The Law Offices of Melissa A. Day, PLLC

# A Year in Review:
## 2019 Workers' Compensation Case Law


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# 1. § 10: Liability for Compensation

**Cannetti v. Darr Construction Equipment Corporation, 173 A.D.3d 1493 (3d Dept. 2019)**

*Decision Below:* Claimant's intoxication was the sole cause of his injuries and the claim is barred under WCL § 10.

*Affirmed:* The employer submitted substantial evidence rebutting the presumption of WCL § 21(4) by producing a toxicology report showing the decedent had "abnormally high" ethanol levels in his blood at the time of the accident, as well as opiates, cocaine and benzodiazepines. Insofar as the employer's IME concluded these substances, in the reported amounts, impaired the decedent's ability to drive and he should not have been driving, and insofar as decedent's wife conceded that claimant consumed alcohol at lunch, and insofar evidence showed the decedent's vehicle crossed the double-yellow line and struck an oncoming vehicle, the Board's conclusion "that the accident was caused solely by decedent's intoxication due to drugs and alcohol" would not be disturbed.

*NB:* The Appellate Division also considered claimant's argument that because three different WCLJs presided over initial hearings, the Board violated WCL § 20. The Court held that because the WCLJ who heard the testimony had rendered a ruling, and because "unavailability" of the other two WCLJs was a sufficient reason, WCL § 20 was not violated.

**Delacruz v. Incorporated Village of Freeport, 175 A.D.3d 1739 (3d Dept. 2019)**

*Decision Below:* Claim for work-related death is disallowed under WCL § 10(1).

*Affirmed:* Where the evidence clearly established that claimant, a police office, committed suicide in her patrol car, and that she had not interacted with any other person during the period leading up to her death, and in the absence of evidence that her suicide was the result of "insanity, brain derangement or a pattern of mental deterioration caused by a work-related injury" the Board properly concluded that the claim was not compensable insofar as substantial evidence demonstrated that the claimant willfully intended to bring about her own death.

*NB*: It does not appear the decedent's estate offered any work-related rationale for her suicide apart from possibly "being in trouble at work" but the decedent's colleagues had informed her that such was not the case before her death. The record contained several unrelated bases from which motive might be infered, including that the claimant had recently begun marriage counselling and had "experienced some depression and/or stress during the holiday season."

# 2. § 11: Exclusivity of Workers' Compensation Law

**White v. Metropolitan Opera Assoc., Inc., 64 Misc.3d 290 (Sup. Ct., N.Y. Cty., May 10, 2019)**

*Decision:* Employer could not claim "exclusivity" as a defense to liability under WCL § 11.

Where opera singer, who was injured while in the course of contract work for the Metropolitan Opera, was subject to a "private bill" (S3353) signed into law in 2017, which held that plaintiff here was "not an employee of the venue of the performance" thus exempting her from the current reading of the statute and case law, the trial court properly dismissed the defendant's affirmative defense under WCL § 11 as the plaintiff was not an employee of the defendant at the time of the accident.

*NB:* These are the politicians we elect and support – likely spending more time addressing the personal issues of a single diva than the welfare of hundreds of citizens. Mic-drop.

**Eshonkulov v. Rafiqul,- - -AD3d- - -, 2019 NY Slip Op 07236 (2019)**

*Decision Below:* Defendant's motion to dismiss under CPLR § 3211 and 3212 on the grounds of exclusivity under WCL § 11 – for both direct, liability and contribution/indemnification against co-defendant contractor, is denied.

*Affirmed as modified:* Insofar as the plaintiff conceded in his Bill of Particulars that he was employed by one defendant at the time of the accident, and that the second defendant established, *prima facie*, that it was plaintiff's co-employer, and that plaintiff had received workers' compensation benefits for the injuries arising out of the subject accident, both defendants demonstrated that plaintiff's action against them was barred by WCL § 11.

However, defendants were not entitled to dismissal of third co-defendant's cross-claims for contribution and indemnification insofar as defendants failed to establish, *prima facie*, that plaintiff did not suffer a grave injury or that there was no contract between them and third co-defendant seeking such indemnification/contribution.

**Smith v. Park, 63 Misc.3d 1235(A) (Sup. Ct., Cortland Cty., Jun. 4, 2019)**

*Decision*: Plaintiff's action is barred by exclusive remedy provision under WCL § 11.

While the defendant's corporate structure was changed, and various "members" entered and left the corporate structure, potentially changing its nature and construction and composition, the fact that plaintiff's estate pursued and obtained workers' compensation benefits for the injury that resulted in death (findings which limited the recovery to $50,000/parent for a non-dependency death) and where an attempt to except the case from WCL § 11 was already rejected by the Appellate Division (161 A.D.3d 1426, 3d Dept. 2018), plaintiff's renewed attempt to sue defendants in Supreme Court must be dismissed. To the extent that the employer plead guilty to three misdemeanor criminal charges of: endangering the welfare of a child, prohibited employment of a minor, and allowing a minor to operate a large driven hoisting apparatus, such evidence was insufficient to trigger intentional tort exception to WCL § 11. The exception is applicable only if the employer's actions are directed towards a specific employee, with intention of causing harm to that particular employee.

*NB:* The decedent's workers' compensation claim was affirmed by the Third Department in 2018 – the primary issues here in 2019 were: alleged negligence and gross negligence; malicious, wonton, and reckless behavior; wrongful death; and civil liability for criminal conduct, which led to the gruesome death of a 14-year old child who was employed there. Plaintiffs, and their counsel, appear to believe that substantial damages could be obtained at trial in Supreme Court following employer's guilty plea, while defendants did every thing they could to get the WC claim established.

In Smith v. Park, 161 A.D.3d 1426 (3d Dept. 2018), the employer fought "employment" before the Board, but NYSIF rightly accepted the claim and voluntarily paid benefits. The Appellate Division affirmed the employer was insured on the date of claimant's death despite coverage being obtained prior to the employer's restructuring, stating that "neither the stated name nor structural composition of the insured is determinative of coverage; rather, it is the intent to cover the risk insured against that is controlling." Claimants (parents of the child-decedent) fought very hard to try and gain the right to "elect remedies" and sue the employer in tort.

**Guthorn v. Village of Saranac Lake, 169 A.D.3d 1298 (3d Dept. 2019)**

*Decision*: WCL § 11 bars a claim of contractual indemnification against plaintiff's employer. While the parties entered an agreement, explicitly indemnifying the defendant with respect to plaintiff's employer, the fact that this agreement was entered *after* plaintiff's accident, and it did not clearly and expressly demonstrate the parties intent for that agreement to apply retroactively, it could not be read as applying retroactively where established precedent requires such agreements be (1) "made" before the accident occurred and (2) the parties intended the agreement to apply as of a prior date to the accident. Where, as here, the record established that the agreement was entered *after* plaintiff's accident, and where the agreement was silent on retroactivity, and where the record demonstrated no evidence that the parties had previously agreed to such indemnification, the defendant's claims for indemnification fail.

*NB:* This is likely not a good way to deal with a business partner after "encouraging" them to sign a back-dated joint venture agreement when the proffering party claims that the original contract was "lost" and the signing party seems to deny that assertion.

**Robles v. Taconic Management Company, LLC, 173 A.D.3d 1089 (2d Dept. 2019)**

*Decision*: Moving defendant was not entitled to summary judgement under a theory that it was the alter ego of plaintiff's employer. While defendant established that it was owned by the same entity which owned plaintiff's employer, and shared facilities, its proofs also established that it had been formed "for a different purpose[] and had different workforces that performed different functions." While the record demonstrated that plaintiff's supervisor was actually an employee of the moving defendant, and that same person had caused the accident, those showing establish a triable issue of fact as to whether common-law indemnification against moving defendant is barred by WCL § 11.

# 3. § 114-A: Fraud

**Persons v. Halmar International, LLC, 171 A.D.3d 1317 (3d Dept. 2019)**

*Decision Below:* Claimant's Volunteer Firefighting activities are a violation of WCL § 114-a.

*Reversed and Remitted:* Where claimant had never been questioned about his volunteer activities previously, and when first questioned he "readily acknowledged his volunteer activity" and disclosed the extent of that conduct, and absent any evidence that "the carrier or any physician, either directly or on any questionnaire . . . asked claimant about his involvement in any volunteer activity" the Board's conclusion that the claimant made a material omission is without support in the record.

Moreover, insofar as the Board's review of the video surveillance contained numerous factual inaccuracies, and the only medical expert to review that evidence was "speculation and surmise . . . and factually inaccurate" the Board's conclusion that the claimant committed fraud relied only upon "certain presumptions regarding the nature of those [fire] calls and the extent of claimant's activities in determining that the claimant's presence at those calls was inconsistent with his injuries.

*NB:* On remittal the Board adopted the Appellate Division finding and concluded there was insufficient evidence of a WCL § 114-a violation. The claimant, ironically, later appealed a Reserved Decision which made awards during the relevant periods at a 50% rate, arguing that he was disabled from all forms of employment by combination of physical and psychiatric disabilities. The claimant wisely abandoned that position before the Board Panel took up the case. HALMAR INTERNATIONAL, G136 9919 (November 12, 2019).

As we say all the time, "the fraud is in the lie, not the surveillance."

**McAndrews v. Buffalo Sewer Authority, 171 A.D.3d 1426 (3d Dept. 2019)**

*Decision Below:* The claimant sustained injuries within the scope and course of his employment and there is insufficient evidence of a violation of WCL § 114-a.

*Affirmed:* Where the employer's controversy of the claim was late (*see* WCL § 25(2)(b)) the Board properly limited its defense of the claim to question of causal relationship. Similarly, it was not improper for the WCLJ to "curtail" questioning of the claimant on the issue of WCL § 114-a when the employer's cross-examination strayed beyond questions related to causation. While the employer raised WCL § 114-a based upon discrepancies between the claimant's initial injury report to the employer and the C-3 filed months later, insofar as the history he provided to his physician was largely consistent with both accounts, the Board properly resolved questions of witness credibility in favor of the claimant.

**Angora v. Wegmans Food Market, Inc., 171 A.D.3d 1419 (3d Dept. 2019)**

*Decision Below:* Claimant's work activities at his restaurant/bar, depicted on video footage, during a period where his physician deemed him totally disabled as a result of his work-related injury, constituted a material omission, and a violation of WCL § 114-a and the imposition of a discretionary penalty.

*Affirmed:* Video surveillance, depicting the claimant taking orders, enter them into a computer, serving food and drinks, taking out the trash, and other work activities, constituted substantial evidence from which the Board could conclude a WCL §114-a violation "by omitting and failing to disclose, for the purpose of obtaining workers' compensation benefits, his work activities at his restaurant/bar."

*NB*: At least one other employee of the employer was captured committing fraud in the same footage and was similarly found in violation of WCL § 114-a.

**Vazquez v. Skuffy Auto Body Shop, 168 A.D.3d 1240 (3d Dept. 2019)**

*Decision Below:* The claimant violated WCL § 114-a and the nature of the claimant's conduct warranted both mandatory and discretionary penalties.

*Affirmed:* There was sufficient evidence in the record to support the Board's finding of a violation of WCL § 114-a where the claimant did not fully disclose his work activities with a landscaping business, despite multiple opportunities to do so, until after the employer presented copies of multiple checks from that business, to the claimant, deposited into claimant's account. Moreover, the evidence in the record was sufficient that the Board could also impose a discretionary lifetime penalty.

**Stone v. Saulsbury/Federal Signal, 172 A.D.3d 1851 (3d Dept. 2019)**

*Decision Below:* The claimant did not perform any work or make any false statements regarding work.

*Affirmed:* While claimant was found guilty of the unlawful manufacture of methamphetamine, and was subsequently incarcerated, the employer was unable to establish sufficient evidence that the claimant performed any work or made any false statements in connection with his workers compensation claim. Insofar as the crime of "unlawful manufacture" only requires that the offender "possess, at the same time and location, two or more pieces of laboratory equipment" necessary to make methamphetamine, "with the intent to use such products . . . to manufacture" the drug, and insofar as none of these elements do not require that any work be performed, the employer's contention that conviction of that crime must lead the Board to conclude the claimant performed work activities without disclosing them to the employer, or received any remuneration without disclosing such, is without merit.

**Cerobski v. Structural Preservation Systems, 168 A.D.3d 1249 (3d Dept. 2019)**

*Decision Below:* Claimant sustained a compensable accident; employer's claim of WCL § 114-a was not timely raised when first raised in an Application for Board Review of the decision establishing compensability.

*Affirmed:* The Board properly concluded that WCL § 25(2-a)(d) and 12 NYCRR 300.38(f)(4) required the employer to file a pre-hearing conference, and all evidence upon which it intended to rely, ten-days in advance of the pre-hearing conference. Whereas here, the employer failed to file a pre-hearing conference statement, and raised fraud "for the first time in its untimely application for review" the Board properly refused to consider that issue. While the employer could have pursued the issue after producing an affidavit showing such failure and delay was "due to good cause" and that "it exercised good faith and due diligence" the employer's failure to make such an offer of proof was fatal to its subsequently raised issues.

*NB*: The Appellate Division also reached the issue of collateral estoppel. The evidence of fraud here apparently went to the happening of the accident in the first instance. The evidence was strong enough to have convinced the WCLJ below to try to preclude claimant from receiving future medical care (which is beyond the scope of remedies permitted under WCL § 114-a).

Notably, the Appellate Division here found that the employer could not try to "undo" establishment of the claim though a fraud claim. However, *see* Portlette v. Manhattan & Bronx Surface Transit, 159 A.D.3d 1256 (3d Dept. 2018), for *exactly* that result: fraud proved and used to "undo" establishment by a finding that the claimant "did not suffer a causally-related injury" as a result of the alleged work accident.

**Galeano v. International Shoppes, 171 A.D.3d 1416 (3d Dept. 2019)**

*Decision Below:* Claimant's failure to disclose an intervening motor vehicle accident (MVA) did not constitute a material omission.

*Affirmed:* While the claimant did, in fact, sustain a MVA with "overla[pping]" sites of injury for which she received additional treatment through no-fault, and while she did initially refuse to release her medical records, the Board could properly conclude that no material misrepresentation, or omission, occurred where the claimant freely advised the employer's consultant of the injury when asked. Moreover, insofar as the claimant had already been classified with a permanent partial disability, the subsequent MVA could not have impacted the claimant's receipt of wage-replacement benefits under WCL § 15.

*NB*: The employer became aware of the MVA after the claimant's physician filed a request for a total knee replacement. Once the employer made the claimant aware that it had learned of the MVA and was demanding a copy of her medical records related thereto, the claimant withdrew her request for surgery.

**Rosario v. Consolidated Edison Co. of N.Y. Inc., 174 A.D.3d 1186 (3d Dept. 2019)**

*Decision Below:* Claimant did not make a willful representation in violation of WCL § 114-a.

*Affirmed:* While the claimant suffered from a decidedly unique condition of "resting claw hand," the employer's contention that the claimant was exaggerating this condition was not supported by either the IME or the submitted video surveillance. Insofar as the footage of the recorded IME indicates that the doctor did not "make much of an attempt to manipulate [claimant's hands]" and where the surveillance was "of limited value" and "does not show that [sic] claimant engaged in activities inconsistent with his medical restrictions" the Board's conclusion that the employer failed to submit sufficient evidence of a WCL § 114-a violation is supported by substantial evidence.

**Ledney v. Boat-N-RV Warehouse, 174 A.D.3d 1245 (3d Dept. 2019)**

*Decision Below:* Claimant knowingly misrepresented his medical condition in violation of WCL § 114-a.

*Affirmed:* Where claimant reported to his physicians, and the employer's IME physician, that he had difficulty taking "even a few steps" and where he presented to these physicians ambulating with crutches, unable to walk without an antalgic gait, surveillance footage showing the claimant able to walk without a limp and without an assistive device, and showing his use of such device only when visiting a physician's office demonstrated "patent inconsistencies between the surveillance and the claimant's testimony and presentation at medical appointments" and constituted "substantial evidence . . . that claimant made material misrepresentations as to his degree of disability, his level of restrictions and his ability to ambulate without assistive devices."

*NB*: This employer deserves an award for patience; they collected surveillance over a two-year period before embarking on fraud litigation in this claim – the "two-year period" was relied upon by the Board has solid grounds for a lifetime ban and the Appellate Division affirmed such basis.

**Swiech v. City of Lackawanna, 174 A.D.3d 1001 (3d Dept. 2019)**

*Decision Below:* Claimant's misrepresentation of his physical condition at a Functional Capacity Exam (FCE) constituted a violation of WCL § 114-a.

*Affirmed:* Where surveillance footage demonstrated that the claimant could drive, walk, and apparently assist (or complete on his own) substantial home renovations, including shopping for materials and lifting heavy boxes from the ground, the claimant's representation to the employer's FCE that he could do little or no physical activity without constant pain, and that he required "both hands" to lift a gallon of milk, constituted a material misrepresentation. "Contrary to the claimant's argument, significantly feigning the extent of disability and pretending to be unable to perform most tasks and body movement for the purpose of

influencing any determination regarding workers compensation benefits constitute false representation of material facts within the meaning of [WCL § 114-a]."

**Smith v. Rochester-Genesee Reg'l Transp. Auth., 174 A.D.3d 1264 (3d Dept. 2019)**

*Decision Below:* Claimant did not sustain a consequential back injury and violated WCL § 114-a in the process of making that claim.

*Affirmed:* Where claimant's physician originally opining that the claimant's low back injury was consequential to an altered gait, secondary to his causally-related lower extremity injuries, but conceded he had not review pre-accident records establishing a pre-existing low back condition, the Board was free to reject that testimony insofar as it was "based upon an incomplete and inaccurate medical history" and instead credit two IME physicians finding the condition to be pre-existing and unrelated.

Further, claimant committed fraud by testifying that he ceased treatment to his low back in 2003 (from a 2000 MVA), where records demonstrated ongoing treatment to at least February 2012. Where the claimant's "testimony varied significantly" at later hearings – after being confronted with more proof of his misrepresentations – the Board was free to discredit the claimant's testimony and there was substantial evidence to support the Board's conclusion that he made material misrepresentations and omissions about his pre-existing back condition.

**Permenter v. WRS Environmental Services Inc., 172 A.D.3d 1837 (3d Dept. 2019)**

*Decision Below:* The claimant did not knowingly make a material misrepresentation, and therefore did not violate WCL § 114-a.

*Affirmed:* While claimant continued to work for his own flower business after sustaining his work related injury, his testimony that he denied working for any other employer because he "did not consider [working for himself] work because it was not profitable" and where he "freely acknowledged" when questioned, that he owned the business" was sufficient evidence from which the Board could reasonably conclude the claimant did not make a knowing material misrepresentation: "In view of the foregoing, the Board could reasonable conclude that claimant did not believe that his ownership interest in the flower business constituted work for the purposes of receiving workers' compensation benefits."

*NB:* This ruling only makes sense to someone who has never owned a business or has no conception of what owning a business of any sort entails. Somehow, both the Board and Third Department could read testimony that the claimant "went to the store four of five times per week to make sure that everything was running well" but still believe such involvement did not constitute work by accepting the claimant's paper-thin rationale that "he indicated the store was not profitable and produced tax returns" to that effect. Only in New York…

**Matter of Sidiropoulos v. Nassau Intercounty Express, - - - AD3d - - -, 2019 NY Slip Op. 09077 (2019)**

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

*Affirmed:* Although the employer produced video surveillance, including footage of the claimant playing tennis, swimming and other activities, the record failed to demonstrate that the claimant did any more than "downplay[] his abilities" to one of the employer's physicians. Insofar as claimant's physician review the surveillance reports and concluded that the claimant could do "a little more" than he expected, that the activities described in the reports were largely consistent with what he would expect the claimant could do. Where the Board is vested with the authority to what weight to accord such testimony, and the employer "fully explored" any further inconsistencies on cross-examination of claimant's physician, the Board's resolution of conflicting evidence will not be disturbed.

**Matter of Felicello (Marlboro Cent. Sch. Dist.), - - - AD3d - - -, 2019 NY Slip Op. 09070 (2019)**

*Decision Below:* The claimant violated WCL § 114-a, mandator and discretionary penalties are imposed.

*Affirmed:* Where claimant testified that three different physician informed him that he "could not go back to work anymore as a physical education [teacher] and that "he would not longer be able to teach the physical education classes" but those physicians testified, universally, that they never made such statements to the claimant, or even considered any "long-term plan . . . regarding work" the Board properly concluded that the claimant made material misrepresentations regarding "what his physicians recommended to him regarding his retirement and [did so] for the purpose of obtaining workers' compensation benefits."

Moreover, where the Board concluded that the claimant made these misrepresentations under oath and two separate hearings, "claimant's persistent testimony" which was "completely false" was sufficient basis to support the Board's imposition of discretionary lifetime ban appropriate.

*NB*: Defense counsel on this case should be given a medal – this is a unique, and difficult to prosecute fraud claim. It does appear that some of the medical testimony on retirement had been taken before claimant's testimony – enough to give counsel grounds to push the issue.

# 4. § 137: Independent Medical Examinations

**Connolly v. Covanta Energy Corporation, 172 A.D.3d 1839 (3d Dept.)**

*Decision Below:* Upon additional evidence and testimony, claimant's allergic bronchopulmonary aspergillosis constitutes an accidental injury. Claimant's treating doctor's report for a third-party action is not subject to WCL § 137.

*Affirmed:* On July 28, 2017, the Board ruled that claimant sustained an accidental injury arising out of and in the course of his employment. The court reversed that there was insufficient medical evidence to establish occupational disease and remitted for further proceeding. Upon remittal, the Board was free to consider a new theory for the claim. The Board has continuing jurisdiction over matters presented before it and may modify prior decisions on its own initiative in the interest of justice. The record establish that Dr. Johanning was retained for purpose of providing a medical assessment of claimant in connection with a third-party action, and, as such, his medial report is not subject to WCL § 137. Dr. Johanning testified that based on his personal visit to the claimant's work place, the environmental testing and environmental inspection, claimant's cumulative and accidental exposure to the aspergillus fungi was causally related to his inspection and remediation work at cooling towers. The Board is entitled to draw any reasonable inference from the evidence contained in the record. The issue of whether claimant had an accidental injury is a factual issue for the board and will not be disturbed if supported by substantial evidence. Therefore, the foregoing provides substantial evidence to support the Board's decision and as such it will not be disturbed.

# 5. § 15-8(d): Reimbursement From The Special Disability Fund

**Durham v. Wal-Mart Stores, Inc., 174 A.D.3d 1273 (3d Dept. 2019)**

*Decision Below:* Employer is not entitled to relief under WCL § 15-8(d); Special Funds Conservation Committee (SFCC) concession is not admissible and the employer's C-250 is both untimely filed and defective.

*Affirmed:* While SFCC executed a "concession" that WCL § 15-8(d) would apply to the underlying claim unless a permanent total disability solely due to the claim arose, such writing did not meet the requirements of 12 NYCRR 300.5(b) and thus would not be "enforced" upon SFCC. Moreover, the employer's C-250 was submitted after the July 1, 2010 closure date under WCL § 15-8(h)(2)(A), and that form was defective insofar as it failed to list the WCB ID of the prior WCB case which established the premise of the employer's PPI claim.

# 6. § 18: Notice Of Injury Or Death

**Sedlock v. Employ Bridge, 172 A.D.3d 1684 (3d Dept. 2019)**

*Decision*: Claimant sustained causally-related injuries, and claimant's failure to report those injuries timely, should be excused.

*Affirmed*: While claimant sustained an accident toward the end of September 2016, and admittedly failed to inform anyone of such accident at the time, an email to the employer on October 24, 2016, advising his employer of the work accident, which specifically noted that the severity of his injuries was only apparent to the claimant later, sufficiently demonstrated that the claimant gave notice to the employer "as soon as he realized" and the Board properly excused any claim of late notice "as claimant promptly reported the accident once he discerned that his injuries were related to it."

**Nukicic v. McLane Northeast, 174 A.D.3d 1260 (3d Dept. 2019)**

*Decision Below:* The claimant failed to provide timely notice to the employer under WCL § 18, failed to demonstrate a basis to excuse such failure, and failed to establish that the employer was not prejudiced by his untimely notice.

*Affirmed:* While the record reflected that the claimant timely informed his employer that he had a medical issue with his knee, substantial evidence supports the Board's determination that the employer was not told of the work-related accident until more than three months later, after the claimant had already undergone surgery; and there was ample evidence from the employer's HR director that, when a work accident is reported, a specific process for investigating such accident is implemented, which could not happen here due to the untimely notice (such evidence affirmatively demonstrating prejudice to the employer owing to the late notice).

**Horvath v. Mega Forklift,- - -AD3d- - -, 2019 NY Slip Op 07124 (3d Dept. 2019)**

*Decision Below:* Claimant, the employer's owner, did not give timely notice of his accident to the carrier; claim is disallowed.

*Affirmed:* Where claimant – also owner of employer – filed claim for work-related MVA over two-years after the accident occurred, his failure to give timely notice of the claim to the workers' compensation carrier renders the claim untimely. "Where, as here, the claimant is an officer of the employer, the requisite notice must be given the employer's workers' compensation carrier." Insofar as the carrier did not learn of the claim until long after the claimant underwent a surgical repair of his injury, such delay constitutes substantial prejudice to the carrier, who could not promptly investigate the claim or permit the carrier to subject the claimant to an independent medical examination before that surgery.

**Sheikh v. White & Blue Group Corporation, 168 A.D.3d 1196 (3d Dept. 2019)**

*Decision Below:* The employer was prejudiced by claimant's failure to provide timely notice within 30 days as provided by WCL § 18 and the claimant's account of the alleged incident was not credible.

*Affirmed:* Worker's Compensation Law § 18 requires that a claimant seeking workers compensation benefits must provide written notice of an injury within 30 days after the accident causing such injury. Failure to give timely notice generally precludes claim unless the board excuse the failure on the ground that notice could not be given, the employer or its agent had knowledge of the accident, or the employer did not suffer any prejudice. Claimant's claim was that while working for the employer on July 5, 2014 he was assaulted by another driver resulting in injuries to his right shoulder and neck. Claimant conceded at the hearing that he did not provide the required timely written notice because he was "unable to go to the garage". He testified that he provided verbal notice on an unspecified date to the manager and the dispatcher, and a supervisor testified that claimant provided verbal notice about a month after the alleged incident. However, there is no support in the record for claimant's assertion on appeal that he provided verbal notice to the employer immediately after the alleged incident. Given the lack of any contemporaneous documentation or proof to support claimant's allegation that he was assaulted and the employer's resulting inability to properly investigate the incident, the board providently concluded that claimant failed to demonstrate that the employer was not prejudiced by the untimely notice. Therefore, the board did not abuse its discretion in declining to excuse claimant's untimely notice.

# 7. § 2(7): Stress Claims

**Carey v. Westchester County Department of Correction, 171 A.D.3d 1414 (3d Dept. 2019)**

*Decision Below:* Claimant did not sustain a physical injury within the meaning of Workers Compensation Law § 2(7) and the amendment to Workers Compensation Law § 10(3)(b) does not apply to claimant. *Later amended during pendency of appeal.*

*Appeals dismissed:* Where the Board initially found that the claimant did not sustain a physical injury within the meaning of WCL § 2(7) and that the amendment to WCL § 10(3)(b) did not apply to claimant, but later amended its ruling, claimant's appeal is moot and must be dismissed.

In its amended ruling, the Board held claimant's testimony credible and ruled that WCL § 10(3)(b) applied in this instance insofar as the inmate in question was more dangerous than the average inmate, and that the exposure to bodily fluids was not a regular occurrence for claimant at work, and thus claimant experienced stress greater than similarly situated correction officers and a claim for psychological condition was supported by credible evidence.

*NB*: Last year's rulings on WCL § 10(3)(b) were focused on limiting its application and enforcing a narrow reading of the statutory language. Maybe not anymore?

# 8. § 2(9): Definition of Wage

**Covert v. Niagara County, 172 A.D.3d 1686 (3d Dept. 2019)**

*Decision Below:* Claimant's public assistance constituted a "wage" as defined in WCL § 2(9).

*Affirmed:* Claimant's public assistance, insofar as it was subject to reduction or suspension if claimant refused to participate in a Work Experience Program (WEP), and insofar as the Third Department held this ruling was "consistent with the statutory scheme governing WEP's" the Board was correct in considering the claimant's public assistance as a "wage."

*NB*: This decision is completely wrong.

# 9. § 207-C: Payment of Salary, Wages, Medical and Hospital Expenses of Police Officers

**Matter** of **Tomaine (City of Poughkeepsie Police), - - - AD3d - - -, 2019 NY Slip Op. 09072 (2019)**

*Decision Below:* Claimant's retirement was due, in part, to his work-related injury and the claimant remained attached to the labor market thereafter.

*Affirmed:* Where, as here, the Board credited the testimony of the claimant that his injury left him unable to work, and further credited the testimony of the employer's IME that the claimant's injuries led to lumbar fusion surgery and that the claimant was "incapable of returning to the workforce in any capacity" and that such condition was permanent, the Board's findings regarding the basis of claimant's retirement are supported by substantial evidence.

Moreover, insofar as the Board credited the employer's IME, who found the claimant totally disabled, it properly concluded that the claimant could not be found voluntarily withdrawn from the labor market and was entitled to awards at a total rate of disability.

*NB*: The decision below seems entirely premised upon the very poor IME, which found, essentially, PTD and supported the claimant's disability retirement theory.

# 10. § 21: Presumptions of Compensability

**Ferrari v. Darcon Construction Inc., 170 A.D.3d 1392 (3d Dept. 2019)**

*Decision Below:* Claimant failed to establish an accident occurred in the first instance; claim disallowed.

*Affirmed:* Where claimant alleged an unwitnessed fall to the ground, the Board was free to reject the claimant's testimony regarding the happening of the accident as incredible where the claimant gave inconsistent statements regarding the mechanism of injury and how and when he reported to a supervisor, whom the employer alleged did not exist and they had no notice of the accident until over a year after it allegedly occurred. These facts combined with claimant's failure to seek treatment for several weeks after the accident, despite claiming he was unable to work immediately after the accident, was sufficient evidence upon which the Board could rest its credibility assessment.

**Rangasammy v. Philips Healthcare, 172 A.D.3d 1858 (3d Dept. 2019)**

*Decision Below:* Claimant's injury did not arise out of the scope and course of employment.

*Affirmed:* While claimant alleged head and neck injuries from a work-related MVA in a taxi, the record contained substantial evidence supporting the Board's conclusion that the accident likely did not occur. This evidence included a written statement from the responding police officer who indicated that, the claimant was "very fishy and suspect", his story "changed several times", and claimant presented a photograph of a taxi medallion to identify the cab driver but that photograph was taken at a different location than the alleged accident. Only after the officer informed claimant that he believed no accident had, in fact, occurred did claimant request transportation to the hospital and medical treatment that he previously refused. These facts, combined with evidence of numerous prior MVAs in which the claimant was involved "some of which resulted in injuries to his head and neck", along with opinions of his own physicians "who could not adequately explain the lack of any objective findings" to support claimant's symptoms was a proper foundation for the Board's disallowance.

**Aldea v. Damari Installations Corporations, 172 A.D.3d 1852 (3d Dept. 2019)**

*Decision Below:* Claimant failed to produce sufficient evidence to establish the happening of an accident, or that timely notice was provided to the employer.

*Affirmed:* While claimant alleged he injured his back in September 2016 while "lifting planks", the Board properly concluded that the claimant failed to establish the happening of an accident in the first instance. Insofar as the claimant did not seek treatment until March 2017, and witness statements from co-workers which contradicted the claimant's allegation that he had informed his co-workers and supervisors that he injured himself on the date of the accident was sufficient evidence upon which the Board could conclude the accident did not occur. Moreover, claimant's numerous "incomplete, nonresponsive and contradictory" statements about his treatment, medications, and prior injuries was substantial evidence upon which the Board could find the claimant's testimony was not credible.

**Petesic v. Fox 5 New York, 174 A.D.3d 1198 (3d Dept. 2019)**

*Decision Below:* Claimant failed to produce competent medical evidence causally-relating her Bartonella exposure to her employment.

*Affirmed:* Despite claimant's testimony that she believed she, had been in contact with rodent feces and had observed either a live mouse or a rat at, and that it smelled like "dead animals" her place of employment, the claimant's medical evidence, ascribing causation to work, was not credible. Insofar as claimant failed to report to her physician that she had recently traveled to Croatia, and, taking that fact into account, that physician then testified he could not determine whether the claimant contracted Bartonella at her employment, the claimant failed to meet her burden.

# 11. § 25-A Lives on in Death

**Rexford v. Gould Erectors & Riggers, Inc., 174 A.D.3d 1026 (3d Dept. 2019)**

*Decisions Below*: SFCC is not liable for consequential death claim, despite established lifetime claim with established liability under WCL § 25-a.

*Reversed*: While the Court of Appeals in American Economy confirmed the constitutionality of the closure of the Special Fund for Reopened Claims, WCL § 25-a(1-a) and the Court's holding in Matter of Misquitta v. Getty Petroleum, 150 A.D.3d 206 (3d Dept. 2017) both clearly hold that "Special Funds remains liable for consequential death claims in situations where the decedent had a compensable workers' compensation claim, liability for which was transferred to the Special Fund prior to January 1, 2014. Such holding does not constitute an "application" made after the closure of the Special Funds insofar as "lability for the claim has already been transferred from the carrier to the Special Fund and the employee thereafter dies for reasons causally related to the original claim, the Special Fund remains liable for the claim for death benefits."

*NB*: Counsel here is, curiously, listed as Habberfield Kaszicki, LLP, but with Matthew Mead, partner at Stockton, Barker & Meade, LLP (another WC firm) having written the brief and prosecuted the appeal. Question: why subcontract a basic Appellate Division appeal?

*See also* **Verneau v. Consolidated Edison Co. of New York, Inc., 174 A.D.3d 1022 (3d Dept. 2019)**

# 12. Employer Reimbursement

**Matter of Mundy v. Verizon New York, Inc., et al.,- - AD3d - -, 2019 NY Slip Op.08751 (2019)**

*Decision Below:* The employer's request for reimbursement for wages paid to the claimant from a period of disability is denied.

*Modified and, as so modified, affirmed:* While the decision awarding claimant a schedule loss of use did not address employer reimbursement, the employer was nevertheless entitled to take credit for the full amount of wages paid to claimant during his disability out of the schedule award.

While the employer did not specifically request reimbursement in its submissions to the WCLJ, the claimant's brief did acknowledge such reimbursement was due. Further, the employer had, since the inception of the case, file, and regularly updated, reimbursement requests denoting the wages it continued to pay to the claimant during the pendency of his disability.

Insofar as the WCL, and established law (Matter of Mott v. Central NY Psych Ctr., 113 A.D.3d 911 (3d Dept 2014)) clearly state that "reimbursement *must* be awarded to the employer unless such reimbursement would achieve a disproportionate result, either to the employer or the employee" the WCLJ's failure to address such reimbursement, even where not specifically requested by the employer in its submission, was improper. "[I]t appears the WCLJ simply overlooked [reimbursement] while fashioning claimant's SLU award." The Board should have invoked its broad authority under WCL § 123 to address the interests of justice where denying employer reimbursement would "receive both workers' compensation benefits and his full salary for the same period of time [leaving] an imbalance favorable to the employee, thus requiring that the employer be reimbursed."

*NB*: This case does not really abrogate the Board's rule that reimbursement requests be timely filed *before* an award of compensation – it merely fixes an injustice where the employer's counsel failed to raise reimbursement both in its papers to the WCLJ and a subsequent appeal. This is particularly so where the AD believes this entire case revolves around a ministerial oversight by the WCLJ that issued the initial SLU award. It does, however, impose a pretty bright line rule regarding the Board's exercise of discretion regarding employer reimbursement – an unfair result demands the exercise of discretion to correct an "imbalance" to one part or the other.

Finally, the Board did initially seek to appeal this ruling further to the Court of Appeal, but later moved to accept the ruling of the AD as the ruling of the Board.

# 13. § 29: Subrogation and Liens

**Lenge v. Eklecco Newco, LLC, 172 A.D.3d 843 (2d Dept. 2019)**

*Decision*: Motion to enforce settlement under CPLR § 2104 is denied.

*Reversed*: Where all parties entered into a settlement agreement, on the record, in open Court, with specific terms and conditions placed on the record, such settlement will be enforced by the courts, even if such stipulation or settlement is "improvident" and such settlement can only be set aside if it is "manifestly unfair or unconscionable." The fact that the workers' compensation lien, and Medicare set-aside, both of which were considered and discussed at the time of the settlement, were larger than anticipated and "the fact that the plaintiff are [thus] unsatisfied with the amount they will received after payment of the workers' compensation lien and the establishment of a Medicare set-aside does not constitute sufficient ground to invalidate the settlement."

**Hisert v. Ron Allen Trucking Inc., 174 A.D.3d 1185 (3d Dept. 2019)**

*Decision Below:* The claimant failed to obtain the employer's consent to settlement of a third-party action; and as a result, the claimant is barred from further awards/benefits.

*Affirmed:* Although the employer was aware of pending settlement negotiations, and the carrier had written to the claimant's third-party attorney advising that it "has no objection to a . . . settlement of the claimant's bodily injury claim", the fact that these correspondences concluded noting that "consent is required prior to settlement or discontinuance of any third-party action" and directed counsel to "communicate with [the carrier/employer] before settlement to arrange for consent and satisfaction of the lien" the claimant could not rely on such correspondence as proof of the employer's consent. "A review of the entire correspondence and the plain language therein rejects that the carrier anticipated further communication with the third-party counsel prior to consent to any settlement."

**Djukanovic v. Metropolitan Cleaning LLC, - - - N.Y.S.3d- - - 2019 N.Y. Slip Op. 07974 (2019)**

*Decision Below:* Claimant settled his third-party action without consent and is barred from receipt of future benefits under WCL § 29; however, employer's suspension of ongoing payments without requesting a hearing was improper and awards will be updated and the employer is penalized for that suspension.

*Appeal & Cross Appeal dismissed:* During the pendency of the employer's appeal, the Board, "*sua sponte*" rescinded its ruling below, rendering both the employer's appeal of the penalty and awards, and claimant's appeal of the settlement finding, moot.

*NB*: In Metropolitan Cleaning, LLC, Case No. G065 0669, May 15, 2019 the Board modified its original ruling, this time holding that the claimant's entitlement to benefits "terminated by operation of law" upon the date she discontinued her third-party action without first obtaining the employer's consent. To the extent that such suspension occurred by operation of law, the award of benefits subsequent to such discontinuance, and the penalty imposed upon the employer for effecting the suspension without judicial order, were improper.

Notably, the Board cites a 2004 Third Department case on the "operation of law" argument, Kleinsak v R.B. Samuels, Inc., 12 AD3d 738 (3d Dept. 2004) for such proposition law – presumably that law was brought to the attention of the Board before needing to file a Notice of Appeal and perfecting such appeal.

# 14. § 32: Waiver Agreements

**Curcio v. Sherwood 370 Management, LLC, 175 A.D.3d 1743 (3d Dept. 2019)**

*Decision*: The employer's payment of § 32 proceeds was timely insofar as the agreement became "final" on Memorial Day and was made within 10-days, exclusive of the "reckoning" date.

*Affirmed*: Where, as here, a deadline falls on a holiday, GCL §25-a dictates that the immediately following day (provided it too is not excluded) shall be the operative date of the "counting." Further, insofar as GLC § 20 states that when a time period is calculated, "Day 1" is the immediately following calendar date after the "operative date" the carrier made a timely payment having done so on day 12 after the Board's "final" approval date.

*NB*: The Board's ruling declared Monday, May 29, 2017 the "final" date; which was Memorial Day, so Tuesday, May 30, 2017 became the legally-effective date under GCL § 25-a. Counting ahead ten days shows June 9, 2017 as the last day to render timely payment – when the employer there made payment.

The Board was so annoyed with claimant's counsel here that they imposed a $500 penalty against them for both appealing the ruling and admitting the relevant law and facts against them in the same submission.

# 15. § 49-bb: Date of Disablement

**Chojnowski v. PAR Environmental Corporation, 174 A.D.3d 1247 (3d Dept. 2019)**

*Decision Below:* Claimant failed to timely file his claim for work-related hearing loss under WCL § 49-BB.

*Affirmed:* Insofar as claimant knew, or should have known, that his hearing loss was caused by his employment when he began treating with an otolaryngologist in 2005 (3 years after retiring), and insofar as the claimant did not file his claim until 2017, such claim was untimely filed. While the first written medical evidence of medical causation was presented in 2017, the Board was free to find it "not credible the claimant's assertion that he was unaware of the relationship between employment and his hearing loss until after he consulted with [his doctor] in 2017."

# 16. §120: Discrimination Against Employees

**Romero v. DHL Holdings (USA) Inc., 169 A.D.3d 1124 (3d Dept. 2019)**

*Decision*: Claimant's termination for "job abandonment" did not constitute a violation of WCL § 120.

*Affirmed:* Insofar as the burden of establishing a retaliatory discharge rested with the claimant, he failed to meet that burden. The employer established that claimant's termination was made pursuant to a Collective Bargaining Agreement which indicated that three consecutive unexcused absences would result in termination, the employer's actions were subsequently upheld through arbitration pursuant to that agreement, and claimant conceded he had previously "refused to accept" a work assignment under a different supervisor. While the claimant alleged his present supervisor retaliated and discriminated against him, the Board was free to credit evidence in the record that this supervisor was not, in fact, involved in the decision-making process which led to claimant's termination.

**Matter of Peterec- Tolino v. Five Star Elec. Corp., - - - AD3d - - -, 2019 NY Slip Op. 08899 (2019) (WCL § 120)**

*Decision Below:* Employer's termination of claimant did not violate WCL § 120.

*Affirmed:* While claimant was terminated shortly after reporting his work-related accident, the record demonstrates that the supervisor who terminated the claimant did so without knowledge of such accident. Further, the employer demonstrated that it was undertaking a general workforce reduction of employees in the same class as the claimant, and that, months before the work-related accident, the employer had already considered laying the claimant off Upon this record, the claimant failed to "demonstrate a nexus between his work-related injury and termination from employment."

*NB*: This case looks like almost every other WCL § 120 decision issued in the last several years – these claims are notoriously difficult for claimant to prove.

# 17. §123: Continuing Jurisdiction

**Herberger v. Thomas Johnson, Inc., 172 A.D.3d 1830 (3d Dept. 2019)**

*Decision*: WCL § 123 does not apply where awards are made pursuant to WCL § 25-1(f) and the issue of apportionment, while raised, was not resolved. The claimant is entitled to an award of wage-replacement benefits for current lost time.

*Affirmed*: Where the Board had issued an order in 1995 that the record be developed on the issue of apportionment, but further proceedings were never held to address such record development, the Board properly concluded the issue of apportionment remained outstanding and thus the case was not "truly closed." In the absence of a true closure, the Board correctly determined that the claim could not be subject to WCL § 123, even where the requisite time periods (the "18 and 8" rule) had long-since elapsed.

**Cozzi v. American Stock Exchange, 172 A.D.3d 1658 (3d Dept. 2019)**

*Decision*: Claimant's application to reopen a disallowed WTC claim must be denied as the Board lacked jurisdiction to consider the matter pursuant to WCL § 123.

*Affirmed*: Where claimant's WTC claim was disposed of by disallowance in September, 2015, and a subsequent appeal to Appellate Division affirmed findings of untimely filing, and the inapplicability of Article 8-A, a subsequent request to reopen and reconsider the matter, directed to the Board, was properly denied as the Board lacked jurisdiction to consider the request. To the extent that WCL § 123 states clearly that "no claim for compensation . . . that has been disallowed after trial on the merits . . . shall be reopened after a lapse of seven years from the date of the accident" claimant's 2017 application to reopen his claim was made more than seven years after 9/11/2001, thus the Board lacked jurisdiction to consider the request.

**Cozzi v. American Stock Exchange, 33 N.Y.3d 1129 (2019)**

Court of Appeals dismissed appeal because order sought to be appealed did not finally determine the outcome of the proceeding.

**Smith v. New York State Department of Corrections, 172 A.D.3d 1803 (3d Dept. 2019)**

*Decision*: WCL § 123 did not bar further proceedings where the Board had miscalculated the SLU awarded in 1993, was notified of that fact, and failed to correct the error; such error preventing the case from "truly closing."

*Reversed*: While the claimant's original SLU award in 1998 was miscalculated by the WCLJ (and thus the Notice of Decision improperly awarded the claimant only 35.6 weeks of benefits when 61.2 were actually due), and while the State Insurance Fund identified the error and timely asked the Board to correct the error, the Board's failure to make such correction, and the State Fund's payment of the proper award to the claimant, demonstrated that the case was truly closed at the time of such award.

"The Board's failure to respond is indicative of its lack of intention of conducting any further proceedings in this case. Moreover, any corrective action that would have been taken by the Board in this regard was purely ministerial, as the parties were in agreement as to the number of weeks for which the claimant was entitled to receive."

**Torraco v. National Accessories Stores, 173 A.D.3d 1293 (3d Dept. 2019)**

*Decision*: The SFCC was not required to pay further benefits to claimant under WCL § 123; but SFCCs request to rescind prior awards on the same basis was untimely made.

*Modified and Remitted*: Where a 1981 ruling of the Board established that WCL § 123 applied to bar the award of further lost wage benefits, the Board's subsequent (and erroneous) awards to the claimant, paid (erroneously) by SFCC, were in error. While it is true that the Board has continuing jurisdiction over all matters under WCL § 123, that same statutorily-granted jurisdiction is limited in scope, and expressly prohibits an award against the employer "after a lapse of 18 years from the date of the injury or death, and also a lapse of eight years after the date of the last payment of compensation." Insofar as this limitation is also jurisdictional in nature, and where a jurisdictional defect "may be raised at any time" the Board's attempt to find such issue untimely was a clear abuse of its discretion.

**Zimniak v. Consolidated Edison, 168 A.D.3d 1321 (3d Dept. 2019)**

*Decision*: Claimant's request to reopen and litigate compensability is barred by WCL § 123.

*Affirmed:* Where the claimant filed his claim for various respiratory diseases in July 1998 and the matter closed on a finding of "no *prima facie* medical" that same year, the Board properly concluded that a subsequent attempt to reopen and litigate compensability in March 2014 was barred under WCL § 123. The Board's closure of the case in 1998 clearly did not contemplate further proceedings, and its ruling at that time "disposed of [the claim] without an award after the parties in interest have been given due notice of a hearing . . . and an opportunity to be heard."

*NB*: The Appellate Division here was somewhat distracted in its analysis and focused on the claimant's failure to produce evidence of causation more timely. The Court noted that the claimant had been involved in a lawsuit in another venue in 1998 and had produced evidence of a causally-related asbestosis diagnosis in 2002, but the claimant could not adequately explain why he waited 16 years to produce that evidence to the WCB and seek further consideration of his claim. These facts, although compelling, are not operative in the legal analysis on the issue at bar.

**Matter of Galatro v. Slomins, Inc., - - - AD3d - - -, 2019 NY Slip Op. 53955 (2019)**

*Decision Below:* Claim for consequential coronary injuries is denied based upon earlier ruling to that effect.

*Reversed and Remitted:* Where, as here, the claimant produced a new medical report, hitherto no considered by the Board (insofar as his earlier report was precluded under WCL § 137), the claimant may, despite the earlier ruling, seek a new ruling on the merit of his claim:

"By disallowing the claim in its prior decision based upon the record as it existed after the preclusion of . . . [claimant's IME], and declaring that no further direction was planned a the time, the Baord did not deny the claim outright" *Citing* Matter of Nock v. NY City Dept. of Elec. 160 A.D.3d 1238 (3d Dept. 2018). Citing this horrible misunderstanding of *res judicata*, the Third Department concluded that "the Board's prior decision did not preclude claimant from submitting further medical evidence of causally-related consequential injuries."

*NB*: This is a horrid decision and opens the door to vast amount of relitigating of cases and issues we presumed to be dead. Notably, the Third Department cited WCL § 123 in support of its finding that the Board could – and in this case should – revisit issues where the claimant submits new evidence.

# 18. 12 NYCRR 300.13: Administrative Review

**Markolovic v. MTA Bus Eastchester Depot, 174 A.D.3d 1271 (3d Dept. 2019)**

*Decision Below:* Claimant's Application was incomplete, and appellate review is denied under 12 NYCRR 300.13 et seq.

*Affirmed:* Where, as here, claimant's RB-89 coversheet did not "specify the objection or exception that was interposed to the [contested] ruling" and where claimant's counsel failed to note any exception at the underlying ruling, the Board properly denied the claimant's application as incomplete and properly concluded that the claimant failed to preserve the issue for appeal where "claimant's counsel did not dispute the employer's contention" at the underlying hearing, and now sought to appeal the same issue.

*NB:* Bad facts make bad law, and the Board's use of 12 NYCRR 300.13 have put so many attorneys in tight spots – malpractice in many cases – that a lot of "bad facts" are being presented to the Third Department by attorneys who have no other choice.

**Perry v. Main Bros Oil Co., 174 A.D.3d 1257 (3d Dept. 2019)**

*Decision Below:* Claimant's application is defective where Question 13 [evidence in support of application] is left blank.

*Affirmed:* The Board was empowered to adopt the regulatory changes which require completion of its forms in support of Applications to the Board, and ample warning and guidance was provided to the parties; the Board here acted within its discretion in denying review.

*NB*: This is another case that, but for the malpractice implications, should not have been appealed, and is now merely another line in a growing string-citation solidifying the Board's emphasis on form over substance in applications to the Board.

**Presida v. Health Quest Systems, Inc., 174 A.D.3d 1196 (3d Dept. 2019)**

*Decision Below:* Employer's application was incomplete insofar as they failed to specifically identify all evidence demanded by Question 13, and instead simply wrote "Please see the Board [Electronic Case File] and citations to Board document identification per the attached correspondence."

*Affirmed:* The Board properly exercised its discretion in denying review insofar as the employer's application was not filled out completely.

*NB*: Both sides of the bar are collectively making this worse for all of us…

**Matter of Jones v. Human Resources Admin., 174 A.D.3d 1010 (3d Dept. 2019)**

*Decision Below:* The claimant's application for review was incomplete and appellate review is denied.

*Affirmed:* Where claimant left Question 13 (evidence in support) blank, the Board properly exercised its direction to deny review of an incomplete application.

*NB*: It just keeps getting worse.

**Williams v. Village of Copenhagen, 175 A.D.3d 1745 (3d Dept. 2019)**

*Decision Below:* Where the employer's application failed to list two documents which it relies upon in answer to Question 13, the employer's application was "not filled out completely" and review is denied.

*Affirmed:* "Given the detailed list of evidentiary items encompassed by question number 13, and the overarching requirement that form RB-89 be completed in its entirety, we cannot say that the Board abused its discretion in concluding that the employer's responses to this question, wherein it reference only the underlying hearing transcribe, was incomplete."

**McCorry v. Boces of Clinton, Essex, Warren and Washington Counties, 175 A.D.3d 1754 (3d Dept. 2019)**

*Decision Below:* Claimant's application is incomplete and review is denied.

*Affirmed:* Where claimant failed to answer – at all – Question 15 on form RB-89, the Board acted within its discretion when it denied review. Claimant's contention that the Board failed to provide sufficient notice of the specificity which they would demand of answers to this question is unavailing in light of substantial advisory and legal opinions issued before claimant filed her application (and in light of the fact that she left the question blank altogether).

*NB*: Ugh…

**Matter of Miller (Mo Maier Ltd.), - - - AD3d - - -, 2019 NY Slip Op. 09069 (2019) (12 NYCRR 300.13(b)(1))**

*Decision Below:* Travelers' application utilized an outdated form two months after it was replaced; such application therefore fails to comply with the Board's formatting rules and review is denied.

*Affirmed:* Where Travelers' application was filed using an obsolete form more than two months after the form was replaced, and after the Board had issued notice to stakeholders warning them that use of the old form would result in denial of review, the Board's denial of review here was not an abuse of discretion.

*NB*: LOMAD wins again!

**Matter of Dyer v. Centre Street Systems Inc., - - -AD3d- - -, 2019 NY Slip Op 07121 (2019)**

*Decision Below:* Carrier's application for appeal denied for failing to serve the employer they represent – a necessary party in interest.

*Affirmed:* Insofar as counsel below did, essentially, nothing correct in terms of preserving issues for appellate review, contesting the correct issues before the Court, or otherwise timely appealing such decisions to the Board Panel and/or Appellate Division (apparently believing such appeal would be interlocutory) the Board's rulings below must be affirmed.

**Luckenbaugh v. Glens Falls Hospital, - - -AD3d- - -, 2019 NY Slip Op 07125 (2019)**

*Decision Below:* Claimant failed to complete form RB-89; review is denied.

*Affirmed:* "We previously reviewed the many reasons identified by the Board for the format rules and regulations, including the requirement that applications be filled out completely, and found that the requirements are reasonable." Where claimant here failed to answer Question 13 (evidence in support) and left that condition blank, the Board acted within its discretionary authority in denying claimant's application.

*NB*: The Appellate Division's language here seems like a plea for help – "Please stop filing these appeals…"

**Matter of Fuller-Astarita v. ABA Transp. Holding Co., - - -AD3d- - -, 2019 NY Slip Op 07823 (2019)**

*Decision Below:* Claimant's application was not filled out completely; appellate review is denied.

*Affirmed:* Where claimant's counsel wrote "see attached" in response to Item 12 (issue on appeal) the Board properly exercised discretion and denied review, finding claimant's appeal incomplete.

*NB*: Claimant was struck by a bus owned by her employer; the employer promptly attempted to accept the claim while claimant, who had been laid off at that time, wanted to seek her remedy in Supreme Court.

**Matter of Panchame v. Staples, Inc., - - - AD3d - - -, 2019 NY Slip Op. 08749 (2019) (12 NYCRR 300.13 (b))**

*Decision Below:* Claimant's application, which stated "N/A" in response to item 15, was not filled out completely; review is denied.

*Affirmed:* Insofar as the Board had the authority, pursuant to WCL § 117(1) to "adopt reasonable rules consistent with and supplemental to the provisions of the WCL" claimant's reliance on pre-regulation precedent which might suggest that the failure to note an exception on the record below was *not* fatal to review is misplaced.

*NB*: A more novel and nuanced attack on the Board's regulations/procedure than other claims, this claimant sought to use the Board's history of *not* requiring exceptions to "hoist them by their own petard." It fell flat. As did the claimant's attempt to distinguish cover sheet from appeal – the Appellate Division here entirely endorses the Board's "completeness" doctrine saying the cover sheet *is* the appeal.

**Matter of Drescher v. Washingtonville Cent. Sch. Dist., - - - AD3d - - -, 2019 NY Slip Op. 53952 (2019) (12 NYCRR 300.13 (b))**

*Decision Below:* Employer's application was not filled out completely as it did not identify all documents and evidence upon which it relied in answer to item 13 and merely stated "Arguments were placed on the record at the 10/3/2017 hearing."

*Affirmed:* The Board's regulatory authority to promulgate the regulations under which review was denied here is well-established. Moreover, the employer's failure to completely fill out the application interferes with the Board's stated purpose insofar as "having a complete application . . . assists the Board in providing timely and effective review of the application as it eliminates confusion over which evidence is involved."

**Matter of Daniels v. City of Rochester, - - - AD3d - - -, 2019 NY Slip Op. 08902 (2019) (12 NYCRR 300.13 (b)(1))**

*Decision Below:* Employer's brief, insofar as it exceeded the 8-page limit without offering sufficient justification pursuant to 12 NYCRR 300.12(b)(1)(i), is non-conforming and review is denied.

*Reversed and Remitted:* While the Board has broad jurisdiction to promulgate rules and regulations governing the content and formatting of an application, and may impose a page limitation on briefs, the absence of any "defined standard" as to what explanation the Board would consider adequate to permit the party to exceed the initial 8-page limit in favor of the 15-page maximum, the Board's regulation is vague and, essentially, unenforceable.

Moreover, the regulation itself does not authorize the Board to deny review of an "outsized" brief; it merely authorizes the Board to refuse to consider the brief itself. Nevertheless, the entirety of the regulation is unworkable and unreasonable and "must be rejected as arbitrary and capricious."

"We further conclude that it would not be reasonable in the first instance for the Board to reject an oversized brief outright for to do so would undermine the role of counsel." For that reason, "we find this aspect of the regulation flawed for there is simply no safety valve that would allow an applicant to seek permission to file a lengthier brief without jeopardizing the ability to submit a legal analysis supportive of the application for Board review."

*NB*: This is the biggest chip yet taken out of the great "Appellate Review Wars of 2019" and it demonstrates, at least on this point, the Board's interest was less in imposing standards of appellate practice than it was producing grounds to deny review without expending the effort to review the merits of the claim.

*See also,* **Matter of Casamento v. Rochester-Genesee Regional Transp. Auth., - - - AD3d - - -, 2019 NY Slip Op. 08901 (2019)**

**Matter of Bruscino v. Verizon, NY, - - - AD3d - - -, 2019 NY Slip Op. 09080 (2019) (12 NYCRR 300.13(b)(4)(v))**

*Decision Below:* Claimant's application for review is denied insofar as he failed to interpose a specific objection/exception at the underlying hearing.

*Affirmed:* Where, as here, counsel for claimant failed to make any objection to the WCLJ's ruling that claimant's caps began to run as of the date the claimant was previously classified in 2012, and counsel for the claimant merely acquiesced, noting that the cap would, therefore run in "about 2019" any subsequent appeal would be denied under 12 NYCRR 300.13(b)(4)(v).

**Matter of Sherry (Moncon, Inc.), - - - AD3d - - -, 2019 NY Slip Op. 09068 (2019) (12 NYCRR 300.13(b))**

*Decision Below:* Employer's application failed to answer item 15 with sufficient specificity and review is denied.

*Affirmed:* Where the employer lodged an exception at the hearing, but simply stated, in response to item 15 "The WCLJ issued a decision on 01/11/2018, and an appeal immediately ensued objecting to his findings" such response "failed to identify any specific findings made by the WCLJ to which it was objecting."

# 19. 12 NYCRR 300.14: Application for Rehearing

**Villagra v. Sunrise Senior Living Management, 168 A.D.3d 1199 (3d Dept. 2019)**

*Decision*: Claimant's application for rehearing/reopening is denied as untimely made.

*Reversed and Remitted*: While the claimant's application to reconsider/reopen her disallowed claim was made more than 30 days after the WCLJ's ruling, the Board improperly denied that request as untimely made under 12 NYCRR 300.13 insofar as there "is no statutorily prescribed time period in which a claimant may seek rehearing or reopening of a claim; rather the Board must determine if such application was made within a reasonable time after the claimant had knowledge of the facts constituting the grounds upon which the application is made."

*NB:* The factual recital here makes it unclear if the disallowance below actually constituted a defensible ruling – it appears no development of the record was conducted and the matter was disallowed after two pre-hearing conferences at which the claimant failed to produce sufficient evidence to proceed to trial.

*Footnote Warning*: Footnote1 in this ruling appears to misconstrue the meaning of the phrase "No Further Action" insofar as Judge Pritzker noted that the "WCLJ purported to both disallow the claim and declare that the file would be marked as no further action, we note such phrasing should not preclude claimant from submitting further medical evidence of the mechanism of injury, as was requested by the WCLJ." This footnote cites Matter of Nock, which we discussed last year as another disturbing misreading of the Board's use of the phrase "No Further Action."

**Kariauli v. Weider, 175 A.D.3d 1757 (3d Dept. 2019)**

*Decision*: Alleged uninsured employer's application for rehearing/reopening was not filed within a reasonable time; review is therefore denied.

*Reversed and Remitted*: Where, as here, a party seeks rehearing or reopening under 12 NYCRR § 300.14, "there is no statutorily-prescribed time period in which an applicant may seek rehearing or reopening of a claim." The Board must, therefore, determine whether such application was made "within a reasonable time after the applicant has had knowledge of the facts constitution the grounds upon which such application is made."

The Board's exercise of discretion, denying the employer's application here was misplaced, where the record shows the party was *pro se* during most of the proceedings before the WCB, had not appeared at those proceedings, he did file his application within a year of retaining counsel.

# 20. 12 NYCRR 300.38: Controverted Claims

**Cartafalsa v. Zurich American Insurance Company, 175 A.D.3d 1762 (3d Dept. 2019)**

*Decision*: Claimant failed to meet his burden of establishing a causally related myocardial infarction; the WCLJ below properly precluded the claimant's untimely submitted record review.

*Affirmed*: Insofar as the expedited hearing process necessitated that a claim be resolved within a certain time frame, and where 12 NYCRR 300.38(b)(1)(iii) requires that all independent medical examination reports be filed at least three days before the date of the "initial" expedited hearing (the trial date), the WCLJ properly refused to consider the claimant's record review, submitted after the trial hearing.

The Board was further free to reject claimant's medical evidence as insufficient where the treating physician testified that the claimant's reported work-related stress "could possibly have contributed to" claimant's heart-attack. Insofar as such evidence was speculative, the Board's determination to reject that evidence and conclude the claimant had not met his burden of proof will not be disturbed.

*See also*, **Issayou v. Issayou, Inc., 174 A.D.3d 1277 (3d Dept. 2019)**

# 21. 2017 Amendments

**Scott v. Visiting Nurses Home Care, 172 A.D.3d 1868 (3d Dept. 2019)**

*Decision Below:* The claimant was required to demonstrate reattachment to the labor market before benefits could be reinstated.

*Affirmed:* While the claimant had been classified with a permanent partial disability, and, at that time, had been awarded lost-wage benefits, the Board determined that the legislature did not intend for retroactive application of the 2017 Amendments to WCL § 15(3)(w) to apply to those claimants found to have voluntarily withdrawn from the labor market, only those found to have involuntarily withdrawn or who were otherwise are entitled to benefits at the time of classification. *Compare*, Matter of O'Donnell v. Erie County, 162 A.D.3d 1278 (3d Dept. 2018).

*NB*: This decision, like O'Donnell, relies on a letter from WCB General Counsel David Wertheim, which noted that "[t]his amendment . . . affects previously decided cases in which there has *not been a finding* that the claimant had *voluntarily removed* him[self] from the labor market at the time of classification."

**Pryer v. Incorporated Village of Hempstead, 175 A.D.3d 1663 (3d Dept. 2019)**

*Decision Below:* Claimant is not entitled to awards based solely upon the 2017 Amendment to WCL § 15-3(w).

*Affirmed:* Insofar as the claimant was found unattached to the labor market *before* the effective date of the 2017 amendment to WCL § 15-3(w), the fact that the claimant had, shortly before such finding, been classified with a permanent partial disability and been awarded benefits simultaneously, such findings do not abrogate the claimant's obligation to demonstrate reattachment to the labor market.

While the Court has previously imposed the 2017 amendment to WCL § 15-3(w) retroactively to all claimants who were found entitled to benefits at the time of classification, such retroactive application will not be given to claimants who, before the amendment was enacted, had been found involuntarily removed, unattached, or otherwise unentitled to ongoing benefits – the 2017 amendment will not be retroactively applied as a "cure" for such defects.

**Santos v. Brickens Construction Inc., 175 A.D.3d 1742 (3d Dept. 2019)**

*Decision Below:* WCL § 15-3(w) does not act to automatically reinstate the benefits of a claimant who was found voluntarily removed from the labor market before the enactment of WCL § 15-3(w).

*Affirmed:* Citing Matter of Scott v. Visiting Nurses Care, (*see above*) the Court recognized that the 2017 amendment to WCL § 15-3(w) "does not necessarily retroactively apply to *all* claimant previously classified as permanently partially disable, relieving them of the obligation to show labor market attachment regardless of the procedural posture of their claim." Insofar as this claimant was found unattached in 2016, before the amendment of WCL § 15-3(w) came into effect, the claimant must demonstrate attachment to the labor market in order to receive ongoing benefits.

**Matter of St. Remy (Siemens Corp.), - - - AD3d - - -, 2019 NY Slip Op. 09071 (2019)**

*Decision Below:* Claimant, though previously classified and found entitled to benefits at that time, must nevertheless demonstrate attachment before reinstatement of awards based on subsequent (but pre-2017 amendment) suspension on Labor Market Attachment.

*Affirmed:* Insofar as the Court has already held in Pryer, Scott and Santos, that WCL § 15-3(w) will only be applied retroactively where a claimant has not been found unattached or voluntarily withdrawn, the "then-governing precedent" at the time of such finding on attachment would not entitle the claimant to any presumption, or automatic reinstatement of benefits, absent a showing.

# 22. 2018 Revisited

**Taher v. Yiota Taxi, Inc., 32 N.Y.3d 1197 (2019)**

*Motion for Leave to the Court of Appeals Denied*: The order below "does not finally determine the proceeding within the meaning of the Constitution."

*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 non-schedule *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 non-schedule 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.

**O'Donnell v. Erie County, 33 N.Y.3d 1057 (2019)**

*Decision*: The Board's motion to dismiss, and/or for leave to amend/modify the underlying workers' compensation ruling, and/or for an order confirming the Board's authority to "correct" its ruling pendency of an appeal of that ruling to the Court of Appeals is denied insofar as the Court of Appeals lacks jurisdiction to entertain such motion.

*NB*: The underlying Appellate Division ruling in this matter established a line of cases, which, in connection with its progeny decisions, establish the retroactivity, and limits thereof, of the labor market attachment (LMA) amendments contained in the 2017 Amendments to WCL § 15-3(w).

The employer in this matter has perfected an appeal to the Court of Appeals, been granted review, and oral arguments are pending in March 2020. Only after the Appellate Division ruled, and apparently during the exchange of motion papers, did the Board inform the parties, and the Court, that it believed that both its ruling below, and the Third Department, had made a fundamental error. Unsure of whether it could simply change the underlying decision after the Court of Appeals granted review, the Board filed a motion to dismiss the appeal, informing the Court that it wanted to change its underlying ruling – leading to this somewhat cryptic ruling from the Court of Appeals.

Should the Court of Appeals consider the merits of the underlying matter, there is a possibility of a fundamental and keystone ruling like we saw in Zamora.

# 23. Accident v. Occupational Disease (ANCR V. ODNCR)

**Scott v. Bimbo Bakeries USA, Inc., 171 A.D.3d 1421 (3d Dept. 2019)**

*Decision Below:* Claimant's claim was for an occupational disease and was not time barred under WCL § 28.

*Affirmed:* Board's decision as to whether to classify a certain medical condition as an occupational disease is factual determination and will not be disturbed if supported by substantial evidence. Claimant provided detailed testimony concerning the nature of the job duties that she performed over 20 years of service. The neurosurgeon who examined her testified that she suffered from degenerative disc disease and that the repetitious lifting and bending that she did at wok exacerbated her underlying back condition. There was no contrary medical evidence and there was no indication claimant obtained any remedial medical treatment. The record establishes that claimant's nondisabling back condition was aggravated by the repetitive nature of her job duties, a distinctive feature of her work that she performed over the course of many years. Therefore, there is substantial evidence to support the board's decision that claimant had occupational disease and not her claim was not time barred.

# 24. Appellate Practice

**Washington v. Human Technologies, 170 A.D.3d 1349 (3d Dept. 2019)**

*Decision Below:* claimant's injury did not arise out of and in the course of his employment, and claimant's request for reconsideration and full board review was denied.

*Appeal Dismissed:* There was an administrative decision in August 2017 unanimously holding that claimant's accident did not arise out of and in the course of his employment. Claimant failed to timely perfect his September 5, 2017 appeal to the August 2017 decision, therefore, the appeal was deemed abandoned. And the merit of the appeal was not properly before the court. Claimant's subsequent application for reconsideration and /full board review was denied in a November 2017 decision and claimant also appealed that decision. To obtain a relief, claimant must demonstrate that newly discovered evidence exists and there has been a material change in [claimant's] condition or [that] the board improperly failed to consider the issues raised in the application in making its initial decision. Claimant has failed to: 1) proffer any new evidence that was not available at the time of the hearing; or 2) allege a material change in condition; or 3) or demonstrate that the board improperly failed to consider the evidence that was before it. Therefore, his application was properly denied.

**Bull v. Akron Oil Noco, 170 A.D.3d 1315 (3d Dept. 2019)**

*Decision Below:* Special Funds is properly discharged and removed from notice with prejudice. Employer's "newly submitted" evidence will not be considered.

*Affirmed:* While the employer submitted evidence that the SFCC had previously conceded the applicability of WCL § 15-8(d), such evidence was not presented to the WCLJ below, and was not submitted with an accompanying affidavit, pursuant to 12 NYCRR 300.13(b)(1)(iii) explaining why "it could not have been presented to the [WCLJ]." In the absence of such affidavit, the Board "correctly refused to consider the document submitted in support of the employer's argument."

**Oparaji v. Books & Rattles, 168 A.D.3d 1209 (3d Dept. 2019)**

*Decision Below:* *Pro se* claimant's request for Full Board Review is denied.

*Affirmed:* Where *pro se* claimant appealed to the Third Department only from the Full Board's denial of review, such denial was proper where there was no evidence that the Board's actions were "arbitrary and capricious or otherwise constitutes an abuse of discretion."

**Francis v. Cortland, 175 A.D.3d 758 (3d Dept. 2019)**

*Decision:* Reopening of claim is barred pursuant to WCL § 123.

*Appeal Dismissed*: Insofar as claimant's Notice of Appeal was filed more than 30-days after the underlying decision was filed, claimant's appeal must be dismissed pursuant to WCL § 23 and CPLR § 5520[a].

**Singletary v. Schlavone Construction Company, 174 A.D.3d 1240 (3d Dept. 2019)**

*Decision Below:* Claimant's application for discretionary full Board review is denied.

*Affirmed:* Insofar as claimant appealed only from the Board's denial of full Board review, and insofar as there is no "newly discovered evidence" or a "material change in condition" or that the "Board improperly failed to consider issues raised in the application" the Board did not abuse its discretion or act arbitrarily in denying the claimant's application for reconsideration and/or full Board review.

# 25. Apportionment

**Whitney v. Pregis Corporation, 175 A.D.3d 1731 (3d Dept. 2019)**

*Decision Below:* Claimant's disability is apportioned 40% related to his pre-existing MS diagnosis.

*Reversed and remitted:* Insofar as the Board failed to set forth its reasoning as to why apportionment is applicable in this case, and insofar as the record established that the claimant was effectively performing her job duties before the work-related accident, despite the presence of this condition, there is neither a legal or factual basis for apportionment in this record.

*NB*: This defense should have been styled as causally-related disability – no rational party would dispute that the MS was not part of the claim – ergo the employer should have focused on developing a record about the extent and boundaries of the claimant's causally-related disability.

**Matter of Vashaw v. C & S Tech. Resources Inc., - - - AD3d - - -, 2019 NY Slip Op. 08903 (2019)**

*Decision Below:* Claimant's medical expenses are causally-related to the instant claim, without prejudice to apportionment.

*Affirmed:* Where the claimant sustained a subsequent work-related injury (to the same body site) and where the employer's own IME concluded that at least 10% of his need for treatment related to the current injury, there is substantial evidence in the record to support the Board's "resolution of conflicting medical evidence" to find the claimant's medical expenses related to the present claim.

*NB*: These must be big bills – the employer successfully prosecuted a claim for fraud below against this claimant, resulting in a discretionary penalty.

# 26. Causal Relationship

**Connolly v. Covanta Energy Corporation, 172 A.D.3d 1839 (3d Dept. 2019)**

*Decision Below:* Claimant produced sufficient evidence to establish allergic bronchopulmonary aspergillosis; claimant's IME report, prepared for a third-party action is not subject to WCL § 137.

*Affirmed:* Insofar as claimant's expert was retained for purpose of providing a medical assessment of claimant in connection with a third-party action, his medial report is not subject to WCL § 137. Further, where that expert testified that based upon his personal visit to the claimant's work place, the environmental testing and environmental inspection, claimant's cumulative and accidental exposure to the aspergillus fungi was causally related to his inspection and remediation work at cooling towers, the Board was entitled credit that physician's opinion.

**Christensen-Mavrigiannakis v. Nomura Sec. Int'l, Inc., 175 A.D.3d 1748 (3d Dept. 2019)**

*Decision*: Claim was properly amended to include the left shoulder, bilateral CTS, right cubital tunnel syndrome; and awards should be made at a total rate of disability.

*Affirmed in Part, Modified in Part*: While the employer's consultant opined that the claimant's additional sites of injury were not related due to the delay in the manifestation/diagnosis of the conditions, as well as the fact that CTS and cubital tunnel are typically caused by repetitive-type activities, the Board was free to credit the testimony of the claimant's physician who opined that the shoulder condition was a result of the claimant falling on an outstretched hand, and rather than being "new" were in fact only newly-identified and had been falsely attributed theretofore to her shoulder injury.

However, the Board erred in crediting the opinion of claimant's physician regarding CTS and cubital tunnel insofar as the doctor's opinion was "conclusory" and based only upon the appearance of the symptoms after the work-related accident. "The fact that the claimant was no longer engaged in repetitive activities after the accident would seem to make her less likely to develop bilateral capital tunnel syndrome and right cubital tunnel syndrome" making that doctor's opinion "somewhat contradictory."

Further, while no party had appealed the WCLJ's finding below that the claimant was mildly disabled, the Board's broad jurisdiction under WCL § 123 provided ample authority to modify its earlier findings on degree and period of disability *sua sponte*.

**Ellis v. First Student, Inc., 174 A.D.3d 1243 (3d Dept. 2019)**

*Decision Below*: Claim was properly amended to include injuries to the claimant's right knee and right shoulder (not consequential).

*Affirmed:* While the claimant testified that he began experiencing symptoms in his right knee and right shoulder a week after, and month after – respectively – the work-related accident, the Board was free to credit the opinion of claimant's treating physician that these conditions were causally-related to claimant's work accident. While the employer's IME physician concluded that the conditions underlying the claimant's symptoms were degenerative and age-related, the Board was free to reject this opinion in favor of the claimant's physician.

**Fox v. Altmar-Parish-Williamstown Cent. Sch. Dist., 175 A.D.3d 1728 (3d Dept. 2019)**

*Decision Below:* Claim was properly amended to include an injury to the head.

*Reversed and remitted:* While claimant's physician opined that her condition was related to her work-accident, that physician's testimony was not credible insofar as the physician never personally saw the claimant - her physician's assistant exclusively provided examination and treatment – and the claimant had a history of symptoms similar to those she now related to the work-accident. Moreover, the treating physician conceded that other conditions – like depression – could mimic the symptoms of a head trauma, and the physician had not reviewed any of the prior medical records that had been produced in the claim.

"[C]laimant's medical experts had not reviewed any of her medical records from prior to [the Date of Accident], which that included [similar symptoms]. As these opinions were thus merely speculative, we cannot conclude that the finding of casual relationship has a rational basis."

**Sinelnik v. AJK, Inc., 175 A.D.3d 1732 (3d Dept. 2019)**

*Decision Below:* Claim is disallowed; claimant failed to meet his burden of proof in presenting credible medical supporting his claim.

*Affirmed:* While claimant produced medical evidence establishing causal relationship between his employment and occupational diseases to multiple body sites, the Board was free to reject this medical evidence, even in the absence of contrary medical evidence: "[t]hough the Board may not fashion its own expert medical opinions, it may reject medical evidence as incredible or insufficient even where . . . no opposing medical proof is presented." Where, as here, the claimant's physician did not examine the claimant until three-years after he stopped working, "and relied, at least in part, on claimant's unsupported description of claimant's medical history in reaching his conclusions regarding causal relationship, the Board's decision that claimant failed to provide credible evidence . . . is supported by substantial evidence."

*NB*: Footnotes on this case – two of them – describe portions of the claimant's testimony and medical records which reveal inconsistences on the part of the claimant and *directly* question his credibility.

**Jewett v. New York City Transit Authority, 174 A.D.3d 1254 (3d Dept. 2019)**

*Decision Below:* Claimant failed to demonstrate that her psychiatric injuries were consequential to her established workers' compensation injuries.

*Affirmed:* The Board was free to credit the employer's IME psychiatrist, who concluded that the claimant was not suffering from "any diagnosable psychiatric disorder or disability", even where that IME psychiatrist did not review the records of the claimant's treating psychologist insofar as the IME psychiatrist's review of other records and his own examination provided the requisite rational basis for his opinion.

**Matter of Barker v. New York City Police Dep't, - - -AD3d- - -, 2019 NY Slip Op 07120 (2019)**

*Decision Below:* Claimant failed to produce sufficient evidence to establish that she sustained a causally-related occupational disease or repetitive stress injury to both shoulders while working as an evidence clerk.

*Affirmed:* While the claimant produced medical records which opined that she suffered a causally-related occupational disease to both shoulders, and produced extensive testimony describing her job duties for the employer, her evidence was nevertheless insufficient where "the record does not reflect that claimant's medical providers had adequate knowledge of her work activities or medical history" and "[c]onsequently, neither claimant's testimony nor the medical evidence was sufficient to establish recognizable link between her shoulder injuries and a distinctive feature of her work, or that her shoulder injuries were attributable to repetitive movements associated with her work."

*NB:* The claimant, during litigation, apparently attempted to switch gears and argue that, even in the absence of sufficient evidence of an Occupational Disease (which was her sworn testimony), the injury should be established as accidental – a contention unsupported by the record.

**Matter of Kaplan v. NY City Tr. Auth., - - - AD3d - - -, 2019 NY Slip Op. 09075 (2019)**

*Decision Below:* Claimant (decedent's wife) failed to produce evidence causally-related his death to his employment; claim disallowed.

*Affirmed:* While a presumption of compensability arises for an unwitnessed and unexplained death under WCL § 21(1), that presumption may be rebutted "if substantial evidence demonstrates that the death was not work related." Where, as here, the employer presented the report and testimony of a medical expert who opined that the decedent's death was due to "severe aortic stenosis. . . which often causes sudden death if not treated surgically" and there was no evidence of work-related strenuous activity preceding the claimant's death, the employer produced substantial evidence to rebut the presumption of compensability. Insofar as the claimant failed to produce any evidence contradicting the cause of death as indicated in the ED record – "cardiac arrest secondary to cardiovascular disease of old age" – the Board's ruling that the decedent's death was not causally related to his employer was supported by substantial evidence.

# 27. Causal Relationship of Lost Time

**Garcia v. MCI Interiors, Inc., 173 A.D.3d 1575 (3d Dept. 2019)**

*Decision Below:* Claimant stopped working for reasons unrelated to his occupational disease and had not reattached himself to the labor market.

*Affirmed:* While the claimant demonstrated traditional "labor market attachment" proofs, his lost time was nevertheless not causally related to his established condition. Inasmuch as claimant left his employment for reasons other than his work-related disability prior to the date of disablement and has not sought employment since the surgery, the record lacks proof of causally-related reduced earnings. The record discloses that the claimant had worked before undergoing causally-related surgery (the date of disablement), but that his work ended due to completion of the project and the employer's lack of further work for the claimant.

*NB*: This case came before the Appellate Division in 2018 to consider the Board's ruling that the claimant had to demonstrate attachment before his DOD "such that he had wages to lose as the result of his causally related disability." 158 A.D.3d 907 (3d Dept. 2018). Notably, both the 2019 and 2018 rulings relied heavily on Matter of Bacci v Staten Is. Univ. Hosp., 32 A.D.3d 582, 584 (3d Dept. 2006), applying to an OD claim. The text of both decisions suggests that, unlike Bacci, where a claimant might come off a total disability and reattach later, this ruling might be a permanent bar to award.

**Figueroa v. Consolidated Edison Co. of N.Y., Inc., 168 A.D.3d 1329 (3d Dept. 2019)**

*Decision Below:* Claimant demonstrated sufficient evidence to establish reattachment to the labor market and lost wage benefits are payable.

*Reversed and remitted:* "As we have repeatedly held, where a claimant has voluntarily retired, but claims to have later reattached to the labor market, he or she "must demonstrate that his or her 'earning capacity and his [or her] ability to find comparable employment had been adversely affected by his [or her] disability'" Where, as here, the claimant made significant efforts to "attach" (*e.g.* American Axle) but could not obtain employment, the record nevertheless "fails to contain any evidence establishing that claimant's disability was a factor in her inability to secure employment" where claimant indicated she could not find work because the positions for which she applied were filled.

# 28. Causally Related Schedule Loss of Use

**Napoli v. Edison, 169 A.D.3d 1121 (3d Dept. 2019)**

*Decision below:* Claimant did not sustain a further 45% SLU to each shoulder and the deterioration of the claimant's shoulders is not causally related.

*Affirmed:* Where the employer's IME opined that claimant's dramatic loss of motion from 2012-2013 (as compared to his 2006 SLU exam) was obviously unrelated to the underlying work-related injury, and opined claimant had only sustained causally related 15% SLU in each shoulder, and where a Board-appointed impartial specialist also opined that she expected to see atrophy in claimant's shoulder due to the alleged functional limitations, which was not present, and thus could not establish any causal relationship between the 2003 work related accident and the continued loss of the shoulder's range of motion, the Board was free to credit these opinions and deny a further SLU award. Moreover, insofar as claimant's physician acknowledged that he was not aware of how the 2003 work-related accident had occurred, and that he could not give causation to the 2003 accident, the Board's determination is supported by substantial evidence.

# 29. Collateral Estoppel

**Roserie v. Alexander's King Plaza, LLC., 171 A.D.3d 822 (2d Dept. 2019)**

*Decision*: Moving defendant was entitled to summary judgement on a theory of collateral estoppel where Workers' Compensation Board had ruled that a claimed injury was not related to the accident.

*Affirmed*: The Board's determination that the plaintiff's Chiari malformation was not aggravated by the underlying accident met the elements necessary to estop plaintiff from relitigating that matter in Supreme Court against the defendant. The plaintiff had a "full and fair" opportunity to litigate that claim before the Workers' Compensation Board and the issue before Supreme Court was necessarily "identical to a material issue" already decided in the quasi-judicial determination of an administrative agency (the WCB).

# 30. Death

**Velano v. Kingston Block & Masonry Supply, LLC., 173 A.D.3d 1517 (3d Dept. 2019)**

*Decision Below:* Decedent's death was causally related to his employment because decedent was engaged in strenuous activity half hour before the death and there were no signs of distress the evening before.

*Affirmed:* when an unwitnessed or unexplained death occurs during employment, there is a presumption of compensability under WCL § 21. The presumption may be rebutted by substantial evidence to the contrary. If the employer does rebut the presumption, the burden shifts back to the claimant to prove causal relation. In this situation, the board determined that the defendant was engaged in strenuous work activities during the half hour before his death and showed no signs of distress the evening before. Therefore, the boards determination is supported by substantial evidence.

**DiPaola v. McWane, Inc., 172 A.D.3d 1863 (3d Dept. 2019)**

*Decision Below:* Decedent's son is entitled to death benefit under WCL § 16(3-a) despite a gap in college enrollment.

*Affirmed:* While decedent's son withdrew from one class during the spring semester, and was thus not "full time" as defined under WCL § 16(3-a), where son re-enrolled in that class for the summer term, and successful completed the course, there is substantial evidence to support the Board's determination that the son remained a full-time student during the applicable time period for purposes of receiving death benefits pursuant to WCL § 16(3-a).

*NB*: When the language of a statute is only loosely considered by a fact-finder, one must suspect that the "broad ameliorative purpose" of the WCL has become something of an inoculation to traditional legal reasoning.

# 31. Due Process

**Ferguson v. Eallonardo Construction, Inc., 173 A.D.3d 1592 (3d Dept. 2019)**

*Decision Below:* claimant's request to cross-examine the carrier's consultant was untimely.

*Reversed and Remitted:* 12 NYCRR 300.10(c) provides that when the employer or its carrier or special funds desires to produce for cross examination an attending physician whose report is on file, the referee shall grant an adjournment for such purpose. Claimant's right to cross examine is permitted under the tenents of due process. Therefore, claimant's right is not invalidated by failure to request for cross examination in a C-4.3. the only requirement is that the request for such cross examination must be timely made at a hearing prior to the WCLJ ruling on the merits. The counsel for the claimant had stated that he did not produce a C-4. 3 from claimant's treating doctor because he believed the opinion of the carrier's consultant in regards to claimant's SLU so deviated from the applicable guidelines that he was willing to take his chances upon cross examination of the physician. In addition, claimant's counsel voiced his request to cross examine the consultant at the first permanency hearing. Therefore, the board abused its discretion in denying the claimant's request for cross examination as untimely. The decision is therefore reversed and remitted for further proceeding.

# 32. Graves Amendment

**Zielinski v. New Jersey Transit Corporation, 170 A.D.3d 927 (2d Dept. 2019)**

*Decision*: Motion to dismiss plaintiff's claims against putative employer under WCL § 11 is granted; motion to dismiss plaintiff's claims against lessor/owner of vehicle in which he was injured under 49 USC § 30106 ("Graves Amendment") is granted.

Insofar as the moving employer established that the claimant had applied for, and received, workers compensation benefits on account of the injuries claimed in the instant matter, and that it was, in fact, the plaintiff's employer at the time of the accident, it is entitled to summary judgment dismissing all claims made against it.

Similarly, where moving owner/lessor established that it merely leased the vehicle to the employer, it was entitled to summary judgement under the "Graves Amendment."

# 33. Group Self-Insured Trust Litigation (GSIT)

**New York State Workers' Comp. Board v. Episcopal Church Home and Affiliates, INC., et al., 64 Misc.3d 176 (Sup. Ct., Albany County., April 17, 2019)**

*Decision*: Matter transferred from Albany County to Erie County for further proceedings. GSIT contract, containing a choice of forum provision selecting Erie County as the venue for actions arising under the agreement should be honored, and the Board's various actions against trust members, which clearly arise under the contract which contains this provision, can only be abrogated where the moving party meets a "heavy burden" of establishing some public policy in favor of depriving the contracting party of his or her forum-selection right.

While the Board argued that removal of the matter to the Fourth Department might provide a "home field" advantage to the defendants, and subject the Board to an unfavorable set of case law which might destroy its claims, the trial court was unpersuaded that such a conflict of law, permitted to exist based on the construction of the NYS judiciary, was not a factor to consider; indeed litigation on this departmental inconsistency can be addressed, and possibly resolved on appeal.

*NB*: Moving defendants wanted to get this case into the Fourth Department, where that Court's ruling in Matter of Riccelli Enters. v. State of NY WCB, 117 A.D.3d 1438 (4th Dept. 2014) is likely outcome determinative as to whether the Board, here, satisfied the 120-day time limit of WCL § 50. In the Third Department, that Court had acknowledged, but failed to follow, this ruling. So, while the Board cried foul and sought to "call out" the moving defendants as exercising legal skullduggery, at the very same time they demonstrated their own self-interest in keeping the matter venued in Albany.

# 34. Labor Market Attachment

**Figueroa v. Consolidated Edison Co. of N.Y., Inc., 168 A.D.3d 1329 (3d Dept. 2019)**

*Decision Below:* claimant was not disqualified from receiving benefits based upon violation of WCL §114-A (1), and she had demonstrated reattachment to the labor market entitling her to receive wage replacement benefit for that period.

*Reversed and remitted:* Where claimant has voluntarily retired but claims to have later reattached to the labor market, they must demonstrate that his or her earning capacity and ability to find comparable employment had been adversely affected by their disability. This burden requires claimant to demonstrate that other factors totally unrelated to the disability did not cause the adverse effect on their earning capacity. The record failed to contain any evidence establishing that claimant's disability was a factor in her inability to secure employment. Therefore, the full board's decision to award claimant wage replacement benefit during the period of her labor market reattachment is not supported by substantial evidence and such award is rescinded.

**Kalembka v. Slomins, Inc., 174 A.D.3d 1250 (3d Dept. 2019)**

*Decision Below:* The claimant, although classified with a permanent partial disability, failed to demonstrate attachment to the labor market.

*Affirmed:* The claimant in this case met with a representative from ACCESS-VR on two occasions to discuss its services, and testified he met with Workforce1, but could not provide dates or proof of the meetings. Claimant also testified that while he had conducted an independent job search he "believed that he was unable to perform any job due to the condition of his spine." These efforts fail to establish either an "active and good faith participation with a job location service" or that claimant was "diligently engaged in an independent search for employment within his medical restrictions." Claimant's attachment efforts were insufficient.

**Ostrzycki v. Air Tech Lab, Inc., 174 A.D.3d 1255 (3d Dept. 2019)**

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

*Affirmed:* While claimant used a job location service during the relevant period, he did not produce evidence that the service was aware of his work restrictions or that prospective employers were provided such information in his applications and he ignored a recommendation to take an English as a Second Language Course. This demonstrated that the claimant was not actively participating in job location services or a retraining program.

Moreover, claimant's independent internet job search does not demonstrate any evidence of the physical requirements of the prospective jobs: "they either do not reference the physical reequipments of the job or require physical exertion in excess of claimant's medical restrictions" and, as such, there is no evidence that the claimant sought work within his medical restrictions and the Board's rejection of claimant's efforts is supported by substantial evidence.

**Marcy v. City of Albany Fire Department, 175 A.D.3d 765 (3d Dept. 2019)**

*Decision Below:* Claimant's Reduced Earnings (RE) are not causally-related to his compensable injury based upon evidence that the claimant was self-limiting his earnings.

*Affirmed:* Even though the Board had previously held that the claimant's "retirement" was due in part to his established injury, the claimant nevertheless bore the burden of establishing that his subsequent loss of earnings was related to his injury. Where the record demonstrated that the claimant worked from home, five days a week, selling "wooden boat[s]" and that his limited hours were not imposed by any physician, but rather were dictated by his employer and economic conditions, not his established back injury.

*NB*: The Appellate Division made a point of noting that before claiming RE, the claimant had been found voluntarily removed and had not challenged that finding before the Board, instead choosing to find work and then claim RE and "skip" an LMA trial. General Counsel of the WCB has suggested that this case may establish a heightened standard of attachment in the presence of an earlier voluntary withdrawal finding – e.g. very clear evidence that the work restrictions imposed by the treating physicians match with claimant's applications.

**Matter of Poulard v. Southside Hospital, - - - AD3d - - -, 2019 NY Slip Op. 53956 (2019)**

*Decision Below:* Claimant must demonstrate LMA before awards can be made.

*Reversed and Remitted:* While claimant had previously been found to suffer no further causally-related disability, such finding rendered the issue of LMA moot. Insofar as claimant subsequently underwent causally-related surgery, and sought benefits for the period after such surgery, it was improper for the Board to direct the claimant to produce evidence of labor market attachment in the absence of evidence of a prior direction for such evidence, a finding of a permanent partial disability or any determination of what level or type of disability from which the claimant currently suffers.

**Matter of Cynthia Bowers v. New York City Transit Authority, - - - AD3d - - -, 2019 N.Y. Slip Op. 08748 (2019)**

*Decision Below:* Claimant was required to demonstrate attachment to the labor market where her treating physician opined a 75% disability and a sedentary work capacity.

*Reversed and Remitted:* While the claimant's physician had opined a partial disability, the claimant's obligation to attach to the labor market is predicated upon being "advised that his or her disability is less than total, or the WCLJ makes the same finding" and until such time, "claimant can rely upon his or her doctor's opinion and advise that he or she is totally disabled and cannot work"

Where, as here, the WCLJ below made no such finding here, and where, as here, awards were made at a "tentative rate" and there is – presumably – some evidence of total disability in the file, the Board's subsequent direction that the claimant demonstrate her attachment to the labor market was "premature."

*NB*: The Board initially planned to seek leave to reargue or appeal to the Court of Appeals but later moved to accept the decision – presumably given that the "TR rates" can be characterized as the key factor in the Court's ruling.

**Matter of Lawrence v. Dept. of Corr. Of the City of NY, - - - AD3d - - -, 2019 NY Slip Op. 09064 (2019)**

*Decision Below:* Claimant, decedent's son, is precluded from testifying, and additional documentation relating to decedent's pre-death attachment efforts will not be considered.

*Affirmed:* Where claimant died before completing testimony (and the record) on his labor market efforts, including his creation of a business designed "to assist inmates in re-entering society" the Board properly denied further testimony from decedent's son – the claimant – who, while possibly an expert in the field of business creation, nevertheless had no personal knowledge of decedent's activities. Moreover, the Board correctly refused to consider additional documentation submitted by the claimant after a subsequent hearing at which he appeared, where the record fails to contain any affidavit, as required by 12 NYCRR 300.13(b) explaining why such evidence "could not have been presented before the [WCLJ]." Insofar as "newly filed evidence submitted without the affidavit will not be considered by the Board panel" the Board's refusal to consider such evidence was proper.

# 35. Occupational Disease

**Nicholson v. New York City Health and Hospitals Corp., 174 A.D.3d 1252 (3d Dept. 2019)**

*Decision Below:* The claimant failed to produce competent medical evidence of an occupational disease (OD).

*Affirmed:* Insofar as claimant's physician based his opinion of causation on an incomplete and unclear history, and had originally been told by claimant that her duties as a food service manager, and not an administrative assistant, were the cause of her symptoms, his "lack of knowledge concerning claimant's work history" was a sufficient basis to reject his opinion as "less-than-compelling."

*NB:* Claimant reported a work *accident* to the IME, in addition to a history of work-related repetitive activities, which led the IME to opine causation to a work-related accident; the Board rejected this evidence of causation (which the claimant apparently relied upon heavily) and also rejected his subsequent testimony that it was "possible" claimant's reported "accident" signaled the presence of an OD.

**Glowczynski v. Suburban Restoration Company, Inc., 174 A.D.3d 1236 (3d Dept. 2019)**

*Decision Below:* Claimant failed to produce competent medical evidence of causation between his claimed low back occupational disease and his employment.

*Affirmed:* While claimant's PM&R opined causation between the claimant's low back condition as "cumulative occupational injuries relating to his job duties" for 24 years, the Board was free to reject that opinion – even in the absence of contrary medical evidence – where the same physician "failed to correlate any of claimant's conditions with the performance of any specific repetitive work duties." Moreover, claimant's second physician, who had initially treated the claimant's low back condition, reported that the claimant's conditions were age-related and had never been reported as work-related and he took no history of the onset of symptoms or the specific duties of the claimant's employment.

*NB*: Both the Board and Appellate Division specifically pointed out that the claimant's history about the onset of symptoms and his initial treatment conflicted with the written medical records, at least with respect to the timeline.

**Matter of Keller v. Cumberland Farms, - - - AD3d - - -, 2019 NY Slip Op. 09074 (2019)**

*Decision Below:* Claimant failed to produce competent medical evidence of a causally-related occupational disease.

*Affirmed:* While claimant produced an IME report which causally-related his bladder and kidney cancer to exposure to carcinogens at work, the Board properly precluded that report under WCL § 137 and 12 NYCRR 300.2. Insofar as the IME physician testified that he had reviewed both a cover letter, submitted to him by claimant's counsel, and an intake sheet, prepared by the claimant on the date of the exam, and where neither document was submitted in connection with the IME-3, the IME failed to comply with WCL § 137. Moreover, insofar as the letter from counsel to the doctor was not submitted to the Board and employer, such failure is, potentially, a violation of WCL § 13-a(6).

*NB*: The Appellate Division addressed only the preclusion of the IME report, and did not directly address the claimant's contention that the physician failed to adduce sufficient evidence to establish the claim. Notably, there appears to have been no other evidence to support claimant's case, and the Appellate Division, if it addressed the issue, disposed of it in a decretal line "Claimant's remaining contentions, to the extent not specifically discussed herein, have been reviewed and found to be without merit."

# 36. Premium Litigation

**NY GO Express, Inc. v. New York State Insurance Fund, 64 Misc.3d 1219(A) (Sup. Ct., Warren Cty., Jul. 17, 2019)**

*Decision:* Where plaintiff logistics broker was unable to establish to the satisfaction of defendant State Insurance Fund, or the NY Compensation Insurance Rating Board, that his subcontractor payments did not create an employment relationship with the employees of those entities under the NYS Transportation Fair Play Industry Act (e.g. that these entities had independent coverage, among other elements), defendant was entitled to reassess plaintiff's workers' compensation premium, and plaintiff's motion to reargue on a more complete record is properly denied insofar as plaintiff had ample opportunity to present evidence in support of its position during earlier proceedings.

# 37. Schedule Loss of Use Awards

**Estate of Youngjohn v. Berry Plastics Corporation, 169 A.D.3d 1237 (3d Dept. 2019)**

*Decision Below:* A posthumous SLU award is limited to reasonable funeral expenses under WCL § 15(4)(d)

*Modified and, as modified, affirmed:* While WCL § 15(4)(d) stated that the SLU award paid to a non-dependency estate shall "not exceed reasonable funeral expenses" the Court's earlier ruling in Matter of Healey v. Carrol, 282 A.D.3d 969 (3d Dept. 1953) is still controlling where nothing in Matter of LaCroix v. Syracuse Electric, 8 NY3d (2007) or the legislature's subsequent statutory amendment to permit "lump sum payment" of an SLU clearly contravened the clear statutory intent to limit an estate's SLU recovery to only that portion of the SLU that accrued before the claimant's death.

**Bell v. Glens Falls Ready Mix Co., Inc., 169 A.D.3d 1145 (3d Dept. 2019)**

*Decision Below:* Claimant is entitled to a 60% SLU of the arm consisting of a 50% premised upon defects at the shoulder and an additional 10% for defects at the elbow under Special Consideration 10.

*Affirmed:* While the medical record established that the claimant suffered a 50% SLU of the shoulder and had defects at the elbow joint of the same arm that, taken on their own, generated a 30% SLU, the Board properly applied Special Consideration 10, reducing the 30% generated by elbow defects to only 10% given that "the schedule is focused on the highest-value part of the extremity" and insofar as the WCL and permanency guidelines do not "list the elbow as a body part lending itself to a separate SLU award" (*citing* Matter of Genduso v. New York City Dept. of Ed., 164 A.D.3d 1510, 3d Dept. 2018) the Board's application of Special Consideration 10 was appropriate. Insofar as claimant's arguments regarding the cumulation of schedule percentages would lead to results exceeding 100%, which is not permitted, those arguments are rejected – and such rejection relegated to a footnote.

# 38. Scope and Course of Employment

**Warner v. New York City Transit Authority, 171 A.D.3d 1429 (3d Dept. 2019)**

*Decision Below:* Claimant's injuries did not arise in and out of the scope or course of his employment with the Transit Authority when he was assaulted on a train by a fellow passenger.

*Affirmed:* While the claimant was employed by the operator of the train on which he was injured, he had clocked out before he was assaulted by a fellow passenger, and was "commuting home, using the subways like the general public" given that the incident occurred "six train stops away from claimant's assigned station, after he had completed his shift, and that he was not performing any services for the employer on his commute home." In the absence of evidence that the claimant was required to commute using his employer's train service, or that the employer benefited from the claimant's use of the train for his commute, the assault that led to claimant's injuries did not arise in, or out of, the scope and course of his employment. That the claimant was wearing a safety vest issued to him with the employer's logo was immaterial as he was only required "to wear this while working and not during his commute home."

# 39. SLU Vs. PPD

**Matter of Olaya v. United Parcel Service Inc.,- - - AD3d- - -, 2019 NY Slip Op 07119 (2019)**

*Decision Below:* Claimant's condition has reached maximum medical improvement and is subject to schedule loss of use permanency.

*Affirmed:* While claimant presented evidence, from his treating physician, that he had a total disability and had not reached MMI, and where his claim was amended to include the low back – the Board was nevertheless free to credit the employer's IME, who found that the claimant had reached MMI and should be awarded a schedule loss of use for a knee injury.

"The Board could choose to credit the medical testimony establishing that the claimant had reached maximum medical improvement, and is necessary to support a finding that an injury is schedulable under the guidelines [citing permanency guidelines]."

*NB*: This might be an "apology" from the Third Department for their f&#@ up in Tahar, which the Board "disavowed" pretty handily noting that while the Appellate Division thought it had the WCL figured out, it completed ignored the permanency guidelines and several decades of precedent on the question of SLU versus PPD.

**Matter of Rodriguez v. Coca Cola et al., - - - AD3d - - -, 2019 NY Slip Op. 08754 (2019)**

*Decision Below:* Claimant is properly classified with a non-schedule permanent partial disability.

*Reversed:* While the Board is vested with the authority to determine "whether a schedule loss of use award or a non-schedulable permanent partial disability classification is appropriate" it may not, as it did here, fashion its own medical opinion. Insofar as the Board declined to credit the claimant's treating physician, who opined a schedule loss of use without ever examining the claimant's neck or back, and declined to credit the employer's IME who opined a schedule without reviewing any medical records, the record of the case is devoid of any evidentiary basis from which the Board could reach any conclusion regarding the nature of the claimant's permanent disability: "despite its finding that [both] expert opinions were not credible, the Board went on to conclude that the claimant has residual impairment of the neck and back causally related to the . . . accident."

*NB*: This looks like another skirmish between the Appellate Division and the Board in the wake of Tahar. The Board neutered that case relying on the "medical evidence" nature of permanency determinations along with substantial reliance on its own permanency guidelines, which Tahar fatally (reading the opinion of the Board) failed to address. Here, the Appellate Division strikes back somewhat saying that making a determination on the nature of a permanent disability without some medical evidence will be reviewed and reversed.

# 40. Spoliation

**Martinez v. Nelson, 64 Misc.3d 225 (Sup. Ct., Bronx Cty., May 29, 2019)**

*Decision*: Defendant's motion for sanctions on a theory of evidence spoliation is denied without prejudice pending further development of the record.

Where, as here, the defendant provided an explicit spoliation letter to the plaintiff, informing her that they sought an IME *before* she underwent corrective surgery, and explicitly stated that under precedent in Mangione v. Jacobs, 121 A.D.3d 953 (2d Dept. 2014) proceeding with surgery before the IME would be prosecuted as spoliation, the defendant's met the burden of establishing that plaintiff's medication condition was such that it could be "spoiled" by failing to submit to an IME before undergoing surgery and that plaintiff was under a legal obligation not to "spoil" evidence here by having surgery without first submitting to the IME. However, the record was insufficiently developed to establish medical/expert evidence necessary to show that defendant's could not obtain a valid IME based upon reliance of medical records, and the "state of mind" of plaintiff when she underwent surgery despite the spoliation warning, the record must be further developed before defendant's motion can be properly adjudicated.

# 41. Surgery Authorization

**Czechowski v. MCS Remedial Services, 175 A.D.3d 1759 (3d Dept. 2019)**

*Decision Below:* Claimant's request for lumbar surgery is inconsistent with the Medical Treatment Guidelines and is denied.

*Affirmed:* While claimant's physician (Dr. William Capicotto) testified that the claimant's medical records established all necessary elements to warrant lumbar fusion surgery, the Board was free to credit the opinion of the employer's expert, whose review of medical records, she concluded, failed to demonstrated evidence of spinal instability or 6-12 weeks of conservative care without improvement.

# 42. VFBL § 19: Exclusive Remedy

**Lee v. Verstraete, 2019 N.Y. Slip Op. 29270 (Sup. Ct., Wayne Cty., Aug. 13, 2019)**

*Decision:* Where plaintiff was acting with the scope of his firemanic duties when sustaining significant personal injuries in a car accident, he was barred from filing suit against co-fireman driver and volunteer fire department.

Under General Municipal Law § 205-b, co-fireman could not be held civilly liable for acts done in the performance of his volunteer fireman duties unless he was acting with "willful negligence or malfeasance." Even in a light most favorable to plaintiff, facts adduced in discovery showed, at best, regular negligence, and thus plaintiff's action must be dismissed.

Further, Volunteer Firefighter Benefits Law § 19 provides that benefits granted under that title are plaintiff's exclusive remedy against his volunteer fire company, and the statute immunizes not only the company, but its political subdivision superiors – the Town itself. On those grounds, plaintiff's action against the company must be dismissed.

# 43. World Trade Center Claims

**Chrostowski v. Pinnacle Environmental Corporation, 169 A.D.3d 1217 (3d Dept. 2019)**

*Decision Below:* Claim for a low back injury was time-barred insofar as the injury did not qualify under Article 8-A of the WCL.

*Modified and Reversed:* The claimant's low back injury, as a result of repetitive lifting during the World Trade Center cleanup, which included diagnoses of lumbar radiculitis, degenerative joint disease, lumbar spondylosis, sciatic and spinal stenosis qualify as a "musculoskeletal disease" as listed under WCL Article 8-A. Similar rulings by the Board, insofar as they found claims time-barred, were distinguishable where the injuries in those cases were occasioned by accidents and not "repetitive stress." *See e.g.* Pinnacle Environmental, G0015836, Dec 22, 2015; Trio Asbestos Removal, 00736393, May 29, 2015.

# 44. § 14: Weekly Wages Basis of Compensation

**Matter of Molina v. Icon Parking LLC, - - -AD3d- - -, 2019 NY SLIP OP 07467 (2019)**

*Decision Below:* Claimant's AWW is properly calculated using a two-hundred multiple pursuant to WCL § 14(3).

*Reversed and Remitted:* While claimant worked six-days a week for each of the thirteen (13) weeks that he was with the employer, the Board erred in failing to establish an average weekly wage under WCL § 14(2) using a similar worker payroll. Insofar as the employer did not submit a similar worker payroll, nor did the Board direct such, or even address the applicability of WCL § 14(2) in its ruling below, the Court cannot say that the Board's decision is supported by substantial evidence and that matter must be remitted for the Board to determine if WCL § 14(2) cannot reasonably and fairly be applied, then the Board may apply Workers' Compensation Law § 14(3).

# 45. Employer-Employee

**Matter of Mauro v. American Red Cross, 108 N.Y.S.3d 560 (3d Dept. 2019)**

*Decision Below:* There is no employer/employee relationship between volunteer and the Red Cross; claim disallowed.

*Affirmed:* While the claimant was "injured" during the course of her volunteer activities for the Red Cross, the fact that she was encouraged to volunteer by her paid employer, she was paid by that employer during volunteer activity, and the record showed no more evidence than "some direction and control" by the Red Cross, h evidence reflected that "claimant was strictly a volunteer and that no employer-employee relationship existed that would entitle her to workers' compensation benefits."

**Matter of Sheehan (Nationwide Ct. Servs., Inc.), - - - AD3d - - -, 2019 NY Slip Op. 09067**

*Decision Below:* Claimant was acting in her capacity as an employee of Nationwide, and not for her own business at the time of the accident.

*Affirmed:* Claimant served process for Nationwide during the work day as part of her job duties, she also opened a business to serve process for Nationwide, and others, outside of regular business hours. While claimant was injured driving back to Nationwide after serving process for them outside business hours, and while she was paid in the form of a check payable to her own business, the Board's determination that the claimant was acting on behalf of her employer at the time is supported by substantial evidence. Insofar as the claimant was serving process as a "special request" for Nationwide, her employer, and returning from that task to the employer's premises at the time of the accident, substantial evidence supports the Board's determination that, notwithstanding the claimant's separate business and business-practice with Nationwide, her accident arose in and out of the course of her employment with Nationwide.

*NB*: Ten dollars says this claimant opted-out of covering herself for her own business – everyone is friends and peaches and cream until coverage becomes an issues…

# 46. Medical Marijuana

**Matter of Kluge v. Town of Tonawanda,- - -AD3d- - -, 2019 NY Slip Op 07470 (2019)**

*Decision Below:* Claimant is not entitled to reimbursement for medical marijuana expenses incurred before his treating physician filed a variance; and claimant's variance request is denied where claimant began treatment before such variance was requested or granted.

*Reversed in Part and Remitted:* While the Board properly determined that reimbursement for medical marijuana expenses incurred before any variance was submitted or approved under 12 NYCRR 300.24.3(b)(2)(1)(b), it erred in denying the subsequently submitted variance solely upon those grounds.

Insofar as 12 NYCRR 300.24.3(a)(1) states that, without a granted variance in place, and where treatment requested in that variance has already been provided, "a request for a variance [thereafter] will not be considered if the medical care has already been provided" the Board failed to consider that part of the physician's variance which requested "ongoing" care: "however, where the claimant has a chronic condition necessitating ongoing treatment, the Board should have addressed the merits of claimant's variance request for prospective medical marijuana treatment."

# 47. HIPPA

**Matter of Trusewicz v. Delta Envtl., - - - AD3d - - -, 2019 NY Slip Op. 09336 (2019)**

Decision: Claimant must provide an unrestricted/unlimited medical release to the employer.

*Reversed*: While the Board properly held below that the claimant must provide a medical release which allows the employer to obtain records of prior treatment relating to the same body sites claimed in this case, the Board improperly refused to direct that the actual HIPAA form contain such language consistent with 12 NYCRR 300.37(b)(1)(iii).