CHARTWELL LAW

A Year in Review:

2020 Workers' Compensation Case Law Highlights

NYSIA NEW YORK SELF-INSURERS ASSOCIATION

January 2021

TABLE OF CONTENTS

1. WCL § 2(15): Occupational Disease - "The Nature of Employment"

Matter of Renko v. NY State Police, 185 AD3d 1198 (3d Dept 2020)

- Facts: Claimant, an auto body mechanic, alleged that he developed prostate cancer as a result of exposure to toxins at a facility in Albany, NY, while cleaning police vehicles involved in WTC clean-up operations. The Board found that the claim did not meet the requirements of an occupational disease, reasoning that claimant was exposed to toxins that were not a normal attribute of his work. Considering the claim as one for accidental injury, the Board found the date of accident to be September 12, 2002 and disallowed it as time-barred under § 28.
- Holding: The Third Department *reversed*, finding that claimant's exposure to toxins derived from the very nature of his work – i.e., cleaning the vehicles by removing the toxins – rather than from an environmental condition of the workplace, such that the Board erred in rejecting the claim under § 2(15).
- Discussion: As the Board did not make a determination as to causal relationship, the claim was remitted for further proceedings in that regard. However, the Court noted that insofar as the claim is based on an occupational disease, it was timely under § 28.
  This decision is inconsistent with prior occupational disease decisions insofar as the Third Department so specifically defined the "nature of the employment," and could pave the way for more claims to be considered under the more lenient occupational disease standards versus those for accidental injuries.

2. WCL § 14: Average Weekly Wage

Matter of Foster v. FedEx Frgt. Inc., 188 AD3d 1378 (3d Dept 2020)

- Facts: The C-240 reflected that claimant worked 225 days in the 52 weeks preceding the accident. He worked five days in 28 out of 52 weeks (54% of the year), and the remaining 24 weeks as a four-day or less worker. WCLJ set the AWW using the 260 multiple, finding that claimant worked substantially the whole of the year preceding the injury as a 5-day worker. Employer appealed, noting that the Board had traditionally applied a 234-day guideline for determining whether a claimant had worked substantially the whole of the year preceding the accident. The Board affirmed.
- Holding: The Third Department *affirmed*, finding the Board's calculation of the AWW using the 260 multiple supported by substantial evidence.
- Discussion: The Court noted that the claimant worked the majority of the 52 weeks preceding his injury as a 5-day worker, and that the employer and its TPA had indicated in several of their filings with the Board that claimant was a regular and/or full-time employee who worked a standard work week. While this decision is fact-specific, it evidences the importance of entering accurate information in all FROI/SROI filings, and the importance of their consistency with defense counsel's legal arguments.

3. WCL § 15(3): SLU – Credit for Prior SLU to Different Part of Extremity

Matter of Covington v. New York City Dept. of Corr., 187 AD3d 1285 (3d Dept 2020)

- Facts: Claimant was found to have a 22.5% SLU of the right elbow but had a prior 10% SLU of the right elbow and 15% SLU of the right shoulder. As the prior arm SLUs totaling 25% exceeded the current 22.5% SLU, the Board found a 0% causally related SLU.
- Holding: The Third Department *affirmed*. As claimant's prior SLU awards were for the loss of use of the right arm, the Board properly credited the total of those prior SLU awards toward this claim involving the right arm.
- Discussion: The Court explained that SLU awards are limited to only those statutorily-enumerated members listed in § 15(3), and neither § 15(3) nor the Board's guidelines set forth separate SLU awards for the elbow or shoulder. Impairments to separate parts of a member are encompassed in an overall SLU award for that specified member.

Additional 2020 Cases on this Issue:

Matter of Johnson v. City of New York, 180 AD3d 1134 (3d Dept 2020) ("To authorize separate SLU awards for a body member's subparts is not authorized by statute or the guidelines and would amount to a monetary windfall for a claimant that would compensate him or her beyond the degree of impairment actually sustained to the statutorily-enumerated body member.")

Matter of Blair v. SUNY Syracuse Hosp., 184 AD3d 941 (3d Dept 2020)

Matter of Kleban v. Cent. NY Psychiatric Ctr., 185 AD3d 1342 (3d Dept 2020)

Matter of Rickard v. Cent. NY Psychiatric Ctr., 187 AD3d 1260 (3d Dept 2020)

Matter of Hluska v. Cent. NY Psychiatric Ctr., 188 AD3d 1381 (3d Dept 2020)

Matter of Rybka v. Cent. NY Psychiatric Ctr., 188 AD3d 1389 (3d Dept 2020)

Matter of Liuni v. Gander Mtn., 188 AD3d 1403 (3d Dept 2020)

4. WCL § 15(3): SLU Award & PPD Classification in Same Claim

Matter of Arias v. City of New York, 182 AD3d 170 (3d Dept 2020)
Matter of Saputo v. Newsday, 180 AD3d 1303 (3d Dept 2020)
Matter of Fernandez v New York Univ. Benefits, 180 AD3d 1305 (3d Dept 2020)

- Facts: In each of the above three decisions filed the same day, the claimants sustained both schedule and non-schedule injuries in their accidents, were working at preinjury wages at the time of permanency, and the Board found that the claimants were not simultaneously entitled to an SLU award and PPD classification, despite the Third Department's decision in Matter of Taher v. Yiota Taxi, Inc., 162 AD3d 1288 (3d Dept 2018).
- Holding: The Third Department held that the Board's disregard of Taher was in error and reiterated: Where a claimant who has sustained both schedule and non-schedule permanent injuries in the same accident has returned to work at preinjury wages, and thus receives no award based on his/her non-schedule PPD classification, he or she is entitled to an SLU award.
- Discussion: Prior to Taher, claimants with both schedule and non-schedule permanent injuries stemming from the same accident, who were working at full wages at the time of permanency, could not receive an SLU award. After Taher held to the contrary, the Board declined to follow it. However, by these three decisions, the Third Department reaffirmed its holding in Taher, which was grounded in its interpretation of WCL § 15(3). The Court found that the Board's position amounted to a policy choice without a basis in the WCL, yielded unjust results, resulted in perverse incentives, and added unnecessary complexity to the process. The Court left open the possibility of an SLU award being inappropriate in the case of a temporary residual impairment to a systemic area, since the WCL requires that a partial disability be permanent before an award under § 15(3) is suitable.
    - In response to these decisions, the Board issued Subject No. 046-1211, announcing revised procedures for addressing permanency for claimants who are working at full wages and have evidence of schedule as well as non-schedule injuries stemming from the same accident.

Matter of Nasir v. BJ's Wholesale Club, Inc., ___AD3d___, 2020 NY Slip Op 07971 (3d Dept 2020)

- Facts: Claim was established for schedule and non-schedule injuries. Claimant's physician examined the extremities and gave SLU findings. The IME examined all sites of injury and found schedule and non-schedule permanent impairment. A WCLJ made SLU awards, which were rescinded by the Board, which concluded that claimant's injuries were amenable to PPD classification and directed development of the record on LWEC. Claimant was not working. The WCLJ found a 15% LWEC but that claimant had no causally-related lost earnings, and was therefore not presently entitled to any award. Claimant

appealed, arguing that she was entitled to SLU awards under Taher. The Board Panel, citing its prior decision, held that the WCLJ properly classified claimant with a PPD under § 15(3)(w).

- Holding: The Third Department *reversed* and remitted the matter to the Board for clarification of whether its decision was based on factual and credibility findings regarding the evidence of SLU, or a mistaken interpretation of the law.
- Discussion: The Court observed that it appeared that the Board, at the time of the subject decisions, still held the mistaken belief that a claimant was not simultaneously entitled to both an award for an SLU and a non-schedule PPD classification. It was therefore unclear whether the Board committed an error based on this mistaken belief, or whether it reached its determination that claimant was not entitled to SLU awards based on factual and credibility findings that declined to credit the evidence regarding claimant's SLU percentages. This decision makes clear that Taher does not require the Board to award both an SLU award and PPD classification in the same case if the Board rejects the medical evidence supporting either type of permanent impairment as incredible.

5. WCL § 15(3)(w): Post-Classification Periods of TTD Toll the PPD Caps

Matter of Sanchez v Jacobi Med. Ctr., 182 AD3d 121 (3d Dept 2020)

- Facts: In Feb. 2012, claimant was classified with a PPD and 50% LWEC, entitling him to up to 300 weeks of PPD benefits. Claimant underwent causally-related surgeries in March 2014 and Dec. 2015. After each surgery, awards were initially made at the TT rate, and subsequently reduced to a TR rate. In Oct. 2017, the employer suspended payments, citing exhaustion of the 300-week cap. Claimant argued that the periods of TTD should not be counted towards the cap, and that he should be reclassified. The WCLJ agreed and a Board Panel affirmed, but the Full Board rescinded and remitted the matter for further consideration. The Board Panel then held that once classified with a PPD, a claimant continues to be PPD for purposes of both calculation of the capped number of weeks under WCL § 15(3)(w) and the rate of awards. Disavowing prior decisions on the issue, it held that all periods of awards post-classification counted towards the cap, and should be made at the PPD rate. The Board Panel also found that claimant's request for reclassification was untimely because it was made after the exhaustion of his PPD award.
- Holding: The Third Department *reversed*, holding that post-classification periods of TTD benefits do not count towards the PPD caps under § 15(3)(w). The Court also *reversed* the Board's finding that a PPD claimant must seek reclassification pursuant to § 15(6-a) prior to the exhaustion of the cap.
- Discussion: The Third Department restored the law on this issue to what it was prior to the Board's sudden reversal in its decision below. The Court's decision was based on its statutory interpretation of WCL § 15, under which it found that a claimant can only be classified as PTD, TTD, PPD, or TPD at any particular time. It noted that TTD benefits are payable under § 15(2) rather than § 15(3), and that in contrast to § 15(4-a) (which provides PHP for SLU awards), the Legislature was silent regarding whether PPD awards should include preceding or intervening periods of TTD. The Court remitted the matter to the Board to determine claimant's disability classification during the periods for which awards were made at the TR rate, and instructed that for weeks that claimant is found to have continued to have a TTD, a nontentative rate should be set and the cap on his PPD award should be tolled, and for weeks that claimant is found to have returned to PPD status, he should receive the PPD rate and those weeks should count toward the cap. Therefore, post-classification awards should return to the PPD rate once a claimant is no longer TTD.

  Further, PPD claimants can seek reclassification pursuant to § 15(6-a) ("upon proof that there has been a change in condition, or that the previous classification was erroneous and not in the interest of justice") at any time, subject only to § 123. In contrast, PPD claimants who wish to seek reclassification due to extreme hardship pursuant to § 35(3) must do so within the year prior to the scheduled exhaustion of the caps.

6. WCL § 15(4): Posthumous Award of Remaining PPD Benefits to Survivors After Unrelated Death

Matter of Green v. Dutchess County BOCES, 183 AD3d 23 (3d Dept 2020)

- Facts: In March 2012, decedent was classified with a PPD and 51% LWEC. From the time of classification up to his unrelated death in March 2018, decedent was working and receiving reduced earnings benefits. After his death, decedent's surviving child sought the remaining 38.8 weeks of his PPD award, pursuant to WCL § 15(4)(c). The Board found that claimant was entitled to any unpaid amounts owed for the 311.2 weeks from the time of decedent's classification to his death, but was not entitled to a posthumous award for the remaining weeks of the PPD award. The Board held that § 15(4) did not apply to a non-schedule PPD award, reasoning that decedent, upon his death, no longer had causally-related lost time or future earnings to lose as a result of his work-related injury.
- Holding: The Third Department *reversed* the Board's decision insofar as it limited the non-schedule PPD award payable to claimant to 311.2 weeks, finding that § 15(4) applies to all PPD awards made pursuant to § 15(3), including non-schedule PPD awards. Thus, claimant was entitled to an additional posthumous award for the remaining cap weeks owed for decedent's PPD award upon decedent's unrelated death.
- Discussion: The Court found that the plain language of § 15(4) neither distinguished SLU awards from non-schedule PPD awards nor excepted PPD awards from its scope. It further found that limiting the scope of § 15(4) to SLU awards would create a disparity in treatment between the two classes of beneficiaries of PPD benefits that the Legislature had sought to eliminate via recent amendments to the WCL. The Court rejected the Board's position that upon an unrelated death, there is no longer a causally-related reduction in wages attributable to the non-schedule PPD, finding that it unfairly deprived a claimant's survivors of the remaining cap weeks that were "established, set, and fixed at the time of classification." The Court took no position regarding the manner in which the remaining weeks of PPD benefits are to be paid, or whether its holding applies to pre-cap cases.

  This was a shocking decision that is inconsistent with longstanding precedent requiring causally-related lost wages as a prerequisite to PPD awards, and appears to be based on an erroneous preface that a claimant automatically becomes entitled to the capped number of weeks of PPD benefits upon classification, rather than the cap simply serving as a maximum, with entitlement to PPD benefits still being dependent on a causally related loss of wages. Contrary to the language in this decision, nothing in recent amendments to the WCL evidenced a legislative intent to change this longstanding requirement. However, a motion for reargument or permission to appeal to Court of Appeals was denied. So, as of now, when a claimant with a non-schedule, capped PPD dies of unrelated causes prior to the exhaustion of the cap, the remaining cap weeks may be payable to the claimant's surviving relatives enumerated in § 15(4).

7. WCL § 15(6-a): Rate of Benefits for PPD Claimant Post-Surgery

Matter of Robinson v. NYC Health & Hosps. Corp., 183 AD3d 1160 (3d Dept 2020)

- Facts: Claim stems from a 2009 back injury. In 2015, claimant was classified with a PPD and 80% LWEC. Claimant underwent back surgery in June 2018, and sought an increase in benefits to the TT rate thereafter. WCLJ made awards at the TT rate from the date of surgery through the date of the hearing, and the PPD rate thereafter. The Board affirmed, finding that the post-surgery reports did not support claimant's assertion that the surgery worsened her condition; they merely indicated that there was a continued disability and treatment without other trauma or significant reinjury.
- Holding: The Third Department *affirmed*, noting that the WCLJ never made a finding that claimant had a TTD, and the award stemmed, in part, from an agreement made by the carrier
- Discussion: Claimant argued that the surgery itself was evidence of other trauma or significant reinjury, in response to which the Court noted that the purpose of surgery "was to ameliorate claimant's condition," and that the "evidence credited by the Board . . . failed to show" that the surgery "negatively impacted claimant."
- Dissent: The dissent agreed with claimant that the Board erred in failing to recognize that the worsening of her condition leading to a TTD was demonstrated by the very fact of her surgery, and the continuation of that disability during the post-surgery recovery period.

8. WCL § 15(7): Apportionment of PPD

Matter of Garratt-Chant v. Gentiva Health Servs., 179 AD3d 1421 (3d Dept 2020)

- Facts: 1998 claim established to back. 2010 claim established to neck. Liability for 1998 claim was transferred to Special Funds under § 25-a. In litigation of 2010 claim, claimant noted possible apportionment to 1998 claim, in which she was still treating, and 1998 claim was reopened to travel on permanency. WCLJ found that claimant had a 55% perm impairment and 50% LWEC due to the 2010 neck injury. A Board Panel modified to 40% perm impairment of the neck and 50% LWEC. At a later hearing, additional medical was presented re: claimant's disability to the back post-classification and need for lumbar fusion surgery, and claimant moved to reopen the 2010 neck claim based on a change in condition. The WCLJ did not make any finding on this issue and the 2010 claim was later closed on PFA. In July 2017, claimant filed an RFA based on a change in condition warranting reclassification, and sought to have the claims travel on permanency and apportionment. The WCLJ encouraged the parties to obtain perm opinions that considered the whole person with apportionment of disability between the claims. The WCLJ found an overall 60% perm impairment, 70% LWEC, and apportioned 65% to the 2010 neck claim and 35% to the 1998 back claim. The WCLJ reclassified the 2010 claim and extended wage loss benefits for up to 375 weeks based on the 70% LWEC. A Board Panel affirmed.
- Holding: The Third Department *affirmed*, noting the Board's authority to resolve conflicting medical opinions and continuing jurisdiction under § 123 to reclassify injuries as it deems just to compensate claimant based on her complete state of disability.
- Discussion: The carrier for the 2010 claim argued that the Board improperly shifted a portion of liability for the 1998 back claim to it by increasing the LWEC from 50 to 70%, apportioning liability 65% to its claim, and extending the PPD caps from 300 to 375. The Court noted that the prior classification was only based on the 2010 neck claim and that the medical evidence established that claimant's continuing back and neck problems left her with an overall permanent medical impairment of 60% and LWEC of 70%.
  Had the 1998 back claim been classified when the 2010 neck claim was, with a finding of apportionment back then, and a subsequent change in condition only re: the back, then it would have been easier for the carrier to argue that any increase in PPD/LWEC should only be attributed to the back claim and not affect exposure in the neck claim.

Matter of Cox v. Suburban Propane, LP, 179 AD3d 1425 (3d Dept 2020)

- Facts: Claimant had noncompensable lung cancer for which he underwent surgery in May 2014. He was out of work for six months, then returned in the same capacity in Jan. 2015, although his oncologist had given work restrictions and he continued to experience pain and take prescribed pain medication. In June 2016, he was injured lifting a propane tank, and did not return to work thereafter. His claim was established for various injuries, including aggravation of CRPS, which had initially been diagnosed after the lung surgery.

Carrier raised apportionment under § 15(7) and LWEC. Medical experts apportioned his disability 50/50 between his prior condition and compensable injury. The Board found that apportionment was not applicable.

- Holding: The Third Department *affirmed*, finding that substantial evidence supported the Board's factual determination that claimant's prior condition, although symptomatic, was not disabling in a compensation sense within the meaning of § 15(7). Thus, apportionment was inappropriate as a matter of law.
- Discussion: The general rule is that apportionment is not applicable as a matter of law where the preexisting condition was noncompensable and claimant was able to effectively perform his job duties at the time of the accident despite the preexisting condition.

Matter of Cody v. Ark Glass & Glazing Corp., 182 AD3d 690 (3d Dept 2020)

- Facts: Claimant, a window glazer, injured his lower back in 1999 and was classified with a 75% PPD in 2001. He settled the indemnity portion of that claim in 2012, and returned to work as a window glazer in 2014. In 2015, he reinjured his back and had surgery. In 2017, a WCLJ classified claimant with a 70% LWEC, found no labor market attachment, and held in abeyance the issue of apportionment, as there was no medical opinion on the issue. The Board affirmed the 70% LWEC finding but found that claimant was not entitled to PPD benefits, reasoning that had the prior accident been a capped claim, his prior impairment would have likely resulted in an LWEC of at least 75%, such that claimant had already been fully compensated for his present LWEC by the prior PPD award.
- Holding: The Third Department *reversed* the Board's finding that claimant was not entitled to the 375 cap weeks of PPD benefits in the 2015 claim, and remitted the matter for reinstatement of 375 weeks of benefits based on 70% LWEC classification and for development of the record on apportionment.
- Discussion: The Court noted that PPDs are not apportionable like SLUs; PPDs are allocable to a particular period of disability, not a degree of presumed impairment. Further, different formulas are used to arrive at pre-cap PPD and LWEC findings; the Board's translation of pre-cap PPD to LWEC was speculative, even if it were theoretically permissible for the Board to subtract LWEC findings as it did. The Court further noted that claimant had resumed full-time employment in his original occupation. The claimant will need to be assessed for his overall permanent impairment stemming from both accidents, and an opinion provided as to apportionment between the claims.

9. WCL § 25(4): Payment of Counsel Fees from SLU Award where Employer Reimbursement

Matter of Enoch v. NYS Dept. of Corr. & Community Supervision, 179 AD3d 1430 (3d Dept 2020)

- Facts: Claimant injured his right knee. Employer paid him regular wages while he was out and filed a claim for reimbursement. A Nov. 2017 Administration Decision (AD) made awards, payable as a credit to the employer as partial reimbursement for the wages paid. An Amended AD included a $700 attorneys' fee, made payable as a lien on employer's reimbursement credit. The Board ultimately found a 20% SLU of the right leg and made an award, less prior payments, and indicated that the employer's reimbursement credit was "less [the] prior attorney's fee of $700." Carrier objected to the decision insofar as it reduced the employer's reimbursement credit by the attorneys' fee. A WCLJ awarded the 20% SLU and found that the employer was to receive outstanding reimbursement from the SLU award, and that its reimbursement credit was "less [the] prior attorney's fee of $700." The Board Panel found that the employer was entitled to full reimbursement of wages paid without any reduction for attorneys' fees. Pursuant to § 123, it modified the Amended AD to rescind the $700 attorneys' fee, and modified the WCLJ's decision to direct that the fee be paid out of claimant's SLU award.
- Holding: The Third Department *affirmed*, finding that the Board acted rational in exercising its continuing jurisdiction under § 123 to modify its prior Amended AD to rescind the initial fee award and direct that it be payable out of claimant's SLU award, as this action was necessary to avoid the windfall to claimant that would result from continuing to reduce the reimbursement credit by the fee award (essentially making employer subsidize a portion of his legal expenses).
- Discussion: The Court explained that when the Board initially made the attorneys' fee payable as a lien on employer's reimbursement credit, claimant was receiving TTD payments, the reimbursement credit was limited to the amount of those payments, and the credit was the only source from which the fee could be paid. However, once claimant obtained an SLU award, there were sufficient funds from which employer could receive full reimbursement, leaving claimant with an excess from which the fee could be paid. Accordingly, where there is no money moving to claimant because the entire award is payable as reimbursement to the employer, then the attorneys' fee is payable out of the reimbursement, but where there is money moving to the claimant, the attorneys' fee is payable out of the claimant's awards.

Matter of Razzano v. NYS Dept. of Corr. & Community Supervision, 184 AD3d 939 (3d Dept 2020)

- Facts: Claimant injured his left shoulder and was out of work for a period of time, for which employer paid his full wages and filed a request for reimbursement. In a March 2018 decision, a WCLJ made awards and granted a $2,050 counsel fee as a lien on the

credit to the employer. In a Nov. 2018 decision, the WCLJ found a 42% SLU of the left arm and awarded additional counsel fees. Claimant alleged that the initial counsel fee was improperly deducted from the SLU award, resulting in an underpayment. The Board found that employer was entitled to full reimbursement of the advanced wages without any reduction for counsel fees, and so modified the March 2018 decision to rescind the fee, and modified the Nov. 2018 decision to find that the $2,050 fee was payable from the SLU award.

- Holding: The Third Department *affirmed*, finding no abuse of discretion by the Board in exercising its continuing jurisdiction under § 123 to rescind the initial counsel fee awarded and direct that it be payable out of claimant's SLU award.
- Discussion: The Court noted that continuing to make the employer subsidize claimant's counsel fees under these circumstances would amount to a disproportionate result. Employer was entitled to full reimbursement of the advanced wages without any reduction for the counsel fees.

10. WCL § 35(2): Total Industrial Disability

Matter of Minichiello v. NY City Dept. of Homeless Servs., 188 AD3d 1401 (3d Dept 2020)

- Facts: Claimant injured his back and the parties stipulated to a PPD and 51% LWEC. After the exhaustion of capped PPD benefits, claimant sought classification with a TID. A WCLJ denied the request due to insufficient evidence of a TID. The Board affirmed, but subsequently sua sponte issued an Amended Decision finding that consideration of claimant's application for TID was not warranted because he was not entitled to additional indemnity benefits inasmuch as he had surpassed the cap under § 15(3)(w), and § 35 does not contemplate continuing awards beyond the cap unless claimant is seeking an extreme hardship redetermination pursuant to § 35(3).
- Holding: The Third Department *reversed*, finding that claimant's request for TID status was not precluded because he had exhausted the PPD caps.
- Discussion: The Court's decision was based on the plain language of § 35(2), and the legislative intent of § 35 to create a safety net for PPD claimants who reached their maximum limit on benefit weeks. Whereas evaluation of applications under § 35(3) (extreme financial hardship) entails consideration of claimant's assets, monthly household income, and monthly expenses, evaluation of applications under § 35(2) entails consideration of the effect of the limitations of the disability, coupled with other factors, including claimant's educational background, work history, vocational skills, and age, on the claimant's employability. This decision could open the floodgate to applications for classification with a TID upon the expiration of the cap.

11. Arising Out of & In the Course of Employment: Coming & Going – Traveling Employee Exception

Matter of Wright v. Nelson Tree Serv., 182 AD3d 853 (3d Dept 2020)

- Facts: Claimant tree trimmer was assigned to work at various locations and, due to distance, was given the option of staying in a hotel for the work week. He was not required to stay in the hotel and could have commuted from home (but 5.5-6 hours away). All workers stayed at the hotel. Employer paid each $65/day to cover costs. Workers would drive from the hotel to a parking lot to pick up the trucks each morning, then head to the work site. Claimant was injured in an MVA while en route to the parking lot one morning. The Board found the accident compensable.
- Holding: The Third Department *affirmed* the Board's application of the traveling employee exception.
- Discussion: The outside worker exception to the coming and going rule does not apply where the worker is required to report to a fixed location before work. Under the traveling employee exception, employee status continues throughout the stay away from home, and injuries to a traveling employee may be compensable even if the employee was not engaged in the duties of his/her employment at the time of the accident, provided that the employee is engaged in a reasonable activity.

12. Arising Out of & In the Course of Employment: Working From Home

Matter of Capraro v Matrix Absence Mgt., 187 AD3d 1395 (3d Dept 2020)

- Facts: Claimant, a claims examiner, was hired to work from home and provided necessary computer equipment by employer. He ordered new office furniture and was injured while carrying the boxes upstairs to his home office, during his lunchbreak. Employer did not provide or reimburse claimant for the office furniture. The Full Board disallowed the claim, concluding that claimant's injuries were not sufficiently work-related. It held that injuries sustained by employees working from home should only be found compensable if they occurred during regular work hours, while the employee was actually performing his/her employment duties.
- Holding: The Third Department *reversed*, rejecting the Board's rigid new standard for determining the compensability of injuries sustained by employees working from home as unsupported by precedent and inconsistent with the remedial nature of the WCL, and remitted the matter to the Board to apply the long-established standard – i.e., whether the claimant was engaged in a "purely personal" activity that was not "reasonable and sufficiently work related under the circumstances."
- Discussion: The Third Department rebuffed the Board's reasonable attempt to create a heightened standard of compensability for injuries sustained by employees working from home, where employers have less (if any) control over the workspace and little (if any) ability to investigate accidents after the fact. The Court stated that a "regular pattern of work at home" renders the employee's residence "a place of employment" as much as any traditional workplace maintained by the employer, failing to acknowledge these fundamental differences warranting a stricter standard.

13. Attachment to the Labor Market

Matter of Policarpio v. Rally Restoration Corp., ___AD3d___, 2020 NY Slip Op 07442 (3d Dept 2020)

- Facts: Claimant, an undocumented worker who speaks limited English and does not read or write English, was injured while working in construction. Benefits were awarded at a TPD rate. Carrier raised the issue of labor market attachment, and benefits were discontinued due to claimant's failure to demonstrate attachment. In Jan. 2019, claimant testified through an interpreter re: his employment history since arriving in the U.S. and unsuccessful efforts to obtain employment between April and Dec. 2018. The Board found that he had failed to produce sufficient evidence to establish that his job search was timely, diligent and persistent so as to demonstrate a reattachment.
- Holding: The Third Department *reversed*, finding that the Board's conclusion that claimant failed to submit evidence of a timely, diligent, and persistent job search so as to demonstrate attachment to the labor market was not supported by substantial evidence.
- Discussion: The Court discussed the claimant's job search efforts and difficulties encountered due to his lack of a SSN, limited experience and language skills, and limited physical capabilities due to his injuries. It noted that the record lacked medical evidence of the physical limitations put on his work abilities. The Court found that the Board's reliance on the fact that just over 1/3 of the businesses to which claimant applied had no known publicized openings, or that he applied for positions that did not comport with his physical limitations, did not support its finding that his job search effort lacked good faith, as claimant's circumstances effectively required that he conduct his job search in such a manner. The Court found that the Board made unsupported suppositions regarding claimant's access to or ability to read available job postings, and noted that the Board made no finding that the claimant failed to avail himself of retraining, rehabilitation and/or job-location programs or services that were available to him.
- Dissent: The dissent found that substantial evidence supported the Board's decision. It noted that the burden is on the claimant to demonstrate attachment and argued that the majority did not hold claimant to his burden. The dissent pointed out the resources available to Spanish-speaking individuals in New York City and the deficits in the claimant's efforts supporting the Board's finding that his job search efforts lacked good faith.

14. Causal Relationship: Sufficiency of Medical Evidence

Matter of Johnson v. Borg Warner, Inc., 186 AD3d 1772 (3d Dept 2020)

- Facts: Claimant, a machine operator, alleged a left knee injury. He was walking and felt a sudden pain in his left knee, and was diagnosed with a meniscus tear and degenerative changes. After development of the record, the Board established the claim.
- Holding: The Third Department *reversed*. Claimant's doctor's testimony to a "strong possibility" of causal relation fell short of the reasonable probability required to establish causal relationship.
- Discussion: The Court noted that claimant's medical evidence "must signify a probability of the underlying cause that is supported by a rational basis and not be based upon a general expression of possibility."

Matter of Wen Liu v. Div. of Gen. Internal Medicine, Mount Sinai Sch. of Medicine, 186 AD3d 1770 (3d Dept 2020)

- Facts: Claimant alleged a 2008 neck injury from a fall at work after becoming dizzy. Employer's denial was untimely and it was deemed to have waived § 25(2)(b) defenses. The Board nevertheless found that claimant had not demonstrated a causal connection between her injuries and employment, and disallowed the claim.
- Holding: The Third Department *affirmed* the Board's rejection of claimant's medical proof as unworthy of belief as supported by substantial evidence.
- Discussion: Employer's untimely denial does not relieve claimant of the burden of demonstrating causal relationship. Claimant's doctors related her injuries to her fall, but only after she had filed her claim, and based on claimant's description of the incident, which was inconsistent with the ER records. ER records also reflected that claimant indicated that she had chronic left arm numbness and neck pain for over 5 years.

15. Controverted Claims: PFME Preclusion – Disallowance vs. No Further Action

Matter of Johnson v Consol. Edison Co. of NY, 185 AD3d 1113 (3d Dept 2020)

- Facts: Claimant/wife filed a claim for death benefits, which was controverted. The WCLJ initially found that there was no PFME. In April 2017, Dr. Ploss conducted a records review, the report of which was precluded at a Sept. 2017 hearing. In Oct. 2017, Dr. Ploss prepared a second report, substantively identical to the first, and PFME was found at a Nov. 2017 hearing. Employer's IME denied causal relationship. Depositions were conducted, during which Dr. Ploss attempted to refute the IME's opinion by referring to a published article that was not in eCase or referenced in his report. At an April 2018 hearing, the WCLJ granted claimant's request to have Dr. Ploss produce an addendum addressing the article, and denied employer's request for preclusion. On appeal, the Board precluded Dr. Ploss' Oct. 2017 report for failing to comply with the applicable regulations, rescinded the PFME finding, disallowed the claim, and closed the case.
- Holding: The Third Department *affirmed* the preclusion of Dr. Ploss' report and disallowance of the claim.
- Discussion: The April 2017 report was properly precluded and as the Oct. 2017 report was similar, it was not new or additional evidence. The Oct. 2017 report also did not contain an original signature. The Board properly disallowed the claim versus marking it NFA. 12 NYCRR 300.38(g)(3)(ii) only applies to pre-hearing conferences, and claimant was afforded multiple opportunities to produce admissible medical evidence, yet the only admissible medical in the record was the employer's IME, who denied causal relationship.

Matter of Barton v. Consol. Edison Co. of NY, Inc., 187 AD3d 1477 (3d Dept 2020)

- Facts: In consequential death claim, PFME was found in based on a records review report of Dr. Ploss. A Board Panel precluded Dr. Ploss' report for violation of 12 NYCRR 300.2(d)(4)(iv), rescinded the PFME finding, and, based on the absence of admissible evidence of a causally-related death, disallowed the claim and closed the case.
- Holding: The Third Department found that the report was properly precluded, but *reversed* the disallowance of the claim, finding that it should have been marked no further action, providing claimant with an opportunity to proffer additional information to satisfy her burden of submitting PFME.
- Discussion: Had the WCLJ found in the first instance that claimant had not proffered PFME, 12 NYCRR 300.38(g)(3)(ii) would have required that the case be marked NFA and afforded claimant an opportunity to submit additional evidence. As there had been no finding by the WCLJ as to the establishment or disallowance of the claim, the Court found the Board's decision to disallow the claim based solely upon the rescission of the PFME finding improper.

16. Depositions – Preclusion of Testimony & Reports

Matter of DeLucia v. Greenbuild, LLC, 182 AD3d 874 (3d Dept 2020)

- Facts: Controverted claim was placed on the expedited hearing calendar, and the parties were directed to submit deposition transcripts of the treating physicians within 55 days. Carrier's counsel served 5 subpoenas on the physicians. The WCLJ granted two extensions of time to complete depositions. Only one of the three doctors was finally deposed, and he was unable to offer an opinion on causation. With one exception, the only reason given for the physicians' nonappearance was a general statement that they were not available on the scheduled dates. The WCLJ disallowed the claim, and the Board affirmed, finding that the testimony and reports of the physicians who failed to appear for deposition testimony were properly precluded.
- Holding: The Third Department *affirmed*, holding that the Board properly precluded the testimony and reports of two of the treating physicians and resolved the claim on the record before it.
- Discussion: The presumption contained in § 21(5) for medical reports does not limit the Board's authority to preclude the testimony and reports of physicians who fail to appear for depositions under subpoena, where no valid explanation or sufficient excuse was ever provided for their failure to appear, and no "extraordinary circumstances" were shown to warrant a further extension of time for depositions under 12 NYCRR 300.10(c). The Court held that carrier was not obligated to enforce the subpoenas through court action since the WCLJ did not direct same. The Board has interpreted 12 NYCRR 300.10(c) as requiring a review of the carrier's compliance with any direction by the WCLJ when an extension of time was granted. If the WCLJ's decision granting an extension requires carrier to enforce a subpoena, then the failure to do so should result in a finding that carrier has waived its right to cross-examination. If the WCLJ's decision granting an extension is silent as to the enforcement of a subpoena, no such obligation exists before carrier can seek preclusion of their testimony and reports.

17. No FCRD Finding Does Not Preclude Claim for Consequential Psych Injury

Matter of Page v. Liberty Cent. Sch. Dist., 188 AD3d 1373 (3d Dept 2020)

- Facts: Claim was established for hypersensitivity reaction to the occupational presence of fungi, and amended to include multiple chemical sensitivity. In 2012, a Board Panel found that claimant had no FCRD. The Third Department previously affirmed a 2014 Board Panel Decision that held that the 2012 Board Panel Decision had resolved the issue of degree of disability. In March 2014, claimant was evaluated by a psychiatrist, who diagnosed an adjustment disorder with anxious and depressed mood, and claimant raised a consequential psychological injury. The Board found that the prior finding of no FCRD precluded a consequential condition, but the Third Department reversed. An IME conceded causal relationship. After depositions, a WCLJ amended the claim to include consequential adjustment disorder with depression and anxiety, precluded claimant's physician's reports and testimony as noncompliant with § 137 and 12 NYCRR 300.2, and found that claimant had no FCRD as a result of her psychiatric condition, and the Board affirmed.
- Holding: The Third Department *reversed* the preclusion of claimant's physician's reports on the basis that employer did not timely object to same, and *reversed* the finding that there was no competent medical evidence of a psychiatric disability and no compensable lost time after March 2020 as not supported by substantial evidence in the record.
- Discussion: The Court noted that both doctors found a causally related psychiatric disability, and the cessation of a causally related physical illness and disability does not preclude a subsequent request to amend the claim to find a consequential psychiatric illness and disability. While the Board may disregard medical opinions as "incredible or insufficient" even where contrary medical evidence is not presented, it may not fashion its own medical opinion.

18. Reopening – Change in Condition

Matter of Gallagher v. Hines Interests LP, 188 AD3d 1395 (3d Dept 2020)

- Facts: Claim was established for a right bicep tear and amended to include right CTS. Following production of permanency reports, the parties stipulated to a 33 1/3% SLU of the right arm and no SLU of the right hand. Claimant continued to treat for his hand, and in 2018 submitted a permanency report finding a 30% SLU of the right hand. Although carrier's IME agreed with claimant's SLU opinion, carrier contested an SLU award, arguing that claimant had not established a sufficient change in condition to reopen the claim, and that he had waived any right hand SLU via the stipulation. The Board found that claimant had not demonstrated a change in condition to warrant reopening of the claim.
- Holding: The Third Department *affirmed*, noting the Board's discretion in reopening claims.
- Discussion: The Court noted that notwithstanding the medical records finding a 30% SLU of the hand, claimant's medical records did not demonstrate any change in claimant's condition since the stipulation was entered sufficient to warrant reopening or alteration of the terms of the stipulation.

19. Schedule Loss of Use (SLU)

a. SLU: Protracted Healing Period (PHP)

Matter of Hale v. Rochester Tel. Corp., 182 AD3d 961 (3d Dept 2020)

- Facts: Claimant injured her right knee and was awarded a 55% SLU of the right leg, with additional weeks for a PHP. She subsequently underwent two causally-related surgeries, and requested additional PHP based on the post-surgery periods of TT. The Board denied the request, finding that claimant failed to demonstrate a change in condition.
- Holding: The Third Department *affirmed* the Board's determination that claimant failed to demonstrate a change in condition warranting additional PHP as supported by substantial evidence.
- Discussion: A claimant is not entitled to additional PHP after a prior SLU in the absence of evidence of a change in condition/increased SLU, regardless of any subsequent surgeries or TT awards. The existence of a subsequent surgery in and of itself is not enough to establish a change in condition.

b. SLU: Apportionment

Matter of St. Aubin v. Off. of Children & Family Servs., 185 AD3d 1121 (3d Dept 2020)

- Facts: In 2013, claimant filed a claim for a work-related right shoulder injury sustained in 2003. Claimant produced medical opinions finding a 55% SLU, while carrier's IME found that claimant's shoulder injury was not causally related to the 2003 accident. A WCLJ, crediting the IME, found that claimant was not entitled to an SLU award, and the Board affirmed. In 2015, claimant sustained another work-related right shoulder injury. A WCLJ ultimately found that claimant had a 50% SLU of the right arm causally related to the 2015 accident, and denied apportionment to the 2003 injury in light of the prior no-SLU finding. The Board affirmed.
- Holding: The Third Department *reversed*, noting that claimant was denied an SLU finding for the 2003 injury on causation grounds rather than any affirmative finding of no loss of use, such that the Board should have assumed compensability and determined whether claimant had loss of use, function, or range of motion of the right arm prior to the 2015 accident. The Court remitted the matter for that purpose.
- Discussion: The Third Department reaffirmed the availability of apportionment in an SLU case to a prior, noncompensable injury when the prior injury was disabling "in a compensation sense" before the occurrence of the subsequent injury – i.e., where the medical evidence establishes that the prior injury, had it been compensable, would have resulted in an SLU finding.

c. SLU: Calculating

Matter of Semrau v. Coca-Cola Refreshments USA Inc., ___AD3d___, 2020 NY Slip Op 07650 (3d Dept. 2020)

- Facts: Claimant sustained a left knee injury and tear to his left medial hamstring in Jan. 2016. In August 2017, he underwent left meniscus repair surgery. In 2018, the IME and treating orthopedist reported that claimant had reached MMI and had full range of motion of the left knee, with no permanent impairment. The treating physician gave a 25% SLU of the left leg for the hamstring impairment, which is not specifically addressed in the 2018 Guidelines, so he relied on the special consideration for a quadriceps rupture. The IME gave a 10% SLU of the left leg based on the hamstring. The Board ruled that claimant was not entitled to any SLU award for his left leg, citing the absence of a special consideration applicable to a hamstring impairment and absence of range of motion deficit in the knee.
- Holding: The Third Department *reversed*, holding that the absence of a special consideration addressing a hamstring impairment did not preclude an SLU award for a leg impairment; the Board's determination was not supported by substantial evidence.
- Discussion: The Court found that the Board's decision failed to take into consideration that the 2018 guidelines specifically permit an SLU award to be made based upon a permanent residual deficit caused by physical damage to muscle, and noted that the orthopedists agreed that claimant had reached MMI, and that his hamstring muscle tear left a permanent leg impairment and functional loss to that member. This satisfied the criteria for a left leg SLU award.

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