



Workers' Compensation Board

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DAVID WERTHEIM AND MADELINE PANTZER WCB.NY.GOV



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Workers' Compensation Board Update 2019

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AGENDA

- 1 Legislative/Regulatory Update
- 2 SLU Guidelines Refresher
- 3 Docket Management and Virtual Hearings
- 4 Notable Decisions

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Legislative/Regulatory/Programmatic Updates

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Legislative: 2019 Session

Article VII 2019-2020 Exec. Budget, PPGG Part CC

- Expanded set of providers: NPs, LCSWs, Acupuncturists
- Authorizations for existing ‘ancillary’ providers: PAs, PTs, OTs
- Expands specific authority to resolve bills regarding all medical service, including DME and Rx
- Desk arbitration for all value levels
- Regulations in register 6-19-19; in midst of public comment

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Farm Laborers Fair Labor Practice Act: A8419 /S6578

- Signed July 17, affects labor law (such as overtime & UI), public health law, WCL
- For workers compensation:
 - § 110-b: farm labor contractors – w/ notice of injury, must inform employer, owner, or operator
 - § 120: amended claim, attempted to claim, or “requested a claim form...” as basis
 - § 51: notice must be in English *and* Spanish
 - § 3(1)(14-b): amended to remove the \$1200 *total* payroll threshold
 - § 201(6): definition of employment removed ‘*service as farm laborers*’ exclusion, meaning eligible for Paid Family Leave and disability benefits
 - Effective date: set for 1-1-2020

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Legislative: Adjudication from 2017 Reform

WCB has already adjudicated several aspects from 2017 reform:

- Amendment to §15(3)(w) on attachment to labor market
- Importance of 'entitlement to benefits' has led to Board making sure we handle any raised attachment issues at same point we rule on classification
- Extreme Hardship Redetermination (§35[3]) first cases moving through system
- §23 added a mandatory review of LWEC reductions by panel below safety net
- One case was remitted to consider first-responder stress under §10(3)(b) [*Matter of McMillan v. Town of New Castle*, 162 A.D.3d 1425] (disallowed upon remitter)
- New SLU Guidelines effective 1-1-18 (discussed below)

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Legislative: Adjudication from 2017 Reform

Issue not yet adjudicated: *Safety Valve / no MMI*

- §15(3)(w) amended to include credit against PPD cap for weeks of Temporary Partial Disability paid after 130 weeks from date of accident, where d/a on or after April 10, 2017
- First eligible cases arise October 2019
- "Safety Valve" provides that credit against cap not available where claimant can show, when case is ripe, that Maximum Medical Improvement has not been attained

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Legislative: IME Study & Committee

- Legislature directed an IME Advisory Committee to convene
- Composed of labor, business, physicians, carriers, self-insureds, and attorneys
- Facilitated meetings occur monthly on wide range of topics
- Address issues of administration, quality providers, and fairness
 - For example, “Same day, same manner”
 - Recommendations to legislature and Governor due at end of 2019

New and Pending Regulations

Medical Fee Schedule (MFS)

- First update in over 20 years; provided across-the-board increases for providers
- Consolidated some out-of-date codes
- Clarified and updated certain ground rules, including re: supervision
- New MFS took effect April 1, 2019

Prescription Drug Formulary

- 2017 reforms mandated WCB establish a Formulary; §13-o
- There were 4 public comment periods; last ended May 2019; adopted 6-5-19
- Compliance by 12-5-19 for new Rx and notice of non-compliant Rx
- As of 6-5-20 all refills and renewals need to be on formulary or have prior authorization
- Basic concept: there are 3 lists, one for 1st 30 days; one for balance of claim tied to our MTG; peri-operative for +/- 4 days of surgery.
- Provides that all compound medications must go through prior authorization.
- Process for prior approval or authorization of drugs not listed on the formulary
- Rx Fee Schedule established “lesser of” standard; adopted 4-17-19, eff. 10-1-19

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Paid Family Leave Update

- Fully implemented 1-1-18
- All private employers covered via insurance or ask to self-insure
- Public employers may opt-in to provide for employees
- Union employees covered through employers, subject to CBA (including public)
- 2019 is year 2: AWW and week allotment increases for 4 years
 - 50% SAWW to 67% SAWW over 4 years
 - 8 weeks to 12 weeks over 4 years
- Disputes via NAM arbitration; vast majority PFL claims are handled without dispute
- *NEW: Farm Labor, as discussed above*

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2018 Permanency Guidelines

- Brief update on changes from 2012 (1996) SLU guidelines to the 2018 SLU Guidelines

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Contralateral

- Deficits should be measured by comparing to the baseline reading of the contralateral member, if appropriate. Using the contralateral is not appropriate where the opposite side has been previously injured or is not otherwise available for comparison [1.3(3)(b)]

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Contralateral

- Where contralateral unavailable, 2018 Guidelines now contain designated normal ROMS for all tested sites
- Prior iterations had spotty indicators of normal ROMs

Goniometer

- To measure **active** range of motion (ROM), medical providers should generally utilize a goniometer. In order to measure the maximum range of active motion, three repeat measurements should be taken [1.3(3)(a)]

Amenability

- Prior Guideline classification element lists did not specify whether all or only some of the conditions need be present
- The 2018 Guidelines clarify that the presence of any of the listed conditions may result in a determination that the injury is amenable to classification instead of SLU (2018, Section 1.6[1] and [2])

Special Considerations

- Eliminates confusion as to whether conditions that fall under the category of Special Consideration are to be evaluated standalone or whether value can be added
- Instructions are now clear as to whether to add or not add
- The Special Considerations for meniscal and rotator cuff tears have been removed

Joint Replacements

- Includes charts for determining the loss associated with joint replacements (Shoulder 5.5, Hip 6.5, and Knee 7.5)
- Advances in medicine reflected
- A good outcome is now equated to a 35% SLU

Loading

- Prior Guidelines had limited description of how to apply a load to an SLU evaluation
- 2018 Guidelines contain a step by step explanation
- Loading figures involving fingers have been increased by 20%

Maximum ROM

- SLU cannot exceed the value of full ankylosis of the joint
- Multiple ankylosed joints, SLU cannot exceed the value of amputation (exception for loading)
- ***Matter of Maloney v Wende 157 AD3d 1155 (2018)***: Values added would exceed full ankylosis of the joint. Court labeled this an “illogical result” and affirmed WCB

Guidelines Apply Broadly

- New York medical providers must be Board authorized
- Permanency evaluations performed outside of New York must comport with these Guidelines
- Informs providers who may be otherwise unaware of existing law

Sources of Medical Evidence

- C-4.3 must be complete, or else is subject to rejection
- IME report, whether carrier or claimant, must comport with WCL 137 and 12 NYCRR 300.2
- To compel carrier payment for claimant IME, must meet 300.2(d)(2)

Permanency Threshold

- MMI is a prerequisite finding to permanency
- MMI cannot be determined prior to 6 months from the date of injury or disablement, unless otherwise stated or agreed to by the parties (2018, Section 1.2)

SLU Versus Classification

- No residual impairments must remain in the systemic area (e.g., head, neck, back, etc.) before the claim is considered suitable for schedule evaluation of an extremity or extremities involved in the same accident (2018, Section 1.5)

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Docket Management and Virtual Hearings

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Formal and Informal Decisions

- Administrative Decisions - Claims Examining
- Proposed Decisions – Conciliation / Senior Attorneys
- Notices of Decision - Workers' Compensation Judges

Calendaring of Cases

- Case referred to calendaring unit
- Time allowance set
- Part assigned
- Hearing notice prepared - Regulation 300.8
- Hearing notice served

What Types of Issues and How Many?

GRAND TOTAL.....277,000

Including

- Controverted Claims.....58,700
- Section 32 (indemnity and/or med).....18,000
- Permanent Partial Disability (procedure 3-4 hearings)....15,000

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Virtual Hearing Center (VHC)

- More than point-to-point video
- A new way to “appear” at a hearing
- No need for any participant to come to the Board in person
- All workers’ compensation cases as of March 25, 2019

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VHC = New Efficiencies

- No need to travel
- Comfort of own office
- Cases back up, another attorney at the office can sign in and cover the overage
- Automatic upload of documents
www.wcb.ny.gov/content/ebiz/ecase/ecase_doc_upload.jsp

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2018 Virtual Hearing Center

- We now have video of every hearing saved as an audio record
- Audio record is provided upon request at no charge
- Email request to DARMinutes@wcb.ny.gov

For those who haven't seen or used VHC, here's what the process looks like...

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CIS Hearing Notice

NOTICE OF WORKERS' COMPENSATION HEARING		Virtual Hearing ID: 622204399		State of New York WORKERS' COMPENSATION BOARD	
PLACES OF HEARING Workers' Compensation Board 160 Broadway-Riverview Center Menands, NY 12204	Part 10	Date of Hearing 03/23/2018	Time 3:00 PM 30 Min	District Office Albany (877) 632-4996	WCB Home Page www.wcb.ny.gov
	WCB Case No. G0030035	Date of Accident 01/01/2008	Claim No. W204002	Case File No. ABC123	CLAIMANT John Doe
John Doe 123 Main Street Testville NY 12345					

CLAIMANT: Bring this notice with you. Read important information on reverse side.

Your Hearing ID

EMPLOYER: Test Employer
CARRIER: State Insurance Fund
COPIES TO: John Doe
PURPOSE OF HEARING:
Question of period and extent of disability.

IMPORTANT INFORMATION FOR THE CLAIMANT:
In a compensable workers' compensation case, bills for related medical treatment are the responsibility of your own employer or its workers' compensation insurance carrier. If you have used a private health insurance policy (Blue Cross, Blue Shield, G.H.I., H.I.P., or other) for payment of any bills in your workers' compensation case, please advise the private health insurer immediately.
In order to be reimbursed for any payments or co-payments you may have made for treatment or services which are the responsibility of the workers' compensation insurance carrier, you must tell the judge at this hearing about this payment.

THE NEW YORK STATE WORKERS' COMPENSATION BOARD PROHIBITS VISITORS, EMPLOYEES, CLIENTS OR WITNESSES FROM CARRYING OR BEARING FIREARMS OR ANY OTHER WEAPON ON BOARD PREMISES.

Virtual Hearing Available
Claimants and attorneys/licensed representatives
Hearing ID for this hearing is 622204399

Visit the Board's website wcb.ny.gov/virtual-hearings to learn more. If this is your first time using virtual hearings, please visit the website at least 48 hours before your hearing to ensure you have the required computer technology to participate. Claimants who are not scheduled to testify and cannot conveniently attend the hearing in person or by video must call (844) 337-6301 for information about attending the hearing by telephone.

Your Hearing ID

wcb.ny.gov/virtual-hearings

Virtual Hearings

ATTEND YOUR HEARING

Overview

Virtual Hearings allow injured workers, attorneys/representatives, witnesses, and other participants to attend hearings online. Participants will no longer have to travel to a hearing site to attend their hearing.

The Board's pilot program will make virtual hearings available for some hearings beginning in September 2017.

If you are eligible to participate for your hearing virtually, you will find instructions at the bottom of your hearing notice under ["Virtual Hearing Available."](#)

To take part in a virtual hearing, you must:

- have a computer with a web cam or have a video conference system
- have a high-speed Internet connection
- be able to access the virtual hearing application - [Test Your System](#)
- meet all [System Requirements](#) for Virtual Hearings

Be sure to [test your system](#) at least 48 hours prior to your hearing.

Logging In



Welcome to Virtual Hearings.

GET STARTED IN 3 EASY STEPS.
Simply enter your information, select your role, then wait for the hearing to start.

[GET STARTED](#) or Read More

ENTER YOUR INFORMATION

* Hearing ID * Required
628770821

Where can I find my Hearing ID?
* First Name
Anthony

* Last Name
Contento

Email
acontento99@gmail.com

Phone xxx-xxx-xxxx
717-555-1234

[CONTINUE](#)

Role Selection



Services News Government Local

Q Search Location Translate

HELLO ANTHONY CONTENTO

Select Your Role

- I'M A CLAIMANT
- I'M A CLAIMANT ATTORNEY / REPRESENTATIVE
- I'M A CARRIER ATTORNEY / REPRESENTATIVE
- I'M A WITNESS / OTHER PARTICIPANT



Agencies Services App Directory Counties Events Programs

Mark Yourself as Available or Away

The screenshot shows the 'Waiting Room' interface. At the top right, there is a navigation bar with 'My Status' and two buttons: 'AVAILABLE' (with a green dot) and 'EXIT'. A red arrow points to the 'AVAILABLE' button. Below the header, the text reads 'Waiting Room' and 'You Are Ready!'. A message states: 'If you are appearing in person, please enter your hearing when called. If you are attending virtually, you will be notified with a pop-up to enter your hearing.' Below this is a section 'Add Another Hearing ID' with a text input field for 'Hearing ID Number' and an 'ADD HEARING' button. At the bottom, there is a table with the following data:

TIME	CLAIMANT	HEARING ID	CASE	JUDGE	STATUS	ROLE	OPPOSING COUNSEL
8:13 AM	Test Claimant	62870821	19200009	student46	NOT CALLED	Claimant Representative/Attorney	View CHANGE ROLE ADD ATTENDEE

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Adding Your Hearing Schedule

This screenshot is identical to the one above, showing the 'Waiting Room' interface. A red arrow points to the 'ADD HEARING' button in the 'Add Another Hearing ID' section. The table below the section contains the same data as in the previous screenshot:

TIME	CLAIMANT	HEARING ID	CASE	JUDGE	STATUS	ROLE	OPPOSING COUNSEL
8:13 AM	Test Claimant	62870821	19200009	student46	NOT CALLED	Claimant Representative/Attorney	View CHANGE ROLE ADD ATTENDEE

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Hearing Added

Workers' Compensation Board

Attorney/Representative Anthony Contento | My Status AVAILABLE | EXIT

Waiting Room

You Are Ready!

If you are appearing in person, please enter your hearing when called. If you are attending virtually, you will be notified with a pop-up to enter your hearing.

Added hearing with ID: 627199377

Add Another Hearing ID

Hearing ID Number **ADD HEARING**

TIME	CLAIMANT	HEARING ID	CASE	JUDGE	STATUS	ROLE	OPPOSING COUNSEL
8:13 AM	Test Claimant	628770821	19200009	student46	NOT CALLED	Claimant Representative/Attorney	View CHANGE ROLE ADD ATTENDEE
8:36 AM	Test Claimant	627199377	0045119	student46	NOT CALLED	Claimant Representative/Attorney	View CHANGE ROLE ADD ATTENDEE

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Joining the Hearing

Hearing Started

Your hearing has started. Please click 'Enter Hearing' to enter your hearing.

If you experience an error or the hearing fails to load, you may click this button again to re-enter the hearing.

ENTER HEARING

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Mobile App – Logging In

The screenshot shows a mobile app interface for logging in. At the top, it says "Enter Your Hearing Information". There are four required fields: "Hearing ID" (with value 620075607), "First Name" (with value Somasundaram), "Last Name" (with value Gunasegaram), and "Email" (with value S.G@email.com). There is also a "Phone Number" field with value 5185555555. A "CONTINUE" button is at the bottom.

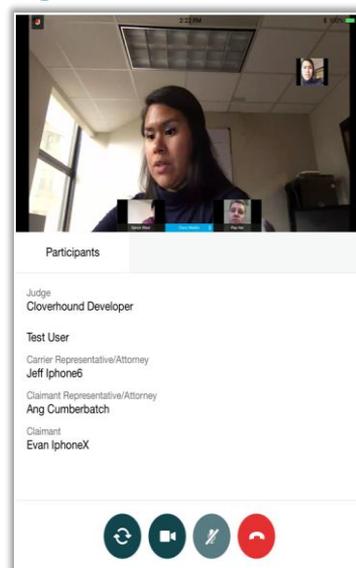
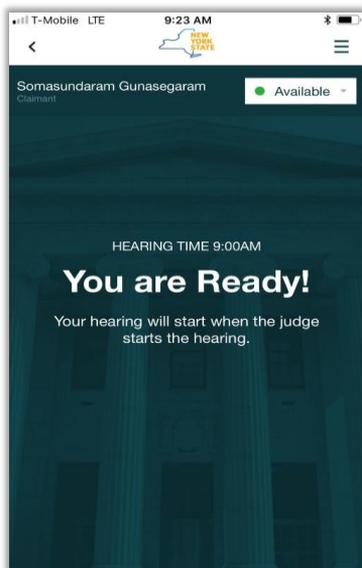
The screenshot shows a mobile app interface for selecting a role. The title is "Select Your Role". There are four options, each with a right-pointing arrow: "Claimant", "Claimant Attorney", "Carrier Attorney", and "Witness/Other Participant" (which has an information icon).

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Mobile App - Hearing

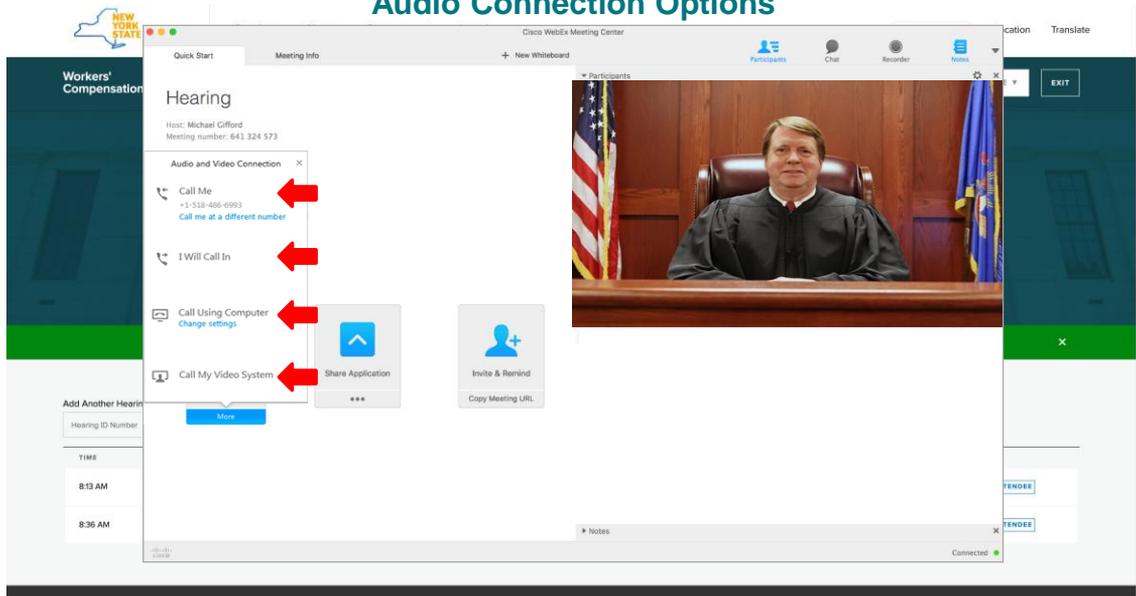


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Audio Connection Options

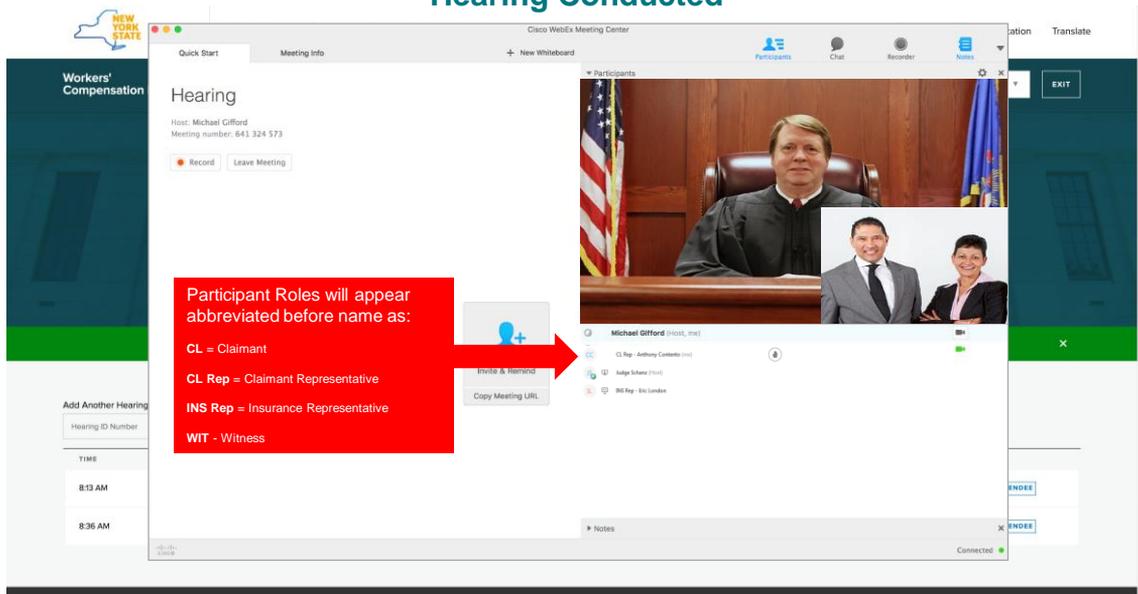


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Hearing Conducted



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Judge Dashboard

10:08:29 AM
September 13th, 2018

MESSAGES		DISPLAY SETTINGS			ALL			UPDATE SCHEDULE
		AM	PM					
PENDING								
TIME	CASE	NAME	CLAIMANT	REP.ATTY	CARRIER REP.ATTY	ASSOCIATED	STATUS	
9:00 AM	G1793502	Air	A M Available	Scott Black Available	Andrew Arbett Available		TO BE RECALLED CALL HEARING	
9:00 AM	G1793502	Ct	Ct Available	David Tomack Available	Stacey Valkness Available		NOT CALLED CALL HEARING	
9:30 AM	G1793502	Ct	E Unavailable	William Kissner Available	Brian Connor Available		NOT CALLED CALL HEARING	
9:30 AM	G1793502	Mi	Unavailable	Edward DeLuca Available	Sean Nicolette Available		NOT CALLED CALL HEARING	
10AM - 11AM								
TIME	CASE	NAME	CLAIMANT	REP.ATTY	CARRIER REP.ATTY	ASSOCIATED	STATUS	
10:15 AM	G1793502	Ki	Unavailable	William Morrison Available	Andrew Arbett Available		NOT CALLED	
11AM - 12PM								
TIME	CASE	NAME	CLAIMANT	REP.ATTY	CARRIER REP.ATTY	ASSOCIATED	STATUS	
11:00 AM	G1793502	E	Unavailable	Unavailable	Jill Johnson Available		NOT CALLED	

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Judge Dashboard

10:09:07 AM
September 13th, 2018

MESSAGES		DISPLAY SETTINGS			ALL			UPDATE SCHEDULE
		AM	PM					
PENDING								
TIME	CASE	NAME	CLAIMANT	REP.ATTY	CARRIER REP.ATTY	ASSOCIATED	STATUS	
9:00 AM	G1793502	Anianna Monahan	Anianna Unavailable	Scott Black In a Hearing	Andrew Arbett In a Hearing		COMPLETED HEARING TO BE RECALLED	
9:00 AM	G1948083	Cheyen ac Synnestera	Cheyen Synnestera	David Tomack Available	Stacey Valkness Available		NOT CALLED	
9:30 AM	G1795276	Christina Torres cappelto	Christina Torres Cappelto	William Kissner Available	Brian Connor Available		NOT CALLED	
9:30 AM	G1833017	Michelle Vesce	Unavailable	Edward DeLuca Available	Sean Nicolette Available		NOT CALLED	
10AM - 11AM								
TIME	CASE	NAME	CLAIMANT	REP.ATTY	CARRIER REP.ATTY	ASSOCIATED	STATUS	
10:15 AM	G2165173	Kyle Turner	Unavailable	William Morrison Available	Andrew Arbett In a Hearing		NOT CALLED	
11AM - 12PM								
TIME	CASE	NAME	CLAIMANT	REP.ATTY	CARRIER REP.ATTY	ASSOCIATED	STATUS	

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Notable Decisions Over Past Year

Payment of Posthumous Schedule

Youngjohn v Berry Plastics Corp., 169 AD3d 1237

- Decedent had right shoulder, left elbow injury; SLU opinions submitted
- Then, claimant died; no surviving beneficiaries or dependents
- Stip 55% SLU left arm, 45% right arm
- Board found SLU limited per 15(d)(4) to reasonable funeral expenses
- WCL § 33 indicates payment of posthumous SLU to estate
- Resolving conflict between statutes, competing case law, and 2009 amendments, Court held SLU payable as allocated to date of death, plus funeral expenses

Full deduction for prior SLU

Genduso v NYC Dept. of Education, 164 AD3d 1509

- “... neither the statute nor the Board's guidelines lists the ankle or the knee as body parts lending themselves to separate SLU awards. Rather, impairments to these extremities are encompassed by awards for the loss of use of the leg. Inasmuch as the 20% SLU award granted with respect to claimant's 1997 injury was for the loss of use of his right leg, it was not improper for the Board to deduct it from the 40% SLU award that it found applicable to claimant's 2013 injury in arriving at the final SLU award of 7.5%.”

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Interstate Commerce / Jurisdiction

McCray v CTS Enterprises Inc.; 156 AD3d 1356

- Claimant lived in Florida, worked on CSX train, in dining service under CTS Enterprises
- Train was in NY; sustained knee injury while exiting train to purchase supplies
- CTS was found to be employer, based on finding that Federal Employer's Liability Act didn't preclude claim, and that there were sufficient contacts with NY
- WCL § 113 allows for comp in interstate commerce cases where claimant, employer, and carrier waive all federal rights and remedies
- FELA was applicable here, and CTS and UEF did not waive their rights to a federal claim; thus reversed and disallowed

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Article 8-a Back Claim

Chrostowski v Pinnacle Env. Corp., 169 AD3d 1217

- Was involved in cleanup of WTC; included lifting heavy bags of material
- Timely WTC-12; claim filed 2016
- For respiratory illnesses, all qualifying conditions, timely
- Back claim was found barred by §28
- Court reversed, as musculoskeletal disease is listed in §161(3)(e) as a qualifying condition, and the IME orthopedist characterized his “affliction as a lumbar spine repetitive use injury”

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Medical Treatment Guidelines

Gasparro v Hospice of Dutchess County, 166 AD3d 1271

- Affirmed finding that MTG apply out-of-state
- Board found that per § 123 and *Kigin* that MTG applies out of state. Found LidoPro and Terocin were not in accord with MTG and resolved objections in favor of carrier
- Court: WCB may alter course from prior decisions, as we explained why
- Applying guidelines to out-of-state was rational

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Gasparro (con't)

Court's rationale:

- “By applying the guidelines to treatment received in another state, the same medical standards of care — developed to ensure that claimants receive appropriate and effective medical care as recommended by the medical community identifying best practices — will apply equally to medical treatment received by in-state and out-of-state claimants.”

Very Recent Decisions

- 25-a [*Verneau, Radley*]
- 300.13 [*Jones, Sweich, Presida*]

Mandatory Full Board Review

Employer Claire Hayduscko: 2019 NY Wrk Comp 4070 8094

- Privately hired Home Health Aide considered a domestic worker entitled to benefits for over 40 hours of work

Employer Postmates, Inc.: 2019 NY Wrk Comp G191 7469

- Claimants who delivered food by bicycle through a digital platform were independent contractors rather than employees

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Questions

- Visit the Board website: wcb.ny.gov
 - Regularly for updates
 - When you have a question

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