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9 N.Y.3d 207, 879 N.E.2d 140, 849 N.Y.S.2d 1, 2007 N.Y. Slip Op. 07498

(Cite as: 9 N.Y.3d 207, 879 N.E.2d 140, 849 N.Y.S.2d 1)

H

Court of Appeals of New York.
 Owen F. **BURNS** III et al., Appellants,
 v.
 James R. VARRIALE Jr., Defendant,
 and
 St. Paul/Travelers Insurance Company, Respondent.
 (And a Related Proceeding.)
 Oct. 11, 2007.

Background: Proceeding was brought to extinguish lien. The Supreme Court, Albany County, Joseph C. Teresi, J., directed workers' compensation carrier to pay "fresh money" to claimant for litigation expenses incurred in personal injury action against third-party tortfeasor. Carrier appealed. The Supreme Court, Appellate Division, 34 A.D.3d 59, 820 N.Y.S.2d 655, affirmed as modified. Worker appealed.

Holdings: The Court of Appeals, Jones, J., held that:
 (1) permanent partial disability determination did not entitle claimant to weekly compensation benefits at specific rate over his life or over set period;
 (2) present value of future compensation benefits was speculative at time that nonschedule permanently partially disabled claimant recovered damages in third-party action; and
 (3) trial court could not use present value of future benefits in nonschedule permanent partial disability case for purposes of calculating workers' compensation carrier's equitable share of claimant's attorney's fees and costs.

Affirmed.

West Headnotes

[1] Workers' Compensation 413 🔑2247

413 Workers' Compensation

413XX Effect of Act on Other Statutory or

Common-Law Rights of Action and Defenses

413XX(C) Action Against Third Persons in General for Employee's Injury or Death

413XX(C)6 Amount and Items of Recovery

413k2244 Action by or on Behalf of Employer or Insurer

413k2247 k. Expenses of Investigation and Litigation (Attorney's Fees). **Most Cited Cases**

Ultimate determination of equitable apportionment of legal expenses with respect to third-party recovery between employee and workers' compensation lienor resides in courts vested with powers of fact finding and exercise of sound discretion. **McKinney's Workers' Compensation Law § 29.**

[2] Workers' Compensation 413 🔑2247

413 Workers' Compensation

413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

413XX(C) Action Against Third Persons in General for Employee's Injury or Death

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413k2247 k. Expenses of Investigation and Litigation (Attorney's Fees). **Most Cited Cases**

Whether the value of future workers' compensation benefits can be ascertained is a question of law subject to an appellate court's review, for purposes of equitable apportionment of legal expenses with respect to third-party recovery between employee and workers' compensation lienor. **McKinney's Workers' Compensation Law § 29.**

[3] Workers' Compensation 413 🔑2247

413 Workers' Compensation

413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

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[413XX\(C\)](#) Action Against Third Persons in General for Employee's Injury or Death

[413XX\(C\)6](#) Amount and Items of Recovery

[413k2244](#) Action by or on Behalf of Employer or Insurer

[413k2247](#) k. Expenses of Investigation and Litigation (Attorney's Fees). [Most Cited Cases](#)

If the future benefit of a workers' compensation carrier is speculative, i.e., it cannot be quantified or reliably predicted, it is not appropriate for a court to apportion attorney's fees incurred in third-party action based on such benefit. [McKinney's Workers' Compensation Law § 29](#).

[4] Workers' Compensation 413 ⚡2247

[413](#) Workers' Compensation

[413XX](#) Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

[413XX\(C\)](#) Action Against Third Persons in General for Employee's Injury or Death

[413XX\(C\)6](#) Amount and Items of Recovery

[413k2244](#) Action by or on Behalf of Employer or Insurer

[413k2247](#) k. Expenses of Investigation and Litigation (Attorney's Fees). [Most Cited Cases](#)

In the context of the Workers' Compensation Law subrogation provision, a carrier's equitable share of the litigation costs and disbursements incurred by a claimant is calculated by (1) adding (a) the carrier's lien and (b) the future payments the carrier is relieved from making during the holiday period, and (2) multiplying the sum of those two figures by the percentage of litigation expenses claimant incurred compared to claimant's total recovery; if the carrier's equitable share is greater than its lien, it must pay the excess to claimant. [McKinney's Workers' Compensation Law § 29](#).

[5] Workers' Compensation 413 ⚡1377

[413](#) Workers' Compensation

[413XVI](#) Proceedings to Secure Compensation

[413XVI\(L\)](#) Presumptions and Burden of Proof

[413XVI\(L\)2](#) Particular Matters

[413k1373](#) Amount and Period of Compensation

[413k1377](#) k. Diminution of Earning Capacity, and Availability of Suitable Work. [Most Cited Cases](#)

An inference that a worker's reduced future earnings resulted from disability may be drawn if the Workers' Compensation Board determines that a workers' compensation claimant has a permanent partial disability and that the claimant retired from his or her prior job due to that disability. [McKinney's Workers' Compensation Law § 29](#).

[6] Workers' Compensation 413 ⚡803

[413](#) Workers' Compensation

[413IX](#) Amount and Period of Compensation

[413IX\(A\)](#) Basis for Determination of Amount

[413k802](#) Impairment of Earning Capacity

[413k803](#) k. In General. [Most Cited](#)

Workers' Compensation 413 ⚡1377

[413](#) Workers' Compensation

[413XVI](#) Proceedings to Secure Compensation

[413XVI\(L\)](#) Presumptions and Burden of Proof

[413XVI\(L\)2](#) Particular Matters

[413k1373](#) Amount and Period of Compensation

[413k1377](#) k. Diminution of Earning Capacity, and Availability of Suitable Work. [Most Cited Cases](#)

A workers' compensation claimant must demonstrate that his or her reduced earning capacity is due to disability, not age, general economic conditions, or other factors unrelated to the disability; the carrier can overcome the inference by offering proof that something other than the disability, e.g., voluntary withdrawal from the labor market, is the sole

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cause of claimant's reduced earning capacity.
[McKinney's Workers' Compensation Law § 29.](#)

[7] Workers' Compensation 413 ⚡857

413 Workers' Compensation

413IX Amount and Period of Compensation

413IX(B) Compensation for Disability

413IX(B)3 Partial Incapacity

413k857 k. Incapacity for Work or Employment in General. [Most Cited Cases](#)

Workers' Compensation 413 ⚡858

413 Workers' Compensation

413IX Amount and Period of Compensation

413IX(B) Compensation for Disability

413IX(B)3 Partial Incapacity

413k858 k. Impairment of Earning Power as Basis of Award. [Most Cited Cases](#)

In a permanent partial disability case, the issue of whether a workers' compensation claimant has maintained a sufficient attachment to the labor market must be resolved by the Workers' Compensation Board in determining his or her reduced earning capacity and whether benefits should be awarded. [McKinney's Workers' Compensation Law § 29.](#)

[8] Workers' Compensation 413 ⚡1377

413 Workers' Compensation

413XVI Proceedings to Secure Compensation

413XVI(L) Presumptions and Burden of Proof

413XVI(L)2 Particular Matters

413k1373 Amount and Period of Compensation

413k1377 k. Diminution of Earning Capacity, and Availability of Suitable Work. [Most Cited Cases](#)

In addition to establishing a sufficient attachment to the labor market, a permanent partially disabled workers' compensation claimant who alleges that he or she works must provide the Workers' Compensation Board with proof of actual earnings after the work for a given period is performed. [McKinney's](#)

[Workers' Compensation Law § 15\(3\)\(w\), 5-a.](#)

[9] Workers' Compensation 413 ⚡860

413 Workers' Compensation

413IX Amount and Period of Compensation

413IX(B) Compensation for Disability

413IX(B)3 Partial Incapacity

413k859 Amount and Period

413k860 k. In General. [Most Cited Cases](#)

Workers' Compensation 413 ⚡861

413 Workers' Compensation

413IX Amount and Period of Compensation

413IX(B) Compensation for Disability

413IX(B)3 Partial Incapacity

413k859 Amount and Period

413k861 k. Earning Capacity as Basis of Computing Amount. [Most Cited Cases](#)

Permanent partial disability determination made by Workers' Compensation Board did not entitle claimant to weekly compensation benefits at specific rate over his life or over set period; claimant had ongoing obligation to demonstrate his continued attachment to labor market and how much he actually earned. [McKinney's Workers' Compensation Law §§ 15\(3\)\(w\), 5-a, 29.](#)

[10] Workers' Compensation 413 ⚡2247

413 Workers' Compensation

413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

413XX(C) Action Against Third Persons in General for Employee's Injury or Death

413XX(C)6 Amount and Items of Recovery

413k2244 Action by or on Behalf of Employer or Insurer

413k2247 k. Expenses of Investigation and Litigation (Attorney's Fees). [Most Cited Cases](#)

Present value of future workers' compensation benefits was speculative at time that nonschedule per-

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manently partially disabled claimant recovered damages in third-party action, since claimant's continued attachment to labor market and how much he actually earned could not be reliably predicted, for purpose of calculating workers' compensation carrier's equitable share of claimant's attorney's fees and costs in third-party action. [McKinney's Workers' Compensation Law](#) §§ 15(3)(w), 5-a, 29.

[11] Workers' Compensation 413 ⚡2247

413 Workers' Compensation

413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

413XX(C) Action Against Third Persons in General for Employee's Injury or Death

413XX(C)6 Amount and Items of Recovery

413k2244 Action by or on Behalf of Employer or Insurer

413k2247 k. Expenses of Investigation and Litigation (Attorney's Fees). [Most Cited Cases](#)

Even if the present value of future benefits cannot be ascertained at the time of a workers' compensation claimant's recovery in a third-party action, the workers' compensation carrier should be required to periodically pay its equitable share of attorney's fees and costs incurred by claimant in securing any continuous compensation benefits. [McKinney's Workers' Compensation Law](#) § 29.

[12] Workers' Compensation 413 ⚡2247

413 Workers' Compensation

413XX Effect of Act on Other Statutory or Common-Law Rights of Action and Defenses

413XX(C) Action Against Third Persons in General for Employee's Injury or Death

413XX(C)6 Amount and Items of Recovery

413k2244 Action by or on Behalf of Employer or Insurer

413k2247 k. Expenses of Investigation and Litigation (Attorney's Fees). [Most Cited Cases](#)

Trial court could not use present value of future benefits in nonschedule permanent partial disability case for purpose of calculating workers' compensation carrier's equitable share of claimant's attorney's fees and costs in third-party action, since value was speculative; however, trial court, in exercise of its discretion, could fashion means of apportioning litigation costs as they accrued and monitor how carrier's payments were made to ensure that payment of attorney's fees by carrier was based on actual, non-speculative benefit. [McKinney's Workers' Compensation Law](#) § 29.

****3** O'Connell and Aronowitz, Albany ([Cornelius D. Murray](#) and [Robyn B. Nicoll](#) of counsel), for appellants.

Sullivan Cunningham Keenan Mraz Oliver & Violando, LLP, Albany ([Michael D. Violando](#) of counsel), for James R. Varriale, Jr., and another, defendant and respondent.

[Melissa A. Day](#), New York City, and Steven M. Licht, for Special Funds Conservation Committee, respondent.

Grey & Grey, LLP, Farmingdale ([Robert E. Grey](#) of counsel), for Injured Workers' Bar Association, amicus curiae.

***142 OPINION OF THE COURT**

JONES, J.

In this proceeding to extinguish a lien asserted pursuant to [Workers' Compensation Law](#) § 29, we conclude, as did the Appellate Division, that the value of future workers' compensation benefits for a claimant with a nonschedule permanent partial disability is speculative, that the present value of these benefits cannot be ascertained at the time claimant recovers damages in a third-party action, and that claimant is not entitled to an apportionment of attorney's fees based on such future benefits.

Facts and Procedural History

In January 2000, claimant Owen Burns, then an 18-year veteran of the Town of Colonie Police De-

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partment, was employed as a traffic safety investigator earning an average weekly wage of \$1,330, or \$69,160 annually. On January 13, 2000, claimant, while on duty driving to an accident scene, was involved in a motor vehicle accident with James Varriale. As a result, claimant sustained a number of permanent injuries. On September 2, 2001, after a number of attempts to resume his duties, claimant, then 45 years old, was forced to retire. Although claimant has worked since his retirement, his earnings have decreased significantly.

Subsequently, the Workers' Compensation Board classified claimant as permanently partially disabled and ordered St. Paul/Travelers Insurance Company (the Town of Colonie's workers' compensation carrier) to pay claimant an ongoing maximum benefit of \$400 per week. This benefit was based on claimant's average weekly wage before the accident.

In June 2001, claimant (and his wife, derivatively) (plaintiffs) commenced a personal injury action against Varriale. After the completion of discovery and the filing of plaintiffs' note of issue, a trial date was scheduled. Prior to trial, Varriale's insurance company offered the full amount of his policy (\$300,000) to settle the lawsuit. Travelers, which had asserted a lien against any recovery plaintiffs received, was required, under [Workers' Compensation Law § 29\(5\)](#), to consent to the proposed settlement before it could be finalized.

In November 2004, plaintiffs petitioned Supreme Court for an order (1) compelling Travelers to consent to the third-party settlement, (2) extinguishing Travelers' lien because under [Matter of Kelly v. State Ins. Fund](#), 60 N.Y.2d 131, 468 N.Y.S.2d 850, 456 N.E.2d 791 (1983), Travelers' equitable share of the attorney's fees expended by plaintiffs in bringing the action and securing the settlement exceeded*143 **4 the amount of the lien by approximately \$19,000 and (3) directing Travelers to pay plaintiffs this excess amount (referred to as "fresh money").

In its opposition and cross motion to add the Special Funds Conservation Committee to the motion,^{FN1} Travelers consented to the third-party settlement, but reserved its right, under [Workers' Compensation Law § 29\(4\)](#), to take a credit against plaintiffs' net recovery (i.e., the money received from settling the third-party action after deduction of the lien). Accordingly, Travelers would be relieved from paying future benefits until the credit is exhausted (i.e., during a "holiday" period). Travelers also asked Supreme Court to apply a portion of the settlement proceeds against its existing lien after the deduction of its pro rata share (34.82%), which represents the percentage of litigation costs and disbursements plaintiffs incurred in bringing the action compared to plaintiffs' total recovery. At the time of the settlement, Travelers' lien totaled \$46,523.26.^{FN2} Further, Travelers sought an order (1) determining that the present value of estimated future compensation benefits cannot be reasonably ascertained because the value of any future benefits is necessarily speculative and (2) directing claimant to pay it \$30,323.86, representing the value of its lien reduced by its equitable share of the costs plaintiffs incurred in legal fees and disbursements (\$46,523.26 [value of lien] less \$16,199.40 [34.82% of \$46,523.26] = \$30,323.86). In the alternative, Travelers argued that if the present value of estimated future compensation benefits could be ascertained, the Special Funds Conservation Committee should be directed to pay its pro rata share as it is responsible for the majority of litigation costs and disbursements.

FN1. The Special Funds Conservation Committee maintains and defends the Special Disability Fund (see [Workers' Compensation Law § 15\[8\]](#)).

FN2. This figure is derived from Travelers' total payments to claimant (\$96,523.26 [\$76,960 for indemnity benefits plus \$19,563.26 for medical benefits]) less \$50,000 it paid in lieu of first-party no-fault benefits.

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Rejecting Travelers' arguments, Supreme Court granted the relief plaintiffs requested. Specifically, the court extinguished Travelers' lien and ordered Travelers to pay \$18,960.92 in "fresh money" to plaintiffs, stating that

"[w]ith [claimant's] limited employment and currently assessed future benefits, it is not speculative to calculate future benefits. Once weekly benefits can be ascertained, the worker's compensation carrier ... is assessed an equitable apportionment of legal fees. This is so because the carrier benefits in two ways: by recouping past compensation and by [being relieved of] its future obligations to pay the weekly benefits." (Citation omitted.)

The Appellate Division modified Supreme Court's order by (1) reversing so much thereof as directed Travelers to pay plaintiffs \$18,960.92 in "fresh money" and (2) directing plaintiffs to pay \$30,323.86 to Travelers to represent the value of its lien reduced by its equitable share of the litigation costs, but otherwise affirmed the order. The court held that a claimant who receives a compensation award based on a permanent partial disability is not entitled to an immediate apportionment of attorney's fees based on both the carrier's recoupment of its lien and its relief from future compensation payments because, in this situation, the present value of future compensation benefits is speculative. In support of its holding, the court stated that "[w]hen a claimant has a permanent partial disability ... neither the duration nor *144 **5 the amount of an award is readily predictable because the award may or may not continue for the rest of the claimant's life and the weekly benefit of an award can change based upon the claimant's actual earnings" (34 A.D.3d 59, 63, 820 N.Y.S.2d 655 [2006]). The court further stated that a claimant is only entitled to an apportionment of attorney's fees based upon the present value of future compensation benefits where the benefits are readily ascertainable, such as in cases involving death, permanent total disability or a schedule loss of use.

Finally, the court noted that claimant may periodically apply to the Board for further compensation benefits and, if claimant is entitled to a benefits award, the Board may direct further reimbursement of attorney's fees; i.e., if the Board awards further compensation benefits to claimant during the carrier's holiday, "the carrier will be required at that point to pay its equitable share of the cost of obtaining those benefits, which can no longer be deemed hypothetical or speculative, as those benefits accrue" (*id.* at 65, 820 N.Y.S.2d 655). On plaintiffs' appeal, we now affirm.^{FN3}

FN3. By decision filed April 5, 2007, an Administrative Law Judge determined that for the period of November 3, 2004 to March 15, 2007, claimant had no legally compensable lost time or entitlement to benefit awards. In support of this determination, the Board found that "claimant has failed to demonstrate a sufficient attachment to the labor market to [warrant] further benefits." An administrative appeal is pending.

Discussion

[1][2] It is well settled that "[Workers' Compensation Law § 29] governs the rights and obligations of employees, their dependents, and compensation carriers with respect to actions arising out of injuries caused by third-party tort-feasors" (*Matter of Kelly*, 60 N.Y.2d at 136, 468 N.Y.S.2d 850, 456 N.E.2d 791; see *Becker v. Huss Co.*, 43 N.Y.2d 527, 537, 402 N.Y.S.2d 980, 373 N.E.2d 1205 [1978]). Section 29(1) provides, in part, that:

"If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee ... may take such compensation and medical benefits and ... pursue his remedy against such other [party].... In such case, the ... insurance carrier liable for the payment of such compensation ... shall [-in order to prevent the employee from enjoying a double recovery-]

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have a lien on the proceeds of any recovery from such other [party] ... after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by this chapter.... Should the employee ... secure a recovery from such other [party] ... such employee ... may apply on notice to such lienor to the court in which the third party action was instituted ... for an order apportioning the reasonable and necessary expenditures, including [attorney's] fees, incurred in effecting such recovery. Such expenditures shall be equitably apportioned by the court between the employee ... and the lien- or."

The purpose of this provision is to

"stem the inequity to the claimant[], arising when a carrier benefits from an employee's recovery while assuming none of the costs incurred in obtaining the recovery, and to ensure that the claimant receives a full measure of the recovery proceeds in excess of the amount of statutory benefits otherwise due the claimant" (*145**6*Matter of Kelly*, 60 N.Y.2d at 138, 468 N.Y.S.2d 850, 456 N.E.2d 791).

Moreover, equitable apportionment by the court "was purposely adopted to avoid 'rigid statutory formulas' and to implement a 'practical and flexible' approach towards ensuring that a compensation carrier assumes its fair share of the costs of litigation" (*id.*[citations omitted]).

Workers' Compensation Law § 29(4) provides that the carrier is responsible for any deficiency between a claimant's actual recovery, i.e., the amount actually collected, and the amount of the compensation provided or estimated under the *Workers' Compensation Law*.

"[Section 29(4)] has been construed to mean that in a deficiency case the amount 'actually collected' by the employee is the recovery proceeds remaining after deduction for litigation costs....

Therefore, the carrier assumes the *entire* cost of obtaining the recovery, as its responsibility to make payments is reduced only by the amount 'actually collected' by claimant" (*Matter of Kelly*, 60 N.Y.2d at 138-139, 468 N.Y.S.2d 850, 456 N.E.2d 791 [citation omitted]).

"The ultimate determination of the equitable apportionment of legal expenses ... resides in the courts vested with the powers of fact finding and the exercise of a sound discretion" (*Becker*, 43 N.Y.2d at 544, 402 N.Y.S.2d 980, 373 N.E.2d 1205). Whether, under the circumstances presented here, the value of future compensation benefits can be ascertained is a question of law subject to this Court's review (*see id.*).

[3][4] In *Matter of Kelly*, petitioner was awarded death benefits under *Workers' Compensation Law* § 16 after her husband was killed in the course of his employment. After petitioner brought a wrongful death action and recovered \$315,000, she applied to the Surrogate's Court for an equitable distribution of the recovery proceeds between her and the compensation carrier. We held that a carrier's equitable share of the litigation costs and disbursements incurred by a claimant must be apportioned based on the total benefit the carrier receives (*see Matter of Kelly*, 60 N.Y.2d at 135, 140, 468 N.Y.S.2d 850, 456 N.E.2d 791). Regarding the carrier's total benefit, we noted that when a claimant recovers damages in a third-party action, a carrier benefits in two ways-i.e., the carrier recoups its lien (past benefits paid out to the claimant) and is relieved of its future obligation to make benefit payments to the claimant (due to its section 29 [4] credit) (*id.* at 135, 468 N.Y.S.2d 850, 456 N.E.2d 791).^{FN4} In recognizing that the carrier's future benefit must be taken into account, we stated that it "is not so speculative that it would be improper to estimate and to assess litigation costs against this benefit to the carrier" (*Matter of Kelly*, 60 N.Y.2d at 139, 468 N.Y.S.2d 850, 456 N.E.2d 791). From this statement it follows that if the carrier's future benefit is speculative (i.e., it cannot be quantified or reliably predicted), it

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would not be appropriate for a court to apportion attorney's fees based on such benefit.

FN4. Under *Matter of Kelly*, the carrier's equitable share is calculated by (1) adding (a) the carrier's lien and (b) the future payments the carrier is relieved from making during the holiday period, and (2) multiplying the sum of those two figures by the percentage of litigation expenses claimant incurred compared to claimant's total recovery. If the carrier's equitable share is greater than its lien, it must pay the excess to claimant.

Following the lead of *Matter of Kelly*, a number of courts, apportioning attorney's fees based on a carrier's future benefit, have held that if the value of such benefit *146 **7 cannot be quantified by actuarial or other reliable means, apportionment of fees based on that benefit is impermissible (see *Matter of Briggs v. Kansas City Fire & Mar. Ins. Co.*, 121 A.D.2d 810, 812, 504 N.Y.S.2d 256 [3d Dept.1986]; *Matter of McKee v. Sithe Independence Power Partners*, 281 A.D.2d 891, 722 N.Y.S.2d 195 [4th Dept. 2001]).^{FN5} Moreover, the Third and Fourth Departments have held that if a claimant does not receive benefits for death, total disability or schedule loss of use, the carrier's future benefit cannot be quantified by actuarial or other reliable means (*id.*). We agree.

FN5. Although *Matter of Briggs* and *Matter of McKee* are factually distinguishable from the case at bar, the distinction is insignificant because these cases focus on (1) the character of the particular classification (i.e., whether the rate and duration of an award based on that classification can be quantified or predicted), and (2) whether, in light of the classification, the present value of future benefits can be accurately ascertained. Accordingly, these cases are helpful in resolving the case at bar.

When an employee dies in the course of employ-

ment, the dependent spouse may be awarded weekly death benefits for life-payable at a rate that does not change-unless the spouse remarries (see *Workers' Compensation Law § 16*). Further, the Board can determine the present value of future death benefits by using actuarial tables that take into account the dependent spouse's life expectancy and the probability of remarriage. When an employee is classified as having a permanent total disability, there is no expectation that he or she will rejoin the work force. Accordingly, the compensation benefits awarded to such employee do not fluctuate and continue for the duration of the employee's life, which can be reliably predicted using life expectancy tables (see *Workers' Compensation Law § 15*[1]). Finally, compensation awards for schedule loss of use, which pay an employee for lost earnings associated with the loss of use of a specific body part, are easily ascertainable because such awards are paid out over a specific number of weeks at a set rate (or in a lump sum) (see *Workers' Compensation Law § 15*[3]). Although there is a measure of uncertainty in all forecasts, a forecast of the future course of, and compensation payments resulting from, a permanent partial disability is substantially more uncertain than a comparable forecast in the cases discussed above.

[5][6][7] 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. Claimant must demonstrate that his or her reduced earning capacity is due to the disability, not "age, general economic conditions or other factors unrelated to the disability" (*Matter of Meisner v. United Parcel Serv.*, 243 A.D.2d 128, 130, 675 N.Y.S.2d 164 [3d Dept.1998]). The carrier can overcome the inference by offering proof that something other than the disability-e.g., voluntary withdrawal from the labor market-is the sole cause of claimant's reduced earning capacity (see *Matter of Leiber v. LILCO*, 29 A.D.3d 1198, 1199, 816 N.Y.S.2d 205 [3d Dept.2006]; *Matter of Tip-*

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ping v. National Surface Cleaning Mgt., Inc., 29 A.D.3d 1200, 1200-1201, 816 N.Y.S.2d 202 [3d Dept.2006]; *Matter of Rothe v. United Med. Assoc.*, 18 A.D.3d 1093, 1094, 795 N.Y.S.2d 394 [3d Dept.2005]). Thus, in a permanent partial disability case, whether a claimant has maintained a sufficient attachment to the labor market must be resolved by the Board in determining his or her reduced earning *147 **8 capacity and whether benefits should be awarded.

[8] A claimant who demonstrates that his or her reduced earnings are related to the partial disability may receive a reduced earnings award (*see Workers' Compensation Law § 15*[3][w]). The weekly rate for such award equals 66 2/3% of the difference between claimant's average weekly wage prior to the disability and "his or her wage-earning capacity thereafter"(*id.*). "The wage earning capacity of an injured employee in cases of partial disability shall be determined by his [or her] actual earnings" during the period of the disability (*Workers' Compensation Law § 15*[5-a]; *see also Matter of Matise v. Munro Waterproofing Co.*, 293 N.Y. 496, 500, 58 N.E.2d 511 [1944] ["where actual earnings during the period of the disability are established, wage earning capacity must be determined exclusively by the actual earnings of the injured employee without evidence of capacity to earn more or less during such disability period"]). Therefore, in addition to establishing a sufficient attachment to the labor market, a permanent partially disabled claimant who alleges that he or she works must provide the Board with proof of actual earnings after the work for a given period is performed.

[9][10] Here, the Board's determination that claimant has a permanent partial disability did not entitle him to weekly compensation benefits at a specific rate over his life or over a set period. Claimant has an ongoing obligation to demonstrate his continued attachment to the labor market and how much he actually earns. However, as these variables cannot be reliably predicted, the rate and duration of benefits awarded by the Board may

change from one period to the next. Thus, at the time a permanently partially disabled claimant recovers damages in a third-party action, the value of future compensation benefits is speculative.

[11][12] Even if the present value of the future benefits cannot be ascertained at the time of claimant's recovery in a third-party action, the carrier should be required to periodically pay its equitable share of attorney's fees and costs incurred by claimant in securing any continuous compensation benefits. We note that because the present value of future benefits in a permanent partial disability case is not ascertainable, the court cannot use these benefits for purposes of calculating the carrier's equitable share of the claimant's attorney's fees and costs. This does not mean that the claimant must wait indefinitely for the carrier to pay its equitable share. The trial court, in the exercise of its discretion, can fashion a means of apportioning litigation costs as they accrue and monitoring (e.g., by court order or stipulation of the parties) how the carrier's payments to the claimant are made. Thereby, the court can ensure that the payment of attorney's fees by the carrier is based on an actual, nonspeculative benefit.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Chief Judge KAYE and Judges CIPARICK, GRAF-FEO, READ, SMITH and PIGOTT concur.

Order affirmed, with costs.

N.Y.,2007.

Burns v. Varriale

9 N.Y.3d 207, 879 N.E.2d 140, 849 N.Y.S.2d 1, 2007 N.Y. Slip Op. 07498

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