The Law Offices of Melissa A. Day, PLLC

A Year in Review:
2021 Workers' Compensation Case Law

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

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Matter of Estate of Youngjohn v. Berry Plastics Corp., 36 N.Y.3d 595 (N.Y., Apr. 1, 2021)

Decision Below: recovery of the claimant's schedule loss of use award by his estate is limited to that portion of the award that "would have been due" to the claimant for the period prior to the claimant's death (Workers' Compensation Law § 33), plus "reasonable funeral expenses" (Workers' Compensation Law § 15(4)(d)).

Affirmed: The Court of Appeals affirmed the Third Department's decision that the decedent's estate was entitled to the "payment of that portion of the SLU award that was due up to the date of decedent's death"; however, since the claimant was not survived by a spouse or children, his estate was solely entitled to an amount not to exceed the reasonable cost of a funeral, in accordance with WCL § 15(4)(d). Here, the decedent's estate argued that the 2009 amendment to the WCL, that made SLU awards payable in one lump sum, made the SLU award immediately due to the claimant. Therefore, regardless of whether the claimant died before taking the lump sum payment, and was not survived by a spouse or children, the estate should be entitled to the full value of the SLU. However, the Court of Appeals noted that, while the legislature amended the law to allow lump sum SLU payments, it did not amend WCL § 15(4)(d), which limits estates to the reasonable cost of funeral expenses, instead of the unaccrued permanent disability benefits. Thus, WCL § 15(4)(d) remains in effect and, where claimant's without surviving spouses or children are entitled to SLU awards and die before taking the lump sum payment, there estate is limited to collecting the number of weeks of the SLU award payable to the claimant up to the date of death and the reasonable costs of funeral expenses.

Fiato v. New York State Department of Transportation, 195 A.D.3d 1251 (3d Dept., June 17, 2021)

Decision Below: The claimant was entitled to a 15% SLU of the left leg.

Affirmed: Where the first medical evidence of an SLU determination occurs on or after January 1, 2018, the 2018 Impairment Guidelines apply, particularly where the claimant undergoes subsequent treatment (such as a surgery) that substantially alters the claimant's condition. Here, the claimant injured his left knee in 2011 and received a 20% SLU of the left leg. Thereafter, in 2017, claimant underwent a total knee replacement and, using the 2018 Guidelines, was later found to have a 35% SLU of the left leg, of which, the previous 20% was deducted, for a 15% SLU of the left leg. Notably, claimant's first SLU evaluation for the 2017 total knee replacement occurred after 1/1/18 and; therefore, the 2018 Impairment Guidelines applied to the SLU determination attributable to the claimant's 2017 left knee replacement. Moreover, the Court properly deducted the previous 20% left leg SLU from the subsequent 35% SLU of the left leg.

Green v. New York City Department of Correction, 191 A.D.3d 1091 (3d Dept., Feb. 04, 2021)

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

Affirmed: SLU awards compensate for the loss of use of the extremity, not for the particular injury; therefore, where a claimant receives an SLU award for an extremity and later receives another SLU award for the same extremity, the SLU award must be reduced by the percentage previously awarded. Here, the Third Department affirmed Genduso and held that the claimant, who had previously received a 17.5% SLU award for an injury to his right arm, was not entitled to the later 17.5% SLU award attributable to his right elbow.

See Also Neely v. New York City Department of Correction, 191 A.D.3d 1093 (3d Dept., Feb. 04, 2021) (affirming Genduso by holding that the claimant was not entitled to a new SLU award where the awards at issue did not exceed the previously awarded SLU awards for the same body parts).

Matter of Flowers v. Alkem Plumbing Inc., 197 A.D.3d 1380 (3d Dept., Sep. 2, 2021)

Decision Below: The claimant was not entitled to additional workers' compensation benefits pursuant to Workers' Compensation Law § 15(3)(v).

Affirmed: To receive WCL § 15(3)(v) benefits, the claimant must have been awarded an SLU of 50% or more, and the claimant must prove that the injured extremity *alone* prevented the claimant from obtaining gainful employment. Here, the Board correctly reversed the WCLJ's awarding of WCL § 15(3)(v) benefits where the claimant testified that he could not find work due to his right wrist injury, for which her received an 85% SLU award, where the claimant testified that he also had "'bad knees' preventing him from standing, that he does not read or write well due to his limited education and that he is not adept at using a computer." These contributing factors preclude a claimant from receiving WCL § 15(3)(v) benefits.

See Also Gilliam v. DOCCS Wende Correctional Facility, 190 A.D.3d 1080 (3d Dept., Jan. 07, 2021) (affirming the Board's decision to credit one doctor's SLU opinion over the other's, where supported by substantial evidence).

2. Scope and Course of Employment

Jean–Pierre v. Brookdale Hospital Medical Center, 190 A.D.3d 1053 (3d Dept., Jan. 07, 2021)

Decision Below: the claimant sustained accidental injuries arising out of and in the course of her employment and she was awarded workers' compensation benefits.

Affirmed: Claimants injured after work hours on a public street can nonetheless have a compensable claim if the street was located on the premises of the employer's place of business. Here, an individual assaulted the claimant after she left her shift at the hospital. She had been off from work for 15 minutes and was walking down a public street. This public street was a part of the hospital's multi-building complex and the claimant fell onto the hospital's lawn. The Third Department concluded that the Board's focus on the street's location within the hospital complex, and that the claimant landed on the hospital's lawn, supported its decision with substantial evidence.

N.B.: This is a terrible case! The general public was also at risk of being assaulted on this street, as it was open to the public. Therefore, there was no "special hazard" that only hospital employees were subjected to. For example, if the claimant instead worked at the mall and was assaulted inside one of the mall's many entrances, she would not have a comp claim despite being on the premises, because the entrance was accessible by the general public and the risks inherent with walking through it were not unique to mall employees. *See* Djukic v. Hanna Andersson, LLC, 185 A.D.3d 1116 (3d Dept., Jul. 2, 2020).

See also Siegel v. Garibaldi, 158 A.D.3d 1049 (3d Dept. 2018) (holding that the claimant's accident occurred in the scope and course of employment where his co-worker hit the claimant with his car while they were both leaving work, because the road, although accessible to the general public, was part of the college campus where the claimant and his coworker worked).

Sharipova v. BNV Home Care Agency, 191 A.D.3d 1071 (3d Dept., Feb. 04, 2021)

Decision Below: Claimant's claim for workers' compensation benefits was denied where her injury did not arise out of and in the course of her employment.

Reversed and Remitted: Injuries sustained during brief deviations from work are compensable so long as they are reasonable and sufficiently work-related. Here, the claimant provided 24-hours a day, 7-days a week home health assistance to one client. The claimant regularly took long walks with her client and on one such occasion she visited her personal doctor's office to retrieve certain medical paperwork required by her employer and to verify whether her doctor accepted her client's medical insurance. While leaving her doctor's office, she fell and suffered significant injuries. On appeal, the Third Department reversed the Board's holding that the claimant's injuries did not arise out of and in the course of her employment, as it found the claimant's activities sufficiently reasonable and work-related for the following reasons: (1) the claimant was engaged in a routine walk with her client; (2) the claimant stopped at her personal doctor's office to obtain paperwork required by her employer and to inquire whether the office accepted her client's insurance, which was relevant because the claimant was responsible for scheduling her client's medical appointments; (3) claimant could not have obtained the necessary paperwork without her client accompanying her, as she provided around-the-clock care to her client; and (4) there was no indication that her employer disallowed personal errands.

Shyti v. ABM, 192 A.D.3d 1309 (3d Dept., Mar. 11, 2021)

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

Affirmed: Claimant suffered a compensable accident where she slipped and fell while crossing the street during her paid 15-minute break.

N.B.: This is a proper application of the coffee break rule, unlike the Third Department's decision in Capraro from last year's update. Claimant had a 15-minute, union mandated, paid break during her shift. She injured herself while crossing the street to the pizza parlor. The short length of the break coupled with the purpose of resting and/or taking brief refreshment essentially inures to the benefit of the employer, and the employer maintains some constructive control over the employee during the claimant's break. Therefore, the Third Department affirmed the full Board's decision that the claimant suffered a compensable accident.

Cadme v FOJP Service Corporation, 196 A.D.3d 983 (3d Dept., July 22, 2021)

Decision Below: The claimant sustained a compensable injury arising out of and in the course of his employment.

Affirmed: Special hazard case where the claimant was struck by a car while walking into work. The Board found the claim compensable, and the Third Department affirmed, where the accident occurred outside a loading dock entrance that was solely utilized by employees and where the claimant parked where most of his coworkers parked, i.e., across the street from his place of employment, where the street did not have a pedestrian crosswalk.

N.B.: This decision correctly applies the "special hazard" standard. Usually, the key with these cases is to consider whether the public at-large would be subject to the same risks that ultimately led to the claimant's accident. If yes, then there is no special hazard and the claim is compensable. Here, the claimant was clearly walking into an employee-only entrance that was, essentially, inaccessible to public traffic. Therefore, the general public would not normally be at risk in this area and the accident was properly found compensable.

See Also Holness v. City College, 192 A.D.3d 1291 (3d Dept., Mar. 11, 2021) (affirming the Board's finding that the claimant did not suffer a compensable accident where the claimant, a college maintenance man, tripped on a raised piece of concrete on the college's campus, after his shift, approximately 160 yards from where he clocked-out; as the general public was exposed to the same risk).

Morales v. Lopez, 192 A.D.3d 1298 (3d Dept., Mar. 11, 2021)

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

Affirmed: The Third Department accords considerable deference to the Board's credibility determinations. Here, the history provided by the claimant in the ER records contradicted the claimant's later testimony as to how he injured himself. That is, the ER records stated that the claimant fell and hurt himself while walking into the hospital, not at work. The WCLJ repeatedly informed the claimant of the inconsistencies between his testimony and the ER records, but the claimant did not address them. Thus, the Third Department upheld the disallowance of the claim, based on the Board's credibility assessment.

N.B.: Claimant also tried to submit a notarized statement from an alleged coworker who allegedly witnessed his alleged accident (allegedly of course); however, the Board refused to consider such "evidence" as the claimant should have produced it before the WCLJ made a ruling and, better yet, the alleged coworker should have testified and been subject to cross-examination by the employer.

See Also Richards v. Allied Universal Sec., 199 A.D.3d 1207 (3d Dept., Nov. 18, 2021) (affirming the Board's finding that the claimant did not suffer a compensable accident where the Board found that the claimant's claim, that lifting exorbitantly oxygen tanks caused his injuries, lacked credibility).

3. Notice

Napolitano v. City of Batavia, 194 A.D.3d 1336 (3d Dept., May 27, 2021)

Decision Below: The claimant did not provide timely notice of the injury.

Affirmed: "Frequent-filer" claim for a knee injury was disallowed for failure to provide written notice to the employer within 30-days; and for subsequently failing to meet his burden of proving that the employer was not prejudiced by his late filing.

Claimant alleged that he failed to notify his employer of the injury within the 30-day window -- despite knowing the law and having previously suffered SLU injuries to both knees -- because he did not initially comprehend the severity of the injury. The Board found claimant's explanation incredible based on both his managerial position and previous experience with the workers' compensation system where he did timely give notice of work accidents.

NB: Case law clearly indicates that an employee need only give notice of the *accident* and not the injuries sustained. Logan v. New York City Health & Hosp. Corp., 139 A.D.3d 1200, 1202 (3d Dept. 2016). Thus, it seems any defense relying on a claimant's failure to comprehend the severity of an injury is inapposite to the statute, which does not speak to notice of any injury.

Abdallah v. New York City Transit Authority, 192 A.D.3d 1297 (3d Dept., Mar. 11, 2021)

Decision Below: Claimant's claim for workers' compensation benefits was denied, as claimant did not give timely notice of injury.

Affirmed: Although the Board did not expressly rule on whether the employer was prejudiced by claimant's failure to timely provide written notice of an injury at work, the Third Department nonetheless upheld the Board's denial where the claimant had knowledge of the workers' compensation system through his work and underwent treatment before filing the claim. That is, the claimant handled the workers' compensation claims for his employer and knew about the notice requirements. Claimant also alleged that he did not file because he did not think it was serious, but this was belied by the claimant's treatment history prior to notifying his employer.

Leduc v. Ne. Clinton CSD, 197 A.D.3d 1373 (3d Dept., Sep. 2, 2021)

Decision Below: The claimant was excused from providing timely notice of her injury pursuant to Workers' Compensation Law § 18.

Affirmed: Claimant injured her shoulder in February of 2018 while pulling a trash gondola through a snowy parking lot. Six months later, in June, she sought treatment for her shoulder, and she reported it to her employer in July. Ultimately the employer controverted the claim, arguing, among other things, late notice under WCL § 18. Both the WCLJ and the Board panel excused the claimant's late notice noting insufficient evidence was presented to show that the employer was prejudiced. (Despite ample case law noting claimant bears the burden of proving that his/her late notice did not prejudice the employer.)

Here, the Third Department reasoned that the employer was not prejudiced, as they could inspect the scene of the incident (even though the snowy conditions were no longer present), one of the claimant's coworker corroborated the claimant's story, and the claimant testified that she was not aware that her shoulder injury was work related until she underwent an MRI in July. Moreover, the Court reasoned that the employer could have obtained an IME on causal relationship, "rather than wait until after the surgery was performed."

N.B.: Terrible decision. Although the Court cites the legal standard, i.e., that the claimant must prove that the employer was not prejudiced by the late notice, the Third Department paradoxically affirmed both the WCLJ's and Board's decision that "insufficient evidence was presented to show that the employer was prejudiced." Instead, the claimant needed to produce sufficient evidence showing that the employer *was not* prejudiced. The Third Department cannot simply *ex post facto* rationalize the claimant's late notice. Moreover, the Court's decision demonstrates a fundamental lack of understanding of the impact claimant's late notice had on the employer. An IME on causal relationship upwards of seven months after the date of accident would solely rely on the history provided by the claimant. Imaging taken that long after the accident could not reveal to the physician what caused the subject injuries, whether the findings are acute, chronic, long-standing, or just present since the accident seven months earlier. Thus, while the employer could have gotten an IME on causal relationship, after such a delay, it would have proven worthless.

Chrostowski v. Pinnacle Environmental Corporation, 191 A.D.3d 1140 (3d Dept., Feb. 18, 2021)

Decision Below: The claimant's application for workers' compensation benefits was time-barred.

Reversed and Remitted: The Third Department reversed and remitted the case for further development where the Board denied the claimant's occupational disease claim as time-barred. Here, the claimant filed his claim for workers' compensation benefits in 2018 for repetitive stress injuries to his left shoulder, both wrists, and both knees, but the Board relied upon a 2009 medical report from a physician who was treating the claimant for respiratory issues related to his work at the World Trade Center (for which he had a separate workers' compensation claim). However, the Board noted that, despite a positive Tinel's test, the claimant was not diagnosed with carpal tunnel until later, and even then, the later reports did not indicate the etiology of the carpal tunnel. Moreover, the 2009 report did not mention the claimant's shoulder or knee injury. Therefore, the Third Department concluded that the 2009 medical report, that the Board relied on to support its finding of untimeliness, did not reflect information pertaining to all the alleged sites of injuries, and remitted the case for further development.

4. Statute of Limitations

DeCandia v. Pilgrim Psychiatric Center, 196 A.D.3d 953 (3d Dept., Jul. 15, 2021)

Decision Below: Claim was untimely filed under Workers' Compensation Law § 28

Affirmed: Here, claimant was bitten by two ticks while at work in 2013. Six years later, he filed a claim for injuries allegedly sustained as the result of unknown tick bacteria entering his bloodstream. The claim for an accidentally contracted disease was denied by the Board as untimely, as the six-year gap clearly exceeded the 2-year filing window under WCL § 28. The Third Department noted that setting the timeliness issue aside, substantial evidence supported the Board's further findings that the claimant produced insufficient medical evidence to establish that the claimant actually had contracted Lyme disease, or that there was a causal relationship between any such disease and the claimant's employment, where the claimant's medical evidence could not conclusively diagnose Lyme disease and, instead, diagnosed a Lyme "disease-adjacent" ailment. Furthermore, claimant's physician could not state that the claimant's tick-related infection related to the tick bites that the claimant suffered in 2013.

NB: It is a common litigation tactic to argue that a physician who cannot clearly diagnose a condition certainly cannot proceed to competently opine on causation. "If you don't know what is wrong with the patient, how can you tell me what caused it?"

Rho v. Beth Israel Medical, 194 A.D.3d 1324 (3d Dept., May 27, 2021)

Decision Below: Claim was untimely filed under Workers' Compensation Law § 28.

Affirmed: While claimant argued that her occupational disease claim should not be time-barred under WCL § 28 because she was mentally incompetent, in the absence of evidence of incompetence, no tolling of the statute of limitations can be implemented. Section 115 of the Workers' Compensation Law states that no statute of limitations "shall run as against any person who is mentally incompetent . . . so long as he [or she] has no committee or guardian." However, upon invoking this provision, claimant must prove that he/she was incompetent within the statute of limitations period.

Here, claimant alleged that she was incompetent for reasons related to her occupational disease claim, as she claimed that her mental incompetence stemmed from insomnia that she developed while working the night shift for several years. However, the claimant did not submit sufficient medical evidence that she was functionally incompetent during the statute of limitations period. While medical records did show that the claimant had a periodic cognitive impairment, case law further provides that mere "cognitive dysfunction" is not enough to enact the tolling provision under WCL § 115. Therefore, the Board properly chose not to toll the statute of limitations and correctly denied claimant's case as time-barred.

5. Settlement

Weishar v. Dan Tait Inc., 193 A.D.3d 1197 (3d Dept., Apr. 8, 2021)

Decision Below: The Workers' Compensation Law § 32 settlement agreement was a nullity.

Affirmed: Claimant's death before the 10-day waiting period for a Section 32 agreement renders the settlement a nullity. Here, the claimant died during the 10-day waiting period, during which either party can withdraw from the proposed settlement agreement. Carrier was notified of the death outside of the 10-day window and immediately sent written notice of its withdrawal from the settlement. Following litigation, the Board held that the decedent's death before the 10-day period had expired invalidated the proposed agreement and the Third Department affirms.

N.B.: Interesting thought: what happens if carrier is notified of the claimant's death within the 10-day waiting period but does not withdraw? Likely the same result, as the Board's precedent, according to the Third Department, states that "a decedent's death prior to the final approval of a settlement agreement render[s] the agreement a *nullity*."

6. WCL § 29

Djukanovic v. Metropolitan Cleaning LLC, 194 A.D.3d 1275 (3d Dept., May 20, 2021)

Decision Below: Claimant was barred from receiving further workers' compensation benefits pursuant to Workers' Compensation Law § 29.

Affirmed: Where the claimant settled her third-party action without the carrier's consent, the Board did not err in finding that the claimant forfeited any further benefits payments from the date of settlement of the third-party action and, furthermore, correctly rescinded the penalty against the carrier for suspending benefits without first requesting a hearing.

NB: The penalty issue in this matter is probably more useful than the "settlement without consent" elements of the case. Here, the Third Department affirmed the Board, who found that the employer could NOT be penalized for suspending benefits unilaterally because the claimant's failure to obtain consent voided, essentially by operation of law, her right to those ongoing payment. This concept has been recognized in some Board panel law where an employer avoided a penalty by establishing that claimant was not entitled to the underlying award in the first instance.

Degennaro v. H. Sand & Co., 198 A.D.3d 1045 (3d Dept., Oct. 7, 2021)

Decision Below: The claimant was barred from receiving further workers' compensation benefits pursuant to Workers' Compensation Law § 29.

Affirmed: The claimant must obtain consent to settle a third-party action, or they can be barred from future workers' compensation benefits. Here, the claimant settled a third-party action without proof of consent. Curiously, the carrier knew about the third-party settlement, the third-party carrier advised the claimant that he owed the workers' comp carrier 2/3 of an approximate $95,000 lien, and the claimant wrote a personal check in said amount, which the workers' comp carrier cashed. Ultimately, the Board barred the claimant from future workers' compensation benefits under WCL § 29 for failing to obtain the carrier's consent to settle his third-party claim.

On appeal, the Third Department affirmed, noting that, while the workers' comp carrier was aware of the settlement, and indeed cashed the lien-repayment check sent by the claimant, which satisfied their lien, there was no evidence that the claimant had asked for the workers' comp carrier's consent to settle and there was no evidence that the workers' comp carrier actually consented. Therefore, under WCL § 29, the claimant was properly precluded from receiving further benefits.

NB: Consent to settlement under WCL § 29 must be in writing. Similar attempts to argue "constructive" consent, or "actual" consent have universally failed. Indeed, Board panel precedent indicates that upon receiving a consent letter, a claimant's distribution of proceeds constitutes the effective date of settlement and demonstrates "acceptance" of the terms of the settlement, i.e., deviation from the terms of the consent letter will result in a finding that the claimant violated WCL § 29(5). See e.g., Matter of Team CSS Limited Liability Comp., 2021 NY Wrk Comp G2133433 (finding that the claimant violated WCL § 29(5) where the carrier consented to the third-party settlement, contingent on the approval of a proposed Section 32; however, the claimant never cooperated with the Section 32 process, and the Board never approved a Section 32 agreement); see also e.g., Matter of L&M Bus Corp., 2020 NY Wrk Comp G1045898; see also e.g., Matter of R.C. Industries Inc., 2012 NY Wrk Comp 00358981.

7. Date of Disablement

Osorio v TVI Inc., 193 A.D.3d 1219 (3d Dept., Apr. 8, 2021)

Decision Below: claimant sustained a causally-related occupational disease

Affirmed: The Board has wide latitude to determine the date of disablement in an occupational disease/repetitive use claim and the Third Department will affirm if supported by substantial evidence. As a reminder, the Board can select one of the following dates as the date of disablement *and is not required to select the earliest of the five*:

1) The date of first causally-related treatment;
2) The date on which the claimant first received a diagnosis indicating that the condition was work-related;
3) The date on which the claimant began to lose time from work due to the work-related disability;
4) The date on which the claimant was advised by a doctor to stop working due to the work-related disability; and
5) The date on which the claimant actually stopped working because of the disability.

Here, the record demonstrated that claimant complained of pain in her neck, back, and/or shoulders three years before the date of disablement, when a doctor informed her that her pain was work-related. What is more, the medical records from three years earlier stated that the doctor informed the claimant that her condition *could* have been related to work. Nonetheless, the Third Department affirmed the Board's decision that the date of disablement was three years later, when her doctor told her that her condition was definitively related to her employment, despite that claimant "was symptomatic prior to that date and may have suspected that her condition was related to her employment."

N.B.: This decision hurts. Claimant's doctor telling her three years before the date of disablement that her condition may be related to her employment should be enough to demonstrate that the claimant should have known that her condition was work-related at that time.

8. § 114-a Fraud

Kornreich v. Elmont Glass Company, 194 A.D.3d 1322 (3d Dept., May 27, 2021)

Decision Below: The claimant violated Workers' Compensation Law § 114-a and was permanently disqualified from receiving future wage replacement benefits.

Affirmed: Substantial evidence supported the Board's finding of fraud and imposition of the discretionary lifetime ban, where the claimant did not disclose that he was engaged in illegal bookmaking, which he ultimately plead guilty to in another court; such conduct constituted work, albeit illegal work.

Ordaz v Jerrick Associates Inc., 194 A.D.3d 1331 (3d Dept., May 27, 2021)

Decision Below: The claimant violated Workers' Compensation Law § 114-a and was disqualified from receiving future indemnity benefits.

Affirmed: The Third Department upheld the Board's finding of fraud and imposition of the discretionary lifetime ban, where the claimant testified that he could not work and could only stand for 15 to 20 minutes; only to later be videotaped selling ice cream on the street and standing for hours at a time. Investigators also submitted video evidence of the claimant raking his yard. These activities were patently inconsistent with the claimant's testimony and warranted a fraud finding and a lifetime ban.

NB: Fraud is in the lie, not the surveillance. The claimant's activities here are not in themselves fraudulent; that he lied about them to a WCLJ is fraudulent.

See also Hughes v. Ferreira Construction Company, 191 A.D.3d 1053 (3d Dept., Feb. 4, 2021) (claimant exaggerated her condition).

See Also Peck v. Organization, 191 A.D.3d 1078 (3d Dept., Feb. 4, 2021) (surveillance showed that the claimant only used a cane and walked with a labored gait while at the IME).

See also Dunleavy v. Federated Fire Protection (Turner Construction), 192 A.D.3d 1303 (3d Dept., Mar. 11, 2021) (claimant seen golfing, performing yard work, and working for a fire department while out on comp).

See also Quaranta v. Special Teams, 195 A.D.3d 1342 (3d Dept., Jun. 24, 2021) (nearly identical case to Peck, 191 A.D.3d 1078).

See also Ringelberg v. John Mills Electric, 195 A.D.3d 1332 (3d Dept., Jun. 24, 2021) (nearly identical case to Peck, 191 A.D.3d 1078).

Lopez v. Clean Air Quality Servs. Inc., 198 A.D.3d 1038 (3d Dept., Oct. 7, 2021)

Decision Below: The claimant violated Workers' Compensation Law § 114-a and received mandatory penalties and a discretionary lifetime ban.

Affirmed: The Third Department will uphold a discretionary penalty unless the Board abused its discretion to such a degree as to have levied a penalty disproportionate to fraudulent offense committed. Here, the claimant, who was injured in May of 2014, had his wife complete an IME intake form for him, that he later signed. On the form, the wife stated that the claimant did not suffer a prior accident; however, the claimant was in a serious car accident in June of 2014. Ultimately, the claimant was found to have violated WCL § 114-a, and his benefits were mandatorily denied from August of 2014 through July of 2019 (i.e., when he and his wife testified regarding fraud). The Board affirmed this finding and this penalty, and also permanently disqualified him from future benefits. The claimant then appealed the penalties, not the finding of fraud, and the Third Department affirmed. That is, the Third Department noted that the claimant clearly received awards relating to the lie, as the IME doctor found the claimant to have suffered a crush injury to the right hand, with a moderate disability solely relating to the work accident. Additionally, the Third Department found no abuse of discretion in the Board's permanent ban, where the wife, a high school graduate with some college, lied on the stand that she did not know what "subsequent" (as in, subsequent accident) meant, despite evidence to the contrary, and where the claimant failed to disclose the non-work-related MVA.

N.B.: LOMAD won on a weaning argument in this case after the Third Department issued this decision!

See also Ortiz v. Calvin Maint., 199 A.D.3d 1211 (3d Dept., Nov. 18, 2021) (claimant failed to report prior injuries on his C-3 or to the IME doctor).

See also Sanchez v. US Concrete, 194 A.D.3d 1287 (3d Dept., May 20, 2021) (claimant failed to report prior MVAs and the treatment related thereto to her treating providers).

Ranieri v. Xerox Corporation, 192 A.D.3d 1289 (3d Dept., Mar. 11, 2021)

Decision Below: Claimant violated Workers' Compensation Law § 114-a but was not banned from receiving workers' compensation benefits for life.

Affirmed: The Third Department will only overturn the Board's refusal to impose the discretionary penalty where the Board abused its discretion as a matter of law. Here, the Board upheld the mandatory penalty against the claimant but rescinded the discretionary penalty, where the claimant snowplowed on two separate occasions, despite being out of work on workers' compensation. The claimant snowplowed some driveways in exchange for being allowed to use the truck, which was owned by the company he previously worked for. The Board found that this did not rise to a level necessitating the discretionary penalty and the Third Department found no fault in the Board's decision.

Takacs v. Kraft Foods Group Inc., 193 A.D.3d 1224 (3d Dept., Apr. 8, 2021)

Decision Below: Claimant did not violate Workers' Compensation Law § 114-a and was disqualified from receiving future workers' compensation benefits.

Affirmed: The Third Department affirmed the Board's finding that the claimant did not commit fraud when, in her efforts to remain linked to the labor market, she attached someone else's resume to her job applications. Although claimant testified that she did not do so deliberately and did demonstrate a lack of computer savvy, the Third Department held that the claimant further testified "that the resumé attached to some of her online applications was a template saved in the same location as her actual resumé and documenting that she had failed to sign into her job search website account before submitting other applications on a public computer," but that the Board was free to conclude that the claimant simply made a mistake. Notably the above-quoted language is poorly written and unclear. While the Court likely is trying to cite facts indicating that the claimant merely lacked computer skills, these facts do not appear to support the Board's finding with substantial evidence.

N.B.: The Court does not seem convinced by its own decision here. In fact, the Court acknowledge that there existed "proof in the record that could support a different result."

Young v. Acranom Masonary Inc., 193 A.D.3d 1315 (3d Dept., Apr. 29, 2021)

Decision Below: Claimant violated Workers' Compensation Law § 114-a and was banned for life.

Affirmed as Modified: Here, the Third Department affirmed the Board's finding of fraud where the claimant did not disclose his return to work, despite continuing to receive checks for workers' compensation benefits. However, the Third department reversed the Board's lifetime ban where the claimant "was forthright in his testimony that he returned to work, the record does not disclose that claimant was advised to report his work activities and he had submitted a request in April 2019 for further action citing his dire financial situation." Moreover, the Third Department noted that the record contained no medical testimony regarding the claimant's disability, the IME doctor found the claimant to have a less than total disability, and the claimant reported to his physician that epidural injections alleviated 80% of his back pain.

NB: The line between and affirmative misrepresentation and an omission is often the key to a fraud reversal. The Third Department, and Board for that matter, will frequently excuse fraud, noting that, while the claimant failed to disclose some facts, since "no one asked the claimant," the claimant never affirmatively lied; therefore, no fraud occurred.

9. 12 NYCRR 300.13 and Appellate Practice

WCL § 23-a (Effective 12/22/21)

Policy of the Board: "As of may 26, 2017 any application for review by a party other than an unrepresented claimant that is not filled out completely will be denied, and any rebuttal filed by a party other than an unrepresented claimant that is incomplete will not be considered." Subj. No. 046-40 (citing 12 NYCRR 300.13(b)(4)(i)). Under this policy, the Board routinely refused to consider meritorious appeals solely on the basis of mere clerical errors on the Form RB-89 Application for Board Panel Review.

Reversed by the Legislature: Under the new law, "[t]he board shall permit any such mistake, omission, defect and/or other irregularity to be corrected within twenty days of written notice by the board," or "if a substantial right of either the party filing the application or the party filing the rebuttal is not prejudiced, such mistake, omission, defect and/or other irregularity shall be disregarded." WCL § 23-a(3).

N.B.: Presumably, the Board will utilize the second option in most cases.

Cirami v. Judlau Contracting Inc., 192 A.D.3d 1307 (3d Dept., Mar. 11, 2021) (claimant's appeal denied for leaving question 12 blank on the Form RB-89).

McLaughlin v Sahlen Packing Co., 192 A.D.3d 1315 (3d Dept., Mar. 11, 2021) (employer's appeal denied for failing to properly respond to question 15 on the Form RB-89).

See Britton v. Aerotek, 193 A.D.3d 1194 (3d Dept., Apr. 8, 2021) (claimant's appeal denied where his/her attorney did not use the current Form RB-89).

See Barber v. County of Cortland, 193 A.D.3d 1202 (3d Dept., Apr. 8, 2021) (appeal denied where the SIE did not properly respond to question 15 on the RB-89).

Centeno v. Academy Group Properties, LLC, 193 A.D.3d 1208 (3d Dept., Apr. 8, 2021) (employer's appeal denied for failing to properly answer question 12 on the Form RB-89).

See also Canadanovic v. Central Absorption of LIC, 193 A.D.3d 1246 (3d Dept., Apr. 22, 2021) (decision appealed was later rescinded by the Board Panel and remitted to the hearing calendar for further development; thus, rendering this appeal moot).

See Boehm v. Town of Greece, 196 A.D.3d 947 (3d Dept., July 15, 2021) (appeal denied where SIE did not list any hearing dates or transcripts under question number 13 of the RB-89).

Garcia v. Cantor, No. 532415, 199 A.D.3d 1218 (3d Dept., Nov. 18, 2021) (appeal denied where the carrier did not properly respond to question 15 on the Form RB-89).

Salinas v. Power Servs. Sols. LLC, 2021 N.Y. Slip Op. 07321 (3d Dept., Dec. 23, 2021)

Decision Below: The application of Everest National Insurance Company for review of a decision of the Workers' Compensation Law WCLJ was untimely, and their application for reconsideration and/or full Board review was denied.

Reversed and Remitted: While this case is essentially a moot point, in light of the recently passed law, WCL § 23-a, this case illustrates how ridiculous the Board was being in denying "defective" appeals. Here, the Board denied review of the decision that found the above carrier to be the liable carrier in the claim against Power Services Solutions, LLC, run by Salvador Almonte. Notably, the WCLJ made this decision in the absence of the above carrier's presence, due to a printing error on the Notice of Hearing that did not clearly list the above carrier as a party of interest. Moreover, the WCLJ established the claim against the above carrier, after the other alleged carrier produced a Certificate of Insurance, that allegedly showed the above carrier as having an effective policy with the employer on the date of accident. Subsequently, the Board denied review as being untimely. However, around the time that the Board denied review, Almonte, the employer, was indicted for alleged extensive insurance fraud, which included creation and issuance of false Certificates of Insurance. The Third Department reversed the Board, finding that it abused its discretion. First, the Court found that the carrier provided an adequate explanation for the late appeal, as they were not properly notified of the hearing and the subsequent decision did not list them as the carrier and did not list Power Services as the employer; instead, it merely parenthetically noted that they were the liable carrier on the middle of page two of the decision. Second—and most importantly—the Court found that the Board's denial of review in the face of legitimate evidence that the Board had been defrauded, defied reason and thus constituted an abuse of the discretion afforded to the Board. Therefore, the Court remitted the case to be reconsidered on the merits.

Matter of Barry v. Verizon New York Inc., 197 A.D.3d 1421 (3d Dept., Sep. 16,2021)

Decision Below: The Board denied review of a decision by the WCLJ, as the claimant's application for review failed to comply with the service requirements of 12 NYCRR 300.13(b).

Affirmed: The Third Department defers to the Board's power to strictly enforce its appellate rules. Additionally, when filing an application for Board Panel review, the filing party must serve all parties of interest. 12 NYCRR 300.13(b)(2)(iv). Parties of interest are defined as "claimants, self-insured employers, private insurance carriers, the state insurance fund, special funds, no-fault carriers per [Workers' Compensation Law § 142], or any surety, including but not limited to the uninsured employer's fund, and the liquidation bureau" Id. 300.13(a)(4). Here, the claimant filed an appeal and served the claim administrator, Sedgwick, but not the carrier, New Hampshire Insurance Company. Thus, the Board denied review and the Third Department deferentially affirmed the Board's decision.

Szewczuk v. ETS Contracting, Inc., 199 A.D.3d 1209 (3d Dept., Nov. 18, 2021)

Decision Below: The claimant's Application for Board Review was denied for failure to comply with the service requirements of 12 NYCRR 300.13(b)(3).

Affirmed: The Board may deny a party's Application for Board Review where the party fails to properly serve all parties of interest, where the unserved party either raises the issue of service in their rebuttal or fails to file a rebuttal. That being said, if the unserved party is not adverse to the appellant, then the Board may excuse the mistake. Here, claimant filed an appeal in this controverted hearing loss claim that the WCLJ denied; however, the claimant only served one of several potentially liable employers and their carrier. Notably, while the claimant argued that the unserved parties were not adverse to the claimant, one of them was the last employer in the claimant's hearing loss claim and could have become fully liable for all awards, if the claimant won his appeal. Therefore, as that unserved party did not file a rebuttal, the Third Department affirmed the Board's denial of the claimant's Application for Board Review.

Brennan v. Village of Johnson City, 192 A.D.3d 1287 (3d Dept., Mar. 11, 2021)

Decision Below: Claimant's request for authorization of a one-year gym membership was granted.

Dismissed: Only an aggrieved party may appeal a claim to the Third Department. Here, the carrier appealed the WCLJ's granting of a C-4AUTH that paid for the claimant's one-year gym membership, to maintain his bilateral hip replacements, in one lump-sum. The Board upheld the granting of the membership but modified the decision to pay the claimant only for the monthly expense of the gym membership to date, adding that the claimant must continually submit proof of the monthly membership fees. Therefore, having received the relief sought (i.e., a yearly gym membership) claimant could not appeal the Board's decision.

Martinez v. MEC Gen. Inc., 198 A.D.3d 1051 (3d Dept., Oct. 7, 2021)

Decision Below: The Board declined to place MEC General Construction Corp. and its workers' compensation carrier on notice as parties of interest.

Dismissed: interlocutory, nonfinal decisions by the Board are not appealable to the Third Department. This is a weird case where the claimant was injured at work, identified a construction company as her employer, and it was later found that the company did not have workers' compensation insurance. The Board's compliance bureau performed an investigation into which contractors were at the construction site and MEC General Construction Corp., among others was identified. At the next hearing, MEC General Construction Corp. asked that they be placed on notice as a potential employer; however, while the WCLJ agreed that further development on the proper employer needed to take place, the WCLJ did not place MEC General Construction Corp. on notice. What is especially strange, is that the WCLJ directed MEC General Construction Corp. to pay the claimant's indemnity benefits and for all medical expenses under WCL § 25(1)(f) but did not deem them worthy of being on notice. MEC General Construction Corp. appealed, the Board affirmed, and the Third Department dismissed the case as interlocutory. But, hey, keep paying for the claimant's lost time and treatment!

Narine v. Two Bros. for Wholesale Chicken Inc., 198 A.D.3d 1040 (3d Dept., Oct. 7, 2021)

Decision Below: (1) the employer and carrier were denied review for failing to comply with 12 NYCRR 300.13(b); and (2) the claim was properly amended to include claimant's frozen right shoulder.

Affirmed: This is a convoluted case where the carrier initially fully controverted the claim, but, at the second hearing, the carrier withdrew its controversy and solely requested the opportunity to get an IME on the "sites of injury," and they objected to the establishment of any sites pending the IME. Nonetheless, at the next hearing, the WCLJ established the case for certain sites, found *PFME* for additional sites, and directed the carrier to obtain an IME on the additional sites. The carrier appealed, asking the Board to rescind the decision and allow for further development on the issues of employment relationship and coverage. Before this appeal was decided, another hearing took place, where it was determined that the carrier made no effort to obtain an IME on the additional sites and thus the WCLJ precluded the carrier from obtaining an IME and established the case for the additional sites. The carrier then filed a second appeal, incorporating their original appeal, arguing that the Court improperly amended the case and precluded them from getting an IME on the additional site.

The Board issued two decisions which denied the carrier's first appeal for failing to preserve the issues raised; and upholding the Court's decision to amend the case to include the additional site. The Third Department affirmed the Board in part noting that the carrier did not raise an objection to the decision appealed from at the hearing and thus did not preserve its right to appeal. Moreover, carrier's argument that they did not obtain an IME on the additional sites because they were awaiting the outcome of their first appeal was rejected as meritless.

NB: Good practice dictates that during the pendency of an appeal the file must be actively managed without regard to the appeal; the stay under WCL § 23 does not foreclose all proceedings during the appellate review process, merely the payment of monetary awards.

10. 12 NYCRR 300.14 Application for Rehearing

Petre v. Allied Devices Corp., 191 A.D.3d 1086 (3d Dept., Feb. 04, 2021)

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

Affirmed: A party applying for reconsideration and/or full Board review must prove that either: (a) the claimant failed to set forth relevant newly discovered evidence previously unavailable to him/her or a pertinent material change in medical condition; or (b) the Board failed to consider the evidence and issues properly before it. Here, the claimant reached a stipulation with the carrier that permitted 24 yearly physical therapy appointments. Subsequently, the claimant argued that he should be entitled to more physical therapy appointments under the Guidelines, in addition to the appointments that he stipulated to. The Board disagreed and held that the claimant stipulated to more physical therapy appointments than he would otherwise be entitled to under the Guidelines, and the claimant applied for reconsideration and/or full Board review. The Third Department sided with the Board and found that the claimant did not present newly discovered medical evidence, or a material change in his medical condition. Additionally, the Court found that the Board did not fail to consider evidence before it.

Taylor v. Buffalo Psychiatric Ctr., 199 A.D.3d 1110 (3d Dept., Nov. 4, 2021)

Decision Below: Claimant's request to reopen or rehear a prior decision was denied.

Reversed: The Third Department will only overturn the Board's decision on an application for reopening/rehearing if the Board abused its discretion. Here, the claimant had two cases and, in the older case, in which she did not retain counsel, her doctor submitted a C-4.3 stating that the claimant had a 15% SLU of the left shoulder, which the carrier accepted. However, the narrative report stated that the claimant had a 35% SLU of the left shoulder, and the doctor outlined how he calculated a 35% SLU as well. However, the 15% SLU was adopted and made final via Proposed Decision, and the claimant never objected. Thereafter, the claimant suffered another work-related injury to the left shoulder, and she retained counsel, who filed a request for rehearing/reopening on the issue of the erroneous SLU award from the claimant's prior case; however, the Board denied the request. Thereafter, the Third Department reversed, stating that the uncontroverted permanency opinion clearly gave an opinion of a 35% SLU of the left shoulder and the doctor merely mistakenly transcribed a 15% SLU on the C-4.3 form.

11. WCL § 15

O'Flaherty v. MRZ Trucking Corp., 194 A.D.3d 1205 (3d Dept., May 13, 2021)

Decision Below: Claimant's earnings award reduced to the permanent partial disability rate for the period from October 6, 2016, to June 26, 2018.

Reversed and Remitted: Under WCL § 15, a claimant can only be classified as having one of the following at any one time: a permanent total disability, a temporary total disability, a permanent partial disability, or a temporary partial disability. "Thus, even though a person may be medically diagnosed with a permanent partial disability and concurrently experience a temporary exacerbation of his or her medical impairment – for example, after surgery related to the disabling condition – rendering the person completely unable to work in the short term, the statute does not permit a claimant to be classified with both a permanent partial disability and a temporary total disability at the same time." What is more, a finding that labels the claimant as one of these four categories must be supported by medical evidence. Here, the Third Department found that substantial evidence did not support the Board's decision to change claimant's previous period of awards at a temporary partial disability rate to a permanent partial disability rate, without medical proof supporting this finding.

12. WCL § 15(3)(w)

Georges v. Zotos Int'l Inc., 198 A.D.3d 1047 (3d Dept., Oct. 7, 2021)

Decision Below: The claimant was entitled to indemnity benefits for certain time periods after she had been classified as permanently partially disabled.

Affirmed: The 2017 amendment to WCL § 15(3)(w), which provides that claimants need only demonstrate labor market attachment at the time of classification, applies to cases that predate the amendment date, provided that a determination has not been made that a claimant was not attached to the labor marked or voluntarily withdrew from the labor marked before the amendment took effect. Here, the claimant was classified in 2000 and in 2003 she left the country and did not return for 12 years. In 2009, the carrier filed an RFA seeking to suspend indemnity benefits as the claimant was out of the country; however, the carrier did not raise the issue of voluntary withdrawal from the labor market. At the hearing in 2009, the WCLJ suspended benefits but did not make a finding of voluntary removal or that the claimant was not attached to the labor market. Thereafter, at subsequent, the WCLJ never made a decision on labor market attachment, and the issue was not dealt with again until 2018, i.e., after the 2017 amendment to WCL § 15(3)(w). Consequently, since the WCLJ never made a finding that the claimant voluntarily withdrew from, or was not attached to, the labor market prior to the amendment date, the claimant did not need to prove ongoing attachment after she was classified in 2000 to continue receiving benefits.

The Third Department found support for this decision in a letter from the Board's general counsel, contained within the legislative history, in which he provided that the WCL § 15(3)(w) amendment "affects previously decided cases in which there has not been a finding that the claimant had voluntarily removed him[self] or herself from the labor market at the time of the classification." Letter from David F. Wertheim, Workers' Compensation Board General Counsel, May 23, 2017, Bill Jacket, L 2017, ch 59, at 29.

King v. New York State Department of Corrections, 2021 N.Y. Slip 06901 (3d Dept., Dec. 9, 2021)

Decision Below: The claimant was not entitled to an award of reduced earnings after June 22, 2014.

Reversed: Where a claimant had concurrent employment and later receives reduced earnings awards, the awards may only be reduced by evidence that part of the claimant's reduced earnings from one of his/her two or more former employments, stemmed from age, economic conditions, or other factors unrelated to the disability. That is, if the claimant's reduced earnings from his/her concurrent employment remain related to his/her disability, then he/she may still collect reduced earnings awards commensurate with that reduction. Here, the claimant had concurrent employment at the NYS Dept. of Corrections and at a restaurant. Eventually, she was awarded PPD benefits, payable as reduced earnings. Thereafter, several years later, she left her employment with the Dept. of Corrections, and she received disability benefits for an unrelated injury as part of her retirement. Subsequently, a WCLJ found that there was no basis to continue her reduced earnings awards "as claimant retired from her employment with the Department on June 22, 2014, due to reasons unrelated to her established disability, and there was no documentation that claimant attempted to reattach to the labor market." The claimant then appealed, arguing that, while she no longer had reduced earnings from her Dept. of Corrections job: (a) she still had reduced earnings from her restaurant job; and (b) she did not need to demonstrate reattachment under WCL § 15(3)(w). The Third Department agreed, as the claimant still had reduced earnings from her concurrent employment at the restaurant. Additionally, under WCL § 15(3)(w), the claimant need only demonstrate labor market attachment at the time that the PPD awards are made.

13. Apportionment

Hughes v. Mid Hudson Psychiatric Ctr., 197 A.D.3d 1376 (3d Dept., Sept. 2, 2021)

Decision Below: The claimant was entitled to a schedule loss of use award and apportionment applied to that award.

Reversed in Part: While a carrier/SIE may take a credit against a prior-non-compensable accident/injury if it would have resulted in an SLU award had it been compensable, the carrier/SIE must produce medical evidence from the prior accident/injury, proving that it would have resulted in an SLU. Here, the claimant underwent several surgeries in 1976, following a prior accident to the right knee, which the claimant later injured in the subject work-related accident. At the time of permanency, both the IME doctor and the claimant's treating doctor apportioned part of their SLU opinions to the claimant's prior right knee injury; however, neither doctor had medical evidence to support their opinions. Subsequently, the WCLJ found the claimant to have an SLU of the right knee with part of it apportioned to the prior accident, and, the Board, upon review, found a lack of medical evidence supporting the WCLJ's ruling but nonetheless held that apportionment was applicable as the claimant would have been entitled to a 17.5% SLU award for his prior right knee injury. The Board came to this conclusion by applying the known surgical procedures to the 1996 Guidelines. However, the Third Department rightly reversed this decision, reasoning that, like the WCLJ's decision on apportionment, the Board did not have any medical records supporting their decision. Therefore, regardless of whether apportionment could have applied to the claimant's prior non-compensable right knee injury, here, it did not, due to the lack of medical evidence proving that claimant would have been entitled to an SLU award had his prior right knee accident been compensable.

Grimaldi v. Suffolk County Department of Health, 191 A.D.3d 1051 (3d Dept., Feb. 04, 2021)

Decision Below: Claimant's average weekly wage was established.

Affirmed as Modified: Where a claimant has more than one established claim, and the claimant's AWW is higher at the time of the first injury, awards should be calculated using the wage earned at the time of each injury, with the apportionment percentage for each injury applied thereto. Here, the Board erred when it utilized claimant's 2008-injury AWW for purposes of computing awards made in his 2007 injury claim, where the AWW in the 2007 claim was set substantially higher than the AWW in the 2008 claim. The Court reasoned that:

"The wage earning capacity of an injured employee in cases of permanent or temporary partial disability shall be determined by his or her actual earnings. Where the claimant has more than one established claim, each of the carriers is liable for its portion of the award based upon the wage, if higher, received by the claimant at the time of the latest injury. However, if the claimant's wage at the time of the first injury is higher than the wage at the time of the second injury, the awards are calculated by using the wage earned at the time of each injury, subject to the apportionment percentage that has been found to apply to that injury. To hold otherwise would run afoul of the statutory directive that compensation for a later, successive claim be determined using a claimant's earning capacity at the time of the later injury."

Fisher v. Erie County Sheriff's Department, 194 A.D.3d 1285 (3d Dept., May 20, 2021)

Decision Below: apportionment did not apply to claimant's workers' compensation award.

Affirmed: Generally, apportionment does not apply to prior non-compensable injuries, unless the injury actively disabled the claimant at the time of the work accident. One exception to this rule, is that apportionment may apply if the prior non-compensable injury would have been amenable to an SLU award if it had been compensable. Here, the Board found that apportionment did not apply where the record demonstrated that claimant's knee remained asymptomatic for many years prior to the date of accident, and that the doctor who treated the claimant as well as the IME doctor could not definitively form an apportionment opinion, as neither had access to the claimant's treating records pertaining to his prior non-work-related knee injury. Therefore, the Court found that substantial evidence supported the Board's finding of no apportionment.

14. Requests for Special Medical Services and Variances

Matteliano v. Trinity Health Corporation, 194 A.D.3d 1227 (3d Dept., May 13, 2021)

Decision Below: Request for authorization of multi-lumbar fusion surgery and use of an external bone growth stimulator is granted.

Affirmed: Substantial evidence supported the Board's approval of the requested lumbar fusion, despite that the IME found that the claimant did not have an instability at the subject level, which is ordinarily a prerequisite to approving a lumbar fusion. Critically, claimant's treating doctor found that the claimant had degenerative disc disease and, under the Guidelines, lumbar fusion is recommended to treat degenerative disc disease without an instability.

N.B.: Under the updated Guidelines for the mid and low back, degenerative disc disease is only cited as an indicator for performing a spinal fusion where the claimant needs a *third lumbar discectomy at the same level*.

Morano v. Hawthorn Health Multicare Center, 193 A.D.3d 1222 (3d Dept., Apr. 8, 2021)

Decision Below: Claimant's use of certain prescription drugs was causally related to her work-related injury.

Affirmed: Here, the carrier denied a variance for Lyrica and gabapentin as not causally-related to the claimant's workers' compensation claim, where the claimant had also been prescribed the same medications one month before suffering her work-related injury. Nonetheless, claimant's physician testified that, regardless of whether claimant had been prescribed the same medications before injuring herself at work, claimant still needed the prescriptions after her lumbar surgery. While the carrier submitted an IME stating that the medications were not causally-related, the Board is vested with the discretion to weigh conflicting medical evidence and the Third Department will support the Board's decision if supported by substantial evidence. Thus, the Third Department affirmed the Board's decision to credit the treating doctor's opinion over the IME's opinion in determining that the requested medications were causally-related to the claimant's case.

Ozoria v. Advantage Management Association, 194 A.D.3d 1213 (3d Dept., May 13, 2021)

Decision Below: Claimant did not sustain a further causally related disability after November 7, 2018, and she was denied authorization for surgery to her cervical spine.

Reversed and Remitted: A WCLJ cannot decide on a C-4AUTH without first allowing the parties to cross-examine the doctors who provided disputing opinions on the need for surgery. Here, the WCLJ denied claimant's treating doctor's C-4AUTH at a hearing that was on to address suspension of benefits as of a certain date. The record contained conflicting medical opinions for and against the surgery, yet the WCLJ ruled in favor of the carrier without affording the claimant to right to depose the IME doctors. The Third Department found this to be a violation of due process and reversed and remitted the case.

15. WCL § 15 – Max Rates

Jagiello v. Air Tech Lab, 195 A.D.3d 1357 (3d Dept., June 24, 2021)

Decision Below: The claimant was entitled to concurrent awards.

Affirmed: Where the claimant received concurrent awards, the later award, if a temporary partial disability award, cannot exceed the "total disability rate." That is, it should equal 2/3 of the difference between the claimant's AWW before the most recent accident and the claimant's wage-earning capacity after the previous accident. Here, in 2018, the claimant was awarded $400/week TPD in relation to his work at the World Trade Center. Claimant then had an occupational disease claim, that became disabling in 2017, which ordinarily would have entitled him to awards at $480.71/week TPD. The Board held that the claimant's concurrent award could not exceed $801.32 (i.e., claimant's AWW on the date of disablement), whereas the claimant countered that he was entitled to the statutory maximum of $870.61. The Third Department disagreed and affirmed the Board's decision, where awarding concurrent awards up to the cap would result in an accumulation of TPD awards higher than the maximum TPD rate authorized by statute.

16. WCL § 13-a(6) – Communication With Doctors

Goutermout v. County of Oswego, 194 A.D.3d 1333 (3d Dept., May 27, 2021)

Decision Below: The claimant's claim for workers' compensation benefits was denied.

Affirmed: Death claim disallowed where both the IME doctor and the treating doctor found causal relationship because both doctors had extensive ex-parte conversations with claimant's counsel. These conversations involved lengthy discussions of the medical records and discussed what the doctors should expect to take place during the deposition. The Board accorded both reports no weight due to these conversations and, therefore, the decedent's beneficiary had no medical evidence supporting establishment.

17. Causal Relationship

Allen v. CPP–Syracuse, 194 A.D.3d 1278 (3d Dept., May 20, 2021)

Decision Below: claimant's generalized anxiety disorder was consequential to his established claim for injuries to his left shoulder and neck.

Affirmed: The Third Department affirmed the Board's decision to uphold the establishment of consequential anxiety where the IME doctor and the treating doctor found causal relationship. The carrier argued that their causal relationship opinions should not stand in support of establishment as they did not account for claimant's treatment records relating to a prior MVA. However, these treatment records were not in the Board file and, while carrier applied to reopen the case to get them put into the Board file, the Board denied their application as they knew about the records for some time and thus did not meet the "within a reasonable time after the applicant has had knowledge of the facts" standard. Therefore, the Third Department agreed with the Board that, where the doctors reviewed claimant's medical records in the Board file and met with the claimant, the Board's decision to establish consequential anxiety was supported by substantial evidence.

Richman v. New York State Workers' Comp. Bd., 199 A.D.3d 1216 (3d Dept., Nov. 18, 2021)

Decision Below: The claimant's claim for workers' compensation benefits was denied, as the claimant did not sustain a causally related injury.

Affirmed: The claimant bears the burden of proving causal relationship through competent medical evidence. Here, the claimant, a claims examiner, alleged that she injured her shoulder at work, after suffering a fall while none of her coworkers were present. However, the claimant did not treat until 19 months after the alleged accident, and she filed her C-3 seven months after that. Regarding the 19-month gap between the purported fall and her first treatment, the claimant stated that she "was busy." With respect to the late C-3, the claimant could not explain the delay. Moreover, the claimant's medical diagnosed her with right shoulder pain with arthritis. While the doctor vaguely mentioned that the claimant fell at work, the doctor did not provide any connection between her degenerative conditions and her alleged fall. Therefore, the claimant's claim was properly denied as she failed to meet her burden of proof, where the Board validly exercised its right to discredit her treating doctor's causal relationship opinion in light of the circumstances.

Barden v. Gen. Physicians PC, 198 A.D.3d 1060 (3d Dept., Oct. 7, 2021)

Decision Below: The claimant's request to amend her workers' compensation claim to include left shoulder aggravation was denied.

Affirmed: The claimant bears the burden of proving causal relationship of an alleged site, and the Board can find no causation where, read as a whole, the record does not contain "substantial and adequate opinion evidence" of causal relationship (quoting Matter of Rossi v. Albert Pearlman Inc., 188 A.D.3d 1362, 1363 (3d Dep. 2020). Here, the claimant had a right shoulder injury that the carrier accepted. Later on, the claimant alleged that she suffered a consequential left shoulder injury, which the carrier contested, but the WCLJ ultimately amended the claim to include. The Board reversed, and the Third Department affirmed that the claimant did not meet her burden of proof. Specifically, the claimant's treating doctor stated that, while the right shoulder injury may have aggravated her left shoulder injury, her left shoulder condition was entirely unrelated to the accident, preexisted the accident, and would have presented itself regardless. Additionally, the IME doctor testified that the claimant did not complain about the left shoulder and that the left shoulder was barely considered during his exam. Finally, the only doctor that found causal relationship, did so under the mistaken belief that the claimant injured her left and right shoulder on the date of accident. Therefore, the Third Department found that the Board supported its denial of the claimant's claim for a consequential left elbow injury.

Maldonado v. Doria, 192 A.D.3d 1247 (3d Dept., Mar. 4, 2021)

Decision Below: Claim amended to include causally related cardiac arrest.

Affirmed: Medical authorities not in the record cannot overcome competent medical evidence in the record. Claimant fell down the stairs at work and sprained his ankle. Claimant then had syncopal episodes, chest pain, and shortness of breath while at home and the doctors diagnosed him with a pulmonary embolism ("PE") and deep vein thrombosis ("DVT"). Subsequently, the PE and DVT were added to the claimant's claim, having been deemed causally related. Thereafter, further proceedings were held to determine whether cardiac arrest, among other things, should also be added to the claim. Carrier argued, by citing medical authorities in its brief, that cardiac arrest should be narrowly defined as "synonymous with death, i.e., where the heart stops beating, and death immediately follows absent a restarting of the heart by medical personnel." However, relying on medical testimony in the record, the WCLJ "set forth a broader definition, defining the term as a 'sudden loss of blood flow resulting from the failure of the heart to effectively pump. Signs include loss of consciousness and abnormal or absent breathing.'" Critically, the Court "[did] not find the [carrier's] narrow definition well supported within the record medical testimony," and upheld the WCLJ's decision.

Scano v. DOCCS Taconic Correctional Facility, 195 A.D.3d 1325 (3d Dept., June 24, 2021)

Decision Below: The claim abated upon decedent's death.

Affirmed: Where a party is deprived of the essential elements of a fair trial due to the claimant's death, the Board may disallow the decedent's claim for workers' compensation benefits. These essential elements include: the right to cross-examine the claimant and the right to have the claimant examined by an IME doctor. Here, the claimant died before the carrier could take the claimant's testimony and obtain an IME; thus, the Board disallowed the claim. Ultimately, the Third Department found that the Board supported its decision with substantial evidence, where the record did not contain direct evidence of the decedent's work duties on the date of accident nor proof that his job duties caused his eventual death. Moreover, the only medical evidence of causal relationship also conceded that another mechanism of injury could have led to the claimant's untimely demise.

Lewandowski v. Safeway Environmental Corp., 190 A.D.3d 1072 (3d Dept., Jan. 07, 2021)

Decision Below: The claimant's claim for chronic obstructive pulmonary disease (COPD) was disallowed.

Affirmed as Modified: Where a claimant does not produce sufficient credible medical evidence to establish causal relationship, the claim must be disallowed. Moreover, unlike a finding of no prima facie medical evidence, the claimant has no automatic right to present new evidence of causal relationship. Here, the claimant helped clean the World Trade Center site in the summer of 2002. The claimant, a member of an asbestos union, was told by a union doctor, in 2004, that he had lung, stomach, and psychiatric problems stemming from his participation in the World Trade Center cleanup. Nonetheless, claimant continued working until 2015, when he stopped working and filed a claim for workers' compensation. Among several other ailments, the claimant claimed COPD, based on his treating doctor's diagnosis; however, in September 2016, by reserved decision, the WCLJ credited the IME physician who found no causally-related COPD (saying that, if anything, his 32-year history of being a pack-a-day smoker would have caused his COPD) and disallowed the claim for COPD. The claimant appealed to the Board and the Board agreed with the WCLJ, that there was not sufficient credible medical evidence supporting a finding of causally-related COPD. Then, approximately two years later, after further development of the medical record, PFME of COPD was found, and, in February of 2019, by reserved decision, the claim was amended to include COPD. The carrier then appealed to the Board, which considered, among other things, whether the claim should have been amended to include COPD, despite having previously been decided by reserved decision in September 2016. The Board agreed with the carrier and disallowed the claim for COPD, noting that the finding of insufficient medical evidence of causally-related COPD had already been administratively affirmed. This appeal then followed, and the Third Department agreed with the Board, reasoning that a finding of no causal relationship necessitates immediate disallowance, and that, thereafter, the claimant cannot submit further medical evidence as a matter of right.

Salas v. Tom Cat Bakery, 193 A.D.3d 1225 (3d Dept., Apr. 8, 2021)

Decision Below: Claimant did not sustain a causally-related injury to his right shoulder and was denied authorization for surgery.

Affirmed: Despite a medical diagnosis of a right shoulder injury related to work, claimant did not establish a causally-related right shoulder injury, as the opinion was "grounded upon a factual premise that had not been established." That is, claimant injured multiple body sites in a work-related accident but did not cite the right shoulder on his C-3, did not list the right shoulder on the IME intake form, and the claimant specifically testified that he did not injure his right shoulder during the subject accident. Based on the foregoing, the Board properly denied the requested right shoulder surgery.

Williams v. Orange & White Markets, 198 A.D.3d 1028 (3d Dept., Oct. 7, 2021)

Decision Below: Carrier #1 is responsible for certain disputed medical bills.

Affirmed: The Third Department will defer to the Board's weighing of medical evidence and testimony on the issue of causally-related treatment. Here, the claimant had a 2016 workers' compensation claim established for the left shoulder, and she later established a 2018 claim for the left shoulder and neck. The claimant's treating physician treated her on both files and, following the claimant's 2018 accident, the doctor recommended left shoulder surgery, which Carrier #1, the carrier on the 2016 file, objected to, claiming that it was causally-related to the 2018 case. However, while Carrier #2, the carrier in the 2018 case, obtained an IME stating that the claimant's left shoulder injuries were related to the 2018 accident, the Board credited the treating physician's opinion that the surgery was causally-related to the 2016 accident. That is, the doctor testified that he would have recommended the surgery prior to the 2018 accident, and the 2018 accident merely compounded the claimant's symptoms. The Board credited the treating doctor's testimony and opinion over the IME doctor's, as the treating doctor had treated the claimant from the beginning of her 2016 claim, whereas the IME did not review all the claimant's treatment records, particularly her lengthy non-operative treatment records relating to the 2016 claim. As such, the Third Department deferred to the Board's decision, as supported by substantial evidence.

Sudnik v. Pinnacle Environmental Corporation, 190 A.D.3d 1067 (3d Dept., Jan. 07, 2021)

Decision Below: the claimant's claim for workers' compensation benefits was denied, as he did not sustain a causally-related disability.

Affirmed: The claimant bears the burden of establishing causal relationship, and to do so he/she must produce medical evidence that "signif[ies] a probability of the underlying cause that is supported by a rational basis and must not be based upon a general expression of possibility." Id. (quoting Matter of Ellis v. First Student, Inc., 174 A.D.3d 1243, 1243 (3d Dept. 2019)). Here, the claimant worked as an asbestos handler for 13 years and participated in the effort to clean office buildings located near the World Trade Center site for nearly six weeks. Originally, the claimant filed a claim in 2014, alleging that his kidney cancer resulted from asbestos exposure. Then, the claimant filed a separate claim for benefits in 2017, alleging that his kidney cancer, PTSD, and depression stemmed from his exposure to toxins while cleaning offices near the World Trade Center site. Ultimately, the 2014 claim was disallowed and continued for record development relative to the claimant's 2017 claim. The claimant's treating doctor testified that the claimant's renal cell carcinoma was causally related to his work near the World Trade Center site; however, the doctor "failed to articulate the factual basis for or otherwise substantiate her opinion in this regard." Id. What is more, the doctor acknowledged that the claimant smoked a pack-a-day, was exposed to asbestos for nearly 15 years, and that smoking was a leading cause of the type of cancer that the claimant had, and she testified that she could not rule these other factors out as the cause(s) of his condition. "Rather, without elaboration, [the doctor] simply insisted that claimant's cancer was attributable to his work near the World Trade Center site and that his shortness of breath and pleural plaque were the result of his exposure to asbestos." Id. The Third Department agreed with the Board, that the claimant's treating physician's opinion contained too many holes and, without further elaboration from the doctor, her report did not satisfy the claimant's burden.

18. Causally Related Lost Wages

Usewicz v. Nozbestos Construction Corporation, 194 A.D.3d 1281 (3d Dept., May 20, 2021)

Decision Below: Claimant had no causally related lost wages.

Affirmed: Lost wage benefits are only appropriate where the lost wages related to the established injury(ies). The claimant bears the burden of proving "that the adverse effect on his . . . earning capacity was not caused by factors totally unrelated to [that] disability." Here, the claimant had two workers' compensation claims and he retired in 2012, receiving PPD on one of the two claims. The claimant also applied for lost wage benefits under his other claim, but the Board denied it because the claimant's 2012 retirement was unrelated to his claim, which was for lead exposure. In 2018, the claimant began looking for work again and applied for lost wage benefits, however, the Board denied the claimant's application where the claimant did not prove that his lost wages related to his lead exposure.

19. Claimant Reimbursement

Whitney v. Pregis Corp., 200 A.D.3d 1257 (3d Dept., Dec. 9, 2021)

Decision Below: The claimant is entitled to reimbursement for home health aide services.

Reversed and Remitted: A finding that requested treatment is causally related can have a preclusive effect, albeit it does not relieve the claimant of the continuing burden of providing both proof that he/she is receiving the requested treatment and receipts reflecting the value of the reimbursement requested. Here, an October 2017 Reserved Decision found that the claimant needed home health aide services, but the carrier never appealed the decision. Thereafter, at the time of permanency, the carrier asserted that the need for home health aide services was unrelated to the subject accident, but the WCLJ disagreed. Ultimately, the Third Department upheld the Board's decision to affirm the WCLJ's holding, as the carrier never appealed the October 2017 Reserved Decision that found the requested home health aide services to be causally related to the claimant's workers' compensation claim. However, the Third Department did reverse and remand the case on the issue of the reimbursement amount for the home health aide services, as the claimant is obligated to prove that he/she is receiving the services for which he/she is seeking reimbursement and must provide proof of the cost of the services.

20. Counsel Fees

Tompkins v. Bedford Stone & Masonry, 198 A.D.3d 1031 (3d Dept., Oct. 7, 2021)

Decision Below: The claimant's counsel's fees were determined.

Affirmed: WCL § 24 gives the Board the discretion to approve counsel fees, and the Third Department will not disturb such a decision absent proof that it was arbitrary, capricious, unreasonable, or an abuse of discretion. Here, the claimant suffered a work accident in 2006, the carrier accepted the case, and the carrier later accepted the case for a consequential injury as well. Ultimately, the case was closed via a Section 32 agreement for a total of $200,000, of which, claimant's counsel requested a $30,000 fee. The Proposed Notice of Approval, approving the agreement, reduced the fee to $24,000 as the fee requested was disproportionate to the work provided, and the Board affirmed. Similarly, the Third Department affirmed, where the record showed that, while claimant's counsel represented the claimant for many years, the bulk of the work consisted of brief uncontentious hearings (remember, these claims were accepted), phone calls, and correspondence. Thus, the Board did not abuse its discretion in reducing the fee to $24,000, and the Third Department upheld the decision.

21. Coverage

Pisarski v. Accurate Plumbing and Heating Co., 191 A.D.3d 1074 (3d Dept., Feb. 04, 2021)

Decision Below: Norgaurd Insurance Company was the liable workers' compensation carrier.

Reversed and Remitted: Where an employer goes out of business and is therefore uninsured, coverage only reverts to the policy in effect at the time the claimant was last employed, where the company that exposed the claimant to the risks that resulted in his/her injuries went out of business before the date of disablement. Here, the employer did not have workers' compensation coverage on the date of disablement and the WCLJ held that Norgaurd was liable as the last company to have a policy in place with the employer when the claimant was last employed. The Third Department remitted the case for further development of the record, as it found Matter of Cammarata v. Caldwell & Cook Inc., 189 A.D.3d 884 (3d Dept. 2005) distinguishable because, in that case, the court reverted liability to the carrier that had a policy in effect at the last time the claimant worked for the employer where the employer had ceased doing business and had been dissolved *prior to the date of death*. Therefore, since the record did not clearly indicate whether the employer dissolved or not, the case was remitted for further development on that issue.

Gaylord v. Buffalo Transportation, 195 A.D.3d 1200 (3d Dept., June 10, 2021)

Decision Below: The State National Insurance Company, Inc. is the liable workers' compensation carrier.

Affirmed: Where an employer enters into a contract with a professional employer organization (PEO) the PEO agrees to co-employ all or a majority of the employees providing services for the client and, assumes many of the rights and responsibilities of an employer, including the responsibility to obtain workers' compensation coverage. Workers' compensation policies generally apply to all employees employed during the policy period in question unless explicitly excluded. Here, the employer entered into a contract with a PEO who obtained workers' compensation coverage through State National (the carrier). Thereafter, an employee injured himself at work and the PEO and the carrier denied coverage, citing to the agreement, alleging that the claimant was not a covered employee under the contract. However, the WCLJ, the Board, and the Third Department disagreed and found that the contract did not specifically exclude the claimant from coverage and therefore, State National was the proper carrier, in light of the employer-PEO contractual relationship and the terms of the policy contract that the PEO obtained on the employer's behalf.

See Also Cardona v. DRG Construction LLC, 196 A.D.3d 988 (3d Dept., July 22, 2021) (finding the PEO's carrier the liable carrier where, as part of the PEO agreement, the PEO was to retain workers' compensation coverage and where the record reflected that the injured worker was covered under the agreement).

Cisnero v. Independent Livery Driver Benefit Fund, 195 A.D.3d 1344 (3d Dept., June 24, 2021)

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

Affirmed: Independent Livery Driver Benefit Fund (ILDBF) provides compensation for claimants injured while driving a passenger at the direction of a dispatch from an independent livery base, regardless of whether the car was also registered under the Black Car Fund. Here, the claimant was driving a customer, provided to him by an independent dispatcher, when the customer repeatedly shot the claimant. The ILDBF and its carrier disputed coverage where the claimant's car was also registered under the Black Car Fund. However, while the car was affiliated with the Black Car Fund, the claimant's work activities met all the requirements for coverage under the ILDBF and; therefore, the ILDBF, not the Black Car Fund was liable.

22. Death

Herris v United Parcel Service, 196 A.D.3d 977 (3d Dept., July 22, 2021)

Decision Below: claimant's claim for workers' compensation death benefits was disallowed.

Affirmed: Death claim where the decedent had coronary artery disease that led to a heart attack in 2002, followed by several surgeries on the heart, the sternum, and the chest. In 2006, the decedent obtained workers' compensation benefits for a reinjury to her chest at work. Thereafter, the claimant again underwent several surgeries and had problems with a plethora of additional body sites. The claimant also developed consequential depression and eventually received a permanent partial disability (PPD) classification. Suddenly, in 2014, the claimant collapsed at home and died. Purportedly, the claimant died after a night of heavy drinking and a narcotics overdose was suspected, although no autopsy was performed, and the death certificate did not list the cause of death. The Board denied the decedent's husband's claim for death benefits and the Third Department found that the Board's decision was supported by substantial evidence where there were conflicting reports on causation and the Board credited the carrier's IME report, that concluded that, while the claimant's depression and compensable injuries may have contributed to the claimant's substance abuse issues that ultimately led to her death, it could have also been related to the claimant's underlying, non-work-related coronary artery disease.

23. Employer Reimbursement

Storms v. Boces Erie No. 1, 191 A.D.3d 1062 (3d Dept., Feb. 04, 2021)

Decision Below: The employer was not entitled to reimbursement for wages paid to claimant during the period of disability.

Affirmed: An employer must make a request for reimbursement for continuing wage payments *before awards are made*, and such requirement is strictly followed, even where the request is made orally at a hearing. While an employer may make an oral request for reimbursement, it still must do so *before* the Board makes awards in favor of the claimant. Where, as here, the employer continued to pay the claimant's wages while the claimant remained out of work, it had not filed a reimbursement request in the ECF at the time the WCLJ made awards to the claimant at a hearing. While the employer's counsel stated, when the WCLJ made the awards, that they were reimbursable, this oral assertion, made after the WCLJ announced the awards on the record, was too late.

24. Extreme Hardship

Phillips v. Milbrook Distrib. Servs., 199 A.D.3d 1184 (3d Dept., Nov. 18, 2021)

Decision Below: Claimant's requests for an extreme hardship pursuant to WCL § 35(3), for a reclassification as permanent total, and for reconsideration and/or full Board review were denied.

Affirmed in Part: First, where a claimant is permanently partially disabled with an LWEC of 75% or higher, under the current PPD framework where benefits are capped under WCL § 15(3)(w), he/she may apply (within one year before the exhaustion of their PPD benefits) for reclassification to permanent total, if they can demonstrate extreme financial hardship. The Board will then consider the claimant's assets, monthly household income, and monthly expenses. Here, the Board considered all these things, concluded that the claimant's monthly household income would not significantly decrease and was able to eliminate monthly expenses that were not necessary/not recurring. The Third Department found this reasonable and upheld the Board's decision. Second, the Board's rule that applications for reclassification must be filed before the claimant exhausts his/her PPD benefits does not comport with WCL § 15(6-a). That is, under that section, the Board may reclassify a disability upon proof that there has been a change in condition at any time. Therefore, where, as here, the Board refused to review three out of four of the claimant's C-27 applications for reclassification because the doctors submitted them after the claimant exhausted his capped PPD benefits, the Third Department remanded the case for those three C-27s to be reconsidered.

N.B.: This case does away with the previous requirement that claimant's apply for reclassification before they exhaust their capped PPD benefits; thus, potentially leaving us open to reclassification claims long after we stopped considering them being possible.

25. Further Causally-Related Disability

Marable–Greene v. All Transit, 190 A.D.3d 1078 (3d Dept., Jan. 07, 2021)

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

Affirmed: The claimant bears the burden of producing credible medical evidence to prove that his/her continuing disability is causally-related to the work-related injury. Notably, the treating physician must review all the claimant's relevant medical evidence in assessing causally-related continuing disability or risk the Board discrediting his/her report. Here, claimant had established a claim for right lower extremity deep vein thrombosis (DVT), and the parties were later directed to submit additional medical evidence on whether the claimant continued to have a further causally-related disability. The Board credited the IME over the claimant's treating doctor and concluded that she did not have a further causally-related disability and that she could return to work, with restrictions. On the one hand, the IME physician reviewed all the claimant's treatment records; whereas, on the other hand, the treating physician admitted that he did not review any reports from the claimant's other treating physicians or any of her diagnostic tests. What is more, the treating physician stated that he based his finding as to the claimant's degree of disability upon a note (that was not in the Board file) from another of the claimant's treating doctors. Thus, the Board's decision to agree with the IME, that the claimant did not have a further causally-related disability and could return to work, was supported by substantial evidence.

26. Labor Market Attachment

Hamill v. Orange County Sheriff's Department, 190 A.D.3d 1052 (3d Dept., Jan. 07, 2021)

Decision Below: the claimant was not entitled to an award of reduced earnings subsequent to November 2018.

Affirmed: Where a claimant voluntarily retires and subsequently reattaches to the labor market, the claimant must prove that his/her reduced earnings are causally connected to the claimant's compensable disability. Here, claimant injured his back at work in 2008, worked for nine more years, and then retired in 2017. The claimant alleged that he partially based his decision to retire on his 2008 back injury. The Court agreed with the Board, that the claimant produced insufficient evidence to prove that his alleged reduced earnings were related to his previously compensable injury. Particularly, the Third Department took note of the fact that the claimant continued working for the employer for more than nine years after his 2008 injury and that he partially based his decision to retire on a retirement package that his employer offered him. Despite claimant's argument that his back injury negatively affected the types of employment available to him post-voluntary removal from the labor market, this was undermined by evidence that he had no issues performing the administrative tasks expected of a police captain during the more than nine years after his 2008 back injury. Therefore, the Board correctly held that the claimant was not entitled to reduced earnings, where his voluntary retirement had a "significant bearing" upon his subsequent reduced wages, and where his compensable disability did not. Id. (quoting Matter of Reese v. Sysco Food Servs. -Albany, 148 A.D.3d 1477, 1479 (3d Dept. 2017)).

Canela v. Sky Chefs, 193 A.D.3d 1216 (3d Dept., Apr. 8, 2021)

Decision Below: Claimant demonstrated an attachment to the labor market.

Affirmed: Here, the Third Department affirmed the Board's conclusion that claimant remained attached to the labor market where: (1) claimant rejected light duty work where the employer wrote a vague later that stated that the claimant may lose his job if he did not return to work, but contained no indication that the employer had positions available within the claimant's restrictions; and (2) the claimant submitted roughly two dozen online applications to jobs within his restriction during the period that he was considered temporarily partially disabled. The Third Department did not go into much detail with respect to the claimant's job search, but this case clearly shows that a light duty offer must clearly state that the employer has positions within the claimant's restrictions, with discrete details supporting the offer.

Delk v. Orange & Rockland, 191 A.D.3d 1067 (3d Dept., Feb. 04, 2021)

Decision Below: The claimant was not entitled to an award of benefits for the period of June 1, 2016 to November 9, 2018.

Affirmed as Modified: Claimants with permanent partial disabilities must establish labor market attachment at the time of classification. Here, the claimant argued that the 2017 amendment to WCL § 15(3)(w) obviated his need to demonstrate an attachment to the labor market. However, the Board clarified that the 2017 amendment did not overrule the requirement that a claimant demonstrate labor market attachment *at the time of classification*, only that the claimant need not demonstrate ongoing labor market attachment after receiving a PPD classification. Therefore, the Third Department affirmed the Board's decision but remitted the case to determine the date in which the claimant needed to prove labor market attachment, as the claimant correctly argued that the Board misapplied its own precedent that findings regarding labor market attachment are limited to the period after the date when the carrier first raised the issue.

Farrulla v. SUNY at Stony Brook, 193 A.D.3d 1206 (3d Dept., Apr. 8, 2021)

Decision Below: Claimant was not entitled to an award of reduced earnings subsequent to October 31, 2018

Affirmed: While a claimant may receive permanent partial disability benefits for reduced earnings, a claimant may not continue receiving these benefits where the Board determines that the claimant voluntarily retired, and claimant's disability did not cause or contribute to the claimant's retirement. Here, the claimant received PPD benefits for reduced earnings for over 15 years when she began a new job. She worked this new job for 12 years and noted that she had continuing neck and back pain related to her workers' compensation claim, and she also received medical treatment related to her workers' compensation claim while she worked for the new employer. However, the Board determined, and the Third Department affirmed, that she was not entitled to continue receiving PPD after she retired in her mid-60s and subsequently testified that she took a normal "regular service retirement" instead of a "disability retirement" and the record contained no medical evidence that a physician advised her to retire due to her medical condition.

NB: This case seems to carve out the distinction between Labor Market Attachment (barred going forward after permanency under the 2017 amendments to WCL § 15) and Voluntary Removal.

Rivera v. Joseph L. Balkan, 193 A.D.3d 1214 (3d Dept., Apr. 8, 2021) (affirming the Board's finding that the claimant voluntarily withdrew from the labor market where the claimant told his employer that he exacerbated his prior work injury and stopped working, but he refused to see an employer-selected physician and where the claimant did not produce credible medical evidence of a disability).

See Also DeWald v. Fiorella's Landscaping, 194 A.D.3d 1327 (3d Dept., May 27, 2021) (finding the claimant not attached to the labor market where he failed to produce up-to-date medical and evidence of labor market attachment).

27. Loss of Wage Earning Capacity

Kristl v. Rome City School District, 193 A.D.3d 1121 (3d Dept., Apr. 1, 2021)

Decision Below: Claimant sustained a 32.5% loss of wage-earning capacity

Affirmed: Substantial evidence supported the Board's affirmance of the WCLJ's LWEC assessment, as the Board considered the appropriate factors relevant to an LWEC determination. Namely, the Board credited the IME doctor's severity ranking over the treating doctor's opinion, the Board found the IME's severity ranking to be consistent with one of the claimant's treating doctor's functional capacity opinion, and the Board factored in the claimant's "extensive education and work experience." Therefore, the record indicated that the Board weighed the medical evidence against the relevant vocational factors in determining the claimant's LWEC and thus, supported its opinion with substantial evidence.

See Also Behan v. Career Start Inc., 192 A.D.3d 1280 (3d Dept., Mar. 11, 2021) (affirming the Board's finding of a 60% LWEC where the claimant had medical restrictions of sedentary work, claimant was 57, had considerable experience as a machine maintenance worker, had an HVAC certification, had taken courses at a technical school, could drive, had basic computer skills, and could perform light duty tasks around the house**).**

See Also Ehrman v. Center for Discovery, 194 A.D.3d 1283 (3d Dept., May 20, 2021) (affirming the Board's finding of a 50% LWEC where the Board supported its finding with substantial evidence by citing medical and vocational factors in favor of its finding).

28. Medical Marijuana

Quigley v. Village of East Aurora, et al, 193 A.D.3d 207 (3d Dept., Feb. 25, 2021)

Decision Below: The claimant's request for a variance was granted.

Affirmed: Carriers paying for a claimant's medical marijuana prescription are not violating federal law, nor are carrier's exempt from paying for a Board approved medical marijuana prescription under the New York Public Health Laws. Here, in response to claimant's treating doctor's variance request for medical marijuana, the carrier argued that, since marijuana is a Schedule I drug, it would be a violation of federal law to pay for the claimant's treatment with marijuana. The Third Department disagreed, as the Controlled Substances Act prohibits manufacturing, distributing, or possessing a Schedule I substance and provides an exception for properly prescribed use. Along that line, the Court determined that paying for a prescribed Schedule I substance is not a violation of federal law. The carrier also argued that Public Health Law § 3368 exempts them from paying for the claimant's medical marijuana prescription. However, the Court clarified that the Public Health Law specifically exempts medical marijuana coverage under certain laws, but not the Workers' Compensation Law. The Third Department reasoned that, if the legislature wanted workers' compensation carriers exempted from paying for medical marijuana prescriptions, then it would have provided for it in the statute.

Matter of McLean v. Time Warner Cable, Inc., 197 A.D.3d 1371 (3d Dept., Sep 2, 2021)

Decision Below: Claimant's request for a variance approving medical marijuana for chronic pain was approved.

Affirmed: The Third Department affirmed the Board's decision to approve the treating doctor's variance request for medical marijuana to treat chronic pain. Under Public Health Law § 33607, marijuana is an appropriate medication for chronic pain. By law, chronic pain is defined as follows:

> any severe debilitating pain that the practitioner determines degrades health and functional capability; where the patient has contraindications, has experienced intolerable side effects, or has experienced failure of one or more previously tried therapeutic options; and where there is documented medical evidence of such pain having lasted three months or more beyond onset, or the practitioner reasonably anticipates such pain to last three months or more beyond onset.

10 NYCRR 1004.2(a)(8)(xi). Here, the Third Department found that the Board supported its decision approving the request, as the treating doctor submitted a letter of necessity, along with proof that the claimant had lumbar spine injuries that caused the claimant to experience chronic pain. Chronic pain that extensive prior treatment with PT, massage therapy, trigger point injections, nerve blocks, spinal cord stimulation, and chiropractic care did not significantly reduce. Moreover, the Third Department noted that medical marijuana reportedly significantly reduced the claimant's pain levels.

29. Non-Schedule Classification

Mayewski v. Superior Plus Energy Services, 192 A.D.3d 1312 (3d Dept., Mar. 11, 2021)

Decision Below: Claimant's injuries were amenable to a non-schedule classification.

Affirmed: Not all impairments of an extremity are amenable to a schedule award. That is, under the Guidelines, chronic painful conditions that affect the distal extremities and are accompanied by objective findings/chronic hypersensitivity, changes in skin color, and changes in skin temperature, are more suited to a non-schedule PPD classification, as there is continuing pain and/or continuing need for medical treatment. Here, the claimant severely burned his right arm, right leg, and abdomen and was absent from work for a period of TPD. Claimant returned to work and later underwent permanency evaluations. Claimant argued that Taher and Arias applied as he had schedule and non-schedule injuries; however, "the employer [was] correct in noting that the issue [was] not whether claimant [was] simultaneously entitled to a schedule loss of use award and a non-schedule classification for injuries arising out of the same work-related incident, but whether the Board properly concluded that claimant's injuries were amenable to a non-schedule classification in the first instance." Here, the Board relied on claimant's treating doctor's opinion that the claimant's skin burns qualified as non-schedule permanent injuries, and the Third Department affirmed.

N.B.: LOMAD strikes again!

30. Occupational Disease

Matter of Valdez v. Delta Airlines, Inc., 197 A.D.3d 1382 (3d Dept., Sep. 2, 2021)

Decision Below: The claimant sustained a causally-related occupational disease and the date of disablement was set.

Affirmed: The Third Department will defer to the Board's decision to credit medical evidence and both medical and lay testimony, provided that substantial evidence supports the Board's decision. Here, the claimant alleged that she developed skin, respiratory, and other physical problems from the uniform that her employer required her to wear. The carrier contended that the claimant had a preexisting allergy to a chemical used in dyes and had had contact dermatitis before she ever wore the uniform in question. However, the Board credited the claimant's testimony that her symptoms worsened after she started wearing the uniform and improved when she switched uniforms. Additionally, the Board "credited the opinion of her occupational physician that, in view of the timing of claimant's symptoms, her known chemical sensitivity, her continuing environmental exposure to the chemicals in the uniform given that her coworkers still wore it, and the fact that a number of her coworkers had similar reactions to wearing it," found a causal link between the injuries claimed and the uniform. Therefore, as the Board is given considerable deference in weighing the evidence, the Third Department did not reverse the establishment of this claim.

See Also Matter of Bigdoski v. Bausch & Lomb, 197 A.D.3d 1379 (3d Dept., Sep. 2, 2021) (affirming the Board's finding that the claimant sustained a causally-related occupational disease, where the claimant testified that she developed wrist and elbow pain while typing, her doctor corroborated this, and, curiously, carrier's counsel did not dispute the medical with an IME or cross-examination).

Clancy v. Park Line Asphalt Maintenance, 191 A.D.3d 1088 (3d Dept., Feb. 04, 2021)

Decision Below: The claimant's claim for workers' compensation benefits was denied as the claimant did not sustain an occupational disease.

Reversed and Remitted: The Board wrongfully found that the claimant, who had a prior workers' compensation claim for the same occupational disease, had an active disabling condition when she went back to work, thus barring her from establishing an occupational disease based upon aggravation of a preexisting condition. The Court reasoned that nothing in the record suggested that the claimant's preexisting conditions prevented her from performing her job duties and there was no evidence that the temporary restrictions placed upon her, in the weeks immediately following her various surgeries, actually impacted her work at all. Therefore, the Board improperly concluded that the claimant had active and disabling impairments when she went back to work.

Gandurski v. Abatech Industries, 194 A.D.3d 1329 (3d Dept., May 27, 2021)

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

Affirmed: The claimant must establish a "recognizable link" between his condition and a "distinctive feature" of his job, to be entitled to comp benefits for an occupational disease claim. Here, the claimant alleged that he suffered binaural hearing loss while working in the asbestos removal industry. However, the claimant last worked in this industry nearly twenty years prior to filing a claim for benefits and the claimant did not inform his medical provider(s) that he had gone on loud job sites and attended loud rallies during his subsequent twenty years as an organizer, which the doctor understood as a job that involved no noise and took place in an office. Therefore, the Board correctly denied claimant's binaural hearing loss claim, where the claimant's medical evidence supporting causal relationship did not contain a full and accurate understanding of the facts; and thus, could not serve as the basis for establishment.

See Also Urdiales v. Durite Concepts Inc./Durite USA, 199 A.D.3d 1214 (3d Dept., Nov. 18, 2021) (affirming the Board's finding that the claimant did not suffer a causally-related occupations diseases, where the Board credited the employer's testimony that the claimant was not exposed to harmful inhalants and that the claimant had previously tried to organize employees to sue the employer).

31. Permanent Total

Arias v. U.S. Concrete, Inc., 198 A.D.3d 1052 (3d Dept., Oct. 7, 2021)

Decision Below: The claimant sustained a permanent total disability.

Affirmed: When claiming a permanent total disability, the claimant must prove that he/she is completely disabled and cannot participate in any form of employment. Here, the claimant raised PTD and simultaneously raised a TBI in addition to the already established body sites. The WCLJ directed the carrier to obtain an IME on causal relationship of the TBI and held the issue of a PTD in abeyance. Thereafter, the carrier obtained an IME, but the IME solely commented on permanency but did not directly address the alleged TBI. The WCLJ then amended the claim to include the TBI and found the claimant to have a PTD, as the IME and the claimant's treating doctor's permanency opinions did not substantially differ; thus, triggering this appeal. Ultimately, the Third Department affirmed, reasoning that, while the doctors submitted differing opinions on the claimant's various SLUs and the severity of the claimant's non-schedule injuries, both gave the claimant restrictions that would indicate that the claimant could not work. That is, the treating doctor opined that the claimant could not engage in any gainful employment, and the IME doctor opined that the claimant could perform less than sedentary work, based upon similar restrictions to those given by the treating physician. Thus, the Third Department felt that substantial evidence supported the finding of a PTD. Moreover, the Third Department found no abuse of discretion in the Board's denial of the carrier's request to cross-examine the treating doctor, as, in the Court's opinion, the permanency opinions did not differ from one another.

N.B.: Horrendous decision. The doctors submitted permanency opinions that wholly differed from one another; and the WCLJ, the Board, and the Third Department simply classified the claimant with a PTD without any due process.

Bugianishvili v. Alliance Refrigeration Inc., 195 A.D.3d 1365 (3d Dept., June 24, 2021) (affirming the Board's finding of a permanent total disability based on the IME doctor's findings).

32. Reclassification

Sanchez v. Jacobi Medical Center, 193 A.D.3d 1154 (3d Dept., Apr. 1, 2021)

Decision Below: Claimant had a permanent partial disability payable at a weekly rate of $211.56 during time periods when he had previously received various tentative rates.

Affirmed as Modified: The Board violated the claimant's due process rights by reclassifying the claimant as permanently partially disabled for periods that he had previously been classified as TTD. By way of background, following an earlier appeal, the Third Department instructed the Board to reclassify the claimant for periods that awards were at tentative rates. The Board reclassified the claimant for these periods with supporting medical evidence and the Third Department took no issue with it. However, the Board also reclassified the claimant for periods that he had already been awarded benefits at a TTD rate. In changing awards already made at a firm rate, "the Board abused its discretion by reclassifying claimant back to permanently partially disabled for the two time periods in question without providing him notice and an opportunity to be heard."

33. World Trade Center

Bodisch v. New York State Police, 195 A.D.3d 1274 (3d Dept., June 17, 2021)

Decision Below: The claimant was not a participant in the World Trade Center rescue, recovery and cleanup operations; thus, his claim for workers' compensation benefits was denied

Reversed and Remitted: Workers' Compensation Law article 8-A, which provides an easier path to workers' compensation benefits for injured workers who participated in the rescue, recovery, or cleanup operations following 9/11 should be liberally construed. Generally, the Board requires either direct or tangential participation in the rescue, recovery, or cleanup operations to qualify under article 8-a. Here, the claimant was stationed at a checkpoint that helped get construction, fire department, and family vehicles to and from the World Trade Center site. The Third Department found this to be "a tangible connection to the rescue, recovery and cleanup operations at the WTC site," and that article 8-A applied to the claimant. Thus, the Third Department reversed and remitted for further development of the record.

34. Stress Claims

Casey v. United Refining Company of Pennsylvania, 194 A.D.3d 1300 (3d Dept., May 20, 2021)

Decision Below: claimant did not suffer a causally-related mental injury.

Affirmed: A mental injury may be compensable only where the claimant proves that the stress that caused the mental injury was worse than the ordinary stress that similarly situated workers encounter in the ordinary work environment. Here, claimant worked at a convenience store and got in an altercation with a customer when she told him to leave for using foul language on the phone. The customer threatened her physically and left the store and the claimant later developed anxiety. Nonetheless, development of the lay record showed that these types of situations occurred frequently in this line of work and that the subject argument did not go beyond what the average convenience store clerk could reasonably anticipate on a somewhat regular basis. Therefore, claimant's claim for comp benefits relating to a mental injury, was properly denied by the Board.

Seeber v. City of Albany Police Department, 195 A.D.3d 1296 (3d Dept., June 17, 2021)

Decision Below: Claimant's claim for work-related stress and PTSD was barred by WCL § 2(7).

Affirmed: Psychological injuries that result from a lawful personnel decision are not compensable under WCL § 2(7). Here, the claimant alleged work-related stress and PTSD due to an incident in March 2019 and his subsequent firing and notification of charges relating to said incident. The Third Department affirmed the Board's decision to bar the claimant's claim under WCL § 2(7); however, did not go into much detail, as the claimant argued that his suspension did not constitute a disciplinary action or other enumerated personnel action under WCL § 2(7), despite arguing below that his suspension did qualify as a disciplinary action. Thus, the Court found that the claimant's argument was not preserved for review on appeal.

Reith v. City of Albany, N.Y. Slip Op. 07339 (3d Dept., Dec. 23, 2021)

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

Reversed: First, under the 2017 amendment to WCL § 10(3), certain first responders claiming psychological injuries absent corresponding physical injuries need not demonstrate that they suffered stress greater than that which usually occurs in their normal work environment. Here, the Board disallowed a firefighter's PTSD claim, stating that the amendment did not apply. They later amended their decision to find that the amendment did apply, only to deny the claimant's claim for failure to submit substantial evidence of causal relationship, stating that the claimant's medical provider did not provide sufficient detail of the alleged traumatic incidents. However, the Third Department disagreed, reasoning that "[t]he nature of each incident was understandably traumatic, obviating the need for further graphic detail." Specifically, among other things, the claimant testified to having witnessed "a suicide, a triple homicide of children, car accidents with fatalities," and even more graphic and disturbing events, as part of his employment as a firefighter. The claimant later developed extensive PTSD symptoms as well. Therefore, the Third Department found that the lack of specificity in the doctor's report(s) did not matter where the claimant's testimony demonstrated exposure to horrifying imagery, which precluded the need for more specificity in the medical

35. § 15(8)(d) Reimbursement

Quinn v. Pepsi Bottling Grp., Inc., 199 A.D.3d 1204 (3d Dept., Nov. 18, 2021)

Decision Below: The employer's third-party administrator is not entitled to reimbursement from the Special Disability Fund.

Affirmed: WCL § 15(8)(h)(2)(B) provides that any request that Special Fund reimburse them on a case with a date of accident/disablement before 7/1/07 must be submitted by the later of: (1) one year after the expense has been paid; or (2) one year from the effective date of the 2007 reform. Here, in 2009, the claimant, the employer and its' TPA, and Special Funds entered into a full and final Section 32 settlement, under which Special Funds agreed to reimburse the TPA in exchange for waiver of its WCL § 25-a rights. Ten years later, the employer and its TPA raised the issue that Special Funds never reimbursed them out of the Special Disability Fund. Consequently, Special Funds responded that their request was untimely, as they should have filed it within one year of the Board's approval of the settlement. Ultimately, the Board and the Third Department agreed, as the settlement did not address WCL § 15(8)(h)(2)(B)'s time limit for requesting reimbursement from Special Funds.

36. § 25-a "Dead on Arrival"

Verneau v. Consol. Edison Co. of New York, 2021 N.Y. Slip Op. 06531 (N.Y., Nov. 23, 2021)

Decision Below: Appeals from two consolidated cases where the Third Department found that Special Funds was liable for death benefits following, respectively, claimant's death from occupational asbestosis and the other claimant's compensable heart attack, that allegedly contributed to the claimant's later demise.

Reversed: Under WCL § 25-a(1-a), Special Funds will not be liable for a death claim filed after 1/1/14, even if they were previously found liable for the underlying workers' compensation claim, prior to the 1/1/14 cutoff date. Here, the Court of Appeals reviewed two death claims, where Special Funds was found liable prior to 1/1/14, but the claimants later died for reasons related to these previous workers' compensation claims, after 1/1/14. The Court focused on the provision in the statute, that "[n]o application by a self-insured employer or an insurance carrier for transfer of liability of a *claim* to the fund for reopened cases shall be accepted by the Board on or after the first day of January [2014]. That is, the Court reasoned that, since a death claim is considered a new claim that accrues on the date of death (regardless of whether the underlying claim that led to the death had previously been established), then, under the statute, Special Funds cannot be found liable in a death claim that accrues after 1/1/14, even if they had been found liable in the claim that the death later accrued from.

37. Judicial Conduct

Cottrell v. Kawasaki Rail Car, 191 A.D.3d 1082 (3d Dept., Feb. 04, 2021)

Decision Below: The WCLJ did not engage in misconduct warranting the recission of her decision.

Affirmed: The Third Department agreed with the Board that the WCLJ did not act with bias, have a conflict of interest, or deny the parties the right to present evidence, or violate applicable ethical standards, when she left the room to consult a colleague on whether she should transfer payments on one claim to another claim to avoid the 18-year foreclosure period set forth in WCL § 123.

38. § 123 Continuing Jurisdiction

King v. City of New York Parks and Recreation, 191 A.D.3d 1048 (3d Dept., Feb. 04, 2021)

Decision Below: The WCLJ lacked authority to reverse his prior decision.

Affirmed: WCLJs do not share the Board's continuing jurisdiction over each case, also they may not modify or change an award or decision previously issued – even if they issued the decision personally. Here, the claimant injured his knee in 1996, for which he received awards. Knee surgery was authorized in 1998 and the issue of authorization was thereafter raised, but the claimant failed to appear and never produced medical evidence as directed, and the case was marked no further action. In 2017, knee surgery was authorized and took place, and the claimant requested post-surgery awards. The WCLJ ruled that there had been a true closing of the claim and that WCL § 123 precluded further awards. The claimant appealed and the Board denied review, and the claimant never applied for full Board review or appealed to the Third Department. In 2018, the case was reopened to address a variance and the WCLJ rescinded his earlier decision that §123 applied and proceeded to issue awards to the claimant. On appeal the Board found that the WCLJ did not have the authority to rescind his prior ruling. The Third Department agreed, reasoning that, under WCL § 150, a decision of the WCLJ is deemed the decision of the Board unless the Board modifies or rescinds the decision, thereby vesting §123 jurisdiction exclusively with the Board panel or Full Board.

N.B.: WCLJ thought he had appellate jurisdiction over his own decision.

Galatro v. Slomins, 196 A.D.3d 949 (3d Dept., July 15, 2021)

Decision Below: The Board disallowed claimant's request to amend his workers' compensation claim to include a consequential injury.

Affirmed: Interesting case with a complicated procedural background. In summary, the claimant underwent a left knee arthroscopic surgery for a work-related injury and complained of chest pains during his recovery. He ultimately underwent two cardiac stent procedures and, based upon a claimant's IME report, claimed that he suffered a causally-related consequential myocardial infarction (MI). Following the carrier's submission of their own IME, the Board precluded the claimant's IME for a WCL § 137 violation *and* credited the carrier's IME. Thus, the Board disallowed the claimant's consequential MI claim. However, critically, the Board concluded its decision with language indicating that no further action was planned by the Board. Therefore, the claimant first tried to submit a new report from the same IME doctor, as the claimant contended that the Board simply precluded his original supporting evidence and did not deny the claim outright. The Third Department agreed and, in an earlier decision, held that the NFA declaration did not definitively deny the claimant's consequential MI claim. Upon remittal, the Full Board exercised its WCL § 123 authority to find that the claimant had been given a full and fair opportunity to produce medical evidence of causal relationship and failed to do so; the Board further removed the NFA language from the originally appealed decision and amended decision; thus, triggering this appeal, as the claimant maintained that the NFA distinction permitted him to produce new medical evidence of causal relationship. Upon appeal, the Third Department took no issue with the Full Board's removal of the NFA language under its WCL § 123 authority, as the phrase was erroneously included in the original decisions where the Board found no causal relationship of the alleged consequential MI based upon *both* the claimant's lack of supporting medical evidence due to his IME report being precluded under WCL § 137 *and* the Board's decision to credit the carrier's IME doctor's finding of no causal relationship. That is, not solely upon the Board's preclusion of the claimant's supporting IME report.