New York Appellate Summaries

- Workers' Compensation -

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Cory A. DeCresenza concentrates his practice on workers' compensation litigation, drawing from significant experience in general and appellate litigation. He has experience handling trials at the New York State Workers' Compensation Board, including lay and medical testimony on all issues of controversy, entitlement to indemnity or medical benefits, fraud issues, and extensive administrative appeals experience. Cory has advised clients on all aspects of workers' compensation claims handling, from claims filing through closure by settlement or alternative disposition, with a focus on early, cost-effective claims resolutions.

Another significant portion of Cory's practice involves drafting appeals and rebuttals to the New York State Supreme Court, Appellate Division, Third Department and Court of Appeals above the Workers' Compensation Board level.

Prior to entering private practice, Cory was a clerk for the New York State Appellate Division, Fourth Department. He has extensive experience analyzing and writing about the latest rulings, developments, and trends impacting the defense of workers' compensation claims. Cory has been recognized as a Rising Star by the Upstate New York Super Lawyers and is a contributor to Law360. When not practicing law, Cory enjoys cooking, baking, and playing with his two rambunctious border collies, Hazel and Mona.

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Bola Awujoola has advised and represented corporate entities and individual clients at various levels of the dispute resolution process. While starting as an in-house counsel for a global corporate services firm, based in Lagos, Nigeria, Bola subsequently garnered experience spanning close to a decade in complex defense litigation and appeared regularly before all superior courts of record in Nigeria, including the apex Supreme Court. In more recent years, Bola has focused his practice on providing counsel and representation to clients at all stages of workers' compensation litigation — from intake to trial and appeal. Bola also defends employment liability, discrimination and civil rights/public sector claims in federal court. Thoroughness and passion are the hallmarks of Bola's litigation approach.

Bola's span of experience is extensive and his scope of knowledge is considerable. He graduated with Merit from Swansea University, Wales, United Kingdom where he earned his Master's in International Commercial and Maritime Law. He also holds a Bar Qualifying Certificate from the Nigerian Law School and a Bachelor of Laws (LL.B) from Olabisi Onabanjo University, Nigeria.

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TABLE OF CONTENTS

COURT OF APPEALS CASES

SELECTED APPELLATE CASES FROM THE THIRD DEPARTMENT AND COURT OF APPEALS

We hope you find this summary of the appellate-level cases pertaining to New York Workers' Compensation proceedings for the first half of 2022 useful. These summaries are meant to be a carrier-centric review of the appellate cases that act as binding precedent on the Workers' Compensation Board. Garden variety, repetitive, and hyper-specialized cases are not summarized here. It should be noted that all cases have their own individual fact patterns which may impact how or even whether a particular set of statutes or cases apply to a given matter. Consequently, these summaries are intended for general use only and are not intended as legal advice or instruction and you should discuss questions of law with your legal representative.

APPELLATE DIVISION, THIRD DEPARTMENT SUMMARIES

JANUARY 2022

Murphy v. New York State Courts

Topics: Death Claim; Causal Relationship; Article 8-A

The Holding: Board disallowance of claim reversed, matter remitted for further consideration.

The Facts: The decedent, a court officer employed by the New York State Courts, participated in rescue, recovery, and cleanup operations from September 2001-February 2002 and was diagnosed with carcinoma in 2015. He registered his participation under Article 8-A in April 2017 before passing in November 2017. His surviving spouse alleged that claimant's passing was due to his work at the WTC site. The WCLJ established the claim for a causally-related death before the Board on administrative appeal disallowed the same. The claimant's treating physician, Dr. Ploss, was cross-examined but no additional contrary evidence by or IME was offered by the carrier.

The Law: Claimant bears the burden of proving by competent medical evidence a causally-related condition or death. Here, claimant produced evidence that decedent was in a "bucket brigade" for months following the attack and Dr. Ploss reasonably opined that claimant's lung issues were worsened by claimant's exposure to fumes, chemicals, and carcinogens while working at the WTC site notwithstanding claimant's smoking history and work as a volunteer firefighter. The Board's decision to disallow Dr. Ploss' opinions for lack of citation to "studies or other evidence" and being "speculative" was improper.

The Takeaway: Declining to obtain a conflicting IME and arguing solely the credibility of the claimant or claimant's physicians is a tough strategic call to be made in files. If the claimant's doctor is seasoned in testimony and provides some substantial evidence supporting that his or her finding be credited, the Board is likely to credit that physician and even where the Board does not, the Third Department may be willing to reverse that decision.

Moore v. U.S. Xpress Inc.

Topics: Arising Out of and in the Course of Employment

The Holding: Board determination that accident did not arise out of or in the course of employment affirmed.

The Facts: Claimant was a truck driver who alleged an accident on 10/26/15 and underwent emergency surgery in February 2016 due to symptoms. He filed a claim alleging that the injury occurred when he was "about to exit" his truck. Ultimately, he would testified that he felt a pain in his back on 10/15/15 which subsided, left work for non-injury related reasons, returned to work on 10/25/15, and claimant maintained he could no longer drive. Claimant reported the injury and did not return to work, though cleared to do so by his provider. Claimant's employer provided

testimony that claimant had ongoing issues with his back that were not work related and claimant's medical notes reflected pain starting in October 2015 when claimant "rolled over in bed." Moreover, claimant's physician testified that the emergent surgery in February 2016 was likely due to infection, not trauma, though the injury may have "indirectly contributed" to the abscess.

The Law: Claimant carried the burden of proving that it was more likely than not that his injury was causally-related to his work activities and the discussion from his doctors opining that it was "possible" or "unlikely" that the surgery was related to the alleged injury was not sufficient.

The Takeaway: The case serves as a valuable reminder of the value of a diligent claims investigation – obtaining the medical evidence that claimant's back pain started while rolling over for bed, presenting the testimony of the employer witness who confirmed that claimant's back issues were unrelated, and rigorous cross-examination of the treating physicians provided a solid basis for a denial on this claim.

McElroy v. Siena College

Topics: Section 18

The Holding: Board decision that Section 18 did not serve as a bar to claim affirmed.

The Facts: On 7/1/19 claimant filed a claim alleging that on 5/3/19 while stepping down on a step, he felt a pain in his right foot and ankle. His C-3 indicated that he gave notice on 6/17/19 and started treating 6/18/19. The carrier alleged improper Section 18 notice as it was provided in excess of 30 days. The WCLJ and Board found no prejudice by the late notice and established the claim.

The Law: Generally under Section 18, a claimant must provide written notice within 30 days unless notice could not be given, the employer had knowledge, or there was no prejudice, and it is the claimant's burden to prove no prejudice. Here, the delay was approximately two weeks and the employer was not hindered from investigating the unwitnessed accident, obtaining an IME, and examining the medical professionals. The Board was within its authority to excuse the untimely notice.

The Takeaway: Unfortunately, there are numerous exceptions to the Section 18 defense of timely notice within 30 days. While in law it is the claimant's burden to prove lack of prejudice, oftentimes it is best practice for employers and carriers to obtain evidence of prejudice (i.e. camera footage being overwritten, inability to discuss the claim with witnesses) to bolster the defense.

Miller v. Mo Maier Ltd.

Topics: Claim Reopening

The Holding: Board did not improperly refuse to decline to reopen claim.

The Facts: Claimant's spouse (the decedent) died in 2012 due to mesothelioma. One of parties on notice, Mo Maier Ltd and its carrier, appeared at one hearing, but subsequently failed to appear during the trial proceeding on compensability and the claim was ultimately established against that entity. The carrier appealed, arguing that there was no evidence that decedent was exposed to asbestos while working for Mo Maier Ltd. The Board on administrative appeal found that the carrier failed to use the proper RB-89 and declined the appeal. While the appeal was pending, the carrier requested reopening of the file under Section 123 in the interest of justice on both coverage and whether claimant reached a third-party settlement without consent. The Board did permit reopening on the third-party issue, but not coverage. The carrier again moved for reopening and reconsideration of coverage in a subsequent proceeding.

The Law: The Board has jurisdiction to reopen claims in the interest of justice under Section 123 and the determination is reviewed for an abuse of discretion. Here, the carrier had appeared at one hearing but did not appear at the trial hearing where compensability was found. The carrier's applications to reopen in the interest of justice could reasonably be denied under these circumstances.

The Takeaway: No matter how apparent it is to a carrier that there is no coverage or no liability, sending legal representation to hearings and ensuring filing of defense pleadings is always prudent. Even adjusters sending correspondence indicating "wrong carrier" may not have any legal effect and relying on this strategy is fraught with danger. Non-appearance on cases may lead to findings which are difficult if not impossible to appeal where defenses such as coverage or lack of an accident or employment relationship may have been successful.

Lazalee v. Wegman's Food Markets

Topics: Procedure; Cross-Examination

The Holding: Board did not improperly decline opportunity for cross-examination of physician.

The Facts: Claimant, a truck driver, had an established 2018 claim for an occupational disease for which he had surgery in October 2018 to repair a right trigger thumb and carpal tunnel syndrome. In February 2019, claimant had an approved surgery involving his left hand for carpal tunnel syndrome. Claimant was paid at TTD throughout both surgeries until he returned to work in April 2019. Claimant would later go on to have an approved left thumb and little finger surgery in October 2019 and was out of work until January 2020. The employer paid the claimant at TTD during that period. At a January 2020 hearing, the employer accepted the conditions of bilateral CTS and left hand thumb and little finger, but requested for the first time an opportunity to cross-examine the claimant's doctor on degree of disability post the October 2019 surgery. The WCLJ denied this based on a lack of conflicting IME or medical evidence.

The Law: Generally under 12 NYCRR 300.10, the carrier does have the right to cross-examine medical witnesses, but this can be waived if not requested in a timely manner. Here, the employer's acceptance of the conditions, voluntary payments, and belated request to cross-examine the doctor coupled with the claimant's ongoing symptomatology rendered the request untimely.

The Takeaway: When challenging an issue such as degree of disability, absent a conflict among multiple treating doctors in the record, obtaining an IME with a competing opinion on degree of disability is generally best practice. Similarly, raising the issue as early as possible in the litigation is reasonable practice to avoid an outcome similar to the one at hand.

Sun v. State Insurance Fund

Topics: Claim Reopening; Extreme Hardship Redetermination

The Holding: No error in Board's determination not to reopen proceedings.

The Facts: Claimant had a 2002 claim for occupational bronchitis where claimant was classified with a 40% PPD/LWEC entitling her to $78.06 per week and a subsequent 2008 claim involving the back, right shoulder, and right elbow in which she was classified with a 40% PPD/LWEC entitling her to 275 weeks at $150.00. The PPD benefits were apportioned between the two files. In January 2020, claimant sought reopening seeking financial assistance, arguing that her conditions had worsened and she was unable to afford living necessities. The Board found that there was insufficient evidence of reopening.

The Law: A request for reopening must set forth facts showing a "material change in the claimant's condition" and the Board has discretion to determine whether that showing is made. Here, there was no medical evidence in support of claimant's assertion of a worsening. Consequently, the request was properly denied. As to an extreme hardship redetermination, claimant did not move to seek this review within one year of the expiration of benefits and was not classified with a 75% PPD/LWEC to qualify. Consequently, the Board properly declined reopening.

The Takeaway: Reopening is generally a matter committed to the Board's discretion, however, claimant must make some prima facie showing of a material change in medical condition to support reopening and must qualify and timely seek benefits for an "extreme hardship."

Molina v. Delta Airlines

Topics: Occupational Disease

The Holding: Determination establishing claim for an occupational disease affirmed.

The Facts: Claimant was a flight attendant who began to have respiratory issues after wearing an employer-provided uniform in July 2018 which worsened over the course of a year. In June 2019, claimant's doctor opined that her symptoms were consistent with an allergic response to the uniform and claimant's symptoms abated on no longer wearing the same. Claimant filed a claim for cough, dyspnea, and respiratory ailments. The carrier's IME maintained that the uniform was not the cause of the symptoms and the carrier produced a toxicology expert who opined that the levels of chemicals in the uniform would not affect sensitive persons. The WCLJ initially disallowed the claim, but the Board reversed and established it on claimant's medical evidence.

The Law: An occupational disease derives from the nature of the employment, not a condition peculiar to claimant's place of work and claimant must prove a "recognizable link" between the condition and a feature of employment. Here, the Board was entitled to credit the testimony that claimant's symptoms began and abated in connection with claimant's use of the uniform and discredited the employer's toxicology expert based on batch sampling of the uniform as opposed to a test on the claimant's specific uniform. Claimant's medical provided a reasonable probability as to causal connection between the uniform and her symptoms.

The Takeaway: As usual, credibility determinations as between competing medical experts remains within the Board's discretion, notwithstanding the existence of contrary evidence.

FEBRUARY 2022

Timperio v. Bronx-Lebanon Hospital

Topics: Accident Arising Out of and in the Course of Employment; Assault

The Holding: Board's establishment of claim reversed.

The Facts: A physician who worked in the same hospital as claimant for nearly six months allegedly sexually harassed another employee, brought an AR-15 rifle to the hospital, set fire to a floor, shot claimant Justin Timperio (a first-year medical resident), and shot other members of the medical staff before ultimately taking his own life. The carrier, the State Insurance Fund, filed a FROI regarding Timperio's injury. Claimant filed a civil action against the hospital in the Southern District of New York on multiple theories. In the federal court action in 2019, the district court denied a motion for summary judgment but, in part, concluded that claimant's injuries did not arise out of and in the course of employment because there was no evidence that the shooting arose from a work-related difference. The hospital moved to stay the federal court action pending proceedings before the Board.

In 2020, the WCLJ and Board concluded that the Board had primary jurisdiction and did not need to defer to the federal court's action and concluded that Timperio did not rebut the Section 21 presumption that the claim arose from employment.

The Law: The Board is vested with primary jurisdiction of the mixed question of law and fact as to whether the claimant sustained an accident arising out of an in the course of employment – as such, it properly determined that it had jurisdiction. On that analysis, under Section 21(1), an assault which arose in the course of employment is presumed to have also arisen from the employment absent substantial evidence that the assault was motivated by purely personal animosity. Here, however, the shooter was not Timperio's coworker, did not know him, and no known reason was provided for the attack and there was no known animus between the two workers. This was sufficient to rebut the Section 21 presumption.

The Takeaway: The Board generally has primary jurisdiction on determining issues such as employee-employer relationship given its special expertise. For assault claims to be compensable, there must generally be some minimal "nexus" between the motivation for the assault and

employment. Here, where the motivation appeared to be wanton destruction with no specific target or work-related animus between the shooter and injured worker, the claim was disallowed.

Mendrok v. NYCTA

Topics: Accident Arising Out of and in the Course of Employment

The Holding: Decision affirmed that claimant did not have an incident arising out of and in the course of employment.

The Facts: Claimant, a bus operator, alleged an injury to his back when he hit a pothole at 5:30 p.m. on 9/25/18 along an intersection. Due to a technical error, only the footage from the 15 minutes preceding the incident was available. The WCLJ initially established the claim. The Board, however, was able to review the entire surveillance video and disallowed the claim as the video contradicted claimant's version of events.

The Law: The Board is generally vested with fact finding authority and ability to determine credibility of the witnesses. The Board was permitted to credit the viewing of the DVD showing claimant uneventfully driving and testimony of claimant's supervisor that he subsequently drove to the location where the incident occurred and did not see a pothole.

The Takeaway: Video surveillance evidence can be a finicky tool before the Board. The Board issued Subject Number 046-237 directing that video evidence must be on a CD/DVD in .wmv or .avi format. Obtaining video evidence of an alleged injury is a potentially powerful tool to use in obtaining disallowance of a claim.

Fuller v. NYCTA

Topics: Permanency; SLU

The Holding: Board determination that claimant is entitled to an SLU affirmed.

The Facts: Claimant worked in various roles for the employer for 24 years as a track worker, train operator, and maintenance worker, but retired. He then proved an occupational disease for the bilateral shoulders, wrists, and knees. The Board concluded that he had a 30% SLU of the right hand, 35% SLU of the left arm, 30% SLU of the right arm, 40% SLU of the left leg, and 37.5% SLU of the right leg. The employer contended that claimant voluntarily removed himself from the labor market by retirement.

The Law: An SLU is an award for anatomical or functional loss designed to compensate for loss of earning power and is not allocable to any particular period of disability. It is independent of the time a claimant loses from work. As such, attachment to the labor market is irrelevant to SLU.

The Takeaway: It is black letter law that the issue of attachment to the labor market is entirely irrelevant to the claimant's receipt of an SLU award.

Guna v. Delta Airlines

Topics: Accident Arising Out of and in the Course of Employment

The Holding: Board decision to establish claim affirmed.

The Facts: In January 2020, claimant, a flight attendant, alleged that chemicals in her work uniforms resulted in headaches, eye and skin irritation, and upper respiratory and stomach issues. The WCLJ established and the Board affirmed based on the medical evidence through an accident either causally-related by the claimant's uniform or exposure to coworkers' uniforms. Claimant testified that prior to the uniform change in May 2018, she had no issues and that they arose following the uniform changed, including rashes and skin issues with progressive symptomatology. Claimant's doctors testified to causal relationship based on claimant's examination and report, the timeline of symptoms, and the abatement of symptoms following her removal from the workplace.

The Law: The Board is vested with wide discretion to determine causal relationship and its findings will not be disturbed if supported by substantial evidence. The medical evidence here was sufficient to support the Board's determination.

The Takeaway: The Board has extremely wide discretion on the issue of causal relationship. Appeals on this issue generally require that the claimant's medical evidence be supported almost entirely by speculation or that there is no supporting basis for their opinion.

Strack v. Plattsburg City School District

Topics: Permanency; SLU

The Holding: Finding that claimant was entitled to a 0% SLU of the left leg reversed.

The Facts: In 2016, claimant sustained a left intertrochanteric hip fracture and injury to the left wrist when she fell to the ground when a door handle broke off a door she was attempting to open. She treated with an IM nail of the left hip. The claim was established ANCR left hip and left wrist and claimant received 10 weeks of TTD benefits. Claimant was seen by two competing IMEs on permanency. In 2018, Dr. Saunders concluded a 60% SLU and Dr. Petroski found a 0% SLU. The 60% SLU was initially found by the WLCJ, but the Board rescinded that finding, maintaining that a permanency determination could not be made pending updated x-rays under Section 6.5(8) of the Permanent Impairment Guidelines and directed a further visit with treating physician Dr. Volk. In 2020, Dr. Volk did not provide a permanency opinion. The WCLJ concluded that because Dr. Volk provided no opinion and the 60% SLU opinion was previously not in accord with the permanent impairment guidelines, the 0% SLU would be imposed. That was affirmed on appeal. Claimant appealed, arguing that Dr. Petroski's 0% opinion was not based on review of the updated x-rays.

The Law: Generally, the determination of whether a claimant is entitled to an SLU is factual question for the Board to resolve and the Board is vested with discretion to credit or not credit the physicians. Here, Special Consideration 8 notes that permanency for hip fractures must occur at least two years post injury or hardware insertion. Here, the permanency opinion credited did not rely on any review of the updated x-rays in either the narrative or deposition testimony. Consequently, his opinion could not be substantial evidence and the Board's determination was to be rescinded.

The Takeaway: Strict attention to the Board's special consideration in hip fractures and other extremity injuries should be paid. If the opinion of one or more medical professionals does not take into account the special considerations specified by the Permanent Impairment Guidelines, this will open up a line of attack on either the claimant's or carrier's permanency opinion.

Simmons v. Glens Falls Hospital

Topics: PPD/LWEC

The Holding: Board determination on PPD/LWEC affirmed, but matter remitted on question of attorney's fees.

The Facts: Claimant, a nuclear medicine technologist, sustained a 2005 injury to the back and right leg and was classified with a 25% PPD/LWEC in 2013. No ongoing indemnity award was made as claimant was working. Claimant took a similar position to her pre-injury job in 2008 and worked until she stopped working in 2017. At that time, the Board concluded that she was entitled to reduced earnings before she underwent a lumbar laminectomy in January 2018. Following a new litigation on permanency/change in condition, claimant was reassessed with a 50% PPD/LWEC with a $4,000 counsel fee awarded. Claimant's counsel requested an additional attorney's fee of $1,350 on appeal. The Board reduced the PPD/LWEC to 25% and rescinded the counsel fee. The claimant's application for reconsideration/full board review was denied.

The Law: In cases involving PPDs, the Board must consider the claimant's medical condition, nature and degree of the work-related impairment, claimant's functional capabilities, and claimant's education, training, skills, age, and English proficiency and the Board is empowered to make credibility determinations on medical issues. Here, the Board was free to discredit claimant's testimony that following her 2018 surgery her condition worsened in favor of medical evidence that claimant's condition ended up being "about the same" or fluctuated pre- and post-surgery and that claimant's ADLs had not significantly changed. The Board otherwise properly weighed claimant's vocational factors including age, education level, inability to perform her prior job or use Microsoft Office, vocational certifications, driver's license, computer/internet skills, and stated inability to drive long distance to be neutral factors. The Third Department declined to second guess the Board's determination of the weight of these factors. With respect to the attorney's fee, the Board improperly declined the fee based on the claimant's counsel's failure to increase the LWEC alone – this was improper and arbitrary in light of the benefit received by claimant by virtue of representation and claimant's overall economic benefit in receipt of representation.

The Takeaway: Attorney's fee issues are generally less relevant to carriers, but notably, determinations on PPD/LWEC are more often than not affirmed by the Third Department absent a showing of a significant legal error or wholly irrational weighing of evidence on the PPD/LWEC factors.

Coll v. Cross-Country Construction

Topics: Reduced Earnings

The Holding: Claimant not entitled to indemnity awards post COVID layoff.

The Facts: Claimant had an established neck and left shoulder claim from September 2016 while working as a laborer for a cement company and received ongoing TPD benefits. In February 2020, he returned to light duty work at reduced earnings. He was laid off in June 2020 due to COVID. The WCLJ and WCB concluded that claimant's lost time was wholly unrelated to claimant's injuries and suspended awards.

The Law: A claimant's unemployment or withdrawal from the labor market are not voluntary if the work-related disability "caused or contributed to" the departure from employment and the Board is entitled to make credibility calls. Here, the claimant's loss of earnings was solely due to economic considerations and not due to his disability.

The Takeaway: The reasons as to when and why a claimant receiving TPD/RE benefits leaves any employment should be carefully scrutinized to determine whether the claimant's disability played any role in the departure and to investigate claimant's entitlement to awards.

Joseph v. Historic Hudson Valley

Topics: LMA

The Holding: Finding that claimant failed to demonstrate LMA affirmed.

The Facts: Claimant was injured in August 2017 and returned to work in November 2017 before being laid off in 2018 for reasons unrelated to her disability stemming from multiple injuries. She sought reinstatement of benefits based on a showing of labor market attachment. However, while claimant testified that she met with vocational vendors such as the Office of Adult Career and Continuing Educational Vocational Rehabilitation, SCORE Westchester, Workforce 1, and Department of Labor, there was little supporting documentary evidence as to the extent of her participation, claimant produced no job searches, and had not actually engaged in retraining.

The Law: It is the claimant's burden to show evidence of an appropriate job search in connection with her claim when she is temporarily partially disabled. Evidence can be of an independent job service, use of a job location service, or evidence of retraining. Here, the Board was empowered to find that claimant's job search was inadequate.

The Takeaway: Notably, the claimant was pro se in this claim suggesting that claimant failed to make any substantial documentary showing that could possibly have warranted a different

outcome. Nonetheless, it serves as valuable precedent that a claimant's bare testimony as to a job search unsupported by documentary evidence may not be sufficient to carry claimant's burden.

Patalan v. PAL Environmental

Topics: Occupational Disease

The Holding: Board finding that claimant did not have an occupational disease affirmed.

The Facts: Claimant, an asbestos handler from 1991-2018, alleged work-related injuries to the back, neck, knees, wrists, and left foot due to repetitive use from lifting, carrying, pushing, pulling, and kneeling in connection with his job duties. The carrier controverted the claim, citing treatment as early as 2003. The WCLJ disallowed the claim for lack of an OD finding no proof of a "causal link" between his work activities and injuries.

The Law: An occupational disease is a disease that results from the "nature of the employment and contracted therein" and does not derive from a "specific condition peculiar to an employee's place of work nor from an environmental condition specific to the place of work." To establish an OD, the claimant must prove a link between the condition and a "distinctive feature of employment." In this case, the claimant's treating physician had no adequate knowledge of claimant's specific job duties, including specific job duties and time spent – generally referring to "repetitive activities" is not sufficient.

The Takeaway: In challenging occupational diseases, getting specific, detailed descriptions of claimant's job activities (through written job descriptions submitted with a PH-16.2 or developed in testimony) is a key factor in determining the issue of a "recognizable link." Those details should also be developed through testimony with the medical professionals with a focus on the time spent or repetitions of each physical job duty.

Yolinsky v. Village of Scarsdale

Topics: Medical Treatment; Causal Relationship

The Holding: Determination that claimant's surgery was not related to claim affirmed.

The Facts: Claimant, a firefighter, had a 2016 injury involving the right knee lost two weeks of work and periodically sought PT. In May 2017, an MRI showed no ligament tears and only a small Baker's cyst and in August 2017, one of his doctors noted his symptoms had "essentially resolved." 17 months later, following no updated treatment, claimant experienced pain in the knee playing volleyball and a January 2019 MRI showed a large chondral defect and moderate to large cyst.

The Law: Assessments of causal relationship are within the Board's determination on credibility. Even though the carrier's consultant in this claim did not review the actual MRI images and relied on the reports, the Board was entitled to discredit claimant's doctor's opinion that the enhanced

findings in the 2019 MRI were related to the 2016 injury which "essentially resolved" with minimal treatment and lost time.

The Takeaway: This case is notable in that the IME was not faulted for not reviewing the images, which claimants generally don't always bring to IMEs and are not filed in eCase. In any event, the case also shows the value in obtaining diagnostic studies to address causal relationship of specific complaints – here, the enhanced findings coupled with the 17 month gap in treatment served as a solid basis for controversy of treatment.

Powers v. State Material Mason Supply

Topics: Occupational Disease; 13-a/Influence of Doctors

The Holding: Board determination that claimant did not sustain a causally-related OD affirmed.

The Facts: Claimant, a delivery driver, filed a claim in 2020 for alleged repetitive stress injuries to the back. Claimant testified that his job included driving a truck, carrying masonry, and operating a forklift that required him to bend, push, and pull. One of claimant's doctors received a note from claimant's counsel describing claimant's job duties, maintaining an onset date of symptoms in 2019, stating that "we will need prima facie medical evidence," including a "diagnosis and a statement indicating whether in [his] opinion the diagnosis is causally related," deferring to the doctor's expertise, thanking him for his "anticipated cooperation." The doctor ultimately confirmed that claimant had rheumatoid arthritis since 2012 (despite the letter noting an onset in 2019), felt that the work "contributed to" the disease, and that claimant had multilevel DDD superimposed on congenital spinal stenosis. The doctor also ultimately testified he did not know how long claimant worked. The WCLJ established, but the Board reversed and disallowed based on failure to prove a causally-related disease and noted that the claimant's doctor's opinion was incredible.

The Law: An occupational disease is a disease that results from the "nature of the employment and contracted therein" and does not derive from a "specific condition peculiar to an employee's place of work nor from an environmental condition specific to the place of work." To establish an OD, the claimant must prove a link between the condition and a "distinctive feature of employment." Additionally, Section 13-a(6) generally prohibits improper influencing of the medical opinion of any physician examining a claimant and parties should avoid "even the appearance" of attempting to influence. Here, the Board was within its discretion to discredit the treating physician and find no causal relationship.

The Takeaway: Letters to any medical professionals, treating doctors or IMEs, should be carefully constructed so as not to even appear to have any semblance of influence. Misrepresentation of material facts is a strong basis to have the medical opinion disregarded if not for further penalty against the person providing the improper correspondence.

Mogilevsky v. NYCTA

Topics: Permanency; Hearing Loss

The Holding: Finding of a 3.3% binaural hearing loss reversed and remanded for further development.

The Facts: Claimant worked as a train car operator for 20 years and after retirement, filed a claim alleging occupational hearing loss. The WCLJ established and found a 3.3% SLU for hearing loss. Claimant was seen by Dr. Alleva who noted a 45.3% SLU and IME Katz who opined a 3.3% SLU. The Board rejected Dr. Alleva's opinion on the basis that there was no explanation provided as to how claimant could work with no deficits despite nearly 50% hearing loss.

The Law: While the Board's authority to accept or reject medical evidence is generally deferred to where it is supported by substantial evidence, here, there was no evidence that Dr. Alleva was in fact asked where or how claimant could work with a 45.3% SLU nor was there any testimony whether such a loss would impair claimant's job duties.

The Takeaway: This is one of the rare cases in which the Board's assessment on medical professionals was remanded for lack of substantial basis. While the line of attack on Dr. Alleva appears to be a credible one, the defense appears not to have been flushed out in the record sufficiently to uphold the Board's opinion.

Kretunski v. Citywide Environmental Services

Topics: Section 28

The Holding: Board finding that claim was disallowed under Section 28 affirmed.

The Facts: Claimant filed a claim for repetitive stress injuries on July 18, 2019 alleging work as an asbestos handler for 20 years with PFME found for various sides. The WCLJ set date of disablement as June 27, 2017 as the date when claimant knew or should have known that his condition was related to his employment and disallowed the claim as being filed outside of the two year statute of limitations. Here, claimant first treated in June 2017 when he saw a pain specialist, but testified that he was aware of his medical condition 5-6 years earlier before he stopped work in June 2019. The claimant and employer disputed how much he lifted and the Board discredited testimony that he did not discuss his job duties with his doctor. Moreover, the pain specialist ultimately testified that he did not address causal relationship of all sites of injury.

The Law: Under Section 28, the claim must be filed within 2 years after a date of disablement and after the claimant knew or should have known that the disease was related to employment. The Board has wide latitude in determining date of disablement under Section 28, including first causally-related diagnosis, first lost time, first date claimant was taken out of work, or first day claimant stopped work. Moreover, claimant bears the burden of showing a causal link between his disease and work activities. Here, the claimant's doctor failed to demonstrate the necessary causal link and the Board did not err in setting date of disablement.

The Takeaway: Board determinations on causal relationship are difficult to overturn for either party at the Third Department. In cases involving Section 28, the record should be fully developed

on all potential dates of disablement, including first symptoms, first awareness of causal relationship, first diagnosis, and first lost time.

MARCH 2022

Ippolito v. NYC Transit Authority

Topics: Permanency; Procedure

The Holding: Board decision on permanency reversed and remanded for further consideration.

The Facts: Claimant, a track supervisor, had an established OD to the elbows, ankles, knees, and bilateral carpal tunnel. Claimant's doctor found a variety of SLU opinions to each site, including a 25% SLU of the hands. The SIE waived its opportunity to obtain an IME, but challenged the claimant's doctor's opinion on the basis that, inter alia, the SLU opinion did not comport with the Permanent Impairment Guidelines and that the findings were inconsistent with claimant's pain complaints. The WCLJ imposed the SLU opinions of the claimant's doctor, but reduced the hand SLU to 10% each hand. The carrier appealed and the Board affirmed, but appears not to have issued a substantive explanation addressing the carrier's contention.

The Law: The Board generally may not reject an uncontroverted opinion that is "properly rendered," but must address legal arguments made challenging whether the medical opinion was properly given so as to avoid due process issues. Consequently, the matter must be remanded.

The Takeaway: Though the decision was not specified, it appears likely that the Board issued a summary decision adopting the WCLJ's decision. More importantly, the case is a reminder that even where no contrary IME is obtained (or worse, precluded), the carrier has a legal ability to challenge the validity of the medical professional's opinion per the Permanent Impairment Guidelines.

Reyes v. H&L Iron Works Corp.

Topics: Section 114-a Fraud

The Holding: Board determination on Section 114-a fraud and lifetime discretionary penalty affirmed.

The Facts: Claimant sustained multiple injuries in 2016 and the carrier subsequently raised Section 114-a on the issue of undisclosed private business activities during receipt of benefits. Specifically, claimant testified that following his accident he worked as a DJ on 5 occasions, but did not do any lifting. Surveillance video, however, depicted claimant lifting heavy equipment, claimant failed to disclose the RTW to four doctors/IMEs, and at least one doctor maintained that there was evidence of symptom magnification.

The Law: Section 114-a applies where a claimant knowingly makes a false statement or representation as to a material fact for the purpose of obtaining benefits. The Board's determination on Section 114-a will be upheld if supported by substantial evidence.

The Takeaway: The double-whammy of working while collecting benefits and misrepresenting physical capacity as documented in video was likely more than a substantial basis for upholding the penalty at issue.

APRIL 2022

Garland v. New York City Department of Corrections

Topics: Scheduled Loss of Use; Permanency

The Holding: Decision affirmed that claimant was not entitled to SLU.

The Facts: Claimant had an established 2011 claim for the back, bilateral shoulders, and right elbow, wrist, knee, and foot. Claimant also had a prior 2009 claim for the back, right elbow, and right shoulder for which she obtained a 25% SLU of the right arm. Following litigation in the 2011 file, claimant was found to have a 60% PPD/LWEC in 2019 and was not entitled to an SLU award. Claimant subsequently moved to reopen under the Third Department decision in *Arias*. In 2020, the Board reconsidered permanency in the 2011 file and confirmed that claimant could be entitled to an SLU, notwithstanding the PPD/LWEC classification. The WCLJ, however, credited an IME finding a 20% SLU to the right arm and no SLU to the other sites and no permanency of the back. Consequently, the claimant was not found to have any increase in the SLU.

The Law: The Board is vested with the power to resolve credibility determinations and is not bound by prior credibility determinations. Here, the Board was not precluded from crediting the IME on the SLU issues, notwithstanding the prior credit of claimant's doctor with respect to a PPD determination for the spinal injury.

The Takeaway: *Arias* remains good law and a basis to reopen certain claims involving both PPD and SLU determinations. Depending on the medical evidence previously set forth, carriers may be able to obtain updated opinions on permanency on reopening.

Blanch v. Delta Air Lines

Topics: Consequential Injury; LMA

The Holding: Claim for consequential postconcussion syndrome with headaches and anxiety denied, but Board partially erred in determination on awards.

The Facts: On 6/20/18, claimant was a flight attendant and she bumped her head on the corner of an overhead bin. The claim was accepted for a head injury and claimant initially found to be entitled to TTD benefits. In May 2020, the carrier raised LMA and claimant raised consequential PCS with anxiety and headaches. The WCLJ disallowed the claim and found a voluntary removal from the labor market subsequent to 7/7/18 based on claimant's testimony as to why she was out

of work and failure to provide a job search. Notably, claimant's neurologist testified, among other things, that he did not see neurological deficit, that her brain MRI was negative, suspected that claimant's symptoms were coming from "emotional amplification," and that he had expected her to recover from a "mild concussion."

The Law: The claimant bears the burden of proving causal relationship or a condition between the employment and claimed disability and the Board is vested with substantial authority to resolve disputes. The treating physician's testimony was sufficient to find that claimant's alleged consequential condition was not causally-related. With respect to the lost time award, the claimant bears the burden of proving attachment, but the "appropriate date of a finding of no labor market attachment is not the date the issue is raised, but rather the date that evidence showing a lack of labor market attachment is submitted." Here, the carrier did not raise the issue of LMA until May 2020 and claimant's testimony occurred on 7/13/2020. Consequently, the Board erred in rescinding awards from 2018 to July 12, 2020.

The Takeaway: The determination on the PCS/anxiety/headache is garden-variety, but the notable takeaway from this case is the date of suspension of awards. Carriers would do well to raise the issue of labor market attachment as early as possible in cases and be prepared to potentially be required to issue awards up to the date of the hearing on which claimant testifies to the issue.

Waters v. NYCTA

Topics: Special Errand; Accident Arising Out of and in the Course of Employment

The Holding: Determination disallowing claim remanded for further development of the record.

The Facts: Claimant was a station agent who accepted an overtime assignment that day and was wearing his uniform when he was struck by a bicycle at 4:27 a.m., sustaining various injuries including a TBI. Claimant was unable to remember the time and location of the assignment (he worked multiple booths on a rotating schedule) due to his injuries, but testified that he generally preferred to accept overtime within 30 minutes from his home. The employer admitted he was scheduled to work at 6:00 a.m., but did not provide a witness or information as to which station claimant was to report and its opportunity to present an unspecified witness was precluded. The WCLJ found the claim compensable based on the "special errand" theory as claimant was traveling for overtime and to a place different than his usual work assignment, but the Board reversed finding that the injury occurred outside of the scope of his employment while traveling to work and finding that claimant was not an outside employee.

The Law: Per *Neacosia*, accidents occurring to and from work are not within the scope of employment, however exceptions include "outside employees" and a "special errand" where a claimant "undertakes a work-related errand" and has "altered the usual geographical or temporal scheme of travel, thereby altering the risks to which the employee is usually exposed during normal travel." Here, the Board's failure to specifically address the "special errand" exception on appeal warranted remand.

The Takeaway: The determination here appears to have resulted in remand based on the Board's failure to address all legal theories on appeal more so than it stands for any expansion of the "going and coming" rule regarding accidents. However, any accident in which a claimant is on the way to or from work should be carefully scrutinized on the issue of compensability prior to being accepted.

Gambardella v. NYCTA

Topics: Permanency; SLU; PPD/LWEC

The Holding: Claimant may not receive SLU award if he receives PPD/LWEC; matter remitted for further determination.

The Facts: In September 2018, claimant sustained injuries while trying to lift an 80 lb. seat. The claim was ultimately established for the back, left shoulder, and right third finger. Claimant did not lose any time from work and voluntarily retired 4/1/20. Claimant was subsequently found to be at MMI with a 10% PPD/LWEC and a 35% SLU of the left arm and 15.8% SLU of the right third finger. The WCLJ found that claimant was not entitled to the PPD/LWEC award based on claimant's voluntary retirement, but was entitled to the SLU awards. The Board reversed, finding that *Taher/Arias* only applied to claimants who had returned to work at the time of classification and found that because claimant had voluntarily retired, he was not entitled to any award.

The Law: A claimant who sustains both SLU and non-SLU injuries may receive only one initial award and both are intended to compensate for future loss of wage earning capacity. Duplicate receipt of an SLU and PPD/LWEC award is not permitted. But where no initial award is based on PPD/LWEC, a claimant can take an SLU award. The *Taher/Arias* case does not require a claimant to return to work to be eligible for an SLU. The Board correctly found that claimant was not entitled to a PPD/LWEC, but incorrectly found that claimant was not entitled to an SLU as labor market attachment is irrelevant to entitlement to an SLU.

The Takeaway: As the Court has noted time and again, a claimant's labor market attachment status is completely irrelevant to receipt of an SLU award. This case demonstrates that this is true, even if there is a concurrent PPD/LWEC determination due to *Arias*. Consequently, any claimant, attached to the labor market or not, can receive an SLU award under *Arias* even where there is a concurrent PPD/LWEC determination, provided that they do not elect to receive non-schedule awards for the PPD/LWEC determination.

Abad v. Vanety's Service LLC

Topics: General/Special Employment

The Holding: Finding of 50/50 apportionment based on general/special theory affirmed.

The Facts: Employer ACME needed a warehouse attendant and contacted a staffing agency, Vanety's Service LLC to obtain a worker. While working at ACME, claimant fell off a ladder and sustained an injury to the right ankle and both knees. Following litigation, Vanety was found to be the employer and found to be 100% liable for claimant's benefits and Vanety appealed, arguing

that ACME was the proper employer or both parties should be jointly and severally liable under general/special theory. On appeal, the Board concluded that claimant was the general employee of Vanety and special employee of ACME and split liability evenly. In terms of working relationship, ACME could set claimant's schedule, control his work activities, and terminate employment and Vanety was responsible for payment of wages and provision of workers' compensation coverage.

The Law: In cases of general/special employment, workers' compensation awards may be made against the general employer, special employer, or both "as it sees fit." Here, there was no impropriety in this determination and ACME failed to properly address the issue of general/special employment in its appeal at the Board.

The Takeaway: First, the case is a reminder that in any case where work is being subcontracted or workers are being shared, having contractually defined relationships regarding workers' compensation coverage and verifying that coverage is a useful tool to avoid messy disputes. However, in cases where there is general/special employment (even where there is a contract as to who provides coverage), liability may be set against either party largely at the Board's discretion.

Butler v. Trustforte Corporation

Topics: LMA

The Holding: Board determination that claimant is not entitled to benefits subsequent to 6/5/19 affirmed.

The Facts: Claimant, a proofreader, sustained a head injury on 5/8/18 when he was struck in the head by a window and the claim was later established for the neck, post concussion syndrome, and posttraumatic headaches. He returned to work on 6/28/18 and left work alleging cognitive and memory issues. On 7/31/18, he accepted an offer from the employer to work as in freelance position doing similar work where claimant could work from home and control his work load, but was then paid per assignment instead of a salary. On 10/17/18, he was terminated for reasons unrelated to his injuries. Claimant later was found to have a mild TPD. Claimant filed an initially defective appeal on the issue of reduced earnings for a prior period, but then later sought to develop the record on the issue of reattachment and reduced as of 6/5/19. Claimant testified that his restrictions were no heavy lifting, need to take breaks due to fatigue, and limited mobility and applied for jobs involving writing, proofreading, or editing and worked some volunteer employment, but did not testify that he advised any employers of his disability. The WCLJ found attachment and reduced earnings, but the Board reversed and found NCLT.

The Law: When employment is lost due to reasons other than a compensable disability, it is claimant's burden to show that the disability contributed to the reduction in earnings and this is a factual determination for the board. Here, there was no proof that claimant's inability to find a job was related to his disability given that none of the employers appeared to have rejected him due to his disability.

The Takeaway: The case is an interesting line of attack for carriers. If an employee is terminated for reasons unrelated to the disability and fails to explain to potential employers that he or she has a disability, the carrier has a valid argument that notwithstanding the disability, the claimant's inability to obtain employment is due solely to an inadequate or improper job search or the overall inability of claimant to obtain work – not due to an injury.

Mallen v. Ace Tinsmith and Building Products

Topics: Section 123; Reopening

The Holding: Finding that reopening of claim was barred under Section 123 affirmed.

The Facts: In 1984, claimant sustained a left leg injury and in 1987 was classified with a PPD with the case marked "closed." In 1993, a C-8 was filed confirming a suspension of benefits as claimant was incarcerated prior to a conviction for second degree murder. Claimant was released from prison in 2018 and sought further indemnity benefits in 2020. The carrier opposed, raising Section 123 and argued true closure in 1987 with no reopening of the file within 18/8 years.

The Law: Under Section 123, no compensation may be awarded where the application is made "after a lapse of eighteen years from the date of injury . . . and also a lapse of eight years from the date of the last payment of compensation" in files that were "truly closed." Here, while the term "closed" in 1987 was not dispositive, there is nothing suggesting that further proceedings were contemplated. The 1993 C-8 notice of suspension was not a reopening of the claim was a mere notice of suspension – no hearing was requested and no action was taken by the claimant or counsel. As such, there was a substantial basis for the Board to find "true closure" and no reopening.

The Takeaway: While not often invoked, claims involving more than 8 years of time since last payment of indemnity should always be reviewed for potential application of Section 123.

MAY 2022

Ali v. NYC Department of Corrections

Topics: Section 114-a

The Holding: Board's imposition of lifetime bar on indemnity awards affirmed.

The Facts: Claimant, a corrections officer, filed two C-3 forms alleging an assault by an inmate alleging injuries to the head, neck, face, and back and denied prior injuries. The claim was established for the head, neck, face, both hands, both shoulders, and both hips. Following IMEs during which claimant denied prior injuries, Section 114-a was raised for failure to disclose claims resulting in SLU awards in 1998 and 2002. Section 114-a was found with a mandatory penalty of all benefits from 7/31/14-5/20/20 and a discretionary bar on lifetime awards.

The Law: Section 114-a will apply in situations where there is a knowing false statement or representation as to a material fact and this may include an omission and the Board's determination

on Section 114-a will be affirmed if supported by substantial evidence. Here, claimant consistently failed to disclose his prior injuries on the C-3, to his treating physicians, or to the IMEs and claimant's explanation that he thought the injuries were "too old" or "too long ago" or "already in the system" were self-serving explanations the Board was free to reject.

The Takeaway: Full investigation of claimant's prior injuries (via ISO, medical canvass, OC-110a, and HIPAA) and reviewing claimant's disclosures on a C-3 and to IMEs is a useful tool to evaluate for potential fraud and mitigate liability.

Vasquez v. Northstar Construction Group Services

Topics: Accident Arising Out of and in the Course of Employment

The Holding: Board's finding that claimant sustained an accident affirmed.

The Facts: Claimant was a demolition worker who alleged a left ankle injury when he slipped and fell from a ladder at work. He testified that he slipped and fell during the course of his work activities and claimant was transported by ambulance to a hospital where he was diagnosed with a ruptured Achilles tendon. The carrier challenged the reported time of the injury and elicited testimony from the claimant that he injured his ankle the day before the injury playing soccer, though claimant maintained it was not "anything bad or anything grave." One of claimant's doctors testified that if claimant had ruptured his Achilles the day before, he would not have been able to walk or climb a ladder. The WCLJ established the claim and on appeal, the carrier attempted to introduce new evidence, but the Board declined to consider it.

The Law: Whether a claimant sustained an accident during the course of claimant's work activities is a factual determination by the Board and will be affirmed if supported by substantial evidence and unwitnessed accidents are afforded the Section 21 presumption absent substantial evidence to the contrary. Here, the Board's determination was supported by the medical evidence and there was insufficient evidence warranting reversal.

The Takeaway: Determinations on credibility (either lay or medical) are extremely difficult to overturn on appeal. While a different outcome is not impossible to imagine if an IME provided a contrary conclusion that the WCLJ credited, evidence of minor prior injuries or minor discrepancies in dates and time are generally insufficient to warrant reversal on appeal.

Ryan v. City of Albany

Topics: LMA

The Holding: Board finding of no labor market attachment affirmed.

The Facts: Claimant sustained a 2018 workers' compensation injury involving the back and in December 2019 was found to be TPD and directed to produce LMA evidence. In February 2020, claimant produced no LMA evidence, but a January 2020 note maintaining he was TTD due to an apparently-unrelated right hip injury. The WCLJ found that claimant voluntarily removed himself

from the labor market and awards were suspended as of February 2020. In May 2020, he filed an RFA re-raising labor market attachment and in May 2020, the WCLJ declined to revisit the issue based on a lack of new evidence as claimant filed no evidence that he remained employed with the SIE and claimant's TTD note post-dating the TPD finding and relying on an unestablished site did not alleviate his responsibility to look for work.
The Law: The Board's determination that claimant has not demonstrated attachment to the labor market will be affirmed if supported by substantial evidence.

The Takeaway: Following a WCLJ's finding that claimant is not attached to the labor market, it is incumbent upon claimant to provide LMA evidence – at that point, a TTD opinion (particularly one relying on non-established conditions) is insufficient to forestall a determination of a lack of attachment to the labor market.

White v. SEG Maintenance, Inc.

Topics: Section 18

The Holding: Board determination that claimant did not provide timely notice of claim affirmed.

The Facts: Claimant, an asbestos handler, filed a claim on 2/21/19 alleging injuries to the left shoulder, elbow, and wrist on 12/12/18. The claim was challenged on grounds including Section 18. Following an initial hearing, it was clarified that the date of accident was actually 12/5/18 and litigation proceeded. Claimant conceded that he did not provide timely written notice, but maintained that the employer had actual knowledge. The employer, however, presented multiple witnesses denying an accident, highlighted claimant's inconsistent history on the date of injury and work activities, and maintained first notice was provided months after the injury. The WCLJ credited claimant's testimony regarding accident and "implicitly" concluded that claimant provided notice. The Board reversed finding no valid excuse for untimely notice.

The Law: Written notice of an injury should be provided within 30 days after an accident unless notice cannot be given, the employer or its agent had knowledge, or the claimant can prove that the employer suffered no prejudice. Here, the claimant failed to carry their burden to show lack of prejudice and the Board was empowered to credit the testimony of the employer's witnesses.

The Takeaway: As always, Board determinations on credibility (in favor of either party) are extremely difficult to overturn on appeal. Had the Board affirmed the WCLJ's findings on credibility, the outcome of the appeal likely would have been an affirmance in claimant's favor.

Hedges v. Scandia Realty Inc.

Topics: Permanency; Reduced Earnings; Temporary Disability Awards

The Holding: Board decision that claimant was not entitled to pre-classification awards due to lack of updated medical evidence affirmed.

The Facts: In 2014, the claimant, a firefighterm sustained a concussion with injuries to the eyes, head, and nose. He moved to Florida in 2015 to become a carpenter's helper. Prior to classification, on 5/24/18, claimant's doctor opined a 60% TPD and then on 5/29/18, the doctor submitted a C-4.3 opining a C level classification and sedentary work capacity. The carrier obtained IMEs in November 2018 and August 2019 opining no further disability. On 12/4/19, the parties agreed that claimant had a 45% PPD/LWEC, but continued the matter to address reduced earnings. In relevant part, the WCLJ opined that the C-4.3 supported awards from 5/29/18 through the classification through 12/4/19. On administrative appeal, the Board concluded that the doctor's opinion was valid 90 days through 8/22/18 but found no medical evidence from 8/22/18-12/4/19 and that the C-4.3 was not sufficient evidence of ongoing TPD for that time.

The Law: Generally, in the absence of a permanency classification which generates a presumption of ongoing disability, the claimant has the burden to provide updated medical evidence within 90 days. Here, given both the delay in provision of updated medical notes and the disputed issue of ongoing disability (particularly given that claimant was working as a carpenter's helper despite his doctor limiting him to sedentary work), the Board may have had some discretion to excuse strict compliance with the 90-day rule, it did not improvidently decline to do so here.

The Takeaway: A C-4.3 by itself in the correct circumstances is insufficient by itself to warrant ongoing awards following 90 days. Prior to classification, the claimant generally bears the burden of proving ongoing disability, even if there is some evidence of permanency by C-4.3.

Kelly v. Consolidated Edison Company of New York

Topics: Special Funds

The Holding: Liability cannot shift to Special Funds for 25-a stemming from consequential death claim on claim where Section 25-a is established.

The Facts: Claimant's husband (decedent) had an established claim for pleural disease and asbestosis with a 9/28/00 date of disability and the claim was transferred to Section 25-a in December 2011. Decedent died in December 2016 allegedly due to the established condition. The employer and carrier argued that because liability for the living claim had been transferred to Section 25-a, liability for the death claim should also be transferred.

The Law: The cutoff date for transfers to the Special Fund under 25-a was set at 1/1/14. The new claim did not technically arise until claimant's death in 2016 and per *Verneau* is a separate and distinct legal proceeding from the claim. Consequently, liability cannot be transferred to the Special Fund.

The Takeaway: Barring an application pre-existing in the WCB case file, transfers of liability to Special Funds is largely foreclosed. The few cases left involving these matters are likely to be consequential death claims, but *Verneau* has squarely put liability back on the original carrier in the lifetime claim.

Seymour v. American Stock Transfer & Trust Company

Topics: Occupational Disease

The Holding: Board did not improperly disallow claim for alleged occupational disease.

The Facts: Claimant, a customer service representative, filed a claim in 2018 alleging injuries to the neck, back, and wrists from repetitive stress and use in the performance of her work activities (typing on a computer 7.5 hours per day for 8 years). Claimant additionally had been attending college during the prior 9 years on either a part or full time basis earning degrees and sat in a classroom 3-6 hours per day and used a computer to perform homework and course assignments. Claimant's doctor opined causal relationship, but conceded that he had not conducted diagnostic studies and was not aware of the extent of claimant's school activities as the doctor believed claimant was part time for one year.

The Law: An occupational disease is a disease resulting from the nature of employment and contracted therein and claimant must show a recognizable link between the condition and a distinctive feature of his or her occupation through medical evidence. The Board's determination will not be disturbed if supported by substantial evidence. Here, the Board was free to discredit the uninformed opinion of the transfer doctor.

The Takeaway: Even in occupational disease claims where there is evidence of repetitive activities that can give rise to a valid occupational disease, the claimant should present competent medical evidence with a doctor who is aware of claimant's medical history and work activities or may risk disallowance of the claim.

Hopeck v. Al Tech Specialty Steel Corp

Topics: Section 123

The Holding: Reopening of the claim barred under Section 123.

The Facts: Claimant had an established claim from 1984 involving the left knee and received a 15% SLU. In 2000, claimant requested reopening of the matter and the file was transferred to Special Funds and the SLU increased to 20%. In 2002, claimant filed a new claim involving a new accident or occupational disease involving the same left knee which traveled with this claim. In 2006, claimant underwent a left knee replacement and the WCLJ made awards from 1/4/06-2/4/06 at TTD without prejudice to apportionment with subsequent awards from 2/4/06-2/13/06 held in abeyance. Also in 2016, the subsequent 2002 claim was disallowed and combined it with the 1984 claim, though the nine-day HIA period was not addressed. Hearings occurred in 2017-2018 on treatment issues, but no action was taken until 2020 when claimant sought awards based on two additional knee surgeries in 2017-2019. The WCLJ concluded in September 2020 that Section 123 barred awards.

The Law: The Board's authority to reopen cases is limited under Section 123 which includes no awards can be issued after a lapse of 18 years from the injury date and 8 years from the last payment of compensation and a file has reached "true closure." Here, while the nine-day period of 2/4/06-

2/13/06 was outstanding, it was not raised in subsequent hearings nor raised for over a decade despite further proceedings. Claimant's inaction for 14 years warranted imposition of Section 123 along with a lack of specific allegation of a change in circumstances.

The Takeaway: It is a rare claim in which this Section applies, but in cases involving extremely dated files of over 18 years where there have been no indemnity payments for 8 years, the applicability of Section 123 should be investigated.

Davenport v. District Attorney of Richmond County

Topics: Permanency; SLU

The Holding: Finding that claimant was not entitled to SLU affirmed.

The Facts: Claimant sustained a left foot injury with a consequential left lower leg DVT. In February 2018, the parties were advised that there were competing opinions on permanency and giving the parties 45 days to negotiate or 90 days to litigate and produce transcripts. In April 2020, after no depositions were filed, the WCLJ issued an opinion finding no SLU of the foot and the Board affirmed.

The Law: Whether a claimant is entitled to an SLU award is a factual question for the Board. Additionally, the Board had the discretion to close the record here given the length of time which passed regarding the permanency litigation directive despite a conclusory statement that the parties were "negotiating." The Board was empowered to credit the carrier's IME of a 0% SLU of the foot based on full range of motion over the claimant's treating doctor.

The Takeaway: Disregarding the Board's set deadlines given either by a WCLJ or by directive on permanency or litigation is tantamount to playing with fire. The party on the losing side of the decision will likely have forfeited their opportunity to develop the record as needed and severely handcuff their ability to appeal.

JUNE 2022

Blue v. New York State Office of Children and Family Services

Topics: Permanency; Special Considerations; SLU

The Holding: Board interpretation of Sections 7.4/7.5 is irrational and matter to be remitted.

The Facts: In 2016, claimant sustained a right leg injury and was diagnosed with a medial meniscal tear and chondromalacia patella. Although the claimant's physician and IME physician opined that claimant had a 50% SLU of the leg due to loss of ROM using Section 7.4, the Board interpreted Section 7.5, Special Consideration 4, as limiting the SLU to 10% due to chondromalacia notwithstanding the meniscal injury on administrative appeal over the WCLJ's assessment of a 50% SLU.

The Law: While Section 7.4 directs to determine SLU whether any special considerations apply before addressing flexion/extension deficient, the application of this Special Consideration to the exclusion of any other knee defect is an "obvious inequity . . . and cannot be upheld" as it would result in disregard of any condition beyond chondromalacia resulting in claimants with greater disability obtaining lesser SLU awards. While deference is usually allotted to the Board's determination on permanency, here, the Board's interpretation of the ambiguous guidelines is not entitled to credit.

The Takeaway: Without so stating, it is apparent that the legal argument that knee claims involving chondromalacia under the Special Considerations in Section 7.5 is dead. While this could be ascribed to simply poor draftsmanship of the guidelines, it is puzzling that the Third Department's determination largely hinged on "obvious inequity."

Anthony v. AB Hill Enterprises

Topics: Employee/Employer Relationship; Section 56; Fair Play Act

The Holding: Board determination that claimant was an employee affirmed.

The Facts: Claimant injured her right wrist during a fall at a construction site. She alleged employment with AB Hill Enterprises. The owner of AB Hill testified that she had entered into a "verbal agreement" with general contractor Dani's Builders to provide carpenters, tapers, and painters for $500,000. The WCLJ found an employee/employer relationship between claimant and AB Hill and since AB Hill was uninsured, found Dani's Builders liable under Section 56 along with a $5,000 penalty against AB Hill for failing to obtain insurance. That decision was affirmed on administrative appeal.

The Law: The Construction Industry Fair Play Act was implemented to stem misclassification of workers as independent contractors unless that person or entity meets the statutory qualifications under Labor Law 861-c. While AB Hill attempts to argue that it was an independent contractor, this is not the relevant analysis – the relevant analysis is whether the injured worker meets any of the statutory requirements of 861-c to qualify as an independent contractor as either an individual or a separate entity. Here, AB Hill failed to argue that claimant met the statutory criteria, so the Board's determination on that issue was affirmed and AB Hill's hiring of workers, providing them with tools, paying them in cash weekly, and overseeing work was sufficient to find an employee/employer relationship.

The Takeaway: Any employer or person attempting to assert "independent contractor" status in either the Construction (or Commercial Goods Transportation) industries in New York would be well served to have an understanding of Labor Law 861-c. The Board does not shy away from finding employee/employer relationships and will apply a strict interpretation of those statutes. Additionally, general contractors or carriers insuring general contractors would be well served to investigate whether subcontractors actually have valid New York workers' compensation coverage to avoid potential Section 56 and vicarious liability issues.

Sequino v. Sears Holdings

Topics: C-8.1B's

The Holding: Board decision remitted for further record development.

The Facts: As a result of a 2007 accident, claimant had numerous injuries resulting in a permanent total disability. In September 2019, the WCLJ made a determination on various C-8.1B's finding them in favor of the carrier. Due to an audio transcription issue, the matter was remitted for a further determination on the same issues in August 2020. The WCLJ ruled that the bills were either untimely filed, inadequately documented, duplicative, or for unestablished conditions, though the carrier was directed to obtain an IME on consequential ulcerative colitis. The Board upheld the ruling on administrative appeal. Claimant appealed against the ruling on the 26 medical bills at issue.

The Law: Pursuant to Section 13, carriers are liable for payment of medical bills "for such period as the nature of the injury or the process of recovery may require" and determinations on this are generally within the Board's discretion. However, the WCLJ's decision did not specify the medical evidence upon which the ruling was based or refer to any medical opinions and some of the medical bills refer to established conditions. By failing to provide the medical rationale or for its rulings, there was no sufficient basis for review and the matter must be remitted for further development.

The Takeaway While the Board's discretion is wide to issue decisions, on issues of medical determination and credibility, the Board should give some reasonable justification for its decision apart from conclusory rulings on causal relationship. Generally, a mere indication as to which side's medical evidence is being credited will be sufficient, but it appears that this was lacking in this case, particularly inasmuch as some of the medical bills referred to both established and unestablished conditions.

Diamond v. Warren County Sheriff's Office

Topics: Apportionment; Permanency

The Holding: Board determination that claimant was entitled to an SLU and no apportionment applied affirmed.

The Facts: Claimant had a 2018 injury in which he underwent a right ankle surgery. His medical provider provided an apparently-nebulous opinion of at least a 30% SLU. Claimant also had sustained an injury to his right ankle 40 years prior, and claimant's doctor declined to offer an apportionment opinion based on a lack of relevant information. The carrier's IME opined a 30% SLU of the right ankle, but opined 65% was the result of the pre-existing injury. The WCLJ initially credited the IME finding a 30% SLU but that claimant was entitled to only 10.5% of it due to apportionment. The Board reversed on administrative appeal, finding the full 30% SLU without apportionment.

The Law: Generally, apportionment is not applicable where the pre-existing condition was not the result of a compensable injury and "claimant was able to effectively perform his or her job duties at the time of the accident despite the pre-existing condition." There is an exception to this rule if the prior injury, had it been compensable, would have resulted in an SLU finding and was disabling in a "compensation sense." (*Scally*). This determination is within the Board's discretion. Here, claimant had an unspecified injury 40 years ago, confirmed by diagnostic study. However, the IME had no idea when, where, or how the injury occurred or how claimant was impacted. There were also no medical records from that injury and claimant was able to effectively perform his duties. Consequently, the Board determination that the IME's apportionment opinion was speculative was supported by substantial evidence.

The Takeaway: Apportionment in New York is extremely difficult to obtain. Often a carrier's best option is the *Scally* exception for prior conditions, but the record needs to be sufficiently developed with any or all of obtaining prior medical records and having the IME fully address the resultant disability (if any) from the prior injury and detailing the exact basis of any apportionment opinion.

Brancato v. NYCTA

Topics: Occupational Disease

The Holding: Board determination of a causally-related occupational disease affirmed.

The Facts: Claimant worked for the employer for 25 years, including 7 years as a mechanic and 18 years in supervisory roles, retiring in August 2019 as the general superintendent of maintenance. While he was a mechanic, he used hand tools and impact guns to replace tries and operated a heavy-duty tow truck, working 60-70 hours per week. As a supervisor, he assisted and instructed mechanics on maintenance and spent 40% of his time doing computer work. In December 2019, he sought treatment for hand/wrist/thumb pain maintaining onset of symptoms in 1999 which became severe in 2007. He filed a claim arguing repetitive stress. The WCLJ established the claim with a date of disablement of December 9, 2019.

The Law: An occupational disease is a disease resulting from the "nature of the employment and contracted therein" and does not derive from a specific condition peculiar to the place of work or environmental condition. The claimant must prove an occupational disease through medical evidence demonstrating a recognizable link between their condition and a distinctive feature of employment. Here, claimant's medical evidence indicated that claimant's doctor was aware of his job duties over the years, use of power tools, onset of symptoms, and his medical condition. While claimant's work was in some part supervisory, the Board could credit claimant's doctor's opinion that this activity aggravated his work condition. In light of no contrary medical report, the Board was free to credit this opinion.

The Takeaway: The decision notes that the carrier did not obtain an IME on causal relationship. However, given the claimant's medical evidence both of long-term use of heavy machinery or vibratory tools along with substantial computer work (either of which are generally sufficient under the NY WC system to support an occupational disease), the claim looks likely to have been establishable.

Hernandez v. AABCO Sheet Metal

Topics: LMA

The Holding: Board properly determined that claimant did not voluntarily remove himself for the labor market.

The Facts: Claimant, a union sheet metal worker, was laid off in February 2008 when the job for which he had been hired was completed. Claimant subsequently fell ill and during the course of diagnosis, a treating physician opined that claimant had been exposed to asbestos as a sheet metal worker. Claimant was unable to continue his employment and retired. In 2010, he was diagnosed with asbestosis and he filed a claim in 2011 for the same. Following administrative appeal, the claim was established for asbestosis and the claimant sought lost time awards. The carrier maintained that claimant voluntarily withdrew from the labor market and was not attached. In August 2020, the claimant was classified PPD and awarded wage loss benefits from July 8, 2015-February 12, 2019 and the Board affirmed, finding that claimant's removal from the labor market was involuntary.

The Law: Issues raised for the first time on appeal and not raised before the Board are not properly preserved. Moreover, the "mere fact that a layoff has occurred does not, in and of itself, render a claimant's withdrawal from the labor market voluntary" as claimant's actions have to be analyzed. Here, claimant did not return to work due to his medical conditions including asbestosis. Additionally, labor market attachment is properly determined from the first time it is raised (here, 2019) not from the outset.

The Takeaway: The issue of labor market attachment appears to have only been partially reserved, leading to a somewhat aberrant result. However, the Third Department's rationale in this case is cause for concern – the claimant's departure from the labor market appears on these facts to have been due to an economic layoff – while claimant was found to be ill afterwards and clamant subsequently may not have returned to the labor market due to this fact, it does not necessarily change that the initial separation form work was unrelated to the disability. Last, the case underscores that raising LMA at the earliest possible opportunity in the case is the best way to preserve this defense and try to mitigate awards.

Spinelli v. Cricket Valley Energy Center

Topics: Section 114-a Fraud

The Holding: Board determination that claimant did not violate Section 114-a affirmed.

The Facts: Clamant sustained a right shoulder, neck, and forearm injury (and consequential left shoulder injury) in 2019 when a falling piece of plywood struck him. In May 2020, the carrier raised Section 114-a fraud and the WCLJ agreed, imposing penalties. On administrative appeal, the Board reversed, crediting claimant's arguments that he did not recall and/or did not suffer long-lasting effects from the prior injuries.

The Law: As always, Section 114-a applies where a claimant makes a false statement or representation of fact (or omission of fact) for the purpose of collecting workers' compensation benefits and if the Board's determination is supported by substantial evidence, it will not be overturned. Claimant reported to his doctors that he had a prior left knee surgery and right wrist surgery, but denied right shoulder and neck injuries, despite 2015 and 2010 MVA's. Claimant testified that he did not recall those sites specifically being injured and that he considered them injuries only if he received surgery, PT, or other treatment, which he had not. The Board was free to credit this explanation.

The Takeaway: The case certainly appears frustrating from a carrier standpoint. The WCLJ, generally the primary arbiter of credibility, was overruled by the Board and Third Department which did not have the benefit of viewing claimant's credibility directly. The case is good reminder that not all prior injuries (or failures to disclose prior injuries) may constitute fraud, particularly if the injuries are (genuinely) minute or forgotten due to passage of time.

Sanchez v. NYCTA

Topics: Occupational Disease

The Holding: Board determination that claimant did not sustain a causally-related occupational disease affirmed.

The Facts: In June 2016, claimant (a station agent) filed a claim for repetitive stress injuries to the neck, back, left shoulder, left hip, and left hand. On development of the record, claimant's doctor opined that claimant's injuries were caused by repetitive lifting of heavy bags of coins as claimant's job duties previously involved moving 25-30 lb. bags of tokens. However, tokens were not used following 2003 and the record failed to disclose the frequency or repetitiveness of moving these coins nor did the doctor correlate this specific lifting activity to how the injury caused any or all of the reported injuries.

The Law: To prove a causally-related occupational disease, a claimant must established a recognizable link between the condition and a distinctive feature of employment and an opinion of causal relationship must signify a probability as to causation. Here, the claimant's testimony and doctor's information were insufficient on the issue of repetitiveness or causation. Consequently, the claim was properly disallowed.

The Takeaway: The Third Department has issued a few rulings in favor of this. Carriers would do well to cross-examine claimants' doctor as to their understanding of claimant's work activities as the Third Department appears to be signifying that mere citation to "repetitive activities" without more is simply insufficient.

COURT OF APPEALS SUMMARIES

In the Matters of Thomas Johnson v. City of New York and Liuni v. Gander Mountain

Given the complexity of these joint claims, both involving a common question of law, but different fact patterns and outcomes, and the importance of the outcome and new legal standard, I will discuss this case in a summary fashion.

The cases impact assessment of SLU awards in concurrent cases. Specifically, they address the extent to which carriers can take credit for prior SLUs involving the same body member (i.e. the hip and knee as comprising the leg and the shoulder and elbow as comprising the arm). In brief, the Court held that under Section 15, separate SLU awards for different subparts (i.e. the knee/hip or elbow/shoulder) are permissible where the claimant proves that the subsequent injury by itself (and not in conjunction with the prior injury) has caused an increase in SLU.

In *Johnson*, claimant sustained a 2006 injury involving both knees and a 2009 injury involving both hips (injuring the different "subparts" of the leg). Though the outcomes are chronologically backwards from what would be expected, he received a 50% SLU of the leg and a 52.5% SLU of the right leg attributable to the hips in the 2009 file before reaching MMI in the 2006 knee file. In the 2006 knee file, claimant's doctors opined an 80% SLU of the left leg and 40% SLU of the right leg. When totaled, those two permanency awards equaled 130% SLU of the left leg and 92% of the right leg. Per *Matter of Genduso v. New York City Dept of Education* (2018), in the 2006 knee file, the WCLJ concluded that claimant had an 80% overall SLU of the left leg and 40% SLU of the left leg pertaining to the knees, but reduced those awards by the 50%/52.5% previous SLU awards for the hips, meaning claimant would receive an additional 30% SLU for the left leg and 0% for the right leg. The Board's decision was affirmed at the Third Department appeals level under the theory that separate SLU awards for the knee and the hip were not authorized by statute and would result in a windfall.

In *Liuni*, claimant injured his left elbow in 2007 and received a 22.5% SLU of the left arm. In 2014, claimant had a subsequent injury which was ultimately established in part for a consequential left shoulder injury. In the 2014 file, claimant's doctor maintained that the claimant had a 27.5% SLU of the left arm and an overall 50% SLU of the arm with 22.5% attributable to the 2007 injury (i.e. the elbow) and 27.5% attributable to the 2014 injury (i.e. the shoulder) on the basis that the pathologies and findings were separate from one another. The WCLJ agreed with the claimant's doctor and found a 50% SLU of the arm, but the Board modified to find that the two SLUs for the arm and elbow could not be treated as separate, that the SLU was 27.5% of the arm, and that claimant was entitled to a 5% SLU. The Third Department affirmed the Board's decision.

The Court of Appeals issued an eight-page analysis and decision impacting both claims and the Third Department's *Genduso* holding. The Court noted that SLU awards were compensation allowed for a specified permanent partial disability due to the loss or loss of use a body member under WCL 15(3). As the Court of Appeals noted, under Section 15(3) the "members" are the arm, leg, hand, foot, eye, thumb, first-fourth fingers, great toe, and the remaining toes – the shoulder/elbow and hip/knee are not separately enumerated. The Court concluded that WCL 15

(7) mandates that the wage rate used in calculating the later SLU award must measure "any diminished earning capacity due to the previous disability" and "generally the award should not exceed the benefits 'allowed for the later work-related injury considered by itself.'" From here, the Court found that these statutory provisions require that the subsequent SLU award must be based solely on the diminished earning capacity resulting from the second injury as opposed to all disabilities.

Applying this rationale, the Court reached split decisions. The Court found that both claimants had the opportunity to present evidence regarding the "degree of loss of use attributable solely to the accident in question," but that their evidentiary showings mandated different outcomes.

Notably, in *Johnson*, the carrier's IME also noted that there was no further injury to the hips as a result of the knee injuries. (Although this is not stated in the decision, it appears that if this IME opinion had been credited, claimant would have received the full SLU for both the knees and hips). The Court of Appeals noted that the Board, however, credited the treating physician's opinion which did not offer an opinion as to whether the knee issues impacted the legs and stated that the injuries were "not isolated from one another, leaving it unclear whether any or how much loss of use of Johnson's legs was solely related to his knee injuries." As such, the Court concluded that because there was insufficient medical evidence to determine whether the later SLU was in part due to the prior injury, the reduction was "not irrational."

In contrast in *Liuni*, the claimant offered evidence that the elbow and shoulder were separate pathologies individually causing a particular loss of use of the arm (i.e. the 27.5% related to the shoulder and 22.5% related to the elbow) and the doctor opined they were "completely separate." Although the carrier maintained that the testimony was incredible as the opinion was not based on examination of the separate sites, the Court found that the Board was entitled to make a "credibility determination" on the matter and reversed for further consideration.

The decisions were reached 6-1 with one Judge issuing a 19-page dissent that essentially would have gone further in its rationale. The dissent agreed that *Liuni* should have been reversed, but disagreed with the affirmance in *Johnson*. The dissent maintained that the Court should have disavowed *Genduso* entirely, set out the correct legal standard of review, and remit for further proceedings in both proceedings. The Judge found that the majority opinion implicitly, but not explicitly, overruled *Genduso* and improperly denied the claimant in *Johnson* any SLU for his subsequent work-related injury.

The takeaway for carriers, apart from the value of a thorough investigation into prior incidents is that the ability to take credit for SLU awards for members of the same subpart (i.e. shoulder/elbow and hip/knee) is not guaranteed and will require careful review of the record as to whether claimant meets their burden of proving separate pathologies and subsequent development of the record with medical reports and testimony. The caselaw, however, seemingly will allow for more than 100% SLU of an extremity in the aggregate in cases involving different subparts of the same member.