier's IME stated that prostate cancer is a common disease in men and that any attempt to opine to causal relationship would be speculation pure speculation, particularly where "prostate cancer is already the second leading cause of death of men" the opinions of both the claimant's physician (Dr. Lax) and the Board's impartial specialist who, at best conceded a possibility of causation (the latter rescinding that opinion on cross-examination), the claimant's proofs were insufficient to meet the burden of established causation by evidence that was more than "speculation."

***Dissent (Egan, J.)*:** All that is required is that the causal connection is that it be reasonably apparent the expert meant to signify a probability as to the cause of the claimant's condition, and that said opinion be supported by a rational basis. Insofar as claimant's specialist, who opined that claimant's long-term exposure to carcinogenic material as a firefighter was probably the cause of his cancer diagnosis, the claimant's proof was legally sufficient to establish the claim. (Only addresses burden, not carrier's substantial evidence).

Prince v. Verizon New York, 153 AD3d 1111 (3d Dept. 2017)

Decision Below: Claim disallowed on grounds of insufficient evidence of causation.

Affirmed: Although the claimant produced sufficient evidence to warrant development of the record, the Board was free to disallow the matter insofar as the claimant conceded, after development of the record, that her claim for a casually-related occupational disease was not supported by sufficient evidence to warrant establishment of the claimant. The Board was also free to reject the decision of the WCLJ below which, rather than disallowing the claim, attempted to "preserve" the claimant's right to produce additional evidence by instead marking the case "No Further Action – Failure to Prosecute."

28. Prima Facie Medical Evidence

Bucci v. New York City Transit Authority, 60 NYS3d 849 (3d Dept. 2017)

Decision Below: Decedent's estate is directed to produce *prima facie* medical evidence.

***Appeal Dismissed*:** A non-final decision of the Workers' Compensation Board is interlocutory, and appeals from such rulings are not subject to review by the Third Department.

29. Reduced Earnings

Reese v. Sysco Food Services-Albany, 148 AD3d 1477 (3d Dept. 2017)

Decision Below: Claimant's reduced earnings were not causally-related to the claimant's causally-related disability.

***Affirmed*:** Claimant, who was previously found voluntarily removed from the labor market after refusing to return to the employer of record in a light duty capacity. Although the claimant later did return to the employer in a light duty capacity, he again left that position, this time as a result of a condition unrelated to the claim. That the claimant's employment with the employer was later terminated due to excessive absence pursuant to a CBE, and that the claimant then returned to work at a different employment, earning less money, was insufficient to establish causally-related loss of wages.

The Board's previous finding that the claimant had voluntarily removed himself by refusing light duty employment "has significant bearing upon claimant's entitlement ot reduced earnings insofar as it establishes that that claimant failed to return to the employer's light duty assignment of his own volition" and the "medical problem that later caused claimant to stop working for the employer . . .after which he never returned, was difficulty that he was experience with his left knee, which was not a compensable injury."

30. Reopening/Rehearing under 12 NYCRR 300.14

Yujuan Sheng v. Time Warner Cable, Inc., --- NYS --- (3d Dept. 2017)

Decision Below: Claimant's application for reconsideration/reopening was denied.

***Affirmed*:** Insofar as the claimant's application to the Board failed to include any contemporaneous medical records that demonstrated a material change in her condition, and insofar as no new evidence was presented, the Board's refusal to consider her request was not an abuse of discretion.

Andrews v. Combined Life Ins., 146 AD3d 1203 (3d Dept. 2017)

Decision Below: Carrier's request to reopen classified claim on issue of labor market attachment denied; carrier penalized $500.00 for a frivolous application under WCL §114-a(3).

***Affirmed as Modified*:** The Board rationally concluded that the claimant's failure to respond to a request for job search, and his failure to respond to an offer of vocational rehabilitation services was insufficient to reopen the claim. However, the Board's imposition of a penalty under WCL § 114-a(3)(i) was an abuse of discretion. "we cannot say that substantial evidence supports the Board's conclusion that, by ruling on proof that the Board ultimately rejected, the carrier initiated the request to reopen the claimant without reasonable grounds."

31. Scope + Course of Employment

Quigley v. Concern for Independent Living, 146 AD3d 1185 (3d Dept. 2017)

Decision Below: Claimant sustained left arm and wrist injuries arising in, and out of, the scope and course of her employment.

Affirmed: Insofar as WCL § 21 provides for a presumption that an accident that occurs in the course of employment also arises out of that employment, unless there is substantial evidence to the contrary, the Board's conclusion that the accident here arose out of the claimant's employment, and was not "idiopathic" is support by substantial evidence. Although employer alleged claimant was experiencing balance issue and using a cane to walk before this fall, the Board was free to credit claimant's testimony that she did not know the cause of her fall, and that it was not balance issues.

Bagnato v. General Electric, --- NYS3d --- (3d Dept. 2017)

Decision Below: Claim disallowed; claimant's testimony was not credible, and the timing of the claim was "suspect".

Affirmed: Where claimant acknowledged that he never reported the injury to anyone, and that he continued working following the injury, and additionally sought no treatment, and only did both after being terminated for cause by the employer, the Board was free to determine that the claimant's testimony was not credible, and such determinations will not be overturned.

32. Special Employment

Berhe v. Trustees of Columbia University in City of New York, 146 AD3d 697 (1st Dept. 2017)

Decision Below: Defendant established that it was entitled to summary judgement and dismissal of complaint upon a showing that plaintiff was a "special employee" of the defendant, and thus immune from suit under WCL § 11.

***Affirmed*:** Defendant did establish that they "controlled and directed the manner, details and ultimate result" of the plaintiff's work. Although plaintiff was in the direct employ of a temporary agency who provided a uniform and retained the right to terminate and assign the plaintiff to a worksite, where University personnel planned the events at which plaintiff worked, assigned the plaintiff to certain tables, and generally directed the claimant's day-to-day activities, including break and meal times, the University established that the plaintiff was a "special employee." The fact that the University manager who directed and controlled the plaintiff did not provide more detailed control (micro-management) of the plaintiff's work activities is insufficient to raise a triable issue of fact.

33. Stacked Schedule Loss of Use Awards

Deck v. Dorr, 150 AD3d 1597 (3d Dept. 2017)

Decision Below: Claimant sustained a 100% SLU of the right thumb in addition to a 100% SLU of the right hand.

***Affirmed*:** "Such result is supported by the guidelines, which contemplate awards greater than 100% for the loss of a hand (see New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity at 17, figure 2.8 [2012])."

***Dissent* (*Aarons*):** Common sense dictates that the absence of claimant's entire hand supports only a 100% SLU of the hand where there is no evidence in the record of a "separate and distinct injury to the thumb."

***Corrected*:** Revised guidelines, 2018, remove/correct the offending chart, and the guidelines now specifically prohibit a schedule of the hand exceeding 100%.

34. Standing

Cortes v. Eagle Systems, Inc., 153 AD3d 1468 (3d Dept. 2017)

Decision Below: Excess carrier has no standing to defend, or appeal, a claim for which it is not directly liable as the carrier of record for the employer.

***Affirmed*:** An application for review to a panel of the WCB may be made only by a party to the claim "who are normally the injured employee and the employer of his workers' compensation carrier." Insofar as Zurich's liability is not the claimant, but instead rests upon a contingency and, even then, would be to the carrier, XL Specialty Insurance, such liability is beyond the jurisdiction of the Board and does not incur upon Zurich the standing to appear "unbidden" in this claim.

35. Stress

Burke v. New York City Transit Authority, 148 AD3d 1498 (3d Dept. 2017)

Decision Below: Claim for causally-related stress is disallowed.

***Affirmed*:** Claimant, sensitive to light, occasionally utilized tinted lenses to protect his vision. Although employer closely monitored claimant at his job as a subway train operator over the course of several days to ensure he did not utilize these lenses while driving, nothing about this supervision rose to the level of stress that was "greater than that which other similar situated workers experienced." That the employees who monitored claimant's work activities testified that their interactions were professional and cordial was sufficient evidence to support the Board's determination.

Novak v. St. Luke's Roosevelt Hosp., 148 AD3d 1509 (3d Dept. 2017)

Decision Below: Claim for stress-related injury is not compensable.

***Affirmed*:** Insofar as the claim is premised upon discrimination from co-workers subsequent to claimant's suspension without pay due to misconduct at work, claim cannot be sustained. Workers' Compensation Law § 2 (7) precludes claims for mental injuries based upon work-related stress "if such mental injury is a direct consequence of a lawful personnel decision involving a disciplinary action, work evaluation, job transfer, demotion, or termination taken in good faith by the employer" (*citing* Matter of Haynes v Catholic Charities, 135 AD3d 1267).

36. Venue

Taitt v. Manhattan and Bronx Surface Transit Operating Authority, 147 AD3d 1182 (3d Dept. 2017)

Decision Below: Venue change request, from Harlem to White Plains, is properly denied; claimant's counsel penalized $750 for making a meritless request to change venue.

***Affirmed*:** The claimant failed to articulate and rationale grounds for her venue change; the claimant has no obvious connection to White Plains, nor did the accident. Although claimant's difficulty walking may make the Harlem WCB inconvenience insofar as it is not particularly accessible by public transportation, insofar as the WCLJ permitted the claimant to appear by phone, any such inconvenience was irrelevant.

37. WTC – Timely Filing

Cozzi v. American Stock Exchange et al., 148 AD3d 1500 (3d Dept. 2017)

Decision Below: Claim was not timely file; request for reconsideration/Full Board Review denied.

***Affirmed*:** Claimant failed to properly appeal from the Board Panel's determination that although he commuted to and from work in the aftermath of the 9/11 disaster, he did not actually participate in the cleanup efforts, and thus was not entitled to preferential SOL on claim filing permitted under WCL Article 8-A. Insofar as the claimant appeal only from the Full Board's denial of review, the merits of the underlying decision are not before the Court, and there is nothing arbitrary or capricious about the Board's ruling in this matter.