



# **NYS WORKERS' COMPENSATION LAW UPDATE 2016**

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Albany Claims Association  
Education Day  
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Born in Troy, New York, Mr. Burke still resides in Rensselaer County with his wife, Julie, and two children. He graduated from Alfred University (B.A.) in 1988 and University of Toledo College of Law (J.D.) in 1991.

Mr. Burke concentrates his practice in representing employers, injured workers, and insurance companies in all stages of litigation before the New York State Workers' Compensation Board and New York Courts. Mr. Burke also represents claimants in matters before the Social Security Administration and handles personal injury accident claims, real estate, and traffic matters. Mr. Burke has over 25 years of litigation experience involving premises liability claims, contract disputes, and motor vehicle and construction site accidents.

Mr. Burke is a Judge in the Town of North Greenbush having won election in November 2015. George's term as Town Justice runs from January 1, 2016 through December 31, 2019.

Prior to joining *Lemire, Johnson & Higgins*, Mr. Burke was a partner in an Albany Workers' Compensation defense firm and an associate attorney at a plaintiff firm where he represented injured workers.

# Topics

- 1) WCL § 114-a
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# WCL § 114-a

- Cruz vs. Buffalo Board of Education (4/21/16) \*\*\*
- Appeal from WCB decision which ruled the claimant demonstrated attachment to the labor market. Claimant worked as an assistant principal at an elementary school and sustained work-related injuries. He was awarded WC benefits until he returned to work. His employment terminated thereafter. Claimant sought additionally causally related lost earnings and the self-insured and its employer raised voluntary removal. Following hearings employer raised issue of whether claimant had violated Section 114-a based upon alleged misrepresentation regarding a search for work. WCLJ denied benefits finding due to lack of sufficient effort to find work, the claimant voluntarily removed from the labor market.
- Furthermore, ALJ found the claimant violated 114-a and disqualified him from benefits. Upon review, Board concluded employer had not submitted sufficient evidence the claimant violated 114-a. Although WCB affirmed ALJ's determination of voluntary removal, the WCB also found he had reattached to labor market in Feb, 2013. WCB restored the case to calendar to investigate claimant's RE and employer appealed.
- Appellate Division affirmed. WCB's determination as to whether the claimant has demonstrated attachment will be upheld if supported by evidence. Here, medical evidence in record reflected on account of his injuries claimant could only sit or stand for no more than 2 hours per day and could not lift more than 20lbs. Claimant said he used VESID services and obtained a part time job. Claimant was still searching for other work with a VESID job counselor. WCB determination the claimant had reattached is supported by substantial evidence.
- Employer relied upon the report and testimony of a vocational counselor who contacted 34 companies by phone with whom the claimant said he filed applications for employment with. Counselor only confirmed two companies had received applications. Further testified 17 companies did not respond or could not verify whether they had received an application and witness conceded the claimant could have applied for employment with them. While the witness testified the remaining 15 companies told her they did not have an application from him on file the WCB noted she did not report the names of individuals she spoke with and concluded although claimant had not presented sufficient evidence to support he remained attached, there was a lack of credible evidence he knowingly made a false statement or misrepresentation of material facts in order to obtain benefits.

- Poupore vs. Clinton County Highway Dept. (4/21/16)
- Appeal from WCB decision which ruled the claimant violated Section 114-a and disqualified him from benefits. Claimant injured while operating power equipment on roadside when road bank gave away and he fell. Claim established for work-related injuries to ankle and leg, pelvis, and lumbar back and claimant was classified in 2005. In the years which followed his physicians continued to prescribe narcotic meds and received wage replacement benefits. In 2012 employer alleged violation of 114-a based upon video surveillance of claimant on several days by investigator hired by employer. Video depicted claimant engaged in activities which employer argued were inconsistent with among other things representation made to Marco Berard, orthopedic surgeon retained by the employer who conducted IME.
- Following testimony of IME and investigator, ALJ ruled claimant violated Section 114-a by fraudulently representing his medical condition to medical providers and imposed penalties. Upon review, WCB modified agreeing the claimant had made willful misrepresentations during the IME in violation of 114-a and imposed a penalty equal to the wage replacement benefits paid to the claimant from April 2012-September 2012 and permanently disqualified him from receiving benefits.
- Claimant appealed. AD affirmed. Claimant argued the record did not contain substantial evidence to support WCB's finding and the penalty constituted an abusive discretion. A fact is material if it is significant or essential to the issue or matter at hand and it need not be demonstrated here the claimant received compensation to which he was not otherwise entitled or he did not sustain compensable injury.
- Here the WCB's factual finding the claimant willfully misrepresented his activity, capacity, and actual disability status during the IME was not disturbed as it was supported by substantial evidence including the testimony and IME report along with surveillance evidence.

- Adams vs. Black Horse Carrier's Inc. (9/29/16) \*\*\*
- Appeal from WCB decision which ruled the claimant violated WCL Section 114-a and disqualified him from receiving future benefits. Claimant sustained compensable injury to the low back in December 2007 and was awarded benefits. In November 2009 claimant was convicted of criminal sale of a controlled substance in the third degree and September 2010 was sentenced to a prison term of three years. Claimant did not receive benefits during his incarceration. Upon release from prison the claimant sought a reinstatement of his wage replacement benefits and the employer requested any award be held in abeyance pending the determination of its allegation claimant had violated WCL Section 114-a.
- Following a hearing, ALJ determined the claimant had violated 114-a by testifying at a June 2010 hearing he had not received any income while receiving wage replacement benefits when he had already been convicted for criminal sale of a controlled substance in the third degree. ALJ imposed mandatory penalty rescinding the award of benefits and a discretionary penalty disqualifying the claimant from receiving any future wage benefits. Upon administrative appeal, WCB upheld the determination the claimant had violated 114-a and the discretionary penalty imposed but modified the mandatory penalty to rescind only the awards for benefits received after 6/30/10 on the basis the benefits awarded after that date were directly attributable to the claimant's misrepresentation at the 6/30/10 hearing.
- When questioned at the hearing whether he had worked since April 2009 or received any income other than workers' compensation benefits, the claimant testified he had not despite having been convicted of criminal sale of a controlled substance. Additionally, claimant testified at the disqualification hearing he received drugs as compensation for his participation in the May 2009 sale.
- Since the Board is the sole and final arbiter of witness credibility, the Board's determination the claimant violated WCL Section 114-a by making a false representation regarding material facts for the purposes of obtaining wage replacement benefits was supported by substantial evidence. AD also denied the claimant's contention his due process rights were violated because he was not provided with adequate notice of the false statement which formed the basis of the employer's allegation he had violated WCL Section 114-a-1.

- Martinez vs. Kingston City School District (6/16/16) \*\*\*
- Appeal from WCB decision which ruled the claimant violated WCL Section 114 and disqualified her from receiving benefits. As a result of January 2005 accident claimant sustained injuries to multiple body parts and was awarded benefits. Following claimant's 2009 arrest for insurance fraud and based upon responses provided by the claimant on a questionnaire denying participating in any work or volunteer activities since her 2005 accident, the employer sought to suspend benefits. A hearing ensued and ALJ found the claimant knowingly misrepresented her voluntary activities with City Vision, a youth camp directed by her husband. ALJ having imposed a mandatory and discretionary penalty.
- Claimant testified she had not worked or volunteered since her 2005 accident and had not undertaken any duties relative to the operation of the camp. She also acknowledged she received questionnaires from the self-insured employers including an August 2008 questionnaire in which she denied doing any work or volunteer activities since her 2005 accident. Contrary to her testimony investigation and video surveillance conducted demonstrated she was the contact person for the City Vision camp and video surveillance showed her working in the camp's main office answering questions about camp activities. Furthermore claimant acknowledged she may have assisted in answering the camp's telephone and was authorized to sign checks on behalf of the camp. AD concluded the Board's determination claimant had violated WCL Section 14 by making false representations regarding material facts for the purposes of obtaining wage replacement benefits were supported by substantial evidence.

- Kennedy vs. NYC Dept. of Corrections (6/30/16) (Attorney fined and fee reduced)
- Appeal from WCB decision which determined the amount of counsel fees due to claimant's counsel. Attorney made a request for a change of venue which was denied by ALJ. ALJ also concluded the request for change of venue was without reasonable grounds and unsupported by evidence in the record. ALJ imposed penalty of \$500 pursuant to WCL Section 114-a-3-ii. WCB agreed and increased the penalty to \$750 pursuant to the same provision based upon attorney's continuing conduct in finding identical improper applications for venue changes despite prior adverse Board rulings. Attorney filed notice of appeal but never perfected appeal and did not pay penalty.
- Attorney thereafter submitted application for counsel fees in regard to work she had performed in the amount of \$15,000. After hearing ALJ concluded the attorney's failure to pay the penalty was dilatory tactic which warranted a reduction of the fee requested to \$10k. Attorney appealed and the Board found the attorney had exaggerated the work performed in this matter and a significant amount of work was performed for the attorney's benefit and not the claimant's. Court also took into consideration the attorney's failure to pay the \$750 penalty. WCB concluded the \$10k fee was excessive and reduced it to \$5k for less than 20 hours of work. Appellate Division affirmed noting it was well established for the Board to impose a penalty upon the claimant's attorney for submitting without reasonable grounds a change of venue request.
- AD soundly rejected the attorney's contention the Board had no authority to reduce counsel fees. AD felt the Board was fully authorized to conclude the attorney's failure for over 18 months to pay a fine imposed by the WCB was a dilatory tactic.



- Leising vs. Williamsville Central School District (10/20/16)
- Appeal from WCB decision which ruled the claimant did not violate WCL Section 114-a and revised her WC benefits. Claimant began receiving benefits in 2010. Hearing held to determine whether claimant violated Section 114-a based upon failure to disclose her part-time employment at a golf course. Although such a violation was found, the ALJ did not impose a mandatory penalty as the earnings were negligible.
- ALJ instead imposed a discretionary penalty of a lifetime disqualification from further compensation benefits. WCB reversed ALJ and concluded if the claimant had made an intentional misrepresentation to the employer's WC carrier regarding her work status, the element of materiality was lacking. Board denied subsequent application by the employer and its carrier for full board review
- Board issued an amended decision in December 2014 which adhered to its prior decision but instead of finding a lack of materiality concluded insufficient evidence existed to show the claimant attempted to conceal her part time employment from the carrier. Employer and carrier appealed.
- Appellate Division found substantial proof was lacking to support the Board's amended decision. In June 2011 carrier's adjuster sent the claimant a questionnaire asking her whether she had worked in any capacity. Claimant through her attorney initially responded she was working but her attorneys later rescinded that response by saying it contained an error and should have said the claimant was not working. The claimant also sent her own individual response to the questionnaire but did not state thereon whether or not she was working in any capacity
- Furthermore, between 2010 and 2012 progress reports from the claimant's doctor noted the claimant was not working. In October 2012 when claimant called the adjuster for an authorization for prescription medication, adjuster noted on the Caller ID the claimant was calling from the golf course. Adjuster advised the claimant she needed to speak with a doctor and had to call her back with a response. Instead of calling claimant's cell phone the adjuster called the golf course, the claimant answered stating the name of the employer. Investigator immediately dispatched to the golf course and obtained video surveillance of the claimant and disclosed in the report the claimant stated she had been working at the golf course for approximately four years.
- Under these circumstances, the AD could not conclude the proof was of such quality and quantity as to generate conviction and persuade a fair finding the claimant did not attempt to conceal her employment activities. To the contrary, the record revealed even though the claimant was admittedly employed at the golf course during 2010-2012, claimant in response to the inquiries from the carrier never affirmatively disclosed such employment and denied any employment activity. While the Board found the claimant's attorney advised the adjuster's supervisor in 2010 about the claimant's part time employment, this finding is premised upon uncorroborated hearsay.

# Voluntary Removal

- Greco-Meyer vs. Nassau County Police Department (5/19/16)
- Appeal from WCB decision which ruled the claimant's removal from the labor market was voluntary. Claimant, police officer, sustained injuries when she fell after tripping over a rug at work. Filed a claim for benefits which established injuries to the left foot, left knee, and back. Claimant did not return to work full duty as a police officer after the accident. February 2012 she took a regular service retirement. Thereafter she was diagnosed with breast cancer. Following her retirement further proceedings were conducted and her case and WCLJ ruled she did not voluntarily remove herself from the labor market and was entitled to a payment for a PPD subsequent to her retirement.
- WCB concluded the claimant's retirement was voluntary and not precipitated by her causally related disability. WCB modified the ALJ decision and claimant appealed. Generally a claimant who voluntarily withdraws from the labor market by retiring is not entitled to WC benefits unless the claimant's disability caused or contributed to the retirement. Here, there was absence of persuasive evidence in the record the claimant's disability caused or contributed to her decision to retire.
- IME testified claimant had a permanent moderate disability which prevented her from performing work duties but did not prevent her from working full time with restrictions. He did not evaluate her at the time she retired and provided no information as to what may have prompted her decision. Ortho who treated the claimant after the accident testified the claimant had a PPD and could not return to work. Although he continued to treat the claimant at the time of her retirement, his testimony was equivocal concerning the reason for retirement.
- Claimant did not indicate she retired from the advice of a doctor. She did not state she was no longer able to perform the duties of her restricted assignment at the time of retirement and no medical evidence establishing her condition had worsened. Substantial evidence supported WBC determination claimant voluntarily removed from the labor market.

# Accident

- Waddy vs. Barnard College (1/28/16)
- Appeal from WCB decision which ruled the claimant did not sustain a causally related injury and disallowed claim. In 2002 the claimant worked in the employer's mail room and applied for benefits upon basis of exposure to atmospheric irritants at the workplace causing her to develop asthma. ALJ disallowed claim finding claimant failed to establish the asthma was causally related to her employment. Upon review, WCB affirmed resulting in an appeal to AD. The Appellate Division affirmed addressing the issue of "accident" by stating "to establish an accidental work related condition, the claimant was required to demonstrate by competent medical evidence her condition resulted from unusual environmental conditions or events assignable to something extra ordinary at her work place". Board relied on IME Friedman who opined the claimant's asthma was not caused by conditions in her workplace.

- Hartigan vs. Albany County Sheriff (6/2/16) (Medical opinion not sufficient)
- Appeal from WCB decision which ruled the claimant sustained an accidental injury arising out of and in the course of employment. Claimant was a CO and filed a claim for benefits asserting he suffered a claim for work-related myocardial infarction in April 2013. Following a hearing the ALJ found the claimant had sustained a work-related injury and awarded benefits. Employer filed ABR and WCB upheld decision of ALJ. Employer appealed.
- Initially, the AD would not consider the applicability of WCL Section 21 since the WCB's finding of causal relationship was not based upon the presumption contained therein but upon the medical evidence and testimony at a hearing. It was claimant's burden to establish through competent medical evidence the myocardial infarction he sustained was causally related to his employment. Medical proof must signify a probability of the underlying cause which is supported by a rational basis and not be based upon a general expression of possibility. Here, claimant testified on the morning in question after delivering food carts for kitchen, he experienced chest pain, began to sweat, and had difficulties breathing. After claimant's second visit to his employer's medical department, a colleague drove him to the hospital where he was diagnosed with the MI on that day.
- Employer's medical expert opined claimant's MI was not caused by work related physical activity and was suffered after he underwent a stress test at the hospital. To counter the claimant relied upon the testimony of his treating cardiologist. Due to unfamiliarity with claimant's work activities, cardiologist declined to offer an opinion on the causal relationship of the MI.
- While the Board is entitled to resolve conflicting medical opinion there must be a medical opinion evidenced regarding a probability of a causal relationship supported by a rational basis, a general expression of possibility will not suffice. Here because the testimony of the claimant's cardiologist expressed merely the possibility the physical activities could have caused the MI at work, such testimony fell short of the required degree of medical proof. WCB's determination was not supported by substantial evidence and was reversed.

- Oathout vs. Averill Park CSD (8/25/16) \*\*\*
- Appeal from WCB decision which ruled the claimant sustained a compensable injury and decision which denied request by the employer and carrier for reconsideration for full board review. Claimant was walking down a school hallway when she heard a pop in her right foot and felt a sharp pain. Thereafter was diagnosed with fourth and fifth metatarsal fracture. Employer and TPA controverted. ALJ found claimant sustained a work-related injury and awarded benefits. Upon review WCB affirmed. Request for reconsideration denied. AD affirmed.
- Absent substantial evidence to the contrary, it is presumed an accident which occurs in the course of employment arises out of that employment. The employer argued that statutory presumption was rebutted by proof the injury stemmed not from an accident associated with the job activities but rather an idiopathic condition namely claimant's congenital metatarsus adductus. Although treating physician opined the fractures may be partially due to the metatarsus adductus the employer's medical expert performed an IME and was unable to draw a direct connection between the claimant's condition and the injury. According to Board's resolution of credibility issues, substantial evidence supported the determination.
- In this case, the WCB review bureau and the Appellate Division failed to specifically address the issue of whether the claimant sustained an accident by merely walking down the hallway and feeling a pop in her right foot. The Review Bureau and Appellate Division also failed to take into consideration the presumption was rebutted by the claimant's own testimony based upon her description of the accident itself.

# Stress

- Haynes vs. Catholic Charities (1/28/16)
- Appeal from WCB decision which ruled the claimant sustained a compensable injury. The claimant worked as a case worker and applied for benefits October 2012 alleging she suffered from psychological injuries as a result of being assaulted by a client. Following hearings ALJ established claim and WCB affirmed. Employer appealed. AD affirmed establishment of claim. After lengthy explanation about Section 2(7) AD noted although the WCB had found the April 2012 discipline instituted against the claimant was at least in part a lawful personnel decision, concluded the employer had not established the July 2012 discipline was undertaken in good faith. AD noted the employer's claims regarding the cause of the claimant's condition were countered. WCB credited the testimony of the claimant and her witness they had overheard the claimant's supervisor, HR director, making disparaging remarks about the claimant including that she was faking her mental condition. AD upheld the claimant's credibility and did not wish to overturn the WCB's decision.

# Consequential Injury

- Stange vs. Angelica Textile Services (5/19/16) (IME, poor job) \*\*\*
- Appeal from WCB decision which ruled the claimant sustained compensable injury and awarded benefits. Claimant established injury to his right shoulder when a production hamper struck him. Employer did not dispute the claim, claimant had surgery. While recovering, claimant had been cleared to start PT and stumbled downstairs and injured the right shoulder when he grabbed a railing to catch himself. MRI disclosed torn tendon of the right shoulder and request was made for additional surgery to the right shoulder which was denied on the grounds it was a new injury, causal relationship had not been established.
- The second surgery was performed and the carrier objected to bill. After review by Full Board, determined the claimant had established a causal connection between the earlier injury and the subsequent consequential injury. WCB upheld award of benefits. Employer and carrier appealed. When a claimant's subsequent reinjury and resulting disability consequentially arose from injuries he sustained, it was a factual issue for the WCB to resolve and its determination will not be disturbed when it is supported by substantial evidence.
- In this case, the carrier's consultant did not review the claimant's medical records following the first surgery and prior to the reinjury in forming his opinion regarding causal relationship. AD held there was substantial evidence supporting the WCB's determination.

- Johnson vs. Adams and Associates (6/30/16)
- Appeal of WCB decision which ruled the claimant did not sustain a consequential injury to the left upper extremity and denied his claim for benefits. In 2009 claimant fell at work injuring the left knee and the claim for compensation was established. Claim was amended to include the left lower extremity RSD, left leg DVT, and injuries to the claimant's left Achilles heel and right knee. In 2013 the claimant sought to amend the claim to include consequential RSD to the left upper extremity. ALJ denied the application based upon lack of credible medical evidence to support the diagnosis.
- Upon review, ALJ confirmed concluding the claimant had not demonstrated a consequential injury to the left upper extremity then any advanced payments of compensation made by the carrier regarding the condition did not compel an amendment of the claim. Appellate Division affirmed holding that as long as the WCB's determination was supported by substantial evidence, it should not be disturbed.
- Claimant's physician Bilfield opined the claimant suffered from RSD of the left upper extremity and the condition was consequentially related. Bilfield admitted however his diagnosis was without observing the objective signs of RSD. He reached his diagnosis based upon the claimant's subjective complaints and muscle tremors. IME conducted three examinations and reviewed medical records concluding the claimant was not suffering from RSD. While an advanced payment of compensation in the form of covered medical bills preclude the defense based upon statute of limitations, it does not foreclose the carrier from asserting other defenses and thus will not give rise to a claim where the elements have not otherwise been established.



- Hyatt vs. Holliswood Care Center (7/14/16)
- Appeal from WCB decision which ruled the claimant sustained a work-related injury and awarded benefits. Claimant sustained injury to the neck and back while performing duties as a utility worker for employer. Claimant applied for benefits and carrier and employer controverted. Following hearing ALJ found the claimant had sustained an injury and awarded benefits. Board affirmed. AD affirmed.
- There were some inconsistencies in the record regarding the specific date of accident. In this case the claimant testified he had been instructed by his employer to file a disability claim rather than a workers' compensation claim. The primary care physician opined the claimant's back condition was caused by his job and limited his ability to work. AD noted although the claimant had previously seen his primary care for back pain and there was some discrepancy as to the date of accident, the ALJ credited the claimant's testimony the accident occurred on a specific date and the Board Panel declined to disturb the assessment. Furthermore the date of the claimed accident was consistent with the C-3 form which claimant ultimately filed and each of his physician's recollections of the self-reported date of accident.
- AD found substantial evidence supported the Board's determination the claimant's injuries arose out of and in the course of his employment and did not disturb the finding.

# Penalty

- Turi vs. 5L Enterprises (5/19/16)
- Appeal of WCB decision which ruled the claimant lacked standing to request the imposition of a penalty for the failure of the carrier to make a timely deposit into the ATF. Case established and death benefits awarded following the death of the claimant's spouse in a 1993 work accident. Based upon computation of the present value, the carrier was directed to make a deposit into the ATF pursuant to WCL Section 21. Although the carrier continually made compensation payments to the claimant and decedent's dependents, no deposit was made into ATF. As is relevant to this appeal, claimant maintained the carrier's lack of deposit amounted to an untimely payment of compensation requiring a 20% penalty to be imposed.
- WCB found the claimant was not an agreed party to request the imposition of a penalty on the carrier for failing to make a timely deposit. Appellate Division affirmed. Any untimely deposit by the carrier into the ATF and resulting in penalty or interest is governed by the Board's rules and regulations and separate and apart from any penalty imposed pursuant to WCL Section 25(3)(f) for a late payment of WC to claimant. Issue of late payment to the ATF was an issue between the ATF and the carrier and is of no consequence to the claimant.

## Causal Relationship

- Pinkhasof vs. Auto One Insurance (6/23/16)
- Appeal from WCB decision which ruled the claimant was entitled to temporary total. Claimant involved in a MVA while driving a company vehicle sustaining multiple injuries in 2006. In 2009 pursuant to a stipulation claimant was entitled to receive PPD benefits based upon the SLU of his right arm and leg. ALJ indicated no further action was planned and case was closed. Claimant's low back condition worsened in 2011 and he experienced a fall resulting in a hospitalization and multiple spine surgeries in 2011. Both surgeries were covered by private health insurance. Claimant's WC case was subsequently reopened based upon a change in medical condition.
- March 2012 the claimant's physician sought authorization to perform fusion surgery and in May 2012 same was granted. Claimant had fusion surgery in May 2013. Thereafter additional proceedings were conducted before ALJ at which time the carrier disputed causal relationship between the accident and medical treatment found in closure of case. Nevertheless without considering further evidence the ALJ award the claimant TTD benefits subsequent to the date of the lumbar fusion. On appeal Board Panel upheld and carrier appealed. Raising the issue of causal relationship the carrier argued the condition precipitating lumbar fusion surgery could be related to his 2011 lumbar surgeries or possibly three prior auto accidents which occurred before 2009. Carrier requested medical records pertaining to all of the claimant's surgeries and prior medical treatment. Records were not provided to the ALJ prior to the issuance of the NOD. However during the carrier's appeal medical records relating to all claimant's surgeries and treatment following the 2011 surgery were disclosed and considered by IME physician. Dr. Hudacks opined the claimant was TT and unstated diagnosis given as causally related to the injury.
- In this case, AD noted they were compelled to find the WCB's decision to award TTD benefits was not supported by substantial evidence noting that Dr. Hudacks in a supplemental report stated the claimant's surgery to the lumbosacral spine was related to a fall which occurred at the claimant's home on 5/15/11. In the AD opinion Dr. Hudacks report did not constitute a rational basis to support a determination there was a probability of a causal relationship between the January 2006 incident and the condition which necessitated the claimant's surgeries. Additionally another physician who treated the claimant for back pain after 2011 surgeries indicated the claimant's residual symptoms were due to degenerative disc disease. In the absence of competent medical evidence establishing a causal relationship between the claimant's medical condition at the time of the surgeries and the work accident, the AD was compelled to find the decision should be rescinded.

- O'Brien vs. Carey Center for Global Good (6/23/16) \*\*\*
- Appeal from WCB decision which denied the claimant's request to amend his claim to include post-concussive syndrome. Following work-related accident where claimant slipped and fell on ice, case was established for the head, neck, and back. Based upon the claimant's protracted recovery and continued medical treatment, the claimant sought to amend the claim to include concussion and post concussive syndrome. ALJ credited medical reports and testimony of a neurologist finding as relevant to this appeal no post-concussive syndrome. ALJ amended the claim to include a mild concussion and found the claimant exhibited a moderate partial disability but denied any further relief. Upon review, WCB affirmed ALJ decision.
- Appellate Division reversed noting the resolution of conflicting medical evidence lied within the province of the WCB but the opinions relied upon must themselves constitute substantial evidence. The Board relied upon medical reports and testimony where Dr. Hughes opined the claimant did not suffer from post concussive syndrome. Nevertheless, Hughes submitted an addendum report which stated the claimant sustained a mild head injury followed by a post-concussive syndrome causally related to his work injury. AD noted because there was an inherent contradiction in the medical reports submitted by Dr. Hughes they cannot constitute substantial medical evidence to support the Board's decision. Decision reversed and remitted to WCB for further proceedings not inconsistent with the decision.

## Death

- Mellies vs. Consolidated Edison Company of NY, Inc. (6/30/16) \*\*\*
- Appeal from WCB decision which ruled the claimant's death was causally related to his employment and awarded benefits. Decedent established a work injury for asbestosis in 1996 and was classified with a PPD and awarded benefits. In 2010 the claimant suffered from numerous medical conditions including diabetes, coronary artery disease, and end state renal failure and underwent surgery for a condition unrelated to asbestosis. While in the hospital the claimant suffered congestive heart failure which required additional surgery for an infected gallbladder, developed pneumonia, and died. Death certificate identified respiratory failure as cause of death. Widow filed a claim. ALJ credited medical opinion of the expert regarding causation between death and asbestosis occupational disease. Board affirmed. Employer appealed. Employer contended the WCB improperly based its finding of causal relationship on the testimony of the claimant's medical expert as it was speculative and not supported by a rational basis. Appellate Division disagreed noting it was well settled the WCB was vested with discretion to assess credibility of medical proof and its resolution of such issues to be accorded great difference.
- Appellate Division noted Dr. Ploss' medical opinion was supported by a rational basis and therefore the decision should not be disturbed. Additionally the AD noted there was no compelling reason to overrule the precedent that work-related illnesses need not be the sole or even the most direct cause of death provided the claimant demonstrates the compensable illness was a contributing factor in the decedent's demise.

- Mangan vs. Tri Ed Distribution Company Inc. (6/30/16) (AWW)
- Issue is whether AWW should be set as the date of disability and not as of the date of death. Appeal from WCB decision which ruled the claimant was entitled to receive death benefits based upon decedent's AWW at the time of the accident. In 2000 claimant sustained work-related injury, in 2009 was classified with a PPD and liability of claim was transferred to Special Funds under 25-a. AWW was set based upon payroll records for the year preceding the injury.
- Decedent died in July 2012 of complications arising from causally related back surgery. Widow filed a claim for death benefits. Following hearing ALJ determined the decedent's death was compensable and calculated the amount of death benefits on the basis of the decedent's AWW at the time of his death. Upon review WCB modified the award of death benefits holding the amount of benefits should be calculated on the basis of the decedent's AWW at the time of the compensable injury. Claimant appealed. AD noted they previously found the calculation of death benefits was based upon the AWW at the date of accident or date of disablement. Award was made subject to the increased (minimum and max) death benefit rates set forth as part of the comprehensive revisions to the WCL in 2007. Therefore the WCB correctly determined the calculation of death benefits was based upon decedent's AWW at the time of his 2000 accident and not at the time of the 2012 death.

## Arising Out Of and In the Course of Employment

- Swatz vs. Absolute Center for Nursing and Rehab (5/19/16) (parking lot)
- Appeal from WCB decision which ruled the claimant sustained an accidental injury arising out of and in the course of employment. Claimant was in employer's lot and tripped on a trailer hitch on a parked car. Claimant fell and sustained injuries to the right elbow and both hands. Claimant applied for benefits and carrier controverted. Following hearing, ALJ found claimant sustained work related injury and awarded benefits and WCB affirmed. AD affirmed noting to be compensable, injury must arise out of in and in the course of employment. While the employer's premises, going to or coming from work, is generally considered an incident of the employment, the record revealed the claimant tripped and fell in the employer's parking lot as she was preparing to leave at the end of her shift. There was substantial evidence in the record to support the WCB's determination the claimant's injury arose out of and in the course of employment.

## Occupational Disease

- Granville vs. Town of Hamburg (2/25/16)
- Appeal from WCB decision which ruled the claimant sustained causally related binaural hearing loss. Claimant filed a WC claim alleging he sustained an occupational hearing loss due to exposure to loud occupational noises. ALJ concluded the claimant suffered consequential binaural hearing loss. Upon review, WCB affirmed. Employer appealed and AD affirmed. Employer alleged the record failed to establish the claimant was exposed to occupational noises during the course of his employment and failed to document his hearing loss was causally related to his employment. AD did not agree.
- Appellate Division affirmed decision confirming the WCB found the opinion of Dr. Nabi to be more credible and accorded appropriate difference to that assessment thereby concluding that substantial evidence supported the determination the claimant suffered a causally related binaural hearing loss.



# Reduced Earnings

- Woodruff vs. Phelps Sungas, Inc. (3/3/16) \*\*\*
- Appeal from WCB decision which ruled the claimant was not entitled to WC reduced earnings benefits after 12/10/09. 10/29/04 claimant sustained a work related injury to the neck and back while working for the employer. Claimant was cleared to return to work the same day and continued to work until June 2005 when he was laid off. Claimant subsequently obtained new employment but was ultimately discharged from that employment in October 2007. Claimant sought various employments and in September 2009 filed a claim for benefits.
- Following a hearing the WCB issued a decision finding the claimant failed to demonstrate his reduction in earnings were causally related to his work related injuries. Claimant was found to have a PPD but was not entitled to continuing indemnity payments because his loss of earnings were unrelated to his work related injuries. Upon review, WCB affirmed September 2012 decision. AD affirmed stating that although evidence of the claimant's work related PPD permitted an inference that a subsequent loss of wages or reduction of earnings is attributable to his/her disability, a RE award may be denied with a reduction of earning capacity as a result of age, economic conditions, or other factors unrelated to disability. This is question of fact for the WCB to resolve and its determination will not be disturbed when supported by substantial evidence.

## Apportionment

- Scuderi vs. Mazzco Enterprises and J.D. Consulting (5/5/16)
- Appeal from WCB which ruled apportionment applied to the claimant's award. Claimant was employed as a Union carpenter for several different employers from 1998-2009. In 2010 he filed a claim for bilateral carpal tunnel caused by repetitive work. ALJ established the claim for an occupational disease and ruled claimant became disabled on 6/25/10. Carrier sought to apportion liability to the claimant's prior employers pursuant to WCL Section 44.
- WCB found the date of contraction to be 8/14/98 and apportioned 45% to the claim for a liability. Determining whether a claim should be apportioned between previous employers in the same field, the relevant focus is whether the claimant contracted an occupational disease while employed by that employer. In this case, the claimant testified he was not diagnosed with or treated with carpal tunnel until 2010 and he did not specify when that condition began to develop. Claimant complained of soreness enhanced by his time as a union contractor and stated the soreness came and went depending on his daily work duties. Claimant described it as insignificant and never sought treatment prior to June 2010.
- Claimant acknowledged he could not recall when his symptoms began. His treating physician did nothing to clarify by recounting the claimant developed hand pain and numbness over the last few years and failed to proffer an opinion as to whether the claimant actually contracted carpal tunnel.
- In as much as the limited evidence in the record could not rationally lead to a date of contraction selected by the WCB and indeed would post challenges to selecting any date of contraction, its determination was unsupported by substantial evidence and must be reversed.

# Loss of Wage Earning Capacity

- Franklin vs. New England Motor Freight (8/25/16) (perm not found yet)
- Appeal from WCB decision which ruled the claimant sustained causally related loss of wage earning capacity. In 2012 the claimant as a tractor trailer driver sustained injury to the low back. He applied for and received benefits for an initial period of total disability. Claimant returned to work in January 2013 but was unable to continue after October. Claimant was classified with a PPD and ALJ found that taking into consideration vocational educational background he had sustained a 75% loss of wage earning capacity.
- Upon review, WCB agreed claimant had sustained a causally related disability but found the vocational factors had not been taken into account when taking into consideration the temporary disability and accordingly reduced the award of benefits to reflect the moderate temporary disability rate. Appellate Division affirmed. Board properly rejected claimant's argument the Board may consider non-medical and vocational factors in determining his wage earning capacity for the purpose of setting the compensation rate.
- Wage earning capacity of a claimant with no actual earnings is to be set by the WCB at reasonable levels not greater than 75% of the claimant's full time earnings. Board said they previously explained the vocational and functional considerations such as age, education, training, experience, restrictions, and related factors are appropriately taken into consideration with prospective to the loss of wage earning capacity only as they are relevant to the duration of the claimant's permanent partial disability benefits, not for purposes of taking into consideration the percentage of the degree of disability.
- In this case, the record of medical evidence established the claimant had a temporary partial disability for a time period in question and permanency had not been established so the Board's decision was supported by substantial evidence and would not be disturbed.

## Appeals

- Onuoha vs. BJs Club 165 (5/19/16)
- Appeal from WCB decision which denied the claimant's request for reconsideration for full board review. Claimant suffered work-related head injury in April 2010 and was awarded benefits. Claim was later amended to include depressive disorder. Subsequently the employer and its carrier controverted the claim and following a hearing ALJ found claimant had no further causally related disability subsequent to 12/15/12.
- Decision filed 11/7/14 WCB affirmed ALJ decision. Claimant's subsequent application for full board review was denied. Claimant appeal ensued. AD affirmed in as much as the claimant only appealed WCB's February 2015 denial of request for reconsideration as the merits were not properly before it. As such the review is limited as to whether the WCB's denial of claimant's application was arbitrary and capricious and was otherwise an abuse of discretion. Board was vested with the discretion to assess the credibility of the medical witnesses. AD could not say the WCB's denial of the claimant's application constituted an abuse of discretion.

## Medical Treatment Guidelines

- Castler vs. National Grid (6/16/16) (Good analysis by AD)
- Appeal from WCB Decision which ruled evidence of an exacerbation was not sufficiently documented. The claimant sustained a work-related injury to the low back in 2006 and was awarded benefits. In January 2013 the claimant's chiro noted an exacerbation of his low back injury after the claimant reportedly shoveled snow and experienced pain. (This case is an example of the WCB MTG's definition of an exacerbation)
- Appellate Division notes it is not sufficient for a treating medical provider to simply say a claimant had an exacerbation without providing medical evidence to support the conclusion. In this case, AD noted the doctor provided sufficient information regarding the expected type and frequency of appropriate and necessary medical treatment to return the claimant to base line. In addition, the doctor provided objective evidence of functional improvement, including a decrease in spasm and documented improvement in the severity of the symptoms with treatment. In review of the foregoing medical documentation, AD could not say the WCB's finding the doctor did not provide sufficient information in accordance with MTGs was supported by substantial evidence and therefore the decision of the WCB was reversed.
- Objective measures of functional improvement are found under Article A.3 of the MTGs as positive patient responses that primarily consist of functional gains which can be objectively measured and include but are not limited to positional tolerance, range of motion, strength, endurance, activities of daily living, cognition, and velocity measures which can be quantified.

## WCL § 18- Notice

- Levin vs. Health First Management Services, LLC (6/16/16)
- Appeal from WCB decision which ruled claimant's ABR failed to comply with 12 NYCRR 300.13a and denied review of the decision from the WCB. Following a hearing ALJ disallowed the claim finding the claimant had not provided timely notice of the claim to the employer as required by WCL Section 18 and failed to meet burden of demonstrating employer was not prejudiced. Claimant filed Application for Review and employer filed Rebuttal asserting the claimant's application did not comply with the service requirements of 12 NYCRR 300.13(e)(1)(i) and was not served upon the carrier.
- WCB concluded the claimant's application for review was defective and did not comply with requirements for several reasons including an unsigned affirmation. WCB also relied upon the fact that while the application indicated service on the parties was accomplished by mail it did not specify the date of mailing and the employer had submitted proof the application was served upon the carrier more than the allowed 30 days after the decision was filed.
- Thus, the WCB concluded the evidence did not establish the claimant timely served the employer. Claimant applied for reconsideration. Upon review of the record AD concluded the matter must be remitted to the WCB to certify the record on appeal pursuant to the rules of the Appellate Division. AD could not resolve the employer's representation the claimant in his joint record on appeal substituted a signed application for review. In this particular case there were also allegations of fraud based upon submissions made by the claimant.

## WCL § 29

- Terra Nova vs. Lehr Construction (5/19/16) \*\*\*
- Appeal from WCB decision which ruled the claimant is not entitled to ongoing benefit payments for litigation expenses associated with SLU award. Case established for injury to the right knee for which the claimant received a 10% SLU of the right leg. Claimant pursued third party action against floor tile manufacturer and reached settlement. By letter claimant sought the consent of the employer and carrier to a proposed settlement of \$173,500. Under consent letter the claimant offered to pay the carrier \$14,018.75 in satisfaction of the lien under WCL Section 29(1) from which the carrier's proportionate share of litigation expenses had already been deducted provided the carrier agree any future WC benefits would be subject to the Court of Appeals decision in Burns. (9 NY 3<sup>rd</sup> 207)
- Ultimately parties agreed to the proposed settlement acknowledging the lien reflected a reduction in the carrier's lien total. Thereafter further proceedings were conducted and the claimant's WC case and Judge ruled the claimant had a 10% SLU of the right leg for which he was entitled to 28.8 weeks of benefits and further ruled given proceeds received by client for third party settlement, carrier was entitled to credit under Section 29(4) and no monetary award was payable.
- On appeal, WCB upheld Judge's ruling the claimant had a 10% SLU but restored the case to the calendar for further development of the record on the issue of the carrier's credit under Section 29(4). Following further proceedings, ALJ ruled the Burns decision was inapplicable, and carrier was entitled to a credit that exceeded the amount of the schedule. WCB upheld ALJ's decision. AD affirmed pointing out the difference between Burns and Kelly involving a situation in which the claimant had a non-schedule PPD and a schedule loss of use.

## WCL § 25-a

- Bordino vs. Consolidated Edison Company of NY (1/28/16)
- Appeal from WCB decision which ruled liability did not shift to Special Funds for reopened cases. Claimant worked as an electrical splicer and experienced serious respiratory problems after being exposed to noxious vapors at work. Filed a claim for benefits in 1995. Claim was established for causally related occupational disease, chronic asthma and reactive airway disease. Claimant continued to work after filing the claim and receiving medical treatment for respiratory problems. On 1/8/02 claimant sustained a work-related back injury and filed another claim for benefits for which he was classified with PPD. At the end of 2002 the claimant retired from his position and received payments from self-insured employer through the disability retirement plan. In 2011 the employer sought to shift liability of the claimant's benefits to the 1995 claim under Special Funds via 25-a. Following the hearings, ALJ found 25-a was inapplicable and discharged SFCC. Panel of WCB upheld. Employer appealed. Issue presented was whether the employer's payment of disability retirement benefits was attributable to the claimant's 1995 OD and constituted an advanced payment of compensation precluding the liability from being shifted to Special Funds.
- Claimant testified he retired from his position due to a number of health concerns including respiratory problems that were the basis of the occupational disease claim. Medical evaluation prepared by claimant's physician stated claimant's respiratory problems were the reason for his retirement. Furthermore, claimant received a disability retirement pension as opposed to a regular retirement pension. AD found substantial evidence which supported the WCB's finding and affirmed.



## WCL § 15-8

- Fzadek vs. Wilson Great Batch (1/28/16)
- Appeal from WCB decision which ruled the claimant's carrier was not entitled to reimbursement from Special Funds. Claimant successfully applied for benefits after injuring back and neck in 2004 after a slip and fall. After learning claimant suffered from a plethora of other medical conditions, the employer and carrier applied for reimbursement from Special Funds under 15-8(d). ALJ found claimant sustained a PPD and carrier was entitled to reimbursement. WCB affirmed. Full Board noted the carrier was not entitled to reimbursement as it failed to meet the burden of showing WCL 15-8(d) applied. AD affirmed and outlined the criteria for reimbursement under 15-8 which showed the carrier must demonstrate the claimant suffered from a preexisting permanent impairment which hindered job potential, a subsequent work-related injury, and a permanent disability caused by both conditions which was materially and substantially greater than what would have resulted from a work-related injury. AD agreed with WCB the carrier failed to prove the claimant's preexisting conditions hindered or were likely to hinder her employability. While the carrier presented evidence the claimant's medical condition and treatment received prior to her 2004 work related injury as well as testimony from medical expert were permanent in nature, the review was based upon the general moralities and speculation. Notably the expert did not examine or conduct a medical interview of the claimant and reviewed only x-rays of the claimant's left ankle taken in 2000 and did not review diagnostic studies of the claimant's back or neck which pre-dated the claimant's 2004 injury. AD determined WCB's ruling was supported by substantial evidence.

# WCL § 21

- Ellis vs. Frito Lay, Inc. (4/21/16)
- Appeal from WCB decision which ruled the claimant sustained a work-related injury and awarded benefits. Claimant while working was unloading trailer when he fell down stairs and caused injuries to the back. Claimant applied for benefits and following a hearing Judge found claimant sustained a work-related injury. WCB affirmed. Employer appealed. AD affirmed.
- Here, claimant testified he slipped while walking down stairs to check a trailer. According to the claimant the stairs had a coating of snow on them and he injured his back and neck after falling. Claimant admittedly used his cell phone to notify his supervisor in an office on the premises and to later call an ambulance. Employer presented evidence supporting its contention the claimant fabricated his claim in light of a pending disciplinary action against him and in retaliation for the denial of his request to leave early on the date of accident. Claimant's supervisor also presented testimony that contradicted certain aspects of the claimant's account of the accident in the hours following the accident.
- Appellate Division noted although there is a presumption an unwitnessed workplace accident arose out of and in the course of employment, pursuant to WCL Section 21(1), the WCB correctly noted in its decision the presumption cannot be used to establish an accident actually occurred. Rather, such determination is a factual question for the WCB to resolve and its determination will not be disturbed if supported by evidence.
- Notably, the record also contained medical reports from the claimant's treating physician, chiropractor, and a physician who performed an IME. All three found the claimant to be temporarily totally disabled from performing the duties of a warehouse worker and concluded his condition was causally related. Appellate Division would not disturb the WCB's finding.

# Miscellaneous

- Von Maack vs. Wyckoff Heights Medical Center (10/6/16)
- Appeal from WCB decision which denied claimant's application for reconsideration. Claimant worked for employer as a pharmacist and part of duties included compounding chemotherapy drugs for patients. Claimant developed persistent coughing and breathing problems and filed a claim for benefits. Employer controverted claim. Following hearing ALJ concluded the claimant did not sustain a causally related injury and disallowed her claim. Panel upheld ALJ decision. Claimant unsuccessfully applied for reconsideration. Inasmuch the claimant had only appealed from decision denying her application for reconsideration, the merits of the WCB's underlying decision disallowing the claim are not before the Appellate Division.
- Record revealed the claimant failed to show that newly discovered evidence existed, that there had been a material change in condition, or that the Board improperly failed to consider the issues raised in the application for review in making its initial determination. Therefore, the AD ruled they could not say the Board behaved in an arbitrary or capricious manner or abused discretion in denying application for reconsideration or full board review.

- Guzman-Dimas vs. Fralexa LLC (10/6/16) (Coverage) \*\*\*
- Appeal from WCB decision which ruled Travelers Indemnity was a liable workers' compensation carrier. Claimant's employer was a NJ corporation with a sole office in NJ. Employer maintained NJ workers' compensation insurance through Travelers. March 2013 claimant a delivery driver sustained injuries after falling off of the back of a delivery truck in NY. Claimant, a resident of NY filed a claim for WC benefits in NY. Travelers controverted on the basis the claim was not covered under its policy because it did not cover the employer for injuries occurring outside of NJ. ALJ found Travelers was the proper carrier. WCB affirmed finding Travelers failed to produce evidence including a copy of its policy showing exclusions.
- AD reversed noting the carrier provided a copy of the policy to the WCB showing the exclusions and it was before the WCB. Pre hearing conference statement identified the policy issued to the employer and noted it was attached to that statement. WCLJ was informed at the hearing the policy was in the Board's file. ABR also identified the policy indicating the policy was in the file and attached to the pre-hearing conference statement. The record demonstrates Travelers had produced the at-issue policy.
- AD agreed Travelers' contention the conditions for coverage in NY were not met. The policy that Travelers issued to the employer contained a limited 'other states' endorsement. In order for Travelers to pay benefits for a work claim in NY under that endorsement, various conditions were required to be met including that the claimant seeking benefits must have been hired in NJ and at the time of his injury the employee must have been principally employed in NJ. Claimant testified he was hired in NY, picked up each morning in NY, and dropped off at the end of each day in NY. Further, the claimant explained his job duties consisted of delivering merchandise to locations around Long Island and never went to or worked in NJ.
- Wherefore, because the claimant was neither hired in NJ nor worked there, the record evidence demonstrated not all of the conditions were met for the policy's endorsement to apply to the WC claim. The decision by the WCB was reversed by the Appellate Division.