The Law Offices of Melissa A. Day, PLLC

LOMAD Magazine

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History of WCL, Did you know?

Charles Evans Hughes, who enacted New York's first "Workmen's' Compensation Law", was the 36th governor of New York before moving on to be Associate Justice of the Supreme Court of the United States. Hughes resigned from the bench as Associate Justice to accept the Republican presidential nomination in 1916.

Mr. Hughes' wife, Antoinette Hughes, was the first spouse of a presidential candidate to make an extended campaign tour. "Excepting the rallies for men only, she never missed a meeting on their trip." At one point on the campaign trail, she was pouring grape juice for the reporters when Charles Evans Hughes proclaimed "Gentlemen- the greatest asset of the Republican Party". Governor Hughes ultimately lost a narrow loss to President Woodrow Wilson.

Mrs. Hughes' mother died when she was just four years old. Her father was a lawyer who worked in a prominent law firm in the days following the civil war. The attorney widower sought a housekeeper to care for his baby after the death. While on the campaign trail, Mrs. Hughes greeted a woman by the name of Mrs. Joseph Williams, and Mrs. Hughes was spotted throwing her arms around Mrs. Williams, embracing the only mother the orphaned child ever knew.

Mr. and Mrs. Hughes had four children, three girls and a boy. Their daughter Elizabeth Hughes Gossett was one of the first people in the world to be treated with insulin for type 1 diabetes. Sadly, their daughter Helen died at the age of 28 from tuberculosis. Though Hughes was encouraged to run for president again in 1920, those days were spent mourning their loss.

https://poststar.com/news/columns/behind-scenes/women-in-hughes-life/article_dc9f6e19-4bb8-540f-976c-3bf705b672b4.html

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An Oldie but Goodie Seasonal Employees Back to Work – Or Not

Excerpts from the September 7, 2015 post by James Cousins (You can find the full article here).

WCL § 14(1) gives us the 260 multiple-method of calculation. § 14(2) provides the option of a "similar worker" payroll (which we will get to later on in our serials) and § 14(3) is the statutory provision that gives us the starting line for today's topic. In the event that neither of the methods provided in WCL § 14(1) and § 14(2) can be reasonably and fairly applied, WCL § 14(3) kicks in. Section 14(3) is an archetypal legal "catchall" favored by lawmakers that, with broad stokes, closes loopholes and otherwise sets thresholds: ceilings or floors. Although § 14(3) grants what seems to be broad discretion to set a wage without any reference to the means of calculation provided it "reasonably represent[s]" the workers' earning capacity, it also sets a floor: *in no event shall an AWW work out to less than a 200 multiple.* When part-time, seasonal, and sporadic workers are injured, this provision of § 14(3) is most often in play, whether the parties realize it or not. The Board has held that the 200-multiple minimum can only be employed "where there has been a finding that the employee was 'fully available' for the employment at issue." Matter of Pease v Anchor Motor Frgt., 158 AD2d 820 (3d Dept. 1990) *lv dismissed* 76 NY2d 772 (1990), *quoting* Matter of Pfeffer v Parkside Caterers, 42 NY2d 59 (3d Dept. 1977).

However, we will talk about teachers and the 10-month work-year that I personally covet (just ask my wife!). Working 10 months of the year, and considering holidays, most teachers generate a C-240 hovering right around, but usually below, 200 days worked in the preceding work-year. When one of the 'known and recognized incidents' of a claimant's job is the fact that he or she is predictably laid off for several months each year, due to the nature of the particular employment, that factor should be taken into account in determining the claimant's average annual earnings pursuant to Workers' Compensation Law 14. Matter of Littler v Fuller Co., 223 NY 369 (1918). When such an employment circumstance exists, the formula outlined in Workers' Compensation Law § 14(1), which is based on the approximate number of days worked by a five or six-day employee during an entire year, cannot 'reasonably and fairly be applied' to determine the claimant's earnings . . . Accordingly, [the] average weekly wage must be calculated pursuant to subdivisions (3) and (4) of Workers' Compensation Law 14." Matter of Till v Opportunities, Inc., 252 AD2d 619 (3d Dept. 1998). Availability is usually not at issue in this matters because a 200 multiple or an actual multiple are generally very close, and, of course, Till appears to have created a case-law driven exception for teachers.

Where an employment is seasonal, a carrier cannot suspend compensation benefits during the summer months when the claimant would not usually be receiving wages because the averaging provisions that determine AWW spread seasonal wages over an entire year. Having properly calculated the claimant's average weekly wage under the statutory formula provided by WCL § 14(3) and WCL § 14(4) for calculating an employee's average weekly wage, seasonal periods of unemployment, such as are customarily experienced by school teachers and other school district employees, are fully accounted for by using a 200 multiple, instead of the 260 multiple or 300 multiple provided by WCL § 14(1) for full time, year round five or six day workers. If the employee was denied compensation benefits during the summer months, the fact that a claimant was not regularly employed during that determining the compensable periods of disability. Thus, even if the claimant did not work during the summer months immediately preceding the injury of this file, the claimant would be entitled to compensation benefits during the summer months. Mt. Vernon Central School, 2015 NY Wrk. Comp. 0774783; Marlboro CSD, 2015 NY Wrk. Comp. 0977561; Floral Park-Bellerose Union, 2015 NY Wrk. Comp. 1071162.

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Oversize Loads

When it comes to a loss of use of the hand, there may be some facts to dispute in the doctors' assessments. While we can assure you that we all discovered our hands and fingers when we were babies and have all sang "Dem Bones" at least once in our lives, sometimes it's just not that simple when it comes to a schedule.

The 2018 Impairment Guidelines provide for SLU awards for permanent impairments of the thumbs, fingers, hands (in cases where multiple fingers are impaired), wrists, elbows, and shoulders. Wrist SLUs are provided based upon evaluations of and deficits in palmar flexion, dorsiflexion, pronation, and supination, and are classified as hand SLUs. Per the specific direction in the Guidelines, the loss of fingers allows for a "load" to a loss of the hand when two or more digits are affected. Great! However, should claims established for the wrist or hand, with no medical reports discussing any injury or treatment to any specific digits, be permitted to casually slip a few digits into the narrative and load them to the hand when it's time for a loss of use finding? We think not, and the Board tends to agree.

For example, in Hendrick Hudson High School, a doctor's opinion of a hand SLU based on the loss of use of the fingers was not in accordance with the Impairment Guidelines, nor in accordance with the facts of the claim. Hendrick Hudson High School, G077 8953 (Decided January 26, 2018). No digits were established, nor was there any evidence that any digits were even injured or treated. While the wrist was established, no specific digits were, and the "loading" strategy was not supported by the facts. The doctor's opinion rendered a loss of use of the wrist *and* the hand, which was not in accordance with the Guidelines.

On the other hand, pardon the pun, in Emco Plumbing Services, the claim that was originally established for only the hand was amended to include the fingers based on the history of surgery, treatment, and consistent reference to the injury of the respective fingers prior to any SLU to the fingers. Emco Plumbing Services, G057 3466 (Decided August 24, 2016). Though no fingers were originally established, the history of the injury specific to those digits supported the case to be established for same, and then a schedule to those digits made sense.

Loss of use determinations must be in accordance with the Guidelines, **and the entire record**. Watch those loss of use opinions, especially when the doctor simultaneously opines a loss of use to the wrist *and* the hand. While it may be a credible loss of use to multiple digits, it could just be a "load" of rubbish.

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

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Employee Appreciation

Elena Camp, Assistant Office Manager

Elena, our Assistant Office Manager who we can always count on to help us with our calendars, has extensive experience as a paralegal and legal assistant across the legal board. Though her roots originate in Erie, PA, she spent her more formative years in Western New York cultivating friendships and joining a church youth group where she was able to share her love for singing. Elena and her husband decided to stay in the area and are raising their children in true Buffalo style: on football and wings. When not managing the calendars of the attorneys, Elena's talent also comes out in the kitchen, where she cooks and bakes the most amazing meals and desserts, it's a wonder how many random guests show up uninvited for breakfast.

What does LOMAD have to say about Elena?

"Elena is super knowledgeable and helpful, both in Workers' Compensation knowledge, and life in general. For example, she taught me that hand sanitizer will remove permanent marker, which came in handy when a small child scribbled with one all over her face right before a dance recital."

"She's smart, energetic, friendly, organized, and overall a fun person to be around. She is always willing to help anyone out!"

"Elena is extremely knowledgeable about the ins and outs of LOMAD, if I ever have a question, no matter what it is, Elena will always provide a prompt answer. Her Guidance for both attorneys and staff does not go unnoticed."

"I remember Elena being one of the first people I spoke to when I started at LOMAD, and she instantly made me feel at home. Chatting with her felt like talking to a friend I'd known for years!"

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Attica Correctional Facility "Uprising"

50 years ago this month, September 9, 1971

On the morning of September 9, 1971, chaos ensued when a group of inmates overpowered their guards, and of the 2,200 inmates housed at the maximum-security prison located in Attica, NY, many inmates joined in the rioting, Though later in the day, the New York State Police retook most of the prison, there were still 1,281 prisoners who an exercise field in one of the yards, holding 39 employees and guards hostage, for four days. Unsuccessful negotiations led to state police and officers launching what became a devastating raid, resulting in the death of 10 hostages and 29 inmates

Families of the slain correction officers lost their right to sue by accepting the death-benefit checks sent to them by the state. The hostages who survived likewise lost their right to sue by cashing their paychecks.

For example, in Matter of Werner v. State, 53 NY2d 346 (1981), Ronald Werner, a guard held hostage was killed by a gunshot wound to the chest during the retaking. Workers' Compensation benefits were received and accepted by his widow, the claimant. She subsequently filed two claims in the Court of Claims. Ultimately the State moved for summary judgment on the basis of claimant's continued receipt of compensation benefits. The Court of Claims denied that motion. The Appellate Division reversed and granted summary judgment dismissing the claim.

Contrarily in Matter of Jones v. State, 96 AD2d 105 an account clerk employed by the State at Attica Correctional Facility, died instantly from a gunshot wound to the head caused by a bullet discharged by one of the State troopers retaking operation. In her claim against the state for wrongful death, the widow claimant asserted two causes of action, the first for negligence and the second for intentional tort. The general rule is, of course, that an employee injured in the course of employment is relegated to workers' compensation as his exclusive remedy. Where, however, injury results from "an intentional tort perpetrated by the employer or at the employer's direction, the [Workers'] Compensation Law is not a bar to a common-law action for damages

"The retaking was carried out as part of a carefully orchestrated plan prepared by officials of the State Police and Department of Correction with the approval of the highest officers in State government. The deployment of the assault team for the purpose of retaking the facility was part of that plan as was the instruction to each trooper "make the decision to fire based on his own personal judgment that 'an overt act' was in progress that threatened the life of a hostage". Having armed the men and directed them to fire into the crowd whenever in their judgment it was required, the State may not now claim that it was not its intention to wound or kill, for this was the inevitable consequence, and indeed, the very purpose of the firing instructions"

https://www.history.com/this-day-in-history/riot-at-attica-prison

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The attack on the WTC

20 years ago this month, September 11, 2001

As we approach the 20-year anniversary of the devastating attack against the United States, none of us will ever forget where we were when we heard the news. The shock in New York took a disastrous turn when the south tower of the World Trade Center collapsed in a massive cloud of dust and smoke. Thousands of first responders and people working in lower Manhattan near Ground Zero were exposed to toxic fumes and particles coming from the towers, and by 2018, 10,000 people were diagnosed with 9/11-related cancer.

The Board almost immediately began preparing for the claims that would surely result after the attacks, which 6,000 claims were filed in the first few months including more than 2,000 death claims. Throughout the influx of claims as time went on, it became apparent there was no way to address claimants with latent illnesses, which led to the adoption of Article 8-A. Article 8-A incorporated occupational diseases that allowed two years from the date of disablement to file and give notice with a date of disablement to be decided as the date most favorable to the claimant. Claims that were previously disallowed as untimely under Sections 18 and 28 for failing to timely file the WTC-12 forms were located and reopened.

Workers' Compensation Law article 8–A was enacted to remove statutory obstacles to timely claims filing and notice for latent conditions resulting from hazardous exposure for those who worked in rescue, recovery or cleanup operations following the [WTC] September 11th, 2001, attack". Williams v. City of New York, 887 N.Y.S.2d 286 (2009). "It is undisputed that this legislation was intended to be liberally construed to provide a potential avenue of relief for workers and volunteers suffering from ill health as a result of their efforts in the aftermath of the terrorists attacks"

In enacting Workers' Compensation Law article 8–A, the Legislature recognized that many who followed in the wake of emergency personnel (construction workers, for example) would not be afforded coverage under the Workers' Compensation Law as it then existed—despite the fact that participants in the World Trade Center rescue, recovery or cleanup operations were exposed to the same "uniquely hazardous conditions" and "various toxins" as those who were first on the scene.

Consistent with the Legislature's stated desire to achieve some measure of parity among different categories of workers exposed to the same environmental hazards, the Board has required that the injured claimant directly participate in or otherwise have some tangible connection to the rescue, recovery, or cleanup operations in order to fall within.

https://www.history.com/topics/21st-century/9-11-attacks#&gid=ci02475b9b700027cb&pid=september-9-11-getty-123974415

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Surveillance, Social Media.....Section 32?

By: Neil A. Diegelman

In a recent claim, we obtained surveillance of a claimant performing activities well outside of their doctor's restrictions. From there, we obtained social media sweep-reports. Of note, the carrier's obligation to disclose surveillance materials applies not just before the carrier's questioning of the claimant, but also prior to when the carrier prompts the WCLJ's questioning of the claimant. See Matter of Moreilli v. Tops Mkts., 107 AD3d 1231 (3d 2013). See also Matter of Aeropostale, 2012 NY Wrk Comp G0410425, wherein the Board Panel held that the carrier does not need to disclose the evidence from social media before questioning the claimant.

At our hearing, we prompted the Judge to ask the work-related questions before updating awards. While our litigation strategy was to hold off on disclosure of the surveillance, we did not want to lose the opportunity to use the surveillance under a fraud claim. Upon conclusion of the claim, we received a call from claimant's counsel – advising that they were interested in a section 32 full and final agreement – as the claimant, fully admitted to activities that their attorney was not aware of. From there, we used an evidence based MSA to finalize the medical portion of the claim under the full and final Section 32 agreement. We were able to reduce the indemnity portion of the claim based upon the surveillance and social media reports, prior to the claim moving forward with fraud.

Overall, it is important to remember when we must disclose surveillance (though not social media). Once we disclosed the surveillance, without any specifics given to claimant/claimant's counsel, they knelt to our request, and we settled on a full and final agreement saving countless dollars on litigation of fraud. The use of surveillance and social media sweep has been increasingly useful. Here at LOMAD, once we take the deep dive and determine the need for surveillance and/or a social media sweep, the results carry the Day.

What's New with the WCB? Updated Guidance: Labor Market Attachment

As we're sure you know, employers and carriers were given the green light to raise the issue of labor market attachment in workers' compensation claims, beginning on August 16, 2021. Partially disabled claimants will be required to demonstrate a good faith, independent job search, or participation in job placement or vocational rehabilitation, appropriate given the current Covid-19 infection rate and resulting limitations on mobility. Which means:

- Such efforts should include the use of online job placement and vocational rehabilitation services, as well as online and/or phone applications. Online and phone interviews should be accepted. In-person job searches are not presently required.
- When an employer is in compliance with local board of health guidance relating to business operations in the state, job offers *may not be refused solely because it requires in-person attendance*.
- When determining issues related to labor market attachment, the Workers' Compensation Law Judge will take into account difficulties and obstacles that continue with respect to job searches. job placement, and vocational rehabilitation. The Board will apply a standard mindful of the statewide Covid-19 infection rate and resulting limitations.

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

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Opinions, Everybody's Got One!

When the claimant's disability has not yet been classified as permanent, then the claimant has the burden of submitting up-to-date medical opinions of the claimant's degree of disability, as there is no presumption that it is ongoing. However, not all opinions of disability are sufficient to meet this requirement. The Expanded Provider Law, effective January 1, 2020, allowed licensed social workers, nurse practitioners, acupuncturists, as well as ancillary providers to include physician assistants, occupational therapists, and physical therapists were able to become Board-authorized providers.

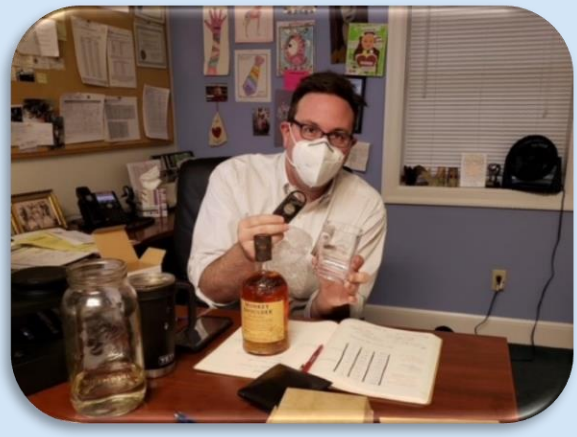
This means that licensed clinical social workers, acupuncturists, nurse practitioners, physician assistants, occupational therapists and physical therapists may now become Board-authorized to treat injured workers, and bill in their own name. Under the new law, physician assistants can sign and submit reports without the signature of the supervising physician for reports addressing ongoing degree of disability. However, reports must be countersigned by the supervising physician when the report addresses causal relationship, initial degree of disability, permanency, and medical-treatment issues. Additionally, physician assistants can be deposed if directed by the Board. As the supervising physician must countersign a physician assistant's report regarding causal relationship, initial degree of disability, permanency, and medical-treatment issues, the supervising physician testifies on these issues.

However, while physical therapists, occupational therapists, and acupuncturists can treat the claimants with a referral from a treating provider, they're opinions on initial causal relationship and diagnoses, initial degree of disability, or ongoing disability. Nor are they able to opine permanency opinions nor be deposed under this new law.

When Proposed Decisions are issued by the Board making awards, it is imperative to determine where the opinion of those awards are coming from, as even if you don't have a contrary IME opinion. If the awards are based on the initial opinion of a physician's assistant without a medical doctor's signature, then it is invalid. Likewise, any initial or ongoing opinion of a physical therapist or occupational therapist, is invalid, and cannot be relied upon for an award determination. So, the records must be reviewed, and the Decision must be objected to by the deadline, if the opinions are not authorized under the Expanded Provider Law.

Happy Birthday James!

We couldn't let the September Issue of our newsletter get by without acknowledging the birthday of one of our fearless leaders. James does so much for all of the attorneys and staff, many of us would not be where we are without his guidance.



He's a wealth of knowledge, and a genuine mentor. He's been referred to as "the reflection pool of our awesomeness".

One LOMADIAN said it best, "He puts up with a lot. We've learned so much from him and he doesn't seem to mind taking the time to explain something or talk about a case when we ask."

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