NEW YORK STATE Workers' Compensation Board

# CONFERENCE 2024

OCTOBER 18


# Legal Updates & Recent Case Law

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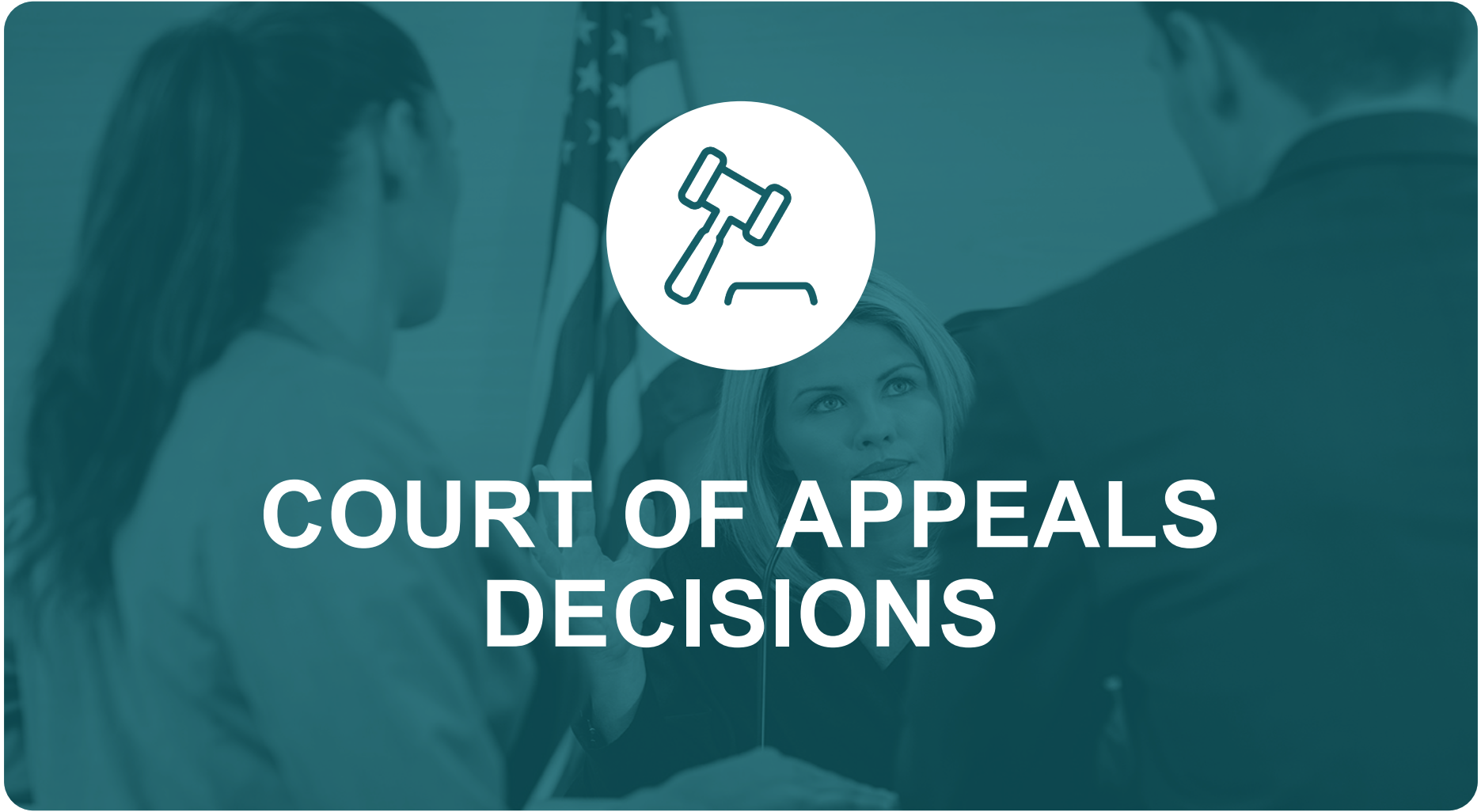
# AGENDA

1. Statistics
2. Court of Appeals Decisions
3. Appellate Division, Third Department Decisions
4. Upcoming Decisions of Note

# STATISTICS

- From September 2023 through September 2024, the Appellate Division, Third Department issued **74 decisions** in cases involving appeals from Workers' Compensation Board decisions.
- Of those **74** decisions:
  - The Board's decision was affirmed in 52 cases.
  - The appeal was dismissed in 4 cases.
  - The Board's decision was reversed in 13 cases.
  - The Board's decision was modified in 5 cases.
- During that period, the Court of Appeals issued two decisions in cases involving Board decisions.



# COURT OF APPEALS DECISIONS

# COURT OF APPEALS

## *Matter of Lazalee v Wegman's Food Markets, Inc.*, 40 NY3d 458 (2023)

- The Board must grant an adjournment for the carrier to cross-examine claimant's attending physician if the request to take the physician's testimony is made before a decision on the merits of the issue on which cross-examination is sought.
- The Court based its decision on "the plain language of" 12 NYCRR 300.10(c): "When the employer or its carrier or special fund desires to produce for cross-examination an attending physician whose report is on file, the referee shall grant an adjournment for such purpose."
- The Court in *Lazalee* made clear that "[i]f the Board concludes that the Workers' Compensation Law Judge (WCLJ) should have discretion under those circumstances, it is within the Board's power to amend its rules as it sees fit (see Workers' Compensation Law § 117[2])" (*id.* at 462).

# COURT OF APPEALS

## *Matter of Timperio v Bronx-Lebanon Hospital,* __ NY3d __, 2024 N.Y. Slip Op. 02723

- Claimant, a first-year resident in a hospital, was injured during a mass shooting at work. The assailant was a former employee of the hospital whom claimant had never met. Claimant brought a tort suit against the hospital who sought to have the suit dismissed based on the exclusive remedy provision of the Workers' Compensation Law (*see* WCL § 11).
- The Board found that the injury arose out of and the course of claimant's employment. Claimant appealed and the Third Department reversed and disallowed the claim, finding that the assault "resulted exclusively from arbitrary, broad-sweeping and gravely maligned personal animosity and not from work-related differences" (*Matter of Timperio v Bronx-Lebanon Hospital*, 203 A.D.3d 179, 185 [2022]).
- The Court of Appeals reversed and reinstated the Board's decision, finding that the Third Department had "erroneously disturbed the WCB's determination that the claim is compensable" (*Timperio*, __ A.D.3d __, 2024 N.Y. Slip Op. 02723).

# APPELLATE DIVISION THIRD DEPARTMENT DECISIONS

# APPELLANT MUST BE AGGRIEVED

***Matter of Talarico v. Niagara County Department of Social Services,* 225 A.D.3d 1061 (2024)**

- Court dismissed employer's appeal, finding, *sua sponte*, that the employer was not aggrieved by the Board's decision.
- "Aggrievement is a central and necessary component to invoke this Court's jurisdiction, and only an aggrieved party may take an appeal to this Court. In other words, this Court has no jurisdiction to entertain an appeal if a party is not aggrieved" (*id*. at 1062 [internal quotation marks and citations omitted]).

# APPELLANT MUST BE AGGRIEVED

***Matter of Cross v. New York State Department of Corrections and Community Supervision,* 224 A.D.3d 1079 (2024)**

- Claimant appealed the Board's finding that the carrier was not liable for several disputed medical bills for testing performed outside the carrier's diagnostic testing network, and that claimant was not liable for the bill.
- The Court found that claimant was not aggrieved by the Board's decision and dismissed the appeal.

# APPELLANT MUST BE AGGRIEVED

***Matter of Birro v. Wolkow–Braker Roofing Corp.*, 221 A.D.3d 1221 (2023), *reargument granted, vacated,* 226 A.D.3d 1227 (2024), *and superseded*, 226 A.D.3d 1228 (2024)**

- Claimant appealed the Board's finding that apportionment between his two claims did not apply.
- In November 2023, the Court found, *sua sponte*, that the issue of apportionment only impacted the payers in the two claims and therefore claimant was not aggrieved by the Board's decision. Therefore, the Court dismissed the appeal.
- In April 2024, based on claimant's motion for reargument, which was supported by the Board, the Court vacated its earlier decision and addressed the merits of claimant's appeal, affirming the Board's finding that apportionment was not applicable.

# ISSUE PRESERVATION/WAIVER OF DEFENSES

***Matter of Romero v. Capital Concrete*, 221 A.D.3d 1149 (2023)**

- Carrier precluded from raising certain defenses, including no employer-employee relationship, by failing to timely controvert the claim (WCL § 25[2][b]).
- Carrier's application for review of decision establishing the claim was denied based on its failure to appear at the underlying hearing and interpose an objection on the record (12 NYCRR 300.13[b][2][ii]).
- Carrier's request to further develop the record on the issue of "coverage" was properly denied.

# ISSUE PRESERVATION

***Matter of Puccio v. Absolute Chimney & Home Improvement, LLC,* 222 A.D.3d 1060 (2023)**

- Claimant did not raise the issue of the carrier's failure to comply with WCL § 21-a (3) "at the underlying hearing, in his application for administrative review or in his application for reconsideration and/or full Board review. The first time that claimant challenged [the carrier's] compliance with the statute was in his application for a rehearing or reopening" (*id.* at 1062). The Court affirmed the Board's denial of the claimant's application for a rehearing or reopening, finding that the issue raised therein had not been preserved for review.

# COLLATERAL ESTOPPEL

***Matter of Kaminski v. Integrated Structures Corp.,***
**225 A.D.3d 1077 (2024)**

- Collateral estoppel precludes a party from relitigating an issue that was "raised, necessarily decided and material in the first action, and the party who is being estopped had a full and fair opportunity to litigate the issue in the earlier action" (*id.* at 1078 [citations omitted]).
- The doctrine of collateral estoppel precluded the carrier from raising the issue of claimant's need for 24-hour home health care, which had been previously decided.

# SERVICE OF APPLICATION FOR ADMINISTRATIVE REVIEW

***Matter of Evans v. Northeast Logistics, Inc.,***
**227 A.D.3d 1246 (2024)**

- Court found that the Board abused its discretion by denying the carrier's application for review for failing to serve a necessary party of interest when that party:

  (1) had knowledge of the application and filed an untimely rebuttal, and;

  (2) had erroneously been taken off notice and was not listed as a party of interest on the Law Judge's decision from which review was sought.

# OCCUPATIONAL DISEASE/EXACERBATION OF PRE-EXISTING CONDITION

***Matter of Freyta v. Calvin Maintenance Inc.*, 220 A.D.3d 1036 (2023)**

- Claim established as an occupational disease based upon aggravation of a preexisting bilateral knee condition, despite claimant having been treated for knee pain for several years before he began to work for the employer.
- The Court found that "nothing in the record suggests that [claimant's] preexisting condition rendered him unable to perform his employment duties prior to the date of disablement" (*id.* at 1039).

# OCCUPATIONAL DISEASE

## *Matter of Morgan v. Kinray, Inc.*, 226 A.D.3d 1288 (2024)

- Occupational disease claim was disallowed because there was insufficient credible medical evidence of a causal relationship between claimant's injuries and a distinctive feature of his employment.
- "[N]either the medical reports nor the medical testimony contain any information as to the methods, frequency or repetitiveness with which claimant performed various tasks or lifted heavy items in the warehouse. Likewise, they did not indicate a correlation or mechanism by which claimant's specific work activities caused his conditions" (*id*. at 1290).

# LABOR MARKET ATTACHMENT

***Matter of Faisca v. New York City Transit Authority,* 222 A.D.3d 1136 (2023)**

- "If the Board determines that a workers' compensation claimant has a permanent partial disability and that the claimant retired from his or her job due to that disability, an inference that his or her reduced future earnings resulted from the disability may be drawn" (*Matter of Zamora v. New York Neurologic Assoc.,*19 NY3d 186, 191 (2012) [internal quotation marks, emphasis and citation omitted]).
- "Such an inference, however, is merely permissible and not an entitlement or a presumption, and the burden remains on the claimant to demonstrate that his or her reduced earnings are due to the disability and not unrelated factors" (*Matter of Faisca,* 222 A.D.3d at 137-138).

# LABOR MARKET ATTACHMENT

***Matter of Vukotic v. Prince Food Corporation,* 224 A.D.3d 1035 (2024), *leave denied* __ NY3d __, 2024 N.Y. Slip Op. 73911**

- The inference discussed by the Court of Appeals in Zamora is not applicable before claimant is classified with a permanent partial disability (PPD).
- Vocational factors are not considered when determining wage earning capacity/rate of compensation of temporary partial disability benefits.

# LABOR MARKET ATTACHMENT

***Matter of Digbasanis v. Pelham Bay Donuts Inc.,***
**224 A.D.3d 1047 (2024)**

- Claimant was found not to be attached to the labor market at the time of PPD classification but was subsequently found to have reattached and was awarded benefits.
- Carrier raised the issue of voluntary removal from the labor market and claimant was found to have an ongoing duty to demonstrate attachment.
- 2017 amendment to WCL § 15(3)(w) not applicable.

# WCL § 114-a

***Matter of McNulty v. Craeco, Inc.*, 224 A.D.3d 1059 (2024)**

- Claimant's benefits were suspended when he was incarcerated on firearms charges.
- The carrier raised WCL § 114-a and the Board held the issue in abeyance until such time as the claimant was released from prison and had the opportunity to fully participate in the proceedings.

# WCL § 114-a/MANDATORY PENALTY

***Matter of Newman v. Project Renewal, Inc.,***
**222 A.D.3d 1144 (2023)**

- A mandatory penalty under WCL § 114 disqualifies the claimant from receiving benefits "directly attributable to such false statement or representation."
- The Court modified the Board's decision to reduce the length of the mandatory penalty.

# AVERAGE WEEKLY WAGE IN CLAIM FOR DEATH BENEFITS

***Matter of Reid v. National Grid,* 222 A.D.3d 1119 (2023)**

- Default rule in claims for death benefits is that awards are based on decedent's average weekly wage on the date of accident or disablement, not the date of death.
- However, because "there is no proof that decedent was ever disabled due to his condition prior to his death and no prior date of disablement had been established" (*Matter of Reid*, 222 A.D.3d at 1121), the Board properly set the average weekly wage as of the date of his death, which it found to be the date of disablement.

# TOTAL INDUSTRIAL DISABILITY

***Matter of Reyes v. Nationwide Furniture Installers,* 222 A.D.3d 1291 (2023)**

- A claimant who has a PPD can be found to have a total industrial disability (TID) if their work-related disability, combined with other factors, render the claimant incapable of gainful employment.
- Court affirmed Board's finding that claimant was not incapable of gainful employment and therefore not TID.

# CAUSALLY RELATED DEATH/PRESUMPTION

***Matter of Polonski v. Town of Islip*, 220 A.D.3d 1031 (2023)**

***Matter of Hickey v. Skanska–Walsh JV/Pace Car Plumbing LLC*, 224 A.D.3d 1018 (2024)**

- Deaths occurred in the course of employment. WCL § 21(a) presumption applied.
- Presumption rebutted.
- Claims established based on medical evidence that exertion at work contributed to decedent's death.

# COVID-19

***Matter of Aungst v Family Dollar,* 221 A.D.3d 1222 (2023), *leave granted*, 41 NY3d 908 (2024)**

- Claim established for COVID-19 and consequential stroke. Claimant was a retail store manager.
- Claimant, a public-facing worker, “experienced an elevated risk of exposure to COVID-19 at work due to his consistent interactions with the public during the time period in question” (id. at 1226).

# COVID-19

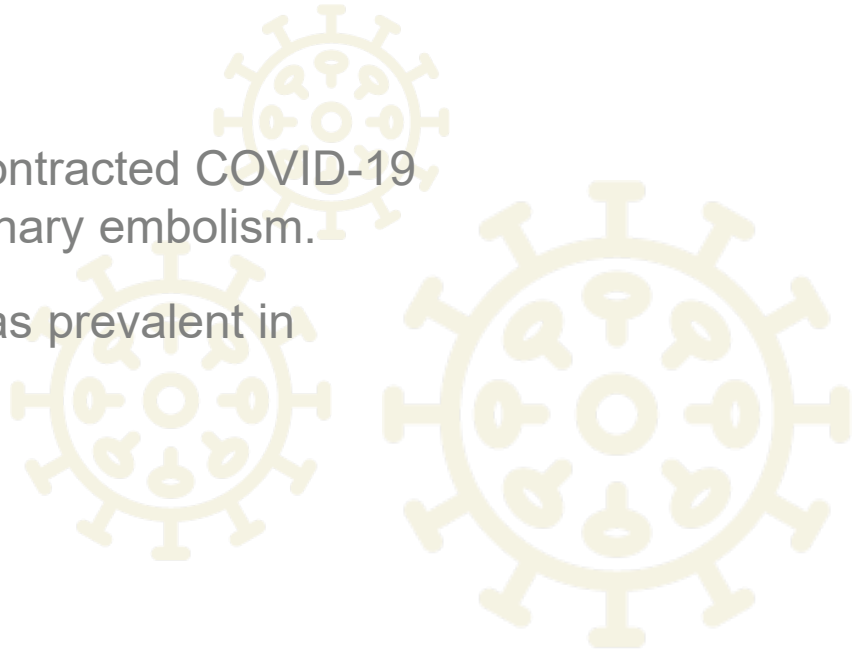
***Matter of Leonard v. David's Bridal, Inc.,***
**224 A.D.3d 1063 (2024)**

- Claim established for COVID-19 and consequential injuries.
- Causal relationship found based on claimant's specific exposure to a coworker who tested positive for COVID-19. No medical opinion conclusively finding causal relationship.

# COVID-19

***Matter of Fernandez v. New York City Transit Authority,* 224 A.D.3d 1066 (2024)**

- Claim for death benefits disallowed.
- Decedent, a subway track inspector, contracted COVID-19 and died of cardiac arrest and a pulmonary embolism.
- Insufficient evidence that COVID-19 was prevalent in decedent's work environment.



# COVID-19

***Matter of Leroy v. Brookdale Hospital Medical Center,* 222 A.D.3d 1160 (2023), *leave dismissed*, 41 NY3d 976 (2024)**

- Claim established for contraction of COVID-19 in March 2020 and consequential injuries.
- Claimant, a registered nurse working in a hospital, "experienced an elevated risk of exposure to COVID-19 at work due to her consistent interactions with infected individuals and colleagues and that, as a result, COVID-19 was prevalent in her workplace at that time" (*id.* at 1163).

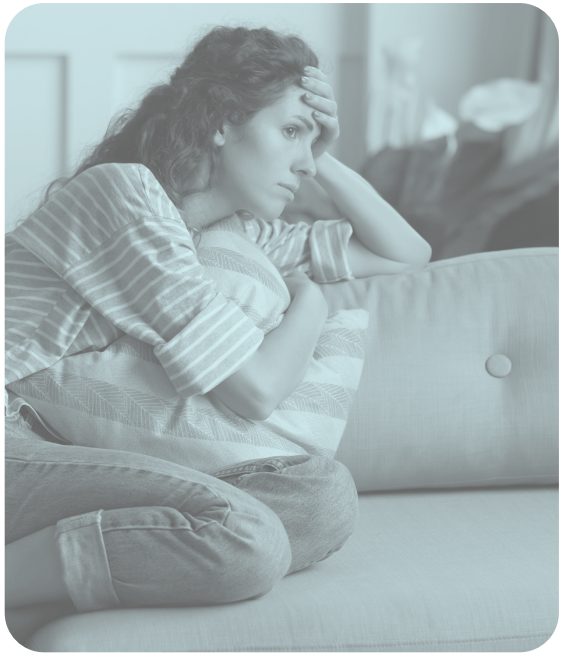
# STRESS/PSYCHOLOGICAL INJURIES

***Matter of Spillers v. Health & Hospital Corp.,***
**225 A.D.3d 1100 (2024)**

- Claimant alleged that he developed post-traumatic stress disorder (PTSD) after being verbally assaulted by his supervisor. The Board disallowed the claim.
- The Court affirmed, finding that the stress experienced by claimant was no greater than that experienced by similarly situated workers in the normal work environment.
- The Court found that "the incident was not so improper or extraordinary so as to constitute a workplace accident under the Workers' Compensation Law" (*id.* at 1102 [internal quotation marks, brackets and citations omitted]).

# COVID-19 STRESS CASES

- *Matter of Anderson v City of Yonkers,* 227 A.D.3d 63 (2024)
- *Matter of Djanuzakov v Manhattan & Bronx Surface Transit Operating Authority,* 225 A.D.3d 1107 (2024)
- *Matter of Matthews v New York City Transit Authority,* 225 A.D.3d 1109 (2024)
- *Matter of McLaurin v New York City Transit Authority,* 225 A.D.3d 1105 (2024)



# COVID-19 STRESS CASES (cont'd)

- The Board disallowed these claims for psychological injuries allegedly caused by the fear of contracting COVID-19 at work, finding the stress that the claimants experienced was not greater than similarly situated workers in the normal work environment.
- The Third Department reversed and remitted the cases to the Board for further development.
- On July 18, 2024, the Third Department granted permission to appeal to the Court of Appeals in all four cases.

# FAILURE TO ATTEND IMEs

***Matter of Mina v. New York City Transit Authority,* 225 A.D.3d 1013 (2024)**

- Claimant's failure to attend two scheduled independent medical examinations (IMEs) was unreasonable.
- IME scheduled in Manhattan, 22.3 miles from claimant's home in NJ, was "a reasonable distance from claimant's residence" (WCL § 137[4]).
- Court noted that the office of claimant's treating physician in Brooklyn was 39 miles from this home.

# ARTICLE 8-A: WORLD TRADE CENTER (WTC)

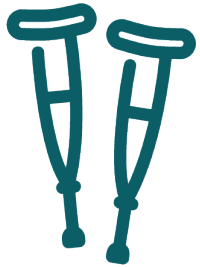
***Matter of Liotta v. New York State Unified Court System,* 226 A.D.3d 1277 (2024)**

- Claim under Workers' Compensation Law Article 8-A disallowed by the Board who found insufficient evidence that claimant's injuries resulted from participation in WTC rescue, recovery, or clean-up activities.
- The Court reversed, finding "that claimant's activities of assisting with clearing the area — which notably was located within the statutorily-defined WTC site — in order for the emergency vehicles to access *Ground Zero* had a tangible connection to the rescue efforts" (*id.* at 1280).

# SCHEDULE LOSS OF USE (SLU) – BLUE

***Matter of Blue v. New York State Office of Children and Family Services*, 206 A.D.3d 1126 (2022)**

- The Board found that a Special Consideration in the Board's Impairment Guidelines that limited the total SLU that could be awarded for a knee injury based on a diagnosis of chondromalacia patella was applicable, and that claimant was therefore limited to a 10% SLU of the leg.
- The Court reversed, finding that because a separately diagnosed injury to the same knee (meniscus tear) resulted in a loss of range of motion that would result in a greater SLU than permitted by the Special Consideration for chondromalacia patella, the Special Consideration did not limit the SLU that claimant could receive.



# SLU – BLUE

***Matter of Garrow v. Lowe's Home Centers Inc.*, 227 A.D.3d 1242 (2024)**

- The Court found that the holding in *Blue*, which involved an SLU of the leg, applied in this case, which concerned an SLU of the arm.

# SLU – BLUE

***Matter of Zuhlke v Lake George Cent. Sch. Dist.*, 220 A.D.3d 1028 (2023)**

- Despite the Court's holding in *Blue*, the applicable Special Consideration for a tibial plateau fracture limited the SLU that claimant could receive to 15% of the leg, despite range of motion deficits which, if considered, would result in a higher SLU.
- Court distinguished this case from *Blue*, noting that here, the range of motion deficits in claimant's knee were due solely to the tibial plateau fracture.

# COMMUTING

***Matter of Bonilla v. XL Specialty Insurance,***
**228 A.D.3d 1188 (2024)**

- Claimants injured in a motor vehicle while commuting to the job site.
- Although the general rule is that injuries that occur while an employee is commuting to or from work are not compensable, an exception exists when “the employer takes responsibility for transporting employees, particularly where the employer is in exclusive control of the means of conveyance” (*id.* at 1190).

# MEDICAL EVIDENCE

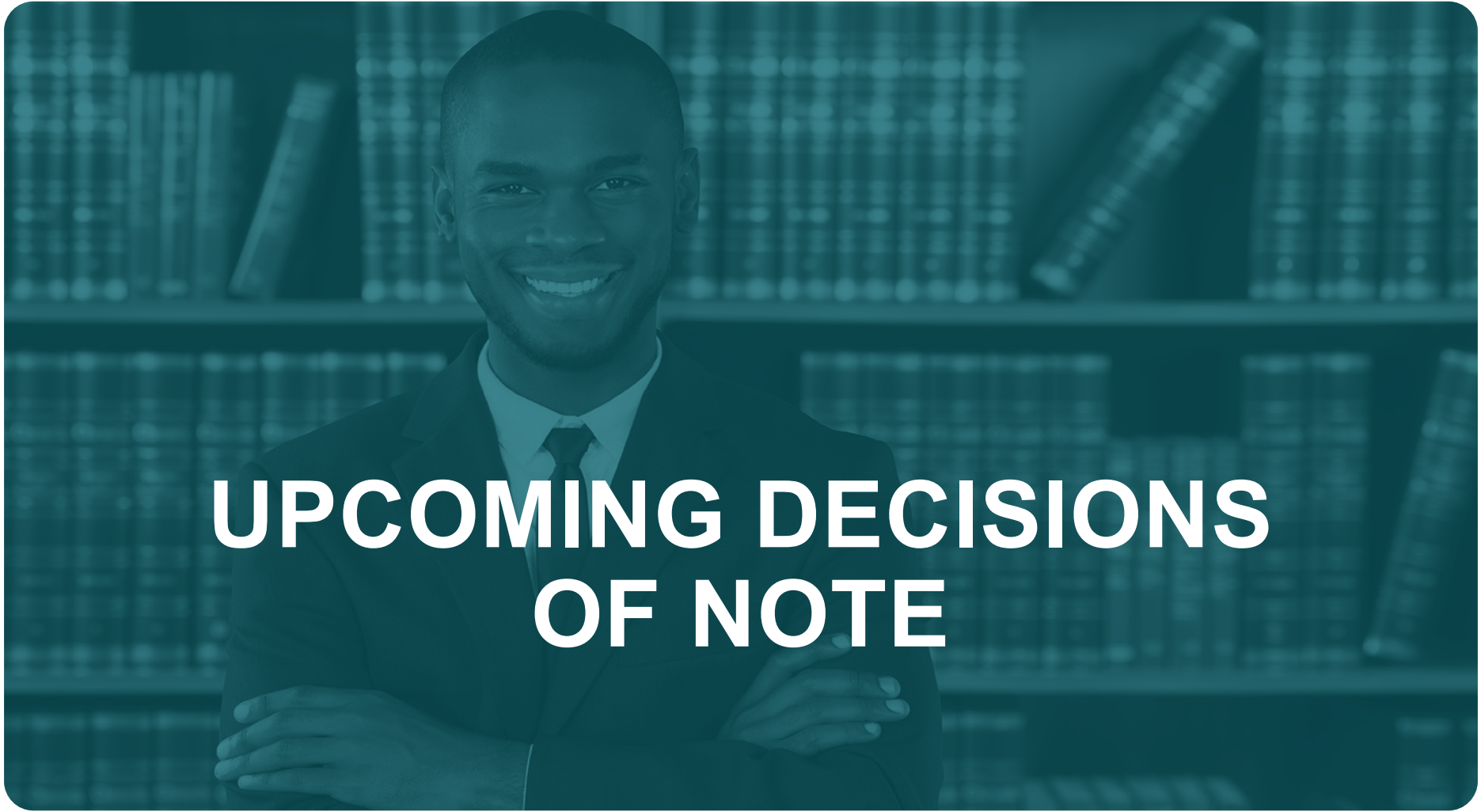
***Matter of DeWolf v. Wayne County,* 228 A.D.3d 1218 (2024)**

- Medical opinions were insufficient to support a finding of occupational hearing loss.
- A medical opinion on causal relationship must indicate that claimant's work was the probable cause of an injury and must be supported by a rational basis.

# ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

***Matter of Matter v. Google Inc.*, __A.D.3d __, 2024 WL 4292646)**

- Accidents that occur outside of work hours, away from the workplace are generally not compensable, but an exception exists when there is a causal nexus between the accident and the claimant's employment.
- Claimant, an account executive, was injured after leaving an after-work happy hour event. The Court affirmed the Board's decision finding claimant's injuries compensable. The Court found that claimant's attendance at the event both benefited the employer and "altered the usual geographical or temporal scheme of travel, thereby altering the risks to which he was usually exposed" (*id.* [internal quotation marks, brackets and citations omitted]).


UPCOMING DECISIONS
OF NOTE

# UPCOMING DECISIONS OF NOTE

- **WCL § 24 – Attorney Fees**
- **Court of Appeals – Leave Granted**
  - *Matter of Schulze v. City of Newburgh Fire Department*, 213 A.D.3d 1046 (2023)
  - *Matter of Garcia v. WTC Volunteer Fund*, 211 A.D.3d 1264 (2022)
  - COVID-19 “Stress” Cases

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