

**STEWART, GREENBLATT, MANNING & BAEZ**

**ATTORNEYS AT LAW  
6800 JERICHO TURNPIKE**

**SUITE 100W  
SYOSSET, NY 11791**

**516-433-6677  
FAX 516-433-4342**

**KAFI WILFORD (2003-2010)  
MICHAEL H. RUINA (1992-2016)**

**RAYMOND J. SULLIVAN  
MONICA M. O'BRIEN  
MARY ELLEN O'CONNOR  
JAMES MURPHY  
OF COUNSEL**

**DONALD R. STEWART (RET.)  
MADGE E. GREENBLATT (RET.)  
ROBERT W. MANNING  
RICARDO A. BAEZ  
DAVID J. GOLDSMITH  
PETER MICHAEL DeCURTIS  
LAURETTA L. CONNORS  
JOHN K. HAMBERGER  
LISA LEVINE  
ANDREA L. De SALVIO  
KRISTY L. BEHR  
LUKE R. TARANTINO  
THOMAS A. LUMPKIN  
JONATHAN SO**

Supreme Court, Appellate Division, Third Department, New York

In the Matter of

KEITH WHITNEY, Appellant  
v  
PEGIS CORPORATION et al., Respondents  
and  
WORKERS' COMPENSATION BOARD

Decided September 26, 2019

**Facts:** The claimant sustained a slip and fall with established injuries to the lower back, right hip, head, TBI, Post-concussion syndrome, cognitive impairment and hydrocephalus. The claimant was then diagnosed with multiple sclerosis (MS) and sought to amend the claim. The carrier raised defenses against causal relationship and was seeking apportionment of the claimant's overall disability. The WCLJ disallowed the claim for MS and found 40% of disability related to the accident and 60% unrelated due to the MS. The Board Panel affirmed and the claimant appealed.

**Holding:** Reversed.

**Discussion:** As a general rule, apportionment is not applicable as a matter of law where the preexisting condition was not the result of a compensable injury and the claimant was able to effectively perform his or her job duties at the time of the work-related accident despite the preexisting condition. The Court found that the MS was preexisting but there was no evidence that the claimant was not capable of performing the duties of his employment and therefore, apportionment was not applicable.