The Law Offices of Melissa A. Day, PLLC

A Year in Review:
2018 Workers' Compensation Case Law

Presented by:
James B. Cousins
Partner

Coauthored by:
Robert J. Caggiano
Associate

The Law Offices of Melissa A. Day, PLLC
636 North French Road, Suite 3, Amherst, NY 14228
www.getMAD.today
jcousins@getMAD.today
rcaggiano@getMAD.today

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1. § 2(7): STRESS CLAIMS

Lanese v. Anthem Health Services, 165 A.D.3d 1373 (3rd Dept. 2018)

Decision Below: Claimant failed to demonstrate that the stress to which she was subjected to was greater than that experienced by a similarly situated worker.

Affirmed: Claimant failed to establish that her work as a Nurse Case Manager, and her subsequent change in supervisor, and that supervisor's conduct, caused her psychological condition to develop. Nor did she demonstrate stress greater than a "similarly situated worker." While claimant's physician gave an opinion of causation, he was unaware that her diagnosis was long-standing, and related to her son's tragic death, and his opinion on causation was "based upon claimant's self-reporting." Moreover, the record demonstrated "normal oversight and monitoring practices undertaken to assist [claimant] in correcting deficiencies and improver her performance" which did not include any formal discipline or reprimand, or unfair treatment.

2. § 11: EXCLUSIVITY OF WCL

Siegel v. Garibaldi, 158 A.D.3d 1049 (3rd Dept. 2018)

Decision Below: Action was barred by WCL §11; plaintiff's coworker (defendant) was acting within the scope of his employment at the time of the accident.

Reversed: Although plaintiff and defendant were co-employees of a college, the defendant was outside the scope of his employment when he struck the plaintiff with his car in a crosswalk on campus. Both plaintiff and defendant had left work for the day, and the accident occurred on a roadway owned by the campus that was open to the public. Although going to and from work while on the employer's premises is typically within the course of employment, the location of this accident was "for general use by the public." Since "there is nothing in this record indicating that the accident was precipitated by any special hazard" and defendant's failure to stop for a pedestrian in the crosswalk (plaintiff) is a common risk shared by the general public" defendant's work day therefore ended when he left the parking lot to drive home.

Lamela v. Verticon, Ltd., 162 A.D.3d 1268 (3rd Dept. 2018)

Decision Below: Motion for summary judgment dismissing claim for contractual indemnification against employer was denied.

Affirmed: Claimant, employed by Lamela, was injured when a wall collapsed onto, and knocked over, a scissor lift on which he was working. A subcontractor of another subcontractor, also working at the job site, was responsible for the injury. One carrier, the Hartford, insured those two subcontractors and the building-owner. Those three parties settled their liability in the action for $3.2M, over the objection of the plaintiff's employer, Lamela, who refused to settle and reserved all rights with respect to its pending cross-claims against those parties. The trial court found thereafter that the building owner (who had already settled) was entitled to contractual indemnification in full against Lamela. Lamela argued that the stipulation to judgment by Hartford's insureds was made in bath faith, essentially to short-circuit Lamela from properly defending itself, and to use the claims of contractual indemnification to excuse the truly negligent parties from payment for plaintiff's injuries, and using the conceded judgment by those parties as a pass-through to seek reimbursement from Lamela, making Lamela cover the cost of all claimant's damages.

The trial court was correct in granting summary judgment on the question of contractual indemnification owed by Lamela to the building owner, as there was no triable question of fact. However, because Lamela's cross-claims against the two negligent subcontractors for contribution or indemnification were not resolved by the order below, Lamela's claim that the Hartford defendants manipulated a settlement to unfairly shift costs to Lamela, was not yet been fully explored, and the stipulated settlement did not compromise Lamela's still-valid cross-claims.

3. § 13-a(6)

Knapp v. Bette & Cring, LLC, 166 A.D.3d 1428 (3d Dept. 2018)

Decision Below: Text message from claimant's counsel to IME doctor, disclosing only the issue/subject of an upcoming deposition, violated WCL § 13-a(6) and Board Subject Number 046-124; the IME report is therefore precluded from evidence.

Reversed (with costs): Where physician's ensuing testimony was entirely consistent with the written report, there is no evidence of "undue influence" and confirming the subject of a deposition is "simply ministerial in nature and does not reflect an effort to influence the witness testimony."

4. § 20: Determination of Claims for Compensation

Karam v. Rensselaer County Sheriff's Department, NYS3d, 2018 NY Slip Op 08390 (3d Dept. 2018)

Decision Below: WCL § 20 "does not require that the same WCLJ preside over any and all hearings that may be conducted in conjunction with a given claim." Writing of Reserved Decision by a second WCLJ, where another WCLJ heard trial testimony, was proper.

Affirmed: The "absence" of a WCLJ (without further explanation) is sufficient to satisfy WCL § 20(1) and thus allow reassignment of claim.

NB: This claim contains a substantial discussion of a claimed stress injury premised on racism, where the Board and Court accept that claimant's active participation in that form of "banter" and his inconsistent testimony rendered his claims of discrimination and stress unreliable: "Although we find the disparaging statements and conduct described abhorrent and unbecoming of a public official, under the circumstances presented and in deferring to the Board's credibility assessments, we find no basis to disturb the determination."

5. 2017 Repeats

Jeffrey v. Frontier Cellular Verizon Wireless et al., 148 A.D.3d 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 disturbed 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.

NB: Leave to appeal to the Court of Appeal denied, 30 N.Y. 3d 910 (2018)

Claimant's counsel threw good money after bad on this appeal, and was pushing for a fee that looked more like a percentage contingency rather than an hourly bill.

Mancini v. Office of Children and Family Services, N.Y., 2018 N.Y. Slip Op. 08425 (2018)

***Decision Below*:** The Third Department held that the durational caps imposed by WCL § 15-3(w) apply to benefits awarded pursuant to WCL §15(3)(v). 151 A.D.3d 1494 (3d Dept. 2017).

Affirmed: The Court of Appeals held that because WCL § 15(3)(v) "specifically provides that determination of such additional compensation "shall be . . . in accordance with paragraph (w) of this subdivision" the Board's reading of the statute was proper. Insofar as the legislative history of sub-section v clearly indicated that it was designed "to give a limited subset of severely injured schedule award recipients an opportunity to apply for additional compensation that would place them roughly on par with non-schedule benefit recipients," the imposition of durational caps on these benefits, pursuant to the 2007 amendment to sub-section w, was entirely consistent with the language and intent behind sub-section v. Claimant's reading of sub-section v as only incorporating some elements of sub-section w by the explicit reference, and his claim that the "automatic termination" provision upon eligibility for age-based social security benefits, conflicted with imposing durational caps, is contrary to the plain meaning of the statute, and there is no actual conflict with the "automatic termination" provisions.

NB: This decision drew a strongly-worded dissent from Judge Wilson, who wrote: "Instead of following the Legislature's clear command, the majority takes a durational provision that the Legislature expressly limited to "all compensation payable under this paragraph"—paragraph (w), and applies it to paragraph (v). That is no way to read a statute."

6. § 21: Presumptions of Compensability

Elias-Gomez v. Balsam View Dairy Farm, 162 A.D.3d 1356 (3d Dept. 2018)

Decision Below: Claimant failed to demonstrate that his accident occurred; employer's proof to the contrary was substantial and rebutted the presumption of WCL § 21(1).

Affirmed: Where employer produced testimony and evidence which established that the alleged mechanism of injury – which farmhand alleged occurred during a difficult "birthing" of a calf – could not have happened on the date in question, and where claimant's testimony was inconsistent and the claimant did not file the claim until after termination (in part for "doing bad things to the employer's cows at night"), the Board's ruling will not be disturbed.

7. § 25(2)(b): Timely and Proper PH-16.2 Filing

Love v. Village of Pleasantville, 161 A.D.3d 1477 (3d Dept. 2018)

Decision Below: Law firm's failure to serve pre-hearing conference statement on claimant's counsel (twice) warranted dismissal of employer's defenses.

Affirmed: Where law firm representing employer twice served a pre-hearing conference statement on the wrong claimant's firm, and failed to produce an affidavit showing "good cause" pursuant to 12 NYCRR 300.38(f)(4), the Board was justified in finding a waiver of defenses.

NB: Leave to appeal to Court of Appeals denied, __N.Y.__, 2018 NY Slip Op 81515(U)

See Also: Portlette v. Manhattan & Bronx Surface Transit Auth., 159 A.D.3d 1256 (3d Dept. 2018) (Employer's failure to file a timely controversy is properly excused where "claimant's misrepresentation of the indecent and the cause and extent of her injuries" presumably mislead the employer into accepting an otherwise fraudulent claim.)

8. § 29: Subrogation and Liens

Adebiyi v. New York City Housing Authority, 160 A.D.3d 420 (1st Dept. 2018)

Decision Below: A workers' compensation lien is properly calculated as of the date the third-party action is settled; but repayment of that lien may be held pending the Board's consideration/reconsideration of claimant's pending permanent total disability claim.

Affirmed in Part, Reversed in Part: Claimant, who recovered $2.4M from a personal injury action (products liability) could not defer the computation/commutation of the workers' compensation lien amount until the claim for a pending permanent total disability award was resolved by the Workers' Compensation Board, nor could repayment be held pending such redetermination. WCL § 29 states that the amount of the lien should be ascertained as of the date the settlement was obtained "without consideration of potential reclassification of petitioner's disability status." The trial court's determination to stay repayment of the lien (in the amount of $222,049.27) pending a possible reclassification by the Board was improper, insofar as repayment of the lien is also triggered by the settlement under the statute, and the claimant's disability status at the time of settlement is the only relevant factor; not any future possible reclassification.

NB: This is the same timing issue that was considered by the Third Department and Court of Appeals in Terranova v. Lehr Construction Co., 2017 NY Slip Op 08799 (2017): "Whether 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 a 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." In Terranova, timing allowed the claimant to recover Burns contributions against his SLU award which was entered after his third-party settlement was resolved.

Here, claimant was looking to use Kelly to apportion attorney's fees – which at something in the range of $800K, far exceed the $222K lien, meaning, under a Kelly analysis, this is a "fresh money case" and despite claimant's substantial net recovery, the carrier would incur an obligation to contribute equitably to the cost of litigation to the tune of some $600K. Contrasting that result with the application of Burns, given the size of the carrier's credit, although the carrier will make Burns contributions, they likely will not make the same size payout over the life of the credit.

Battista v. Dong Zhu Wu, 59 Misc.3d 1203(A) (Sup. Ct., Bronx Cty., Mar. 14, 2018)

Decision: Plaintiff's motion for a "cramdown" of the employer's lien was denied. Although the workers' compensation lien, even accounting for the statutory reduction under WCL § 29, and the $50,000 exemption* under NYS Ins. Law § 5102(a), exceeds the claimant's recovery, the claimant has no viable claim, and the court does not have authority to reduce the employer's lien further. Moreover, the carrier's rejection of claimant's proposed three-way 1/3 split, and its refusal to consider any further lien reduction beyond the statute, is neither factually improper, nor is it the type of conduct subject to any sanctions under CPLR 8303 or 12 NYCRR 130-1.1 – the WC carrier was not a party to the § 29 action, and thus could not be sanctioned as a matter of law.

*The first-party benefits exemption under Ins. Law § 5102 and 5014 is more nuanced than merely exempting the first $50,000, particularly in light of the much higher weekly benefit rate available to WC claimants – a lien can accrue in the first month of WC payments even though the $50,000 limit is not met.

See also: Estevez v. Public Defender Trust, 85 NY3d 850 (S.Ct. Westchester Co, 2018)(Plaintiff's motion for *nunc pro tunc* order of consent, and a cramdown of carrier's lien is denied: there is no legal authority to force a lien reduction "so that the claimant would recover something" from a settlement where the workers' compensation lien far exceeds the amount of the § 29 action settlement; these liens are "inviolable" according

to the Court of Appeals. *See* Matter of Granger v. Urda, 44 N.Y.2d 91 (1978). The "made whole" doctrine applicable to equitable subrogation cannot be applied to an inviolable statutory lien extant pursuant to WCL § 29.

See also: Rahman v. Busby, 2018 WL 6166239 (S.Ct. Bronx Co. 2018) ("A court is without authority to arbitrarily divide a proposed settlement amount equally between plaintiff, plaintiff's counsel and a workers' compensation carrier, or to strike, waive or reduce and portion of the carrier's lien . . .").

Carlone v. Utica Mutual Assurance Company, 158 A.D.3d 755 (2d Dept. 2018)

Decision Below: Motion for settlement approval *nunc pro tunc* is denied.

Affirmed: Where claimant settled an action, commenced under WCL § 29 for $7,500 against defendant with a $100,000 policy limit, and where claimant failed to obtain the carrier's consent before settling, her request for judicially enforced consent is legally insufficient. Insofar as claimant offered no evidence that the settlement adequately protected workers' compensation carrier's interests, and claimant failed toproduce any of the evidence required under WCL § 29(5), her application must be denied.

Empire Sate Transportation Workers' Compensation Trust v. Special Funds Conservation Committee, 163 A.D.3d 558 (2d Dept. 2018)

Decision Below: SFCC is directed to consent, *nunc pro tunc* to the settlement of claimant's personal injury action.

Affirmed: Although claimant obtained the consent of his workers' compensation insurance carrier to settlement of an action brought consistent with WCL § 29, he failed to obtain the consent of SFCC, who was liable for reimbursement in his underlying

workers' compensation claim pursuant to WCL § 15(8). Although the trial court originally concluded that the statutory provisions allowing for *nunc pro tunc* consent did not apply to SFCC (and thus the Court could not fashion such an order), an earlier appeal to the Court on that point reversed, and found that SFCC could be ordered to consent. Upon that basis, the record did demonstrate that the settlement was reasonable, the delay in obtaining consent from SFCC was explained, and the SFCC was not prejudiced by the settlement.

9. § 32: Settlement

Williams v. New York State Workers' Compensation Board, 60 Misc.3d 1203(A) (Sup. Ct., N.Y. Cty., Jun. 18, 2018)

Decision: Article 78 petition seeking to reopen a settled (by WCL § 32) workers' compensation claim is denied, cross-motion to dismiss is granted.

Discussion: The Third Department has exclusive jurisdiction to review final awards of the Workers' Compensation Board, and the Supreme Court lacks the authority to rule on the matter. Although claimant alleges his AWW was improperly calculated, and thus his settlement amount was insufficient, insofar as claimant voluntarily and knowingly entered into a settlement, which became final without any objection, WCL § 32 precludes further review of that agreement absent the consent of all parties to that agreement that such review occur – which is not the case here.

10. § 114-a: Fraud

Fernandes v. Del Frisco's Restaurant GRP, 159 A.D.3d 1319 (3d Dept. 2018)

Decision Below: The claimant violated §114-a (no penalty imposed); claim disallowed.

Affirmed: Where claimant alleged she was injured while standing on a shelf that collapsed, and where the employer provided video footage of the event showing the incident, but which otherwise materially conflicted with claimant's description of its severity (e.g. claiming loss of consciousness where the video demonstrates she continued working without visible discomfort or injury) and where claimant has a long-standing pre-existing condition with recent low back surgery (1 month before accident), Board was free to reject claimant's testimony and medical proof and conclude she was not injured in the work accident.

Portlette v. Manhattan & Bronx Surface Transit Operating Authority, 159 A.D.3d 1256 (3d Dept. 2018)

Decision Below: Employer's video evidence established that the claimant misrepresented her work accident and the nature and extent of her disability; mandatory and discretionary penalties were imposed and a further finding was made that the claimant "did not suffer a causally-related injury."

Affirmed: Although the employer originally accepted the claim and paid benefits, its production of video evidence which contradicted the claimant's statements about the mechanism of injury, and further surveillance evidence demonstrating that the claimant was not as disabled as she represented to her physicians, was substantial evidence from which the Board could properly find both that the claimant committed fraud, and that the

accident did not occur in the first instance. The employer's failure to comply with WCL § 25-2(b), and timely controvert the file, was properly excused where claimant's actions were, essentially, fraudulent inducement of an acceptance of the claim.

Santangelo v. Seaford U.F.S.D., 165 A.D.3d 1358 (3d Dept. 2018)

Decision Below: Claimant committed fraud under WCL § 114-a, by exaggerating his disability to treating physicians and the employer's IME, including his use of a cane to ambulate.

Affirmed: Where the employer's video evidence demonstrated that the claimant walked without a limp, could drive for an extended period, bend at the waist, lift heavy items and otherwise be observed without any cane or brace, the Board was correct to conclude the claimant had misrepresented his medical condition.

NB: Claimant here had a lumbar fusion, which apparently had, for some time, convinced this employer that the claimant's complaints were legitimate. However, claimant's use of this prior surgery to try a shield him from the fraud claim, was rejected by both the Board and the Third Department as irrelevant.

Papadakis v. Fresh Meadow Power, __ A.D.3d __, 2018 NY Slip Op 69107(U) (3d Dept. 2018)

Decision Below: Claimant committed fraud under WCL § 114-a by exaggerating his disability and physical limitations to the employer's IME, warranting a discretionary lifetime ban.

Affirmed in Part, Reversed and Remitted in Part: The Board properly weighed the evidence and found that the claimant, who alleged he could not sit upright or stand

without becoming dizzy, who did “nothing social” and who was “sensitive to light and noise” had misrepresented his physical condition where video surveillance demonstrated the claimant doing construction work on his house, lifting and carrying wood, playing soccer outside with his son, and appearing to have played paintball. Additionally, social media demonstrated that the claimant went to Disney World and the beach during this period of alleged disability. Where this video evidence led the IME to conclude the claimant was not disabled, and that his presentation at the exam was significantly different, the Board’s decision was supported by substantial evidence. However, insofar as the Board’s decision provides no explanation for the basis upon which it imposed a discretionary lifetime ban, the case must be remitted “so that the Board can fulfill its obligation and provide some explanation for its determination in this regard”

11. § 137: Independent Medical Examinations

Esposito v. Tutor Perini Corporation, 158 A.D.3d 912 (3d Dept. 2018)

Decision Below: Claimant did not sustain a compensable injury; claimant's expert report from Dr. Ploss was precluded under WCL § 137.

Affirmed: Where Dr. Ploss examined the claimant for the purpose of providing an opinion with respect to claimant's diagnosis and causal relationship, his report was properly considered an IME (apparently despite no formal designation as an IME in the record), and insofar as the doctor's report referenced documents that were not contained in the Board's file, the report was properly found to violate WCL §137 and 12 NYCRR 300.2. As that preclusion was proper, the Board's decision, crediting another physician who found no causation was within its discretion and supported by substantial evidence.

NB: Leave to appeal to the Court of Appeals denied, 31 N.Y.3d 906 (2018).

This decision is entirely consistent with Matter of Estanluards v. American Museum of Natural History, 53 A.D.3d 991 (3d Dept. 2008).

12. 12 NYCRR 300.13 and Appellate Practice

Johnson v. All Town Central Transportation Corp., 165 A.D.3d 1575 (3d Dept. 2018)

Decision Below: Claimant's failure to use updated RB-89 form rendered his appeal defective and review of same was denied.

Reversed: Although the Board was vested with the right to adopt reasonable rules consistent with, and supplemental to, the provisions of the WCL, the claimant's use of an outdated form, only five business days after the "effective date" of the use of the new form, and where the new form did not require any information that was not already provided in the older version, and there was no demonstration of prejudice by the employer, the Board's refusal to consider the appeal was an abuse of discretion.

NB: By footnote the Court indicates that it was "significant that the Attorney General has decided not to file a responding brief on behalf of the Board."

Duncan v. Crucible Metals, 165 A.D.3d 1377 (3d Dept. 2018)

Decision Below: Employer's appeal as to whether it was the liable party was untimely.

Affirmed: Insofar as the Employer appealed to the Third Department only from the Board's denial of Full Board Review/Reconsideration, the standard of review applicable is whether the decision "was arbitrary and capricious or otherwise constituted an abuse of discretion." Where there is no evidence that the Board failed to consider the evidence of

the record when considering the timeliness of the Employers appeal, the Board's ruling must be affirmed.

See Also:

Brasher v. Sam Dell's Dodge Corporation, 159 A.D.3d 1234 (3d Dept. 2018) *leave to appeal denied* **2018 WL 4440286 (2018)**

Seck v. Quick Trak, 158 A.D.3d 919 (3d Dept. 2018)

Waufle v. Chittenden, A.D.3d, 2018 NY Slip Op 08404 (3d Dept. 2018)

Decision Below: Employer's Application for Board Review was defective, and appellate review was denied.

Affirmed: It was not an abuse of discretion to deny appellate review where the employer used the wrong cover sheet (form RB-89.2) on its timely application, and its later resubmission of appeal with correct cover sheet was untimely. The Board's dismissal of the employer's appeal under 12 NYCRR 300.13 et seq. was not an abuse of its "broad discretion" granted in such matters.

NB: Once again, by footnote, the Court indicates that it contrasts this case with Johnson, above, noting that the Attorney General's brief argued that the Board's actions here were entirely within its discretion.

Sweeney v. Air Stream Air Conditioning, A.D.3d, 2018 NY Slip Op 08613 (3d Dept. 2018)

Decision Below: Claimant's application for review failed to comply with 12 NYCRR 300.13(b)(4)(v) insofar as no exception was noted to the appealed-from finding at the underling hearing.

Affirmed: At the underlying hearing, held to address whether the employer made timely payment of an SLU award, and whether a penalty was due under WCL § 25(3)(f), claimant's counsel, upon reviewing the employer's evidence, told the WCLJ "It looks like it's timely." The WCLJ subsequently found no late payment. Although claimant's counsel subsequently determined that the payment proofs actually demonstrated the payment was three-days late, the Board properly denied appellate review noting that claimant's counsel failed to interpose a specific objection or exception at the hearing. Although WCL § 25(3)(f) is a self-executing penalty, the Board's denial of review was proper where the penalty, although self-executing, must be based on a factual finding of "late payment," and the claimant's failure to preserve the issue for appellate review was therefore fatal to the appeal.

13. Accident v. Occupational Disease

Yonkosky v. Town of Hamburg, 158 A.D.3d 860 (3d Dept. 2018)

Decision Below: Claimant sustained an occupational disease in the course of his employment.

Reversed and Remanded: Where the record demonstrated that the claimant injured his shoulder while lifting a wheelbarrow, the medical record failed to demonstrate the injury was the result of an occupational disease "during his short period of employment as a laborer" where "claimant testified that the onset of shoulder pain occurred during a definitive event."

NB: This claim was subsequently disallowed on *remitter* as the Board concluded that claimant failed to provide timely notice (or any notice) of his work-related accident to the employer.

14. Administrative Error in Decision

Murray v. South Glens Falls School District, 166 A.D.3d 1263 (3d Dept. 2018)

Decision Below: The claimant was never classified with a permanent partial disability.

Affirmed: The record clearly demonstrated that a previous designation of benefits as "PPD" led to a subsequent, and erroneous, amended decision assigning a 50% LWEC. Where there was substantial evidence that neither claimant's counsel nor employer's counsel understood the history or status of the case, the Board's finding here was in accord with its authority under WCL § 123, and is supported by substantial evidence.

NB: Apparently, no one – including one WCLJ, a Board examiner, and counsel for both the claimant and employer – knew what was going on in this case over a period of at least 18 months before this error was addressed.

15. Apportionment

Ferrari v. Lay, 164 A.D.3d 1507 (3d Dept. 2018)

Decision Below: Claimant's permanent total disability is apportioned 50/50 between his 2007 and 2008 workers' compensation claims.

Affirmed: Apportionment between two workers' compensation claims was appropriate where the medical evidence established that the claimant's current disability is at least partially attributable to a prior compensable injury. The Board's reliance on the only evidence in the record, an IME finding 50/50 apportionment premised upon a review of all relevant medical records, as well as an examination of the claimant, was therefore substantial evidence to support the Board's ruling.

Genduso v. New York City Department of Education, 164 A.D.3d 1509 (3d Dept. 2018)

Decision Below: Employer is entitled to take full credit against all prior leg SLU awards in earlier claim.

Affirmed: Employer is entitled to credit prior Leg SLU, awarded for an ankle injury, against current SLU, premised upon an injury to the knee. Insofar as the statute (WCL § 15(3)(a) et seq.) does not distinguish the knee and ankle, instead assigning permanency only to the "leg," the claimant's contention that the allowance of apportionment was factual and legally improper, was without merit.

16. Average Weekly Wage

Bain v. Mew Caps. LLC, 157 A.D.3d 1146 (3d Dept. 2018)

Decision Below: Intermittent worker was entitled to an average weekly wage of $709.15 using a 200 multiple under WCL § 14(3).

Affirmed: Even though claimant only worked for employer for 16 days in the preceding 52-weeks, and only earned $2,950 for that work, because the employer failed to produce evidence that the claimant *was not* fully available for employer (*see* Kellish), the use of a 200 multiple is required by the statute, even though it may be contrary to §15(a)(6) insofar as the result does not reasonably reflect the claimant's actual earnings.

NB: The Court suggests that this ruling may be contrary to common sense, and other provisions of the WCL, but notes that the AWW "floor" of WCL § 14(3) is "legislative mandate."

A great practice tip is illustrated by this claim: like voting, you should produce evidence regarding a claimant's wages, and employment relationship early and often.

17. Collateral Estoppel

Sanchez v. Nordica Soho LLC, 61 Misc.3d 1207(A) (Sup. Ct., Queens Cty., Oct. 3, 2018)

Decision: Defendant's motion for leave to amend its answer to assert the defenses of judicial/collateral estoppel is denied. Insofar as the defendant's motion relied upon a "Proposed Decision" of the Workers' Compensation Board that found "no evidence of any permanent injury" and insofar as the Board's "narrow findings" regarding permanency/damages are not binding on a finder of fact in a negligence action, the defendant's motion is contrary to established law and must be denied.

18. Consequential Injuries

Molette v. New York City Transit Authority, 166 A.D.3d 1278 (3d Dept. 2018)

Decision Below: Claim for a consequential neck injury was disallowed.

Affirmed: Where claimant's chiropractor (Dr. Xerxes) offered "pure pseudoscience speculation" in support of his opinion of causation, and where the employer's IME found no evidence of any neck injury, and an "obvious attempt to mislead the exam" by the claimant, the Board's decision was supported by substantial evidence and would not be disturbed.

NB: "The neck bone is connected to the shoulder bone" is only good science in kindergarten.

19. Coverage

Smith v. Park, 161 A.D.3d 1426 (3d Dept. 2018)

Decision Below: The decedent's employer was insured on the date of claimant's death.

Affirmed: Although employer's workers' compensation coverage was obtained before several changes in its corporate/business structure, those changes did not void said coverage: "neither the stated name, nor the structural composition of the insured is determinative of coverage; rather, it is "the intent to cover the risk insured against" which is controlling.

NB: Claimants (parents of 14-year old illegally-employed decedent) fought very hard to try and gain the right to "elect remedies" and sue the employer in tort. Oddly, the employer fought "employment" before the Board, while NYSIF rightly accepted the claim and voluntarily paid benefits.

Nunez v. Ulster BOCES/Arden Hill, A.D.3d., 2018 NY Slip Op 08611 (3d Dept. 2018)

Decision Below: Arch Insurance was barred from raising the issue of coverage by the doctrine of laches.

Affirmed: Where Arch Insurance accepted the claim, managed and administered the matter, reached compromises with the claimant on the issue of average weekly wage, agreed to pay awards and authorized surgery, it was estopped from claiming AIG was the proper carrier, raising that issue almost two-years later. Although AIG later filed a SROI

indicating it was the insurer of the general contractor on the job site where claimant was injured, Arch did not establish an "excusable delay" in raising the issue of coverage, and AIG was prejudiced by the various claims-handling activities undertaken by Arch during the two years it handled the file. Arch's claim that the delay was caused by "complex" coverage issues, without further elaboration, was insufficient without more explanation to establish why it took nearly two years to figure out it was not the proper carrier.

NB: *Compare with* C&C Affordable Management, Case No. G0765238, Decided: October 20, 2016. In C&C, Rochdale accepted the claim, handled the matter, consented to awards etc. and a year later determined that there was an error in identifying the proper employer, which was covered by NYSIF. After extensive development of the record, and after NYSIF failed to brief the issue of prejudice, the WCLJ and Board concluded that "While there was a delay of over one year in raising these issues, the Board Panel finds that there has been no actual injury or prejudice to SIF warranting a finding of laches. SIF has conceded coverage for the employer on the accident date. Furthermore, SIF has not offered any applicable defenses that would have resulted in disallowance of the claim including no accident, that the claimant was not an employee of its insured, failure to provide timely notice, nor lack of causal relationship." This standard of "prejudice" is certainly more restrictive than the concept applied in Nunez.

20. Causal Relationship

Byoung Park v. Corizon Health Inc., 158 A.D.3d 970 (3d Dept. 2018)

Decision Below: Claimant's fibromyalgia was not causally-related to claimant's exposure to pepper spray at work.

Affirmed: Where, of five physicians, all agreed that they could do no better than expressing a "possibility" of causation, and where all agreed their conclusions, and even diagnoses, were premised entirely on the claimant's subjective complaints, the Board did not err in crediting the employer's IME who "declined to state that, in claimant's case, her exposure to pepper spray was a triggering event" for a flare in her condition.

NB: Leave to appeal to Court of Appeals denied, 31 N.Y.3d 909 (2018).

Gullo v. Wireless Northeast, 160 A.D.3d 1106 (3d Dept. 2018)

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

Reversed: While the Board's factual determinations are generally upheld, where there is evidence that the Board's reading of the record was inaccurate or incomplete, its rulings cannot be sustained. While the Board was free to reject the opinion of a treating doctor, the record indicated that the Board misread and/or misinterpreted the testimony given by that doctor. Insofar as the Board relied on these erroneous statements while reciting its basis to reject this opinion, its decision cannot be affirmed as written.

Levin v. Rensselaer Polytechnic Institute, 164 A.D.3d 1505 (3d Dept. 2018)

Decision Below: Claimant failed to meet his burden of proof; claim for a consequential (and/or casually-related) right shoulder injury was disallowed.

Affirmed: The Board was free to assess the credibility of the medical evidence in the record, and was free to reject claimant's medical evidence. Where claimant's medical opinion was premised upon a reported mechanism of injury that was significantly different from any theretofore reported, and where that differing history was also accompanied by a delay of three months before any right arm complaints were mentioned in a medical report, there was substantial evidence upon which the Board could base its ruling.

Murrah v. Jain Irrigation, Inc., 157 A.D.3d 1088 (3d Dept. 2018)

Decision Below: Claim was amended to include cubital tunnel syndrome, but claim for ulnar neuritis was disallowed.

Affirmed: Employer's appeal to judicial notice that ulnar neuritis and cubital tunnel syndrome "are in fact the same condition" was raised for the first time on appeal and was otherwise not a suitable fact for application of the doctrine.

Nock v. New York City Dept. of Education, 160 A.D.3d 1238 (3d Dept. 2018)

Decision Below: Claim is disallowed; claimant failed to produce sufficient medical evidence of a causally-related injury/condition.

Affirmed: Where claimant's medical evidence "contains no specific diagnosis, makes no mention of the history of her injury or how it related to her work for the employer and,

while it makes reference to other medical providers and tests, no other evidence was submitted" the claimant could not meet her burden of proof.

NB: The employer here failed to timely controvert this claim and the WCLJ established the case at a hearing (form over substance). The Board panel, on review, agreed with the employer that the claimant's burden of proof failed in the first instance, making the employer's "default" without moment. Moreover, on panel review, the Board *sua sponte* disallowed the claim. HOWEVER, the Court here interpreted (possibly misinterpreted) the Board's ruling as impermanent saying "we do not read the Board's decision [to disallow the claim based on the record as it existed] as precluding claimant from submitting further medical evidence of a causal relationship between her injury and employment."

Pilacik v. Jacsa, LLC, 161 A.D.3d 1463 (3d Dept. 2018)

Decision Below: Claimant sustained a work-related injury when he fell from a scaffolding.

Affirmed: Although the exact date of the claimant's fall was in some dispute, the two-month delay between the alleged fall and the manifestation of symptoms of a subdural hematoma was typical. Where the employer's IME similarly found causal relationship in his written report, and agreed the delay in symptoms was common, the Board properly established the claim.

Turner v. New York City Dept. of Juvenile Justice, 159 A.D.3d 1236 (3d Dept. 2018)

Decision Below: Claimant did not sustain a causally-related injury to his back.

Affirmed: Although claimant's physicians opined her present disability and need for surgery was related to her 2005 workers' compensation claim, the Board was free to reject that opinion. Insofar as the claimant sustained an intervening motor vehicle accident and the 2005 claim was closed by an arm SLU which "suggests that any work-related injury to the claimant's back had been resolved well before the 2009 surgeries" the Board was free to "credit the medical testimony establishing the lack of causational relationship." The Board was further free to conclude that the claimant's description of the injuries she sustained in the MVA was not credible, and "draw a negative inference" from the claimant's failure to produce court filings from that MVA lawsuit as directed by the WCLJ.

Williams v. New York State Office of Temporary Disability and Assistance, 158 A.D.3d 965 (3d Dept. 2018)

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

Affirmed: Where the claimant's (an ALJ) claim of being squished between two closing elevator doors "like a jelly donut" was proven patently false by video footage, the Board was free to reject claimant's testimony as incredible, and conclude that all medical evidence in the file, despite giving causation, gave causation to claimant's incredible version of events and there was, as a result, no credible evidence of any disability or work-injury.

NB: The claimant here was an ALJ with 10 years on the bench, and was apparently terminated for her testimony in this claim – both the ALJ and Board essentially did everything but say the claimant perjured herself. The claimant is now suing the state to reclaim her job. https://nypost.com/2018/04/21/judge-who-faked-elevator-injury-wants-her-job-back.

21. Causal Relationship of Lost Time

Busat v. Ramapo Manor Nursing Center, 162 A.D.3d 1167 (3d Dept. 2018)

Decision Below: Claimant's lost wages were unrelated to his causally-related disability.

Reversed and Remitted: Although claimant failed to return from a scheduled vacation as a result of unrelated cardiac surgery, the fact that his physicians opined a total disability from causally-related injuries before it was evident he had recovered from his cardiac procedure, the Board's conclusion that the claimant was unattached to the labor market after he recovered from cardiac surgery was not supported by the record.

Usewicz v. Nozbestos Construction Corporation, 158 A.D.3d 963 (3d Dept. 2018)

Decision Below: Claimant's loss of earnings was not causally-related to established lead-exposure claim, but rather related to his established Article 8-A WTC claim; request for lost-wage award in lead exposure claim was denied.

Affirmed: Where claimant's testimony and medical evidence in the record demonstrated that his inability to work was largely due to his asbestos and WTC-related exposures, and where his physicians could only speculate on some partial casualty between lead-induced cognitive deficits (themselves only partially related to the lead exposure), there was substantial evidence for the Board to conclude that claimant's disability stemmed from his WTC exposures.

22. Civil Service Law § 71: Job Protection due to Injury

Singleton v. New York State Office of Children and Family Services, 161 A.D.3d 1357 (3d Dept. 2018)

Decision Below: Article 78 proceeding is dismissed.

Affirmed: Claimant's late appeal of Article 71 notice classifying his injury as "non-assault related" was not filed within four-month statute of limitations under WPLR § 217(1).

NB: CSL § 71 is often motivational in WC claims – the 1-year and 2-year job protections are cumulative terms, and a permanent injury that prevents claimant from returning to his or her employment renders the protection inapplicable.

23. Death

Kaplan v. New York City Transit Authority, 162 A.D.3d 1194 (3d Dept. 2018)

Decision Below: Case disallowed as the medical record did not support a finding that claimant's death was causally-related to his employment.

Reversed and remitted: On the appeal to the Board, the Panel considered numerous medical reports contained in a separate Workers' Compensation for the decedent involving a different accident. The Court noted that the employer in this file never requested the Board to do so, and never adhered to the Board's procedure for introducing additional evidence into the administrative appeal. Where such procedure was not followed, the new evidence must not be considered. The claimant was prejudiced as she was not on notice in the separate claim and as the Court was not willing to assume that the Board would have reached the same conclusion on appeal if it had not considered the records from the other claim, and the Board's improper reliance on documents outside the record, the matter was remitted back for further proceedings.

NB: On remittur, the Board conducted an analysis of the record without reference to the documents in the second WC claim, and concluded that, based only upon the evidence in the instant claim, the presumption of WCL § 21 was fully rebutted:

> The July 11, 2015, emergency room records indicate that decedent's death was the result of "cardiac arrest secondary to cardiovascular disease of old age." The November 28, 2014, hospital discharge instructions state that decedent had severe aortic stenosis, and in his April 25, 2016, report, Dr. Brief stated that "[s]ever aortic stenosis is a very significant and dangerous cardiac condition that, if not treated surgically, is often the cause of sudden death." Based on the emergency room records, the hospital discharge instructions and the absence of any evidence

that claimant had performed strenuous physical activities, Dr. Brief determined that decedent's death was not related to his work activities.

Pickerd v. Paragon Environmental Construction, Inc., 161 A.D.3d 1470 (3d Dept. 2018)

Decision Below: Claimant's work activities contributed to the myocardial infarction that resulted in claimant's death.

Affirmed: "[A] heart injury precipitated by work-related physical strain is compensable, even if a pre-existing pathology may have been a contributing factor and the physical exertion was no more severe than that regularly encountered by the claimant." Here, the coworker the claimant was helping at the time of the infarction testified that the claimant was using an excavator to help remove gravel just prior to the accident, and then collapsed while retrieving a pipe wrench and descending into a three-foot-deep pit. Even in light of the decedent's smoking habit and untreated high cholesterol, the Court found the claimant's operation of the excavator and retrieval of pipe wrench were significant precipitating factors that caused the decedent's fatal myocardial infarction.

24. Disability Pensions

Kelly v. DiNapoli / Sica v. DiNapoli, 30 N.Y.3d 674 (2018)

Decision Below: Neither petitioner was entitled to an accidental disability pension.

Affirmed: Petitioner Kelly's injury while rescuing injured civilians during a hurricane, and petitioner Sica's chemical exposure while attending unconscious victims in a supermarket were not "accidental." Neither injury was precipitated by "accidental events which were not a risk of the work performed." Both petitioners were injured by events that, while unforeseen or unique or sudden, where nevertheless within the ambit of their prescribed duties as public safety officers.

25. Effect of 2017 Amendments

McMillan v. Town of New Castle, 162 A.D.3d 1425 (3d Dept. 2018)

Decision Below: Claim disallowed; the alleged work-related stress was not greater than such which occurs in the normal police work environment.

Reversed and remitted: While claimant's initial application for full Board review/reconsideration was pending, WCL § 10(3)(b) was amended. The amendment, which went into effect immediately on April 10, 2017, states in relevant part that when a police officer files a claim for mental injury premised upon extraordinary work-related stress incurred in a work-related emergency, "the Board may not disallow the claim, upon a factual finding that the stress was not greater than that which usually occurs in the normal work environment." In terms of the appeal from the application for review and/or reconsideration, the Court's inquiry is limited to whether the Board's denial of such was arbitrary or capricious or otherwise an abuse of discretion. The Court then viewed the effect of the amendment to WCL § 10(3)(b) and concluded that, based on the immediate date of effectiveness of the amendment, the Legislative clearly viewed this amendment as remedial, and thus the Board's denial of the application of the claimant for reconsideration was improvident in light of the intervening substantial change in the law. The matter was remitted to the Board for further proceedings consistent with the opinion.

NB: In a subsequent MOBP on *remittur* Town of New Castle, Case No. G140 4105, Decided: November 16, 2018 the Board again disallowed the claim, noting that the concept of "extraordinary work-related stress" was not defined by the statute, and that, in the Board's view, WCL § 10(3)(b) was not satisfied. Pointing to instructive law (*citing* Cook v East Greenbush Police Dept., 114 A.D.3d 1005 (3d Dept. 2014)) the Board noted that under the old standard, witnessing a criminal firing a rifle at fellow

officers, then ordering a subordinate to shoot the criminal, and then seeing the victim's brains coming out of his ear, was not "extraordinary" because although it was likely rare, it was not outside the remit of the job.

Because the claimant's only allegation in Town of New Castle was witnessing blood while responding to a suicide attempt was not "extraordinary" The Board noted that "the record reflects that claimant repeatedly witnessed blood while at work throughout his ten-year carrier as a police officer" and the treating doctor, who described the specific incident in question as involving "only a "superficial" cut, and that claimant reported that he had passed out while watching a movie depicting blood approximately four years earlier" –these fact, together, did not rise to the level of "extraordinary."

O'Donnell v. Erie County, 162 A.D.3d 1278 (3d Dept. 2018)

Decision Below: Claimant sustained a 65% loss of wage earning capacity and was excused from demonstrating attachment to the labor market pursuant to the 2017 amendments to WCL § 15(3)(w).

Affirmed: While the claimant only demonstrated that she left employment, due in part to her established injuries, the Board correctly found that she need not also demonstrate post-retirement attachment efforts (as enumerated in Matter of Zamora) based upon the 2017 amendments to WCL §15(3)(w) which states, in part, that compensation, "shall be payable during the continuance of such permanent partial disability, without the necessity for the claimant who is entitled to benefits at the time of classification to demonstrate ongoing attachment to the labor market" and the effect of this amendment was to be applied retroactively in the context of the Workers Compensation Law, as the statute was remedial in nature.

NB: Defense counsel here argued that Zamora, and its extensive progeny, establish that a claim for "involuntary retirement" requires both a showing that the claimant stopped

work, at least in part, due to the work injury, and that he or she sought suitable replacement employment thereafter. Zamora, as you will recall, rejected a "presumption" that the Third Department had created whereby any claimant was found involuntarily retired merely by showing only that they left work (and retired) as a result of the work injury.

Leave to appeal to the Court of Appeals was GRANTED on October 18, 2018, and briefing to the Court is underway at this time.

26. Employer – Employee Relationship

Colamaio-Kohl v. Task Essential Corp., 157 A.D.3d 1103 (3d Dept. 2018)

Decision Below: Claim established as accident occurred arising out of and in the course of the claimant's employment with Task Essential.

Affirmed: Whether an employer-employee relationship exists is a factual issue for the Board to resolve, and the Board's determination on this issue will be upheld when supported by substantial evidence. Relevant factors in making this determination are "the right to control the work and set the work schedule, the method of payment, the furnishing of equipment, the right to discharge, and the relative nature of the work at issue." Here, the claimant was injured while working as a "skin care specialist and spokesmodel" at a Bloomingdale's store but claimed he was an employee of the skin care line owner Task Essential. The claimant testified that his supervisor, an employee of Task Essential, held himself out to be his employer, set his work schedule, trained the claimant to do his work duties, and informed him of a required dress code. Additionally, the claimant was paid an hourly rate by Task Essential and was required to meet sales goals by the company. Based on this substantial evidence of the employer control over the claimant's work, the Decision was affirmed.

Estate of Yoo v. Rockwell Compounding Associates, Inc., 158 A.D.3d 921 (3d Dept. 2018)

Decision Below: Decedent was an employee of Rockwell.

Dismissed as Interlocutory: Where a claim for death benefits has been filed, the Board's determination of whether an employer-employee relationship exists does not create a threshold legal issue so as to permit review by the Court prior to the Board's final decision of the claim for death benefits. The Court therefore found the appeal

interlocutory and dismissed the appeal, holding that such would be more appropriately reviewed upon an appeal from the Board's final decision of the claim.

Findlater v. Catering by Michael Schick, Inc., 166 A.D.3d 727 (2d Dept. 2018)

Decision Below: Defendant's motion for summary judgment to dismiss the complaint on the exclusivity provisions under the WCL is denied; plaintiff's motion for summary judgment determining the defendant was negligent and that the plaintiff was an independent contractor at the time of the accident is granted.

Affirmed as modified (Reversed): The defendant's motion for summary judgment dismissing the complaint should not have been denied, and the plaintiff's cross-motion for summary judgment determining he was an independent contractor should not have been granted. "Where the availability of Workers' Compensation benefits 'hinges upon questions of fact or upon mixed questions of fact and law, the parties may not choose the courts as the forum for resolution of the questions, but must look to the Workers' Compensation Board for such determinations.'" The motions should have been held in abeyance pending a determination from the Board regarding the plaintiff's status as an independent contractor or employee. However, the trial court's determination that the defendant was negligent in the happening of the accident was proper.

Garner v. Christian Contractors, Inc., 161 A.D.3d 1497 (3d Dept. 2018)

Decision Below: Claimant is an employee of the employer of record.

Dismissed as Interlocutory: The Board's determination of whether an employer-employee relationship exists does not create a threshold legal issue so as to permit review by the Court prior to the Board's final decision of the claim. Accordingly, the Court

dismissed the appeal as it was interlocutory prior to the Board's final decision on the claim.

Joseph v. Atelier Consulting LLC, 157 A.D.3d 1116 (3d Dept. 2018)

Decision Below: An employee-employer relationship existed between the claimant and Atelier. A $36,000 penalty was imposed to Atelier for failing to secure coverage.

Affirmed: The determination of whether an employer-employee relationship exists is a factual issue for the Board. Relevant factors in this determination include the right to control the work, the method of payment, the right to discharge, and the relative nature of the work. The claimant testified that the man he identified as his supervisor, an employee of Atelier, was the one who hired him, paid him using monies provided by the head of Atelier, would ask questions about work duties to either the supervisor or boss of Atelier, and that following this work-accident the boss informed him that he would be paying for his medical bills. Notably, no representative from Atelier testified. Based on this uncontroverted testimony, the Board's Decision was based on substantial evidence.

Smith v. 129 Avenue D, LLC, 161 A.D.3d 1493 (3d Dept. 2018)

Decision Below: Claim disallowed with a finding that the claimant was not an employee of 129 Avenue D, LLC.

Affirmed: The Court initially noted that it was satisfied that the Board's Decision complied with WCL § 23, as it undertook a complete and independent review of the record. Claimant's argument, that the Board failed to determine certain issues, including whether the claimant was an agent or employee of the superintendent at the time of the accident, was not properly preserved for review as they were neither raised at the hearing nor on the claimant's Application for Review. In determining whether an employer-

employee relationship existed, insofar as the claimant's work on the premises was dictated by the superintendent and not the employer and insofar as he was paid cash by the superintendent, as well as having tasks assigned and being provided the equipment for the tasks by the superintendent, the Board's Decision was based on substantial evidence.

27. Premium Audit

NY GO Express, Inc. v. New York State Insurance Fund, 60 Misc.3d 536 (Sup. Ct., Warren Cty., May 30, 2018)

Decision: NYSIF was entitled to audit premiums of "load broker" to include payments made to trucking vendors as "compensation" under broker's policy unless broker could establish that its vendors carried workers' compensation coverage during the relevant policy terms pursuant to the NYS Transportation Fair Play Industry Act. Although the movant produced a "certificate of insurance" from vendors which showed coverage, they failed to produce any policies; the former being, apparently, insufficient to prove coverage under workers' compensation as requested by NYSIF in the first instance. Moreover, movant's proof failed where there were no affidavits from vendor's owners addressing "direction and control" and other elements necessary under the NYSTFPIA.

28. Further Causally-Related Disability

Hughes v. World Trade Center Volunteer Fund, 166 A.D.3d 1279 (3d Dept. 2018)

Decision Below: Claimant not entitled to benefits from 2008 to 2016 on the basis there was insufficient medical evidence to warrant the awards.

Affirmed: "A claimant bears the burden of establishing, by competent medical evidence, a causal relationship between a . . . disability and the established work-related injury." The claimant put forth records and testimony from her treating psychologist who opined she was totally disabled for this period due to depression, anxiety, and panic attacks connected to her volunteer work at the World Trade Center. However, upon review, there were many inconsistencies in the treating provider's account of claimant's ongoing disability. Notably, the provider indicated there could have be other reasons contributing to the claimant's depression. Also, he testified the claimant was bedridden 80% of the time, but alternative evidence showed the claimant was involved as a mentor at an art program, went on dates, and was planning a cross country trip. Accordingly, the Board's conclusion that claimant's evidence was unreliable is rational, and its ruling was supported by substantial evidence.

Kemraj v. Garelick Farms, 164 A.D.3d 1504 (3d Dept. 2018)

Decision Below: Claimant has no further casually-related disability after September 16, 2013.

Affirmed: The claimant had an established injury to his left-shoulder as a result of 2005 accident. He subsequently was awarded a 45% SLU of the left arm. In 2012, this SLU was rescinded, and the claim was amended to include complex regional pain syndrome. The parties were subsequently directed to provide evidence of further casually-related

disability. The IME provider performed a neurological exam of the claimant and found no objective evidence of any neurological problem or symptoms of CRPS. He further noted that the claimant appeared to be exaggerating symptoms. Although claimant's treating provider disagreed, the Board found the IME to be more credible, and was within its discretion to do so based on substantial evidence.

29. Jurisdiction

Galster v. Keen Transport, Inc., 158 A.D.3d 959 (3d Dept. 2018)

Decision Below: The Board had jurisdiction over claimant's case.

Affirmed: While employer had no property in New York, claimant was injured in Illinois and was hired over the phone, the fact that claimant performed some 17 deliveries in New York, and lived in New York during the term of his employment (as a "remote employee"), the Board's exercise of jurisdiction, finding sufficient contacts, was supported by substantial evidence.

McCray v. CTS Enterprises, Inc., 166 A.D.3d 1356 (3d Dept. 2018)

Decision Below: The Board had jurisdiction over claimant's case (surprise!), where claimant was an employee of a staffing company, not the railroad operating in interstate commerce.

Reversed: Where claimant was an employee of CTX, and was injured on a train while passing through New York, the Federal Employer's Liability Act preempted the Workers' Compensation Law, and the Board could only exercise jurisdiction over the claim if, pursuant to WCL § 113, all parties stipulated to the exercise of jurisdiction. It was not proper for the Board to conclude that the claimant was not an employee of CTX, nor was it proper for the Board to permit an "election of remedies" where it found the claimant had not filed a FELA claim, and thus could pursue a claim under the WCL.

NB: WCL § 113 reads, in relevant part, that "The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also interstate or foreign commerce

for whom a rule of liability or method of compensation has been or may be established by the congress of the United States . . . provided that awards according to the provisions of this chapter may be made by the board . . . in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies."

The Board has repeatedly taken the position that once a federal remedy is sought and concluded (e.g. a FELA claim is filed, litigated and dismissed without an award of benefits) the Board may assume jurisdiction under the WCL insofar as any federal remedy no longer exists, the limitations of § 113 do not apply akin to an "election of remedies."

30. Labor Market Attachment

Bloomingdale v. Reale Construction Co., Inc., 161 A.D.3d 1406 (3d Dept. 2018)

Decision Below: Claimant had a 33% LWEC and was not attached to the labor market.

Affirmed in part, Reversed in part, and Remitted: The Board's determination the claimant failed to maintain an attachment to the labor market was supported by substantial evidence where he testified that his only efforts to look for work were attending an orientation at the Office of Adult Career and Continuing Education Services – Vocational Rehabilitation (ACCES-VR), filling out an application for a job program with the Department of Labor, and calling his former union (which he had since retired from) to inquire about work. However, the 33% LWEC determination was not supported by substantial evidence where the IME provider opined a "3B" impairment to the claimant's lumbar and cervical spine, and that the claimant could not return to his prior occupation as a heavy equipment operator, and was only able to perform sedentary work. In light of this level of medical impairment, in conjunction with multiple aggravating vocational factors, the 33% LWEC finding was not supported by substantial evidence.

Wolfe v. Ames Dept. Store, Inc., 159 A.D.3d 1291 (3d Dept. 2018)

Decision Below: Claimant had a temporary partial disability and was not attached to the labor market.

Affirmed: To establish a total disability, a claimant must demonstrate that he or she is totally disabled and unable to engage in gainful employment. The Court upheld the finding of a partial disability in light of the opinion of the impartial specialist who

reviewed the entirety of the medical record, imaging findings, and performed an exam of the claimant. Additionally, the claimant's attempt to argue that she believed she was totally disabled as of November 2011, is rejected – in part – by the fact the claimant subsequent undertook job search efforts in 2013. Based on the proper finding of partial disability, the Board was within its discretion to consider claimant's attachment to the labor market. The finding claimant was unattached to the labor market as of December 2013 was supported by testimony that she did not avail herself of educational or retraining programs and ended her job search as of August 2013.

31. Loss of Wage Earning Capacity

Oyola v. New York City Department of School Food & Nutrition Services, 157 A.D.3d 1145 (3d Dept. 2018)

Decision Below: Working claimant has a 70% loss of wage earning capacity.

Affirmed: Although the employer contended that the Board improperly set a loss of wage earning capacity for this full-duty claimant, the guiding rule of law is that "the Board is entitled to establish an LWEC, which sets a fixed durational limit of potential benefits in the event that a claimant incurs a subsequent reduction of wages as a result of his or her work-related injuries." *Citing* Perez v Bronx Lebanon Hosp. Ctr., 151 A.D.3d 1159,(3rd Dept 2017). The fact that the claimant was back to work earning her pre-injury wages at the time of classification does not affect this rule, nor does it provide any basis to prevent the Board from establishing claimant's loss of wage earning capacity.

Saintval v. AMN Healthcare, 165 A.D.3d 1364 (3d Dept. 2018)

Decision Below: The claimant sustained a 45% loss of wage earning capacity.

Affirmed: The Board Panel rightfully credited the opinion of the Carrier's IME in terms of the claimant's medical impairment, specifically where the provider opined the claimant would be amendable to a 7.5% SLU of the left knee, 10% SLU for the right shoulder, a mild radiculopathy component to her spine which resulted in slight restrictions. The IME provider further opined an overall disability of 33% and that the claimant was capable of full-time sedentary work. Mitigating factors such as claimant's youth and college certifications, supported the Board's conclusion, even where the injuries of the claim would prevent the claimant from returning to her pre-injury employment. Although claimant argued that her skills as a surgical technician were not

readily transferable, the Court found she had computer skills, could read/write/speak English, and had years of prior experience as a secretary. The fact that the claimant was able to remain in her prior employments for extended periods of time was also considered a mitigating factor in the LWEC analysis.

Varrone v. Coastal Environmental Group, 166 A.D.3d 1269 (3d Dept. 2018)

Decision Below: The claimant sustained a 15% loss of wage earning capacity.

Affirmed: The Board Panel was within its discretion to credit the opinion of the Employer IME, who opined lower severity ranking, and the Board properly considered that the 47-year old construction project manager was able to return to the same position he held prior to his injury, full duty without restrictions. The claimant's age, education history, prior extensive work history as a construction project manager, ability to use a computer, and professional certifications were all found to be mitigating factors in support of the 15% LWEC finding.

NB: The WCLJ originally awarded a 50% loss of wage earning capacity.

Wohlfeil v. Sharel Ventures, LLC, 32 N.Y.3d 981 (2018)

Decision Below by Third Department: 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"), 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 not some undefined type of limited sedentary work."

Reversed by Court of Appeals: "On this record, substantial evidence supports the Board's determination that the claimant has a permanent partial disability with a 75% loss of wage earning capacity."

NB: You may recall last year we discussed this case, and its companion, Burgos v. Citywide Central Ins. Program, 148 A.D.3d 1493 (3d Dept. 2017). Burgos was issued first in time, and on a very similar fact pattern, affirmed the Board's PPD finding. The Wohlfeil decision, issued several months later, came to the opposite conclusion, essentially creating a conflict of decisions within the same court – the first decision rejected the argument that "less than sedentary" work capacity must necessarily infer a PTD, while the latter embraced that argument. The Board, much to its credit, did away with the "less than sedentary" check box on the C-4.3 because, unsurprisingly, lots of people were somehow fitting into that category despite all common sense to the contrary. The Court of Appeals, reversing in only two sentences, resolved the conflict at the Third Department and leaves Burgos controlling while entirely gutting the "newish" legal standard of PTD that Judge Lynch used in Wohlfeil.

32. Medical Treatment Guidelines – Out of State

Gasparro v. Hospice of Dutchess County, 166 A.D.3d 1271 (3d Dept. 2018)

Decision Below: The claimant's Nevada physicians must comply with the Board's Medical Treatment Guidelines

Affirmed: The Board's reading of Kigin (24 N.Y.3d 459 (2014)), and 12 NYCRR 324.1, was entirely correct and rational; there is nothing in the law that indicates a geographic limitation of the MTGs to the State of New York. Similarly, the purpose of the guidelines - to ensure claimants receive effective and appropriate medical care - is rationally applied to all claimants, not just those who reside within the state.

33. Notice

Taylor v. Little Angels Head Start, 164 A.D.3d 1512 (3d Dept. 2018)

Decision Below: The claimant failed to give timely notice of her claim.

Affirmed: While the employer was aware the claimant was having problems with her knees, the claimant conceded she did not inform the employer that her condition was work-related. Insofar as claimant's C-3 did not list a date when she gave notice to her employer, and insofar as medical reports for, at least a year, noted "no known injury" as the cause of her symptoms, the Board did not err in refusing to excuse her one-year late notice.

34. 12 NYCRR 300.38: Expedited Hearings

Claim of Maloney v. Wende Correctional Facility, 157 A.D.3d 1155 (3d Dept. 2018)

Decision Below: The employer's failure to file a PH-16.2 did not violate 12 NYCRR 300.38.

Affirmed: The Board's designation of the claim as "expedited" and its direction for the parties to file a PH-16.2 was erroneous (as conceded by the Board below) as 12 NYCRR 300.38 only applied to claims where benefits are "controverted."

NB: Dr. Grant finally made it to the AD; the Board agreed in this case that Dr. Grant's reading of the guidelines created "entirely illogical" results.

35. Schedule Loss of Use Awards

Maunder v. B & B Lumber Company, 166 A.D.3d 1261 (3d Dept. 2018)

Decision Below: The claimant is not entitled to a SLU of either arm.

Affirmed: Where claimant's physician opined a 25% SLU of each arm premised on considerations NOT contained in the Board's permanency guidelines (numbness etc.), the Board was justified in rejecting his testimony, even where the employer offered no contrary opinion. The claimant's reliance on WCL §21 is misplaced as he "has the burden in the first instance of proving facts sufficient to support the claim for compensation."

Robinson v. Workmen's Circle Home, 164 A.D.3d 1000 (3d Dept. 2018)

Decision Below: The employer is entitled to a credit for all disability payments made to claimant against a subsequent schedule loss of use of award.

Affirmed: There is no merit to claimant's argument that the employer is entitled to a credit only against temporary total disability awards, and such a distinction is without any basis. The premise of the credit "to avoid what otherwise would be a significant windfall to the claimant" supports the Board's determination. An employer "may take credit for all prior disability payments."

Taher v. Yiota Taxi, Inc., 162 A.D.3d 1288 (3d Dept. 2018)

Decision Below: Claimant is not entitled to a schedule loss of use award where he is classified with a non-schedule permanent partial disability.

Modified: Although the Board was correct that the claimant was not entitled to a schedule loss award insofar as the record regarding his non-schedule classification had not been developed, the Board nevertheless erred insofar as a claimant may ultimately receive a schedule award notwithstanding any non-schedule classification. "A claimant may not, however, receive both an SLU award and nonschedule *award* for the same work-related accident." (emphasis in original)

See also: Tobin v Finger Lakes DDSO, 162 A.D.3d 1286 (3d Dept. 2018) (Board's rescission of SLU awards is supported by substantial evidence where the record demonstrates the claimant suffers from RSD, and the claimant's non-schedule classification must be assessed by further development of the record.)

NB: The Board has, through the Attorney General, filed a request for rehearing and leave to appeal to the Third Department – objecting to the concept that the proper distinguishing factor is the *award* and not the *legal finding* of permanency to which the claimant is ultimately entitled. Motion to reargue, and/or for leave to appeal to the Court of Appeals was denied on November 1, 2018 (2018 Slip Op. 88079U).

Notably, in Trevi Nail Corp., Case No. G156 8888, Decided: November 15, 2018, the Board offered a cogent reply to the Taher case, which is a strong repudiation of the reasoning therein:

> The principle holding in Taher, that a claimant may be entitled to a SLU award in the unique circumstance that they are not entitled to a nonschedule award, failed to address the amenability provisions of the 2018 Permanency Guidelines, which specifically state that no residual impairments must remain in the systemic area (i.e. neck, back, etc.) before a claim is considered suitable for schedule evaluation of an extremity. It should be noted that the 2018 Permanency Guidelines were adopted under legislation for revised guidelines for the evaluation of medical impairment and determination of permanency with respect to injuries which are amenable to an SLU award pursuant to WCL § 15(3).

We further note that a claimant who has returned to work at full wages loses nothing as the cap weeks set forth therein do not run while the claimant is not collecting indemnity benefits. A claimant not experiencing any loss in wages earned despite existing physical impairment may not be collecting any benefits, but retains the right to collect benefits for the same overall amount of time at some point in the future, should he or she experience wage loss caused by the established injuries. The virtual banking of cap weeks is the benefit received under such circumstances and is the benefit permitted by WCL § 15(3) and the Permanency Guidelines.

36. Scope and Course of Employment

Brennan v. New York State Department of Health, 159 A.D.3d 1250 (3d Dept. 2018)

Decision Below: The claimant's injury did not arise in and out of the scope and course of her employment.

Affirmed: While claimant parked in an employer-owned parking garage, paid through payroll deductions, and was walking one block to her place of employment, her fall on a public parking lot did not constitute a "special hazard" and there was no evidence that the employer owned or controlled the sidewalk, nor that the entrance was the sole means of ingress, or was controlled by the employer.

Compare: Grover v. State Insurance Fund, 165 A.D.3d 1329 (3d Dept. 2018) where the Board followed similar rationale denying a claim for an arm injury for claimant injured while reaching out a car window to scan her parking ticket. The Third Department generated a dissent (two justices) who would apply the "parking lot" rule from Thatcher and Stratton.

Button v. Button, 166 A.D.3d 1258 (3d Dept. 2018)

Decision Below: The claimant was engaged in a prohibited activity at the time of his accident and therefore his injuries did not arise out of and in the course of his employment.

Affirmed: The claimant's deviation from employment – returning to his nearby home on the employer's ATV and consuming alcohol while there – was not an acceptable or customary or permissible deviation from employment.

NB: Reviewing this case in a "work rule" paradigm presents a unique point of analytical review.

Deleon v. Elghanyan, 159 A.D.3d 1244 (3d Dept. 2018)

Decision Below: The claimant's accidental fall while using the bathroom was compensable.

Affirmed: Claimant, a housekeeper, stayed overnight at her employer's Hampton's residence in preparation for a house party the following day. Insofar as she fell in the home while engaged in this task, the Board properly found the claim was compensable. That the claimant was injured using the bathroom after waking up for the morning in that home does not defeat the claim; the claimant's overnight stay at the residence inured benefit to the employer and, given the nature of her work assignment, her "extended period of sleep does not establish an interruption of employment."

Rodriguez v. New York City Transit Authority, 161 A.D.3d 1501 (3d Dept. 2018)

Decision Below: The claimant's accident did not arise in or out of the scope/course of her employment with the NYC Transit Authority.

Affirmed: Although claimant was injured by a NYC Transit passenger who assaulted her at a train station, the fact that the incident occurred while claimant herself was traveling to her normal place of employment with the Authority meant that this incident was outside the course of her employment. Although the incident occurred on the employer's premises, and claimant was wearing her work uniform, she was not required to use that uniform, or use the Authority's trains to reach her place of employment. Rather, "claimant was a commuter using the subways like the general public" which supported the Board's ruling here.

Wallen v. Software Communication Systems Inc., 157 A.D.3d 1143 (3d Dept. 2018)

Decision Below: Claimant's stroke did not arise in and out of the scope or course of his self-employment at SCS.

Affirmed: Although claimant testified he had met with SCS clients – thus conducting SCS business – on the day of his stroke, the Board was free to reject that testimony and conclude that the claimant's stroke, and the stress leading to it, stemmed from a contentious meeting had with his former employer that same day involving a claim and lawsuit for discrimination and retaliation. Insofar as the claimant's action against his former employer inured no benefit to SCS. Moreover, the Board properly concluded there was insufficient evidence linking his employment with SCS to the stress that triggered his stroke.

NB: Leave to appeal to the Court of appeals denied, 31 N.Y.3d 906 (2018)

37. Stipulations (C-300.5)

Sheets v. Airy Ridge Farm, LLC, 163 A.D.3d 1321 (3d Dept. 2018)

Decision Below: Classified claimant was entitled to collect only his PPD rate when he stopped working.

Affirmed: Insofar as claimant stipulated, on the record, to a 45% LWEC; and insofar as his counsel explained to claimant, on the record, that if he stopped working he would receive the rate the Board ultimately awarded, the claimant's application, seeking an award at a higher rate, was without merit.

38. World Trade Center Claims

Kearns v. Decisions Strategies Environment, __ A.D.3d __, 2018 NY Slip Op 08599 (3d Dept. 2018)

Decision Below: Claim disallowed as claimant was not a participant in the World Trade Center rescue, recovery, or cleanup operations.

Affirmed: While claimant worked at the World Trade Center disaster site, the Board properly concluded that his work for a subcontractor, monitoring and logging the truck traffic that was hauling debris from the site, was not part of the "rescue, recovery of cleanup operations" within the meaning of WCL § 161(1). Although there is no statutory definition of the word "cleanup" provided in WCL § 161, the Board's construction of that term "as excluding routing monitoring of truck traffic" is consistent with the plain meaning of the word, and further consistent with Board precedent finding that "routine security work" was also excluded from the statute. Because the claimant's work was limited to merely "checking trucks hauling debris" and because the claimant did not "actually inspect the contents of the trucks", nor was he involved "with debris removal or loading and unloading the trucks", the record was devoid of any evidence that "directly aided or supported the drivers or first responders or that he engaged in the recovery or rescue in any respect, nor that he directly engaged in any cleanup activity or transport of people or materials, nor that he controlled who had access to the site."