The Law Offices of Melissa A. Day, PLLC

NEW YORK WORKERS' COMPENSATION BASIC ISSUES OF COMPENSABILITY WEBINAR SERIES

2016 CASE LAW UPDATE: A YEAR IN REVIEW

James B. Cousins

David F. Derrico

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I. ACCIDENT

1.) **Matter of Hyatt v. Holliswood Care Center, 141 A.D.3d 908**

Decision Below: Board found a compensable injury.

***Affirmed*:** The claimant testifying that he was injured while lifting clothes and linens into bins when he grabbed a heavy bin to prevent it from tipping over onto his supervisor resulting in pain in his neck, back, and hands, and corroborated with MRI results taken after the alleged accident showed herniated cervical and lumbar discs was substantial evidence that will not be overturned.

II. AGGREGATE TRUST FUND

2.) **Matter of Joann Turi v. Five L. Enterprises, 139 A.D.3d 1307**

Decision Below: Claimant lacked standing to request the imposition of a penalty for the failure of the WC carrier to make timely deposit into ATF.

Affirmed: Any untimely deposit into an ATF and resulting penalty is governed by the Board's rules and regulations 12 NYCRR 393.2 and is separate and apart from any penalty imposed pursuant to WCL 25(3) (f). It is an issue between the ATF and Carrier.

Claimant does not have standing to raise the issue of "late payment" of an ATF deposit and any penalty and interest is payable to the ATF and not the claimant. (*See* Walmart, 2006 NY Wrk. Comp. 69504297)

Any late payment "penalty" is controlled by 12 NYCRR 393.2 (and WCL § 27(4)) and WCL § 25 penalties do not apply to a late ATF deposit.

N.B. there appears to be no reference in case law to the form of the penalty; the charging of interest and recalculation of the deposit appear to be the only "penalty" imposed despite the statute containing the word "penalty" – at least in published decisions. A settled issue since 2007.

III. AMERICAN ECONOMY

3.) **American Economy Insurance Company v. The State of New York, 139 A.D.3d 138**

Decision Below: Supreme Court granted defendants' motion to dismiss the complaint that alleged sunset of the § 25-a fund was unconstitutional.

Reversed: Holding that the challenged provision impermissibly imposes on plaintiff's significant additional liability with respect to past conflicts and is therefore unconstitutional.

2013 "reform" that sunset the WCL § 25-a fund is ruled unconstitutional as both an impairment of contract and a "taking" in violation of the US Constitution.

Impairment of contract because policies of insurance, already written while § 25-a relief was still a future possibility, now lost that relief because of the "reform" and the method of sunset did not account for the unfunded liability and new legal consequences arising from the closure of the fund – i.e. lifetime management and liability.

A "taking" because the plaintiffs demonstrated that after the "closure" of the fund, the NYS Dept. of Insurance authorized a premium hike based entirely on the closure of the fund, demonstrating the value of the fund to the carrier and proving a "taking" had occurred.

Pending review at the Court of Appeals.

IV. APPEAL TECHNICALITIES

4.) **Matter of Rodney Levine v. Health First Management Services, 140 A.D.3d 1417**

Decision Below: Board ruled claimant's application for review failed to comply with 12 NYCRR 300.13 where it contained unsigned affirmation, no date of mailing, and there was evidence it was served late.

***Remitted*:** for the Board to certify whether the record on appeal is "true and correct." The employer argued that the claimant's appeal contained in the Joint Record on Appeal prepared by claimant which was not the same document that claimant submitted and filed with the Board.

5.) **Matter of Santiago v. Henry Operators, 139 A.D.3d 1308**

Decision Below: Board ordered further development of the record on issue of claimant's SLU percentage based on IME report where claimant had not been provided an opportunity to present his own SLU opinion.

Dismissed as both decisions are interlocutory and do not dispose of all substantive issues or reach a potentially dispositive threshold legal question are therefore not appealable.

6.) **Kimberly Cassano v. Sunrise Medical Laboratory, Inc., 135 A.D.3d 1283**

Decision Below: Board found appeal of the SFCC for review of an Administrative Decision was untimely.

***Affirmed*:** Application for Review was 4 years after the Administrative Decision was filed. Even though there is evidence that the AD was issued in error (finding full § 15-8(d) after the record already contained a partial stipulation), the Board's decision to deny review as untimely shall not be disturbed absent abuse of discretion.

V. BOARD IN CONTEMPT

7.) **Matter of Riccelli Enterprises v. State of New York Workers' Compensation Board, Chairman of Workers' Compensation Board, and Safe LLC, 142 A.D.3d 1352**

Decision Below: Supreme Court , Onondaga County held respondents-defendants in contempt and awarded costs and fees.

Affirmed: The Supreme Court properly found the Board found in contempt for violating stay order previously imposed where the Board, seeking consolidation of an Onondaga County action that was, in its opinion, relevant to its pending GSIT ligation in Albany County. The stay imposed upon the Board in the Onondaga County action by the presiding justice was a "clear and unequivocal mandate" against any action and the Board's motion to consolidate was clearly in violation of that prohibition. Attorney's fees and costs assessments against the Board were therefore proper.

VI. CANCELLATION OF COVERAGE

8.) **Matter of Eduardo Rivera v. Superior Laundry Services, LLC, and Guarantee Insurance, 142 A.D.3d 1257**

Decision Below: Board ruled the employer's WC policy was not properly canceled and affirmed WCLJ decision based on carrier's failure to comply with notice requirements of §54(5).

***Reversed*:** Board erred in finding that the Guarantee Ins. Co. was the proper carrier and in discharging the UEF.

While the WCLJ correctly determined that the carrier did not provide proper notice of the cancellation of the policy that was issued to BMS, the Board failed to address the issue of whether the policy provided workers' compensation coverage to the employer at the time of the claimant's accident in the first instance. The Board failed to review the contract of insurance; had they done so they would have seen that it did not provide coverage.

The Board, while correct on the notice issue, failed to determine the threshold question of whether the coverage actually provided WC coverage at the time of the accident.

9.) **Matter of Nerissa Craig v. Leatherstocking Healthcare, LLC, Wesco Insurance Co., C/O AM Trust North America, 139 A.D.3d 1217**

Decision Below: Affirmed WCLJ decision that the carrier's cancellation of the employer's policy was ineffective due to failure to meet the notice requirements of §54(5).

***Reversed*:** the Carrier controverted coverage on the basis that it had cancelled the employer's policy for nonpayment of premiums but could only produce proof that the cancellation notice was *sent* via certified return-receipt mail; it could not produce the receipt itself.

Because the language of the statute holds that a carrier must serve notice of a cancellation of an insurance contract upon an employer by "delivering it to him, her or it by sending it by mail, by certified or registered letter, return receipt requested" it is not, therefore, required to produce the return receipt; rather, the carrier need only demonstrate that it requested a return receipt. (the mailing manifest with tracking details should be enough).

VII. CAUSAL RELATIONSHIP

10.) **Matter of Bruno Donato v. Taconic Correctional Facility, 38 N.Y.S.3d 288**

Decision Below: Reversed the WCLJ finding that claimant had sustained a causally related injury. The Board found the medical evidence was insufficient.

***Affirmed*:** Claimant, a correction officer, claimed while transporting a prisoner on a commercial plane he was exposed to bacteria causing acute bronchitis. Medical testimony that respiratory infections are commonly caused by air travel, without more, is not sufficient to support a claim for a CR bronchitis.

11.) **Kathleen Huffer v. Nesconset Fire District, 38 N.Y.S.3d 642**

Decision Below: Death not causally related.

***Affirmed*:** Decedent first responder attended drills, went home and died in her sleep of hypertensive and atherosclerotic heart disease.

Standards of VFFBL are not satisfied where there is no evidence of what firemanic activities the claimant was engaged in the day before death, and where medical evidence was "based upon a lack of information, as well as certain assumptions . . . regarding the specific activities that decedent engaged in [on call]."

12.) **Ursula Mellies v. Consolidated Edison Co., 140 A.D.3d 1543**

Decision Below: Death causally related.

***Affirmed*:** With established lifetime asbestosis claim, estate was able to show sufficient evidence to link claimant's death to asbestosis where claimant died of respiratory failure after developing fatal complications after an unrelated surgery. Although there was no direct medical evidence linking the condition to his death, claimant's physicians testified that asbestosis was a progressive disease and felt it certainly contributed to his death. (This is a "one minute earlier" type of case.)

13.) **Christopher Hartigan v. Albany County Sheriff's Department, 140 A.D.2d 3d 1258**

Decision Below: Claimant's myocardial infarction is causally-related.

Reversed: Disallowance of claim for causally-related heart-attack is proper where claimant's doctor testified that he did not know anything about the events leading up the MI and only was able to testify, after being asked hypothetical that recited the work activity, that stress can aggravate a coronary condition and any physical exertion may have caused the MI. Claimant survived the MI. Board's reliance on such speculative testimony is not appropriate.

14.) **Matter of Rita Kitcullen v. AFCO/AVPORTS Management, LLC, 138 A.D.3d 1314**

Decision Below: Death was causally related.

***Affirmed*:** Claimant's MI and subsequent death were causally-related to his employment where evidence showed claimant was directed to work outside in cold conditions and that the claimant's task was sufficiently important to cause both physical and emotional stress and was, according to estate's medical expert, sufficient to bring about the MI.

15.) **Matter of Brenda Hill v. Shoprite Supermarkets, Inc., 140 A.D.3d 1564**

Decision Below: No compensable injury; the presumption of WCL §21 cannot be used to prove that an accident occurred in the first instance.

***Affirmed*:** claimant credibility at issue, multiple DOAs given and medicals filed that report no history of work-related injury; delay in seeking treatment; pre-existing condition denied despite evidence of earlier MVA.

16.) **Matthew Johnson v. Adams & Associates, 140 A.D.3d 1552**

Decision Below: Claim for consequential RSD of the LUE is disallowed and claim of estoppel is rejected.

***Affirmed*:** The IME doctor testified the claimant did not suffer from RSD in the left upper extremity. The claimant's treating physician testified the claimant did suffer from RSD based upon plaintiff's subjective complaints and tremors vs objective signs of RSD in the upper extremity.

Claimant's argument that the carrier was estopped from contesting liability was rejected. A carrier/SIE is not estopped from contesting liability for a condition/injury where it paid medicals bills for that condition; advance payment merely precludes the defense based on the statute of limitations, "it does not foreclose a carrier from asserting other defenses and, thus will not give rise to estoppel where the elements have not been otherwise established."

17.) **Pinkhasov v. Auto One Insurance, and Fidelity & Deposit Company of Maryland c/o Zurich American Ins., 140 A.D.3d 1487**

Decision Below: The Board upheld WCLJ award of TT benefits post 2012 surgery.

***Reversed & Remitted*:** Order of the Chair authorizing surgery did not resolve issue of causal relationship, only medical necessity, and thus it did not preclude the carrier from arguing that the surgery, and subsequent disability, were not related to the instant claim. The making of awards to the claimant, and the Board's refusal to consider carrier's arguments on CR, were not supported by sufficient evidence where IME said the surgery was related to a fall at home while treating doctors related the surgery to DDD – the claimant's burden to show evidence relating these conditions to his case was not yet met.

18.) **Matter of Donald J. Woodruff v. Phelps Sungas, Inc., 137A.D.3d 1345**

Decision Below: Board found that the claimant was not entitled to benefits, affirmed WCLJ finding claimants reduced earnings not the result of causally related work injuries.

Affirmed: Claimant's current reduced earnings are not causally-related to the established work-related injury where claimant was laid off from employment of record, terminated from subsequent job (for cause) and where claimant's physicians opined that he could perform "regular duty" work of the type he was performing for the insured and at the subsequent employer without restriction – even though he was disabled in the broadest sense of the word, carrier was able to establish that he wasn't disabled from his field of employment.

19.) **Matter of Patrick Granville v. Town of Hamburg, 136 A.D.3d 1254**

Decision Below: Claimant sustained causally related binaural hearing loss, affirmed WCLJ finding.

Affirmed: The Board was entitled reconcile conflicting medical testimony of claimant's treating otolaryngologist that found the claimant's hearing loss causally related to his employment, that the hearing loss decreased after 90 days of no longer working with the employer, combined with tests that showed no hearing loss prior to starting with the employer where he was working with heavy and light machinery as being more credible than employer's examining physician that found claimant's hearing loss not causally related to his employment.

20.) **Michael Simpson v. New York City Transit Authority, 136 A.D.3d 1192**

Decision Below: Claimant did not sustain causally related disability to his knees. Affirmed WCLJ disallowance of the claim.

Reversed and Remitted: The Board's findings regarding the bilateral knee claim relied on evidence that the claimant used his right knee at work more than his left, and that MRI results showing similar findings between the two knees supported the IME's opinion that the condition was not causally related to work. However, the actual MRI results show more extensive injuries to his right knee than his left. Since the actual medical evidence is in contradiction to the Board's reasoning, it cannot be said that the decision was supported by substantial evidence.

21.) **Eileen Waddy v. Barnard College, 135 A.D.3d 1257**

Decision Below: Affirmed WCLJ finding that claimant failed to demonstrate that asthma was causally related.

***Affirmed*:** Claimant failed to establish that her asthma was due to "unusual environmental conditions or events assignable to something extraordinary at work." Her employer moved to a basement of a building and claimant complained it was poorly ventilated and mold led to development of asthma. There was substantial evidence to support Board's decision that claimant's condition was not causally related to work based on a treating pulmonologist who testified that he could not determine if the claimant's asthma resulted from environmental conditions at work or from other allergens present outside of work, only that claimant was "probably exposed at work." Additionally, an IME was conducted and concluded claimant's asthma was not CR, noting a February 2012 indoor air quality test that found no adverse environmental conditions.

22.) **Matter of Donald Stange v. Angelica Textile Services, Inc., 139 A.D.3d 1294**

Decision Below: Board found claimant established causal relationship between earlier work-related injury to the right shoulder and subsequent consequential injury to the right shoulder.

***Affirmed*:** Established right shoulder injury was substantially worsened when claimant fell down stairs and used his right arm to brace himself. Carrier's defense of "new accident" was rejected where treating doctor testified that new articular damage was an "extension" of the pre-existing CR tear/repair from which claimant was recovering at the time, and thus this "new accident" became a consequential injury.

VIII. COLLATERAL ESTOPPEL AND RES JUDICATA

23.) **Matter of Joseph King v. Malone Home Builders, 137 A.D.3d 1646**

Decision Below: Supreme Court Granted Plaintiff's partial SJ with respect to Labor Law §240(1) , but denied defendant's cross motion and the rest of the plaintiff's motion on the ground there was an issue of fact whether the plaintiff was the special employee of the defendant at the time of the fall.

Modified: The court below erred in determining that collateral estoppel did not apply to the WC Board determination and therefore modified to grant plaintiff's entire SJ motion.

WCB proceeding that determined that defendant was not a "special employer" of the plaintiff is entitled to the preclusive effect of collateral estoppel because quasi-judicial determination of an administrative agency is entitled to collateral estoppel effect "where the issue a party seeks to preclude in a subsequent civil action is identical to a material issue that was necessarily decided

by the administrative tribunal and where there was a full and fair opportunity to litigate before that tribunal" *Citing* Acqui v. Seven Thirty-One 22 N.Y.3d 246 (2013).

24.) **Danny Rosa v. June Electrical Corporation, 140 A.D.3d 1353**

Decision Below: Board ruled claimant was an employee of June Electric Corp. (JEC) and awarded benefits affirming the WCLJ decision. In an Amended Decision Board clarified that the federal judgment pertaining to the workers' compensation policy between carrier and JEC has no collateral estoppel or res judicata effect on the Board.

Affirmed: WCB determined after a hearing that carrier's policy provided worker's compensation coverage for the defendant corporation, JEC, and its injured employee, plaintiff. Carrier commenced proceedings in Federal Court (SDNY) and obtained a default judgement determining that the carrier owed no duty to defend/indemnify/cover JEC. Board's conclusion that this default judgment has no effect on the WCB's prior findings is correct as a matter of law.

IX. EXCLUSIVITY AND WCL APPLICABILITY

25.) **Matter of Brenda Brown vs. Deborah Hall, Michale Hall, and Canine & Company, 139 A.D.3d 1404**

Decision Below: Supreme Court denied defendants motion to dismiss the complaint.

Reversed and Remitted: The Primary jurisdiction with respect to determinations as to the applicability of WCL are vested in the Board. It is therefore inappropriate for courts to have entertained the motion and it should have sent to the Board for determination.

The plaintiff commenced negligence action for being attacked by a dog on the employer's premises. The defendant moved to dismiss the amended complaint or in the alternative for summary judgment on the ground that workers' compensation benefits were plaintiff's exclusive remedy.

X. FIRING A WCLJ

26.**) Matter of Robert Weinstein v. New York State Workers' Compensation Board, 135 A.D.3d 948**

Decision Below: Respondent WCB filed grievance against WCLJ seeking termination. After binding arbitration, termination of WCLJ was directed. WCLJ moved to vacate the arbitrator decision, and Supreme Court granted respondent motion to dismiss petition to vacate.

Affirmed: In arbitration below, petitioner WCLJ was terminated for cause where arbitrator found that petitioner was insubordinate, incompetent, guilty of multiple counts of judicial misconduct and was rude to his supervisor and had failed to perform his work in a timely manner. The harshness of the penalty is only a relevant factor in appellate review where the

arbitration below was mandatory; however, here the penalty was not such that it would shock "one's sense of fairness."

XI. FRAUD

27.) **Matter of Fernando Calderon v. New York City Dept. of Corrections, 2016 N.Y. App. Div. LEXIS 7607**

Mandatory and discretionary penalties for intentionally concealing a pre-existing condition are appropriate.

$500 penalty against claimant and counsel for producing a "second addendum" report containing "bogus" opinions should be rescinded because there is no evidence that the doctor's opinions were "knowingly false." Two $500 penalty against claimant's counsel (1) for having raised, without grounds, § 114-a(3)(ii) against the carrier, and (2) failing to appear at a deposition without good cause. (1) is affirmed, (2) is reversed as failing to appear is not "institution or continuation of a proceeding."

28.) **Matter of Joel Amaker v. City of New York Dept. of Transportation, 2016 N.Y. App. Div. LEXIS 7589**

Decision Below: Board denied claimant's Request for Reconsideration.

Affirmed: In March 2002 the claimant was found in violation of §114-a for continuing to receive WC benefits after returning to work in 2000. He was disqualified as a result from receiving future benefits. Claimant requested reconsideration and Board refused to revisit the issue. Because application contained no newly discovered evidence describing a material change in condition, Board properly refused to consider issues raised in the application for review.

29.) **Matter of Fern Leising v. Williamsville Central School District, 143 A.D.3d 1107**

Decision Below: No §114-a violation, reversed WCLJ below.

Reversed and Remitted: Claimant's part-time employment at a golf course produced "negligible" earnings and thus there was no "materiality" to any possible misrepresentation. Suggesting that the Board's decision contained factual inaccuracies and was based upon a mischaracterization of the record and misreading of the law, the AD *reversed and remitted* citing the broad definition of "materiality" and reminding the Board that a materiality determination must also consider the intent (knowingly) and whether the claimant's purpose was to obtain benefits.

30.) **Matter of Mia Howard v. Facilities Maintenance Corporation, 2016 N.Y. *Slip Op* 06531**

Decision Below: Claimant violated § 114-a with discretionary and mandatory penalties imposed.

Affirmed: Board's decision was supported by substantial evidence and the disqualification was not disproportionate where surveillance demonstrated that the claimant had exaggerated her functional limitations to her physicians, telling them she spent most of her time in bed. Imposition of mandatory penalty based on medical reports outlining the time-frame of the misrepresentation was proper. Imposition of discretionary lifetime penalty was also proper where Board found the claimant was responsible for "egregious and intentional misrepresentations."

31.) **Matter of Robert Adams v. Blackhorse Carriers, Inc., 142 A.D.3d 1273**

Decision Below: Board found violation §114-a.

Affirmed: Claimant's conviction on count of criminal sale of a controlled substance was proof of WC fraud where claimant had previously testified (before the conviction) that he had not received any income while receiving lost time benefits; claimant had in fact earned income by selling drugs. The "egregious" nature of the claimant's conduct (suggesting that the criminality of the conduct was a consideration) was enough to justify the discretionary penalty.

32.) **Matter of Samuel Snyder v. Bette Cring, 140 A.D.3d 1554**

Decision Below: Board found the claimant not in violation §114-a.

Affirmed: That a claimant denied any prior injury on his C-3 is insufficient grounds for a § 114-a finding where the claimant conceded "pain" in the same area he injured at work, but testified that he did not consider "pain" and "injury" to be synonymous terms.

33.) **Matter of Martinez v. Kingston City School District, 140 A.D. 3d 1421**

Decision Below: The Board affirmed the WCLJ decision that claimant violated §114–a and imposed mandatory and discretionary penalties.

Modified and Remitted: by modifying term of mandatory penalty and rescinding ruling disqualifying the claimant from receiving all future benefits.

Claimant's volunteer activities answering phones and manning a desk at a religious camp constituted fraud where the claimant denied volunteer activities under oath and in written questionnaires. However, mandatory penalties can only be applied to a date where a misrepresentation occurred, not a date where a certain activity, about which the claimant may later lie, took place (the fraud is in the lie, not the activity). The AD modified the mandatory period on those grounds and also rescinded the discretionary penalty noting that the record below contained no justification for that penalty by the Board.

34.**) <u>Matter of Cruz v. Buffalo Board of Education</u>, 138 A.D.3d 1316**

Decision Below: Affirmed WCLJ decision that the claimant had removed himself from the labor market and reversed WCLJ finding §114-a violation regarding the claimant's job search efforts.

Affirmed: The Board properly rejected the carrier's argument that the claimant had committed fraud where the carrier had "verified" the claimant's job search. Although the carrier's investigator could only determine that two companies had received an application from the claimant, 17 other companies failed to respond or could not confirm or deny that the claimant had applied. Moreover, the investigator did not record the name of the individuals she had spoken with at each company.

35.) **<u>Matter of Paul Poupore v. Clinton County Highway Department</u>, 138 A.D.3d 1321**

Decision Below: Claimant violated § 114-a and both mandatory and discretionary penalties imposed.

Affirmed: Worker's Compensation Board properly disqualified claimant from receiving wage replacement benefits due to his violation of WCL §114–a, as his activities shown on a surveillance video, which included, pumping gas, eating lunch out, sitting in a car, entering his truck, and mounting and dismounting a motorcycle with ease, walking, squatting, sitting, and maintaining a leaning position on a motorcycle for 35 minutes, were inconsistent with representations made to the employer's orthopedic surgeon that he could not do anything more than sedentary activity, and then only with significant amounts of narcotic pain medication, and needed help with all of his ADLs, supported the Board's finding that he willfully misrepresented his activity capacity and disability status.

36.) **<u>Matter of Keith Kodra v. Mondelez International, Inc.</u>, 2016 N.Y. *Slip Op* 08136**

Decision Below: WCLJ's finding of no fraud is reversed and Board imposed mandatory and discretionary penalties

Modified: mandatory penalty is affirmed but discretionary penalty is rescinded.

Claimant underwent causally-related shoulder surgery and was deemed 100% disabled from the established employment which required heavy use of his arms. During post-operative recovery, the claimant resumed work at a self-owned lawn care company, however the claimant's treating physician reported both a 100% disability and that he was working part time in a lawn care business. The employer could not accommodate light duty work. Claimant established that his physician had provided him with restrictions relating to the lawn care work and he was working within them. Claimant told the IME he was not working, but testified he thought the question applied to the primary employment (WC employment) only. The Board's imposition of a mandatory penalty was legally correct where the claimant's omission to the IME was knowingly

false. However, the imposition of a discretionary penalty was rescinded where the Board failed to provide any rationale supporting such an onerous penalty.

XII. FEE APPS

37.) **Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts v. Richard Harris, 138 A.D.3d 89**

Attorney filed fee applications with the WCB that contained knowingly false recitals of itemized time and requests to change venue that contained knowingly false representations regarding the grounds of such requests (some of which contained forged signatures) and both actions constituted the "offer of a false instrument for filing" – three year suspension ordered.

38.) **Matter of Steven Kennedy v. New York City Dept. of Corrections, 140 A.D.3d 1572**

Decision Below: $500.00 penalty increased to $750.00 for frivolous venue change request pursuant to §114-a(3). WCLJ reduced counsel's fee application from $15,215.00 to $10,000.00, the Board further reduced fees to $5,000.00, finding the $10,000.00 fee amount was still excessive.

Affirmed: Substantial ($10,000) reduction in claimed attorney's fees was proper on the grounds that counsel exaggerated the work performed by her firm, much of the work did not result in benefit to the claimant, and counsel had made frivolous requests to change venue and refused theretofore to pay the penalties levied by the Board for that frivolous request which was considered a dilatory tactic and offered as grounds to support the reduced fee.

39.) **Matter of Brian Pickering v. Car Win Construction, 26 N.Y.3d 1139**

Decision Below: Board disallowed attorney fees when the only consideration given by the carrier in §32 agreement was a lien waiver and the claimant waived right to future benefits.

***Affirmed*:** Attorney's fees under the WCL cannot be awarded against a "lien waiver" from a third-party settlement where that waiver is the sole consideration for a C-32 because waiver does not meet the definition, however broad, of "compensation" adopted by the WCB and funds do not flow through the WC claim.

XIII. IN HOME IME

40.) **Matter of Jennifer Duncan v. John Wiley & Sons, INC., 137 A.D.3d 1430**

Decision Below: The Board directed the claimant to submit to an in-home IME and suspended benefits for failure to submit to an IME**.**

Affirmed: Substantial evidence supported the Board's decision to direct an in-home IME of the claimant where, despite numerous attempts to schedule an IME over the years, there had been no

agreement with regard to the transportation or conditions under which the examination could proceed; the consultant who conducted the in-home IME had to adhere to the same protocols and restrictions as the personnel who tended to the claimant on a regular basis. Substantial evidence supported the suspension of benefits due to the claimant frustrating the carrier's numerous attempts to perform an IME by imposing onerous and ever-more strict terms on the examination.

XIV. IDIOPATHIC

41.) **Matter of Oathout v. Averill Park Central Schools, 142 A.D.3d 749**

Decision Below: claimant sustained a work-related injury.

Affirmed: While walking down the hallway at work, claimant felt a pop in her foot and fractured 4th and 5th metatarsals; presumption of compensability was not rebutted where IME could not draw a direct connection between congenital defect of the foot (metatarsus adductus) and the fractures.

42.**) Matter of Jennifer Krysinski v. NESSCO Resources/ETS Staffing, 140 A.D.3d 1569**

Decision Below: claimant sustained a work-related injury.

Affirmed: Claimant's sprained her knee while walking between work stations without any apparent "accident;" however, because claimant had no prior history, and because neither medical expert could point to a non-work-related cause, establishment was fully supported**.**

43.) **Matter of Steven Zobel v. Chemung County, 136 A.D.3d 1140**

Decision Below: claimant sustained a work-related injury.

Affirmed: Torn meniscus caused by claimant "twisting" his knee while entering an elevator was sufficient to establish a nexus between employment, which required use of the elevator, and the claimant's injury.

XV. LWEC

44.) **Matter of Maddox v. Baumann Sons Buses, 2016 NY *Slip Op* 07739**

Decision Below: Board found PPD and 40% LWEC and rescinded WCLJ finding of 80% LWEC.

Affirmed: 40% LWEC affirmed for a surgical low back claim where treating doctor concedes sedentary work capacity for a 37-year old HS-educated, English-proficient school bus driver with only driving work-history. (*N.B.* WCLJ awarded an 80%)

45.) **Matter of Pravato v. Town of Huntington, 2016 NY *Slip Op* 07732**

Decision Below: Board ruled that the claimant had a PPD and 40% LWEC and could do sedentary work.

Reversed and Remitted: 40% LWEC rescinded for low back claim where treating doctor finds no practical work capacity for a 57-year old driver. The Board's conclusion that the claimant could perform sedentary work was not the opinion of the IME and as such, the Board's ruling lacked support in the record and must be remitted. (They made it up.)

46.) **Matter of Rosales v. Eugene Felice Landscaping, 2016 NY Slip Op 07239**

Decision Below: The claimant sustained a PPD and 90% LWEC affirming WCLJ. The WCLJ found a PPD and 90% LWEC after considering various vocational factors.

Affirmed: 90% LWEC affirmed for surgical low back claim for a 46-year old non-English-speaking laborer from El Salvador with a second-grade education and only manual labor work history.

Also, WCLJ's consideration of vocational factors in assessing WEC was appropriate. In all non-schedule PPD claims, the Board must fix a "wage earning capacity" under § 15 (5-a) which shall be "not in excess of seventy-five per centum of [a claimant's] former full time actual earnings." WEC establishes the rate of disability payments, not the duration of the caps, and in fixing that rate, the Board may consider both the claimant's injury and physical impairment(s) as well as "vocational factors that reflected claimant's true ability to secure employment, particularly in the absence of evidence to negate claimant's testimony that his injury contributed to his loss of wage-earning capacity."

47.) **Matter of Michael Sarbo v. Tri-Valley Plumbing & Heating, 2016 NY Slip Op 07243**

Decision Below*:* 60% LWEC, modifying the WCLJ's 55% LWEC, WEC of 40% affirmed.

Affirmed: Substantial evidence supported the Worker's Compensation Board's determination to fix the claimant's wage earning capacity at 10% because the claimant suffered a PPD, did not earn actual wages, had limited education, was unable to read and write English, and had a work history comprised of manual labor, the Board was statutorily authorized to consider vocational factors that reflect the claimant's true ability to secure employment.

The sole issue on appeal was whether the Board was authorized to consider vocational factors in fixing claimant's wage earning capacity for purposes of computing the rate of compensation. We conclude the Board was so authorized and there was substantial evidence to support the Board's determination that claimant had a wage earning capacity of 40%.

48.) **Matter of Janine Till V. Apex Rehabilitation, 2016 NY *Slip Op* 07247**

Decision Below: 15% LWEC.

Affirmed: 15% LWEC (reduced from 40% by Panel) is correct. Claimant's argument rejected that mandate under § 15 (5-a) that WEC shall be no more than 75% of AWW requires, by its inverse, that she could never have a WEC under 25% unless she was working at the time of classification, in which case, the 75% limitation would not apply. Rejected by the AD, finding that LWEC and WEC need not be the inverse of one-another. Because the durational limits under WCL § 15 (3)(w) make no distinction between working and non-working claimants, and because § 15 (5-a) decides only the rate of compensation payable during any given week when the claimant is not working, to impose the "limitation" offered by the claimant would mean applying the law differently to claimant's working at the time of classification, to their detriment compared with a similarly-situated, but non-working claimant.

(AD also affirmed reduction from 40% to 15% LWEC)

49.) **Matter of Franklin v. New England Motor Freight, 142 A.D.3d 747**

Decision Below: Board held that vocational factors may not be used when making a temporary disability determination and reduced benefits.

Affirmed: LWEC-style analysis does not apply to temporary benefits. (Second case on this point in two years.)

50.) **Matter of Juan Paez v. Lackman Culinary Services, 140 A.D.3d 1462**

Decision Below: 80% LWEC.

Reversed and Remitted: to consider total industrial disability.

Claimant's argument that Board failed to consider claim of TID is valid where Board's decision incorrectly noted issue was never raised; the claimant did raise it in testimony before the WCLJ.

51.) **Matter of Roman v. Manhattan & Bronx Surface Transit Operating Authority, 139 A.D.3d 1304**

Decision Below: 60% LWEC; Board modified the WCLJ who found 99% LWEC and TID.

Affirmed: 60% LWEC affirmed for bus driver who was assaulted and sustained injuries to head, neck, face, nose, ribs and chest along with related PTSD. Although treating doctor found an 85% psychiatric impairment, because the claimant was otherwise functional, had no suicidal ideation and no cognitive deficits, and because the doctor was not an expert, the Board was free to reject that opinion, as well as the WCLJ's TID ruling below. Opinion of 85% psychiatric

disability lacks probative value and weight where it could not be translated into meaningful work-restrictions.

52.) **Matter of Campbell v. Interstate Materials Corporation, 135 A.D.3d 1276**

Decision Below: PPD reversing WCLJ who found a PTD.

Affirmed: PPD finding affirmed even where, despite significant limitations, claimant still capable of driving and dressing himself with some assistance and might be capable of sedentary employment**.**

N.B. AD also affirms apportionment of the PPD between the claimant's two established cases, even though they did not contain all of the same sites of injury noting that apportionment "is appropriate where the medical evidence establishes that the claimant's current disability is at least partially attributable to a prior compensable injury"

XVI. MALPRACTICE

53.) **Luis Felix v. Klee & Wolf, LLP, 138 A.D.3d 920**

Decision Below: Defendant law firm's motion for summary judgement is granted.

Affirmed: The Supreme Court did not err in granting defendant's motion for summary judgment dismissing plaintiff's cause of action alleging legal malpractice claimant that law firm failed to timely file a Labor Law action on his behalf because the plaintiff would not have prevailed in a subsequent personal injury action against the City or the Parks Dept. under Labor Law Section 240(1), 241, or 200 or common law negligence.

Plaintiff would not have been able to show the accident occurred in the context of work performed on buildings or structures, claimant was seeding a cricket field and not involved in construction, demolition, or excavation and neither the City nor Parks Dept. had notice of the dangerous manner in which the seeding machine was being used or authority to supervise claimant's work.

XVII. MAXIMUM RATE AND SLU

54.) **Matter of Anthony Colasanti v. Con Edison, 142 A.D.3d 1276**

Decision Below: Claimant not entitled to SLU award when award runs during periods previously awarded in another case at max rate.

Modified: Citing Matter of Lewczyk, AD finds that concurrent payments for schedule and nonscheduled awards may not exceed the maximum rate where the nonscheduled award arises from a permanent disability but that where an SLU is one of the awards, §15(3)(u) and 25(1)(b) as amended in 2009 allow payment of the SLU because they state that "the award shall be fully

payable in a lump sum upon the request of an injured employee." Also, because SLU award is not allocable to any period of disability, and payment as lump sum was requested by claimant, and not in periodic payments, SLU award will not violate the max disability rate under § 15(6)

XVIII. MTGS

55.) **Matter of Michael Castler v. National Grid, Special Fund Conservation Committee, 140 A.D.3d 1412**

Decision Below: Evidence of claimant's exacerbation was not sufficiently documented and medical objections are found for the employer.

Reversed and Remitted: the Board's determination that the chiropractor did not produce the necessary proof of an exacerbation not supported by (in fact contradicted by) the record, where the narratives contain reference to the cause of the exacerbation, the objective changes from baseline function, expected type and frequency of treatments needed to return the claimant to baseline, the claimants response to treatment through documented measures of objective functional improvement.

XIX. NOTICE

56.) **Matter of McNichols v. New York City Dept. of Corrections, 140 A.D.3d 1557**

Decision Below: Claimant was excused from providing timely notice of his accident.

Affirmed: Late notice excused because employer knew of accident (although not necessarily the injury claimed) and there was no demonstrable prejudice.

57.) **Matter of Logan v. New York City Health & Hospital Corp., 139 A.D.3d 1200**

Decision Below: Full Board: Claimant was excused from providing timely notice. Reversed WCLJ.

Affirmed: WCL §18 requires notice of the accident, not of each alleged injury.

58.) **Matter of Kevin Johnson v. Cannon Management, 2016 NY Slip Op 08262**

Decision Below: Claimant did not give timely notice of injury.

Affirmed: Untimely notice was not excused and the case was properly disallowed where the record below contains conflicting testimony about whether the claimant ever notified his supervisor about the accident in the first place and the Board could properly credit the employer's witness given the 14-month delay between the accident and the filing of the claim**.**

XX. OCCUPATIONAL DISEASE

59) **Matter of Maria Hansen v. Saks Fifth Avenue, 2016 NY Slip OP 08289**

Decision Below: Claimant sustained a compensable injury***Affirmed*:** Board's decision finding causally related CTS based on claimant testimony that her job duties required counting of cash receipts, frequent use of the computer and telephone, combined with treating physician testimony that her injury could be related to years of work, and IME supplemental report reviewing nerve conduction tests and acknowledging severe carpal tunnel from repetitive strain from working counting cash and with computers, signifies a probability as to the requisite causal connection of the injury to claimant's employment.

XXI. PROPER CARRIER

60.) **Matter of Guzman-Dimas v. Fralexa, LLC, and Travelers Indemnity Company, 38 N.Y.S.3d 293**

Decision Below: Travelers is the liable carrier.

***Reversed*:** The actual issue here was coverage where employer was a NJ corporation, had no offices in NY and the only connection to NY was that the claimant lived in NY and was delivering a mattress in NY when injured. Employer had a WC policy from Travelers, but only for NJ. The policy did not contain an NY endorsement.

Travelers produced a copy of its policy as an attachment to the PH-16.2. WCLJ was directed to the policy by counsel ON THE RECORD, but apparently failed to read it. The Board Panel, affirming the obviously-wrong WCLJ, then noted in its affirmance that the policy had never been produced. The AD, noting that the Board had been sloppy, reviewed the policy and ruled in favor of Travelers.

XXII. PENSION OFFSET

61.) **Matter of Louis Loveless v. Thomas P. DiNapoli, 136 A.D.3d 1193**

Decision Below: CPLR § 78 petition to direct re-calculation of offset is dismissed.

Reversed and Remitted: Claimant was granted a "performance of duty" disability retirement from NYS shortly after settling the related WC case by WCL §32. Comptroller's office apparently calculated an offset of the pension's monthly benefit rate on a dollar-for-dollar basis against the monthly benefit, but then alleged the offset would continue for the duration of the pension, rather than terminating once it had "recouped" the WC settlement figure.

On appeal, AD ruled that an offset is appropriate, but the "lifetime offset" proffered by the Comptroller was improperly calculated as a dollar-for-dollar offset where the statute clearly

required a "reduction in the reserve" that was created at the inception of the pension, with the resultant reduction in the weekly benefit spread over the life-expectancy of the claimant.

The Comptroller's calculations appear to be creating disproportionate reimbursement far beyond recouping the amount of the WC settlement. Case restored below for further discovery and proper calculation of claimant's offset and monthly benefit.

XXIII. RESTORATION OF ACCRUALS

62.) **Matter of Galuski v. New York State Division of Military and Naval Affairs, 135 A.D.3d 1270**

Decision Below: Board declined to impose a penalty on the employer pursuant to §25(3)(f).

Affirmed: Claimant sought a late-payment penalty under §25(3)(f) arguing that her accruals were not timely restored upon the making of an award "subject to employer reimbursement." Reimbursement was issued by the carrier timely, but the employer thereafter delayed restoration of the claimant's accruals beyond the 10-day payment window.

Late reimbursement to the employer is subject to a penalty when the award includes are order for reimbursement only because the statue states that payment must be made both timely and "according to the terms of the award." Because the underlying award here made no direction for restoration of accruals there was no legal basis to impose a late payment penalty.

AD further notes that its precedent (Matter of Keyser, 92 N.Y.2d 100 (3d Dept. 1998) did not hold that restoration of leave/sick credits constituted "compensation" and leaves open the question of whether the Board even has jurisdiction to fashion an order directing an employer to restore leave credits to an employee.

XXIV. SCOPE AND COURSE

63.) **Matter of James Ciullo v. Gordon L. Seaman Inc., 2016 NY Slip Op 07741**

Decision Below: Board ruled that claimant's injury did not arise out of and in the course of employment.

Affirmed: Where the claimant purportedly fell off a ladder and hurt his back, no incident report was filed, and claimant maintained this aggravated his prior back condition leading to a collapse at home, followed by an ER visit where no mention was made of a fall at work, only at home, and claimant filed a disability application that referenced "not work related," substantial evidence supported the Board's finding that the claimant was not credible and did not meet his burden of establishing that an injury arouse out of and in the course of employment.

The claimant is not relieved by the §21 presumption of establishing his injury arose out of and in the course of employment. Additionally, no witness observed the fall from the ladder.

64.) **Matter of Cal Pittner and Francesca Beccari, 2016 NY Slip Op 07729**

Decision Below: Claimant did not suffer an accidental injury arising out of and in the course of his employment. Reversed WCLJ who found that claimant died in his apartment and the death arose out of decedent's employment while traveling for his employer.

Affirmed: Substantial evidence supported Board's determination that the employee's death did not arise out of or in the course of his employment, because he was not engaged in travel or work-related activity for his employer a the time of death, did not regularly perform work from home, was not reimbursed for the apartment he was staying in, and had in fact been staying at the apartment he died in for the last year and 9 month which afforded him the opportunity to be closer to his son for part of the year. That claimant's job had him working in two different states, and that he travelled between the states to work for various periods, did not render the claimant's entire life outside of work at each location "within the scope and course."

65.) **Matter of Lynne Cuva v. State Insurance Fund, 2016 NY Slip Op 07734**

Decision Below: Claimant did not suffer an accidental injury arising out of and in the course of his employment.

Affirmed: Substantial evidence supported the Board's decision not finding an accidental injury of anxiety, PTSD, and depression, based on Board's findings that employer's discipline of employee and appropriate response to an incident of insubordination. Supervisor's conduct was not so improper or extraordinary to give rise to a viable claim for work related injury. Although, the employer became angry, grabbed his chair, gritted his teeth, and began shaking at the claimant, made hissing sound, no verbal threats or physical were made, and he never got up from the chair, and therefore did not exceed work-related stress that could be expected by a supervisor in a normal work environment.

66.) **Matter of Donna Swartz v. Absolut Center for Nursing and Rehab, 139 A.D.3d 1292**

Decision Below: Board found that the claimant sustained an accidental injury arising out of and in the course of employment, affirming the WCLJ decision.

***Affirmed*:** At the end of the claimant's shift she tripped on a trailer hitch on her parked car, fell, and injured right elbow and both hands.

While on the employers premised going to or coming from work is generally considered an incident of employment.

XXV. SUBSTANTIAL EVIDENCE

67.) **Matter of O'Brien v. The Carey Center for Global Good, 140 A.D.3d 1492**

Decision Below: Board denied the claimant's request to amend his claim to include post-concussion syndrome.

***Reversed*:** The claimant fell on the ice injuring his head, back, and neck. Based on his protracted recovery and continued medical treatment he sought to add concussion and post-concussion syndrome. "Citing to Matter of Dingman v. Town of Lake Luzerne, 94 AD3d 1287 AD finds that the "contrary medical" from the carrier also contained an addendum from its IME finding a mild head injury and post- concussion syndrome were present. Such a record cannot constitute substantial evidence contrary to the presumption of WCL §21.

XXVI. TID AND LMA

68.) **Matter of Clovis Walker v. Darcon Construction Co., 142 A.D.3d 740**

Decision Below: Claimant does not have total disability and was not attached to the labor market.

Modified and Remitted: the Board's determination that by relying solely on an unfunded training program claimant had voluntarily removed himself from the labor market was supported by substantial evidence.

However, determination that the claimant did not have a TID was not supported by the decision below as there was no reference to the relevant factors or reference to factual findings that formed the basis of the decision.

XXVII. §2(7)

69.) **Matter of Sandra Haynes v. Catholic Charities, 135 A.D.3d 1267**

Decision Below: The claimant sustained a compensable mental injury due to work related stress.

Affirmed: The Board's finding that the stress that caused the claimant's injury was greater than that that of similarly situated workers was supported by substantial evidence where the claimant alleged that she suffered a mental injury at work as the result of being assaulted by a client. The employer and carrier contend that the claimant's condition was the result of receiving two warning letters from her employer issued in good faith and therefore barred by WCL §2(7). However the Board concluded that while the first letter was in good faith, the second warning letter was issued contrary to normal procedures, without the employer ever contacting the complaining employee, or any complaint being filed. Additionally, testimony established that the claimant's PTSD began prior to the employer warning letters being issued due to work stress.

XXVIII. §11

70.) **Nepomuceno v. The City of New York, Beth Israel Medical Center, 137 A.D.3d 646**

Decision Below: Supreme Court dismissed plaintiffs suit for slipping and falling on a piece of fruit near the entrance of Beth Israel Medical Center on the grounds WC was her sole remedy.

Affirmed: The plaintiff's complaint was properly dismissed against her employer BIMC because she was not able to sustain her burden of establishing the unavailability of workers' compensation benefits or insurance.

71.) **Barksdale v. BP Elevator Co., Lenox Condominium , Kyrous Realty Group, INC. and Car Park Systems of New York, 2016 NY Slip Op 31609(U), (NY County)**

Decision: Defendant's motion for summary judgment dismissing the complaint is granted.

Defendant Car Park was the claimant's employer and provided workers' compensation benefits for the claimant and there is no proof of the employer's express agreement to contribution and indemnification of other defendants. In addition to an express contribution/indemnification contract provision, the injured employee must have sustained a grave injury. The cross-movants provided no lease, or any other proof, that Car Park entered into a written contract where it expressly agreed to contribution or indemnification of the cross-movants.

72.) **Mahony v. 275 Seventh Avenue Building LLC et al., 2016 NY Slip Op 31622(U)**

Decision: Defendant York Scaffold Eq. Co. motion to amend its answer to include the lack of a grave injury granted and concurrent request for summary judgment dismissing the third-party complaint is granted.

The plaintiff fell from a retractable roof while working on a construction site of property owned by Seventh Avenue, LLC. On the day of the injury the plaintiff was employed by York and was disassembling a scaffold and sidewalk shed. Because the claimant did not suffer a permanent and total loss of the use of his right arm, only an articular shoulder injury, he did not suffer a "grave" injury and York is therefore immune to suit and all causes of action against York must be dismissed.

73.) **John Russo v. CBS Corporation and CBS Broadcasting, INC., 2016 NY Slip OP 31091(U)**

Decision: Summary judgement motion dismissing the complaint against CBS is granted.

The failure of the defendants (CBS) to assert §11 as an affirmative defense does not preclude them from moving on that issue up to the point of final disposition of the case.

Additionally, CBS demonstrated that they were the claimant's "special employer" by exercising sole control of plaintiff's workplace, the duties he was to perform, all aspects of his employment while on the series, and furnished equipment for the set production. Although claimant was technically "on the books" of another entity, the fact that day to day control of the employee, among other things, made CBS a "special employer."

XXX. §14(6)

74.) **Matter of Kevin Krazit v. Ski Windham Operating Corporation, 2016 NY Slip Op 07742**

Decision Below: Claimant's second job is not "covered" employment.

Affirmed: Claimant's self-owned contracting company was not "covered employment" and thus cannot be used as concurrent employment wages in his NY WC claim. The company was incorporated in NJ and physically located in NJ, where the claimant resides. The company carried a NJ WC policy that also carried a NY endorsement. The claimant alleged 75% of his business was conducted in NY and that he had held a Rockland County Contracting License for more than 20 years. However, claimant's tax-returns only showed income from his NY employment as a Ski Patrol Supervisor (the employment where he was injured). The Board's ruling was sufficiently supported in the record and was left undisturbed.

75.) **Brenda Mangan v. Try-IT Distributing Co., Inc., 140 A.D.3d 1568**

Decision Below: The claimant is entitled to receive death benefits based on decedent's AWW at the time of his accident. The WCLJ ruled the decedent was entitled to benefits based on the average weekly wage at the time of his death.

Affirmed: The Board correctly determined that the calculation of decedent's average weekly wage should be at the time of his accident, and not the time of his death in a consequential death claim based on an already-established WC claim.

76.) **Matter of James Zaremski v. New Visions et al., 136 A.D.3d 1176**

Decision Below: The claimant is not entitled to an award of reduced earnings, reversing the WCLJ decision.

Reversed and Remitted: After sustaining a work-related injury at his primary employment, claimant returned to work for his self-owned business (which had been excluded from the AWW as non-covered concurrent employment under WCL § 14(6)). The claimant sought an award of RE and the Board denied that award ruling that the claimant had no valid claim for reduced earnings, departing from its outstanding precedent that "although wages from a non-covered concurrent employment cannot be included in the calculation of a claimant's average weekly wage pursuant to Workers' Compensation Law § 14 (6), such wages must be taken into account when computing a claimant's reduced earnings under Workers' Compensation Law § 15 (5-a)"

Because the Board failed to explain its departure from precedent, the decision was reversed and remitted.

XXXI. §15-8(d) & 15(3)(u)

77.) **Matter of Charlotte Vanacore v. Genovese Drug Store and Special Disability Fund, 137 A.D.3d 1443**

Decision Below: SFCC's Application for Review was untimely.

Affirmed: The claimant had a 1997 claim and a 2003 claim that had 55% apportionment to the 1997 claim. The Special Disability Fund conceded application of §15(8)(d) on the 2003 claim and filed an S-15(8) form with the Board. An identical S-15(8) was also filed on the same day again indicating the Fund's concession as to the applicability of the 2003 claim, but referencing the 1997 claim number. In two decisions filed on May 12, 2006 the Board found §15(8) to be applicable to both cases. In January 2013 the Fund applied for review contending this was an erroneous as the Fund never conceded §15(8) on the 1997 claim. The application for review was untimely as it was filed more than 6 years after the administrative decision.

78.) **Matter of Sharon Szadek v. Wilson Greatbatch and Special Disability Fund**, **135 A.D.3d 1279**

Decision Below: Carrier was not entitled to §15-8(d) relief.

Affirmed: The carrier was not entitled to reimbursement from the Special Disability Fund under WCL 15(8)(d) because it had not shown that the claimant's preexisting conditions hindered or were likely to hinder her employability. Medical evidence prior to the 2004 injury was insufficient and medical expert who opined claimant's injuries would be a potential hindrance to certain types of employment was clearly based on generalities and speculation. The medical records reviewed by the expert also did not indicate that the claimant's preexisting conditions were permanent. No examination or medical interview was conducted of the claimant, and claimant testified that subsequent to her pre-existing injuries she was able to work full duty w/o restrictions and that there were no jobs that she avoided due to her medical condition.

XXXII. §21

79.) **Matter of Gavin Ellis v. Frito Lay Inc., 138 A.D.3d 1363**

Decision Below: The Board found the claimant to have sustained a work-related injury.

Affirmed: The claimant a warehouse worker testified the accident occurred at work while he was unloading a trailer and fell down some stair injuring his back and neck. Medical evidence was supplied from his treating physicians and IME that found the claimant totally disabled and concluded the injury was causally related to his employment. The employer's contention that the claimant fabricated the claim due to impending disciplinary action, supported by supervisor testimony that contradicted certain aspects of the claimant's account of his accident, and written reports from a fitness instructor that the claimant had pre-existing back discomfort on and off for

years was insufficient to rebut the presumption that an accident an injury arose out of the claimant's employment.

80.) **Robert Koniak v. Salamanca Board of Public Utilities, 139 A.D.3d 1290**

Decision Below: Board reversed WCLJ finding of insufficient evidence of casual relationship. Carrier is liable for payment of medical bills covering treatment that is causally related to claimant's established case.

***Affirmed*:** Once the statutory presumption of §21(5) has been established, the burden shifts to the carrier to proffer substantial evidence to contradict the medical reports. Carrier failed to meet that burden to establish that claimant that began treating for similar body sites to his established case several years later and while working for a different employer, had sustained a new injury not causally related to his prior established case.

81.) **Sergii Siennikov v. Professional Grade Construction,Inc.,137 A.D.3d 1440**

The presumptions of WCL §21 cannot be utilized to prove that an accident occurred in the first instance.

Decision Below: Board ruled no compensable injury and reversed the WCLJ.

Affirmed: Claimant credibility at issue, multiple DOAs given and medicals filed that report no history of work-related injury; delay in seeking treatment.

XXXIII. §25-a

82.) **Matter of Patrice Giansante v. Seneca Cayuga Arc and Special Fund for Reopened Cases, 137 A.D.3d 1450**

Decision Below: Liability shifted pursuant to § 25-a, as of March 2013, the date it determined the case had truly closed.

Affirmed: The Board's decision finding that the case had truly closed on March 2013 was supported by substantial evidence, when following the hearing on March 2013, the WCLJ found no compensable lost time, and although the finding was w/o prejudice, there was no reference to submission of further evidence or further proceedings being contemplated.

83.) **Matter of Reddien v. Joseph Davis Inc., and Special Fund for Reopened Cases, 136 A.D.3d 1144**

Decision Below: The Board found the case was not truly closed and therefore §25-a is not applicable.

Affirmed: A claimant that had a back injury and a left wrist injury, and subsequent SLU for the left hand, but had not yet resolved the issue of a possible permanent partial disability for the back. Case was therefore not truly closed and transfer of liability is not proper.

84.) **Matter of Ronald Bordino v. Consolidated Edison Co. of NY, Inc. and Special Disability Fund for Reopened Cases, 135 A.D.3d 1253.**

Decision Below: The Board ruled that the liability did not shift under WCL § 25-a.

Affirmed: The Board correctly found that the claimant who testified that he retired and took a disability retirement pension due to a number of health concerns, which included his respiratory problems (chronic asthma) that formed the basis of his OD WC claim, provided substantial evidence for the Board's decision that the disability retirement benefits were at least partially due to his occupational disease and therefore constituted an advance payment of compensation for purposes of §25-a.

XXXVI. §29

85.) **Matter of Joseph Terranova Jr. v. Lehr Construction Co., 28 N.Y.3d 948**

Pending appeal before the court of Appeals

Claimant established a WC claim for a knee injury and simultaneously pursued a third-party for damages. The claimant obtained a settlement of the third-party action with the consent of the carrier in exchange for lien repayment (with a lien reduction premised on its share of attorney's fees) and a credit against the net recovery "subject to the Court of Appeals' decision in Burns v. Varriale . . ."

Thereafter the claimant sought an SLU award for his knee injury, arguing that the carrier was required to pay a "proportionate share" of the SLU reflecting the percentage litigation costs incurred in the third-party action. The WCLJ and Board Panel held that Kelly applied because this was not a deficiency case, and because the SLU award was sufficiently definite to apply the Kelly method of calculation, thus allowing the carrier to take a full credit against the entire schedule award.

AD affirmed, agreeing that "speculative" nature of the award in Burns was not at play in this SLU case and that the carrier's reduction in its lien premised on its obligation to contribute its equitable share of litigation expenses incurred in the third-party action, along with the limitation of its credit to the "net recovery" meant that no further contribution was owed by the carrier.

86.) **Matter of Kathleen P. Muller v. Marcus J. Elliott, Et Al, Sedgwick Claims Management Interested Party-Appellant, 139 A.D.3d 1341**

Decision Below: Sup. Court granted plaintiff's stipulation of discontinuance and issued an order *nunc pro tunc* directing Sedgwick's consent to the discontinuance.

Interested party Sedgwick (WC Administrator) did not consent to the stipulation of discontinuance and filed this appeal. Sedgwick argues that the discontinuance was prejudicial and not reasonable.

Reversed and Remitted: for hearing on reasonableness and prejudice. Pursuant to § 29(5) either carrier consent or judicial approval is required where Plaintiff voluntarily discontinues a third party action. The court must determine whether the carrier was prejudiced by the settlement or discontinuance which depends on whether the settlement or discontinuance was reasonable.

87.) **Ace Fire Underwriters Insurance Company v. Special Disability Funds Conservation Committee, 2016 N.Y. Slip Op 07833**

Decision Below: Affirmed order of the Supreme Court denying an order directing respondent to consent *nunc pro tunc* to settlement of the underlying personal injury action.

***Reversed*:** the Court of Appeals reverses the AD and holds that because SFCC's consent to a third-party settlement is required in an established §15(8)(d) case under § 29(1), it holds logically that SFCC is also a party that may be compelled to consent by obtaining a *nunc pro tunc* order pursuant to § 29(5) because both provisions contains essentially identical language describing the entities that qualify as leinors.

88.) **Matter of Leshley Shiner v. SUNY at Buffalo, 2016 NY Slip OP 07738**

Decision Below: The claimant's failure to obtain consent of her employer's workers' compensation carrier to the settlement of a third party action barred her from receiving future benefits.

Affirmed: Claimant established a WC claim against her employer for PTSD premised on her sexual harrament from her supervisor. The claimant also sued the employer and supervisor in federal court and that action settled for $255,000.00. The WC carrier, SIF, raised settlement without consent and claimant contended that consent was not required because the federal action did not qualify under WCL §29.

Citing Matter of Beth V., 22 NY3d 80 (2013), AD holds that § 29 should be read broadly and that the source of the recovery, nor defendants in the action, nor the causes of action asserted are relevant where the statute's purpose makes clear that the only relevant nexus is whether the action was predicated upon the "same injury that was a predicate for the payment of compensation benefits."

89.) **Wesco Insurance Company v. Douglas Vinsion, 137 A.D.3d 1114**

Decision Below: Supreme Court: Dismissed the action by Wesco Insurance. And Wesco appealed.

Modified: Appeals from the order are dismissed. The judgment is modified by deleting the provision "dismissing the action" and substituting the provision "dismissing the purported action as a nullity".

Wesco Insurance Company's attempt to fix its lien to a settlement by obtaining an index number and moving with an Oder to Show cause to fix its lien of $20,030.01 pursuant to WCL §29, but failing to serve a summons, complaint, or petition, never invoked the jurisdiction of the Supreme Court and therefore was a non-waivable, jurisdictional defect rendering the action or proceeding a nullity

90.) **Burkhardt v. Amtrust North America, Inc., 2016 NY Slip Op 31764(U) Queens County)**

Supreme Court approved the third-party settlement of $100,000.00 and directs consent under WCL § 29(5) holding that the whole of the costs and legal fees will be paid from the settlement proceeds and borne by the carrier since the settlement was less than the carrier's lien. That the claimant will receive $0.00 from the third-party action due to the limits of the torfeasor's insurance policy does not mean that the claimant has lost anything, particular where the claimant has received WC benefits for medical care and lost wages far exceeding the settlement proceeds. Claimant's motion for a cramdown is denied; Supreme Court is not permitted to compromise or reduce a carrier's lien over their objection and there is no legal authority for such an action.

91.) **Rochdale Insurance Company v. Mullaney Gjelaj, PLLC, Nick GJelaj , Esq., and Patrick J. Mullaney, Esq., 2016 NY Slip Op 30914(U) (NY County)**

Plaintiff carrier issued a consent letter to defendant third-party counsel that consented to settlement under terms of (l) lien repayment, (2) credit with claimant's waiver of Burns, (3) benefits in the WC claim would be suspended as of the consent letter date, and (4) release of funds would constitute acceptance.

Counsel released part of the funds, and then caught their mistake and moved to vacate the consent letter as "contrary to law and public policy." The Court held that if the consent letter was in fact contrary to law and policy, it was incumbent on the claimant and defendant-attorney's to renegotiate the consent terms *before* disbursing proceeds. To compound their errors, defendant-attorney's apparently withheld repayment of the lien, which was directed as a judgment against them (both as a firm and individually as partners) with a year's worth of statutory interest.

92.) **Matter of Dwayne McQueer, 142 A.D.3d 743**

Decision Below: Board ruled (1) that the carrier's offset against the proceeds of the claimant's third-party settlement had expired, and (2) Denied request by carrier and employer for reconsideration and/or full Board review. WCLJ found the carrier holiday had expired.

Affirmed: Parties stipulated that the carrier's credit against the claimant's net recovery from a third-party action (under WCL § 29) would be applicable only against ongoing indemnity and not medical. The stipulation also agreed to a weekly rate for awards (subject to the credit), a CCP order, and recited the date upon which the credit would expire.

Carrier's later argument that the holiday was not exhausted because claimant did not meet his burden to produce medical evidence of a continuing causally related disability is meritless because the stipulation contained no such required and it plainly indicates that the parties intended no such demonstration.

XXXV. §44

93.) **Matter of Michael Scuderi v. Mazzco Enterprises and JD Consulting LLC, 39 A.D.3d 1138**

Decision Below: § 44 apportionment applies with a date of contracture of 08/14/1998.

Reversed: Although a reviewing court will not substitute its judgment for that of the Board, it will "insist upon 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" The Board erred in selecting a date of contracture of 08/14/1998 for an OD claim for carpal tunnel syndrome where the evidence and testimony demonstrated that the first treatment and diagnosis was not until June 2010, and claimant's treating physician could not say when claimant actually contracted carpal tunnel other than over the preceding years.

XXXVI. §120

94.) **Matter of Fetahaj v. Starbucks Corporation, 2016 NY Slip Op 07730**

Decision Below: Claimant's termination was not in violation of §120.

Affirmed: Claimant sustained injuries as the result of a witnessed slip and fall. Both claimant and witness filed injury reports with the employer alleging the injury was the result of an accident. Surveillance footage, however, revealed that the two employees were roughhousing which led to the accident. Witness admitted his lie, and testified that claimant asked him to lie in his incident report; but claimant now alleged she could not remember how she was injured and denied asking co-worker to lie. The employer terminated the claimant for cause.

Although there was a clear factual nexus between the WC case and the grounds for termination, the employer established that company policy, acknowledged by claimant, permitted termination

for “serious misconduct” including falsification; and co-worker’s statement, along with video, was sufficient evidence from which the Board could conclude that the claimant misrepresented her accident to the employer.