The Law Offices of Melissa A. Day, PLLC

LOMAD Magazine

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Have you watched "Lawyers and Friends"?
The monthly program airs on the 4th Friday of every month on LOMAD TV and provides insights into the latest developments in NY Workers' Compensation Law.

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August 16th is the Day, Time to raise LMA!

Upon the start of the COVID pandemic, on 03/07/2020, Governor Cuomo declared a state of emergency which shortly thereafter resulted in the Board issuing correspondence relieving injured workers from the requirement of demonstrating an attachment to the labor market.

Though we have consistently attempted to raise the issue, it's been pushed to the wayside and has even resulted in the delay of the claimant's Loss of Wage-Earning testimony and classification, unless we were willing to waive it. While we are all thankful that we are nearing the end of the pandemic and returning to normal, employers and carriers get an extra perk, as of 8/16/2021 we can start raising and addressing the issue of labor market attachment!

So, what does that mean? Claimant must make ***reasonable efforts*** to find employment consistent within their medical restrictions. Failure to do so will result in a finding of claimant to have voluntarily removal from the labor market, can result in the suspension of benefits.

As stated in the American Axle decision, claimant must demonstrate their efforts to secure employment, as ***timely, diligent, and persistent.*** If the claimant is using a job placement service such as One-Stop, or is making efforts at vocational rehabilitation, there must be documentation showing active participation in those efforts. American Axle, 8050 4343 (Decided January 26, 2010).

Did claimant apply in person? Then documentary evidence should provide the who, what, where, when, information for the application, including the name and address of the employer, and the information for the specific individual contact.

Did claimant apply online or in writing? Then copies of the resume submitted if any; the inquiry letter or email communication; or the application completed is necessary along with the day, month, and year submitted, the nature of employment sought, name and address of the employer and the response of the potential employer, as well as any follow-up e-mails the claimant has sent.

Questions specific to your claim? Reach out to hearings@getMAD.today to get in touch with one of our experienced attorneys to discuss the filing of your RFA-2, or for any other matter.

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History of WCL, Did you know?

Crystal Catherine Eastman (June 25, 1881, to July 8, 1928) arrived in Elmira at age 13 in 1894. She was the third of four children. She was one of only a few hundred women lawyers in the early 20th century. After graduating from New York Law School, Eastman's work involved investigating workplace accidents in Pittsburgh, PA, and in 1910 she published a book based on her findings, titled *Work Accidents, and the Law*.

New York Governor Charles Evans Hughes appointed her the first woman on New State's Industrial Commission where Eastman drafted the first serious Workers' Compensation Law. Though it was challenged, and as we know was declared unconstitutional on March 24, 1911, it ultimately became the model for the WCLs throughout the nation, vindicating Eastman's efforts. During Woodrow Wilson's administration, Eastman became investigating attorney for the United States Commission on Industrial Relations.

Eastman believed workers' compensation was essential for preventing accidents as it "makes every serious accident a considerable cost to an employer and thus insures his invaluable cooperation … in promoting safety" (from "The Three Essentials for Accident Prevention" by Crystal Eastman).

No Cold Shoulder, but No Frozen Shoulder Either

By: Kristen Degnan

This claim was already established for the left small finger. Per the C-3.0, claimant was employed as a Parks Utility Worker when he was taking down the tailgate of his dump-truck, slipped, and crushed fingers on his left hand. The claimant underwent closed reduction and percutaneous pin stabilization of the left small finger. Six months following surgery, the claimant reported frozen shoulder and left elbow pain, and his doctor opined it was causally related while the IME did not.

By way of relevant history, claimant underwent serious open-heart surgery before the pain in the shoulder and elbow began where he was in the hospital for an extended stay and was directed not to move his arms due to complications with his chest wall.

Testimony ensued and the treating physician admitted on cross-examination that the injuries could also be caused by the claimant's open-heart surgery as the muscles involved in the shoulder injury align with the chest wall that had to be disturbed for the heart surgery. The Judge noted that it was the claimant's burden to establish a causal relationship of the consequential injury and noted that the treating physician admitted that the injuries could have been caused by immobilization following heart surgery. The additional sites were disallowed.

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A Glimpse from Across the George Washington Bridge

By: Andrew Gould

New Jersey has long been the butt of many jokes. Then after a certain MTV show debuted, it became too easy. But when it comes to reasonable worker's compensation settlements, the Garden State employers and insurers may be the ones laughing at us. As an attorney with many years practicing in the New Jersey worker's compensation court system, I was curious how the two states compared. Recently, I assisted a colleague on a stipulation regarding an SLU of a shoulder injury. My review of the dollar amount of the settlement, the number seemed very high—and that's not to criticize my colleague in any way as Claimant's attorney did come down off the demand—but it sparked some curiosity of how the New York system quantifies the value of certain injuries.

A cursory view of the medical records of the case did not reveal anything that struck me as shocking. It appeared to be a relatively common shoulder-injury case. An average operated shoulder case in NJ is worth about 25% of partial total (under their system). If we give a 25% partial total disability using 2021 maximum rates (which of course would not be realistic because the worker was not injured this year, so it's already being generous) and plugged them into OSCAR—the online permanency award calculator system for New Jersey worker's compensation—we find that the same injury in New York is getting 3x the dollar value of what they are getting on the other side of the Hudson. Now maybe there is something in the file I missed. I admit I only did a cursory view of the medical records as I was only assisting my colleague. I plugged in the number for what I thought a homerun award for a shoulder injury would be New Jersey—the kind of award you get if the Judge was convinced that this was a really bad outcome. The New York stipulation was still twice the New Jersey award.

In fact, doing more calculations, the NY stipulation was on part of what a 1-level fusion would be in the Garden state. Bear in mind, New Jersey politically is left-of-center. Like New York, they are one of the five states that have a mandated temporary disability system (along with California, Rhode Island, and Hawaii). You expect New Jersey to be worker friendly. And yet still an injury in New York may cost 2-3x as much in terms of a permanency award. With a thriftier system, New Jersey comp adjusters and Snooki may be snickering at us. But at least we know how to pump our own gas.

What's New With the WCB?

In addition to the return of the labor market attachment, you should also be aware of the following changes in light of the end of the State of Emergency, and the Board's return to more regular operations:

- Relief from the original signature requirements on 27 Board prescribed forms will continue until August 16, 2021.
- Board offices remain closed for the time being and contact with Board employees will be by phone and email only.
- Remote-only attendance continues, meaning parties and witnesses appearing by video through the Virtual Hearing Center. Claimants have the opinion to appear by telephone.
- Consideration given to requests for extensions of the 30-day filing requirement for appeals and rebuttals ended **July 6, 2021.**
- Personal service on the Board still will not be permitted, must be served by mail only.

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Employee Appreciation

Thomas Dickinson, Legal Analyst and Office Manager

Prior to joining the Law Offices of Melissa A. Day, Tom worked for Special Funds Conservation Committee for 23 years defending the interests of the Fund at thousands of Workers' Compensation hearings. Tom was also manager of the Albany office of Special Funds for two years and manager of the Buffalo office of Special Funds for eight years. Over the years, Tom has worked closely and developed a strong working relationship with insurance carriers and their legal counsel as well as claimant's attorneys. Tom presently lives in Grand Island, New York with his wife Jeannie. He has three daughters, Jessika, Sari, and Isabel, age 18. During his free time, Tom enjoys golf, skiing, reading, and spending time with his wife. If you're lucky, you may catch him or Jeannie, riding the Hornet at Darien Lake!

What does LOMAD have to say about Tom?

"Quick and simple, he is just freaking awesome. He is quick to step in to help where needed and lends his ears to everyone."

> "During this entire pandemic, he has been enormously helpful to EVERYONE! He was a calming force when all seemed hopeless."

"He's so nice and takes a genuine interest in everybody when he asks them how they're doing and what they're up to."

> "Tom is very knowledgeable on office procedures, and he's easy to talk to if you have a question about anything"

"He always gives good advice, no matter how dumb the question. He is always willing to lend a hand no matter how busy I know he is."

> "He is generous and patient with his knowledge, and I knew this even before I worked with him, when I represented claimants and he was on the opposing side—a gentleman and a scholar!"

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Fine for the Illegally Hired Minor was Only Fair

Fun City Shops, 7891 1885 (Decided June 22, 1992).

The 15-year-old claimant testified that his first day on the job with Fun City Shops was July 17, 1989, initially hired for the setup of the machines at the Yates County Fair. However, as stated in his C-3, he lost half of his first finger on the right hand while *taking down* the rides.

The machine was a kiddy roller coaster called a mini-himalaya; that he was being paid $10 per machine that he tore down. The claimant indicated that he approached a man at the fair and asked him if he had any work for the week, who told him that he knew someone would have some work for him. So, the claimant worked on the roller race, helped set up the merry-mixer, and got paid $10 per machine. Then when it was time to take down the Mini-Himalaya, the same man told the claimant he'd pay him to help.

That man testified that he does business under the name Fun City Shops; that he had a contract with the Yates County Agricultural Society to supply a midway for the entire fair at Penn Yan, New York, in July 1989. The contract required that he produce rides, food, and games. He testified that he recalled meeting the claimant at the fair but told the claimant that he was too young for available jobs, that he did not hire the claimant to set up or tear down rides and that he did not pay the claimant for such work. He testified that he owned the mini-himalaya, but nobody working on the ride had any authority to hire anyone to assist with the tearing down of the rides.

The Board Panel finds based upon a review of the whole record, and in particular the claimant's testimony and the report of and Enforcement Section Investigator, that claimant was an employee of the man d/b/a Fun City Shops when he sustained the injury of this case, also finding an illegal employment of a minor and assessing Fun City $6,900.

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Who's who?

Jenny Malkowski, Legal Assistant

Jenny graduated from Erie Community College with an Associate Degree in Business Administration. She has worked extensively in the legal field for more than 10 years in various areas of law including Foreclosures and Contract Law. She is looking forward to learning more within the Workers' Compensation area with our firm.
Jenny has resided in WNY her whole life. In her free time, she enjoys spending time with her children, catching up with friends, watching television and crafting with her Cricut Machine.

Q. Spring, summer, fall or winter: What's your favorite season and why?

Summer is my favorite season! I love the hot weather and not having to bundle up for the snow is a plus!

Q. Camping. Love it or hate it?

Ever since I went camping with my parents and there was an infestation of caterpillars that would drop on you at any given moment, I've hated it!

Q. What's the bravest thing you have ever done?

I went parasailing a long time ago. Not sure if I'd ever do it again but it was fun when I did it.

Q. You just won a cruise to anywhere in the world! Where would you go?

I'd go to Hawaii! Going there is on my bucket list!

Q. What kind of pets did you have growing up?

I had a dogs growing up. The dog we adopted when I was in high school was the best because I trained him to sit, lay, roll over & play dead! That's when I actually had time to spend on that stuff!

Q. A movie? A concert? A ball game? What is your favorite spectator activity?

Movies are my favorite, but I do love watching my sons play baseball!

WELCOME TO OUR TEAM JENNY! THANK YOU FOR ALL YOU DO!

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For Your (Special) Consideration, Avoid a Knee Jerk Reaction

When looking at loss of use, familiarity with the Special Considerations and how they are applied are a must. Many times, treating providers will add percentages for everything under the sun—and many times for conditions that weren't even discussed throughout the medical records. And while it is desirable to have an IME with an opinion of a lower schedule, it is more important to have an opinion that adheres to the proper Guidelines.

For example, chondromalacia can be missed by both the treating doctor *and* the IME consultant, and while it's not uncommon for doctors to misapply the Guidelines, the Board Panel limits SLU awards only to that which the Guidelines permit. Case in point is the recently decided New Horizons Resources Inc., wherein both doctors misapplied the guidelines and opined a higher SLU as a result, but the Board Panel found the claimant only had a 10% loss of use based on the proper application of Special Consideration #4, which **does not allow** for any additional loss of use due to motion deficits. New Horizons Resources Inc., WCB# G163 2953, December 28, 2020.

Flip the coin though, the Special Consideration does not allow for an addition of the 7.5% to 10% loss of use to an otherwise complete lack of any range of motion deficits simply because the treating provider happened to mention the word 'chondromalacia' in a medical record in 2017. In Kelly Bros. LLC, the Special Consideration for chondromalacia did not apply when the treating doctor, who also performed surgery on the claimant's knee, simply noted the presence of chondromalacia and did not reveal it to be a contributing factor into the claimant's condition overall, nor in his opinion of the overall SLU of the knee. Kelly Bros. LLC, WCB #G212 2381 (Decided January 1, 2021).

We were recently successful on an appeal where the uncontroverted opinion of the treating doctor of 5% loss of use of the knee was increased to 10% (the maximum allowed under the Special Consideration) because chondromalacia was present, despite the perfect range of motion findings. We first argued that the treating provider who actually operated on the claimant's knee opined a 5% knowing full well that chondromalacia was present but did not consider it in his opinion on loss of use. However, we were also willing to acknowledge that chondromalacia does in fact provide for a 7.5% to 10% loss *depending on atrophy and range of motion findings*. So when the range of motion of a claimant leads to his own provider finding only a 5% loss, would not amount to a double loss simply because chondromalacia was present. In another win, both the treating doctor *and* the IME misapplied the Guidelines, and both opined higher loss of use after adding the range of motion deficits to the Special Consideration. The Board has consistently held that the Special Consideration does not allow for both. The takeaway, avoid the "knee jerk reaction" to trust the opinions on permanency, even of your IME. Review the Guidelines, review the records, and make sure they match.

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The 90s Called

This month, blast from the past Vanilla Ice was quoted saying that the 90s was the best decade ever. We aren't sure we would agree with that entirely in light of the neon windbreakers and high-waisted stirrup pants, but we *are* a fan of the 1996 Impairment Guidelines when litigating degree of disability for the lumbar spine, and we're glad they haven't gone entirely out of style!

The 1996 Medical Impairment Guidelines provide objective criteria to assess a claimant's degree of disability. Relied upon once again in a recent decision, Rochester General Hospital, the Board Panel maintained that although the Board adopted the 2012 NYS Guidelines for Determining Permanent Impairment and Loss of Wage to replace the 1996 Medical Guidelines, the newer Guidelines no longer provided any assistance when it came to determining the degree of temporary disabilities.

As a result, the 1996 Medical Guidelines "may be used as an aid in determining a degree of temporary disability." Rochester General Hospital, G119 8472 (Decided April 7, 2021). As such, although no longer controlling, they are still authoritative in determining a claimant's degree of temporary disability.

For example, in order to credibly opine a finding of total disability, Section "G" of the 1996 Medical Guidelines provides five additional objective criteria that should be present, over and above the criteria used to evaluate marked partial disability. The criteria for total disability include: 1) use of an assistive device to ambulate for more than two years duration; 2) needs assistance to undress or disrobe and unable to get up to the examination table without assistance; 3) needs assistance to perform activities of daily living such as self-care, personal hygiene, and transportation; 4) severe neurological deficit such as marked muscle weakness, paraplegia, and paraparesis; 5) disturbance of bladder, bowel and/or sexual function. See, Medical Impairment Guidelines June 1996 p. 27.

Have You Heard? The Latest from the 3rd

Matter of Boehm v Town of Greece 2021 NY Slip Op 04401 (3rd Dept. July 15, 2021).

Decision Below: An appeal filed by the self-insured employer was denied based on the appellant's failure to comply with 12 NYCRR 300.13(b), as there was no response to question #13 on the RB-89.

Affirmed: The Court referred to the consistent recognition that "the Board may adopt reasonable rules consistent with and supplemental to the provisions of the Workers' Compensation Law, and the Chair of the Board may make reasonable regulations consistent with the provisions thereof". Further, where a party who is represented by counsel fails to comply with the formatting, completion and service submission requirements, the Board has the discretion to deny review. In this claim, the appellant cited, discussed, and relied upon testimony from the hearings, however failed to list any hearing dates or transcripts. The instructions require appellants to list "transcripts, documents, reports, exhibits, and other evidence in the Board's file that are relevant to the issues and grounds raised for review".

What does this mean for you? You may have what could be a slam dunk of an appeal, but nobody will read it if you don't properly complete the coversheet. It is imperative that RB-89s are completed in entirety,

Reach out to hearings@getMAD.today to get in touch with one of our experienced attorneys to discuss your appeals, rebuttals, or for any NY WC issue.

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News and Events

Najee has been such an important and loved part of LOMAD. So, when he told us it was time for him to move closer to family and that he found a position matching his long-term goals and aspirations, it's no surprise that we were proud, but sad to see him go. LOMAD held a "Farewell and Thank You Happy-for-Najee, Sad-for-LOMAD Hour" at Santora's.

"Najee Walker – A Modern Day Renaissance Man"

By: Melissa A. Day

From the humble catacombs of a mail room he came to us;
Wary but eager, squinting in the light.
A suspicious academic endorsed by a fellow escapee.
Would he? Could he? Oh, my, yes…
Can you? Yes, he could.
Will you? Yes, he would.
Find this? Yes, he found.
Fix this? Yes, he fixed.
Learn this? Yes, he learned.
Teach us? Yes, he taught.
Was there a limit? Not for us to know, but we suspect not.
Najee Walker – A Modern Day Renaissance Man.

"Najee will be missed. He was easy going, cheerful, and always had something witty to say. I wish him the very best in his future endeavors and believe he will succeed at anything he puts his mind and heart to!"

Good Luck Najee!

We miss you greatly but wish you all the best in your new endeavors!

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