To be Argued by:
JUSTIN S. TEFF
(Time Requested: 10 Minutes)

APL-2021-00053
Workers' Compensation Board Case No. G091 9639
Appellate Division, Third Department Docket No. 531142

Court of Appeals

of the

State of New York

IN THE MATTER OF THE CLAIM OF
JOSEPH D. LIUNI,

Appellant,

-against-

GANDER MOUNTAIN, *et al.*

Respondents,

AND

WORKERS' COMPENSATION BOARD,

Respondent.

BRIEF FOR APPELLANT

Justin S. Teff, Esq.
KIRK & TEFF, LLP
10 Westbrook Lane
P.O. Box 4466
Kingston, New York 12402
(845) 338-4477
Attorney for Appellant

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PRELIMINARY STATEMENT

Since the inception of New York's Workers' Compensation Law ("WCL"), and throughout its history, neither the statute itself nor associated case law has contained any prohibition against an injured worker being separately compensated for permanent injuries to different joints within the same bodily extremity. This changed precipitously after the Appellate Division's decision in *Genduso v. New York City Dept. of Education* (164 AD3d 1509 [3d Dept. 2018]). Indeed, the Workers' Compensation Board ("Board") has since wielded the Court's *Genduso* holding and its progeny as a sword against injured workers, systematically slashing schedule loss of use ("SLU") awards without regard to the evidence of record, precisely as it has done in the instant case.

The Board and Appellate Division have justified this sudden change in posture by reasoning that neither the statute nor the Board's Impairment Guidelines "lists the knee or the hip as a statutorily-enumerated member or 'as body parts [or members] lending themselves to separate SLU awards'...Rather, as the Board found here, impairments to these body parts or extremities are encompassed by awards for the loss of use of the leg, which is the applicable statutorily-enumerated body member" (*Matter of Johnson v. City of New York*, 180 AD3d 1134 [3d Dept. 2020] [citations omitted], lv. granted, 35 NY3d 915 [2020]). The same rationale

has been applied to subsume SLU awards for the elbow and shoulder one within the other, as the Board did here.

Yet this abrupt change in course is contrary to the intent of the WCL and relevant provisions, as is borne out by the plain language and historical progression of WCL § 15 and its pertinent subsections. This Honorable Court has previously concurred with this contention in a situation substantially similar to that now presented (*see*, *Matter of Zimmerman v. Akron Falls Park-Erie County*, 35 AD2d 1030 [3d Dept. 1970], rev'd 29 NY2d 815 [1971]). Furthermore, the Board's newly charted course disserves the humanitarian intent of the WCL, the importance of which this Court has confirmed on numerous occasions. Given this, the Board's rationale and holding cannot be deemed a reasonable interpretation of the statute.

The Board specifically held in this case, as a matter of fact, that the medical evidence supported a finding of a causally related 27.5 percent SLU of the left arm due to permanent injury to the shoulder joint, but then held as a matter of law that because the claimant had previously been awarded a 22.5 percent SLU of the left arm due to permanent injury stemming from a wholly separate and distinct work injury to his left elbow, he would be awarded only a five percent SLU in this claim. Appellant contends that this holding is legally erroneous and not based upon

the substantial evidence of record, and respectfully requests reversal of the decisions below.

STATEMENT OF FACTS

Joseph D. Liuni sustained an injury to his right upper extremity on September 2, 2014 when, while holding onto a ladder with his right arm and reaching outward, he twisted the arm causing injury to his right bicep and rotator cuff (R. 13, 19). The Board established the claim for an injury to the right shoulder (R. 22). The claim was later amended to include a consequential left shoulder injury incurred as a result of overuse in the aftermath of the accident (R. 29). Mr. Liuni ultimately underwent left shoulder surgery on February 13, 2017, performed by Dr. Adam Soyer, consisting of a diagnostic left shoulder arthroscopy with examination under anesthesia, manipulation, and lysis of adhesions; subacromial decompression; and rotator cuff repair (R. 31-33).

Mr. Liuni had previously sustained a work-related injury to his left upper extremity on December 14, 2007 (R. 77, 99-100). In that incident, the claimant ruptured his left distal biceps tendon while lifting a 200-pound table (R. 99-100). He underwent a left biceps tendon repair surgery on March 5, 2008, also performed by Dr. Adam Soyer (R. 112). In a medical report dated October 30, 2009, Dr. Soyer opined that the claimant had a 25 percent SLU of his left upper extremity

based upon the surgery and "weakness and inability to perform certain activities" (R. 116-17). A carrier IME, Dr. Govindlal Bhanusali, opined a 20 percent loss of use, stating: "This includes 10% loss because of the biceps tendon tear repair surgery and 10% for the mild deficiency of flexion of the left elbow..." (R. 119-24). The claimant received a compromised loss of use award in that case of 22.5 percent of the left arm (R. 100).

Relative to his 2014 injury, the claimant was examined by Dr. Richard Saunders, who opined, *inter alia*, that the claimant had a 27.5 percent SLU of his left arm associated with his left shoulder surgery and residual defects at the shoulder joint (R. 37-45). Dr. Saunders noted that the claimant's overall SLU of his left arm would be 50 percent, and the current 27.5 percent loss due to shoulder defects was medically separate and distinct from his prior 22.5 percent loss resulting from the 2007 accident (R. 42). The carrier had the claimant examined by Dr. Douglas Petroski, who opined that Mr. Luini had a 20 percent loss of use of his left arm associated with his 2014 injury (R. 49-60). Pursuant to the direction of a Workers' Compensation Law Judge ("WCLJ"), depositions were taken from both doctors (R. 63-72, 84-98).

At a hearing held September 26, 2019, a WCLJ agreed with the claimant's contention that the evidence warranted a finding of an overall 50 percent SLU of the left arm, with a causally related 27.5 percent being separately payable from the

2014 claim (R. 129-156, 157). The carrier filed an Application for Board Review (R. 160-67, 168-76).

In a Memorandum of Board Panel Decision filed January 30, 2020, a Board Panel reversed the decision of the WCLJ (R. 06-10). The Panel specifically found that the claimant had a causally related 27.5 percent schedule loss of use of his left arm resulting solely from his 2014 shoulder injury, but awarded only a five percent loss of use noting that under *Genduso*, the overall finding must be reduced by the prior 22.5 percent awarded for the biceps tendon injury in the claimant's 2007 claim (R. 9).

The claimant appealed to the Appellate Division, Third Department, which affirmed the Board by decision filed November 12, 2020 (188 AD3d 1403). This Honorable Court granted leave to appeal.

ARGUMENT

POINT I

The Workers' Compensation Board's decision that the claimant has only a five percent schedule loss of use of the left arm payable in this case is not supported by substantial evidence

The issue presented concerns the proper calculation of an overall schedule loss of use in situations where a worker has sustained multiple permanent losses to different joints in a single extremity, whether from a single accident or several occurrences. Since the Appellate Division's decision in *Genduso*, the same has been widely touted as creating a black-letter rule that losses of use to multiple joints in a single extremity may never be independently considered, but rather, the smaller must be subsumed within the larger, even if the permanent losses stem from defects in wholly different joints. As applied, such a rule effectively demands that a worker only suffer serious harm to one joint of each major limb during the entire course of their working life, as additional injuries to a different joint in the same appendage will not be separately compensated.

Not only is this consequence contrary to the legislative intent of the WCL, as evidenced by the plain language and historical development of WCL § 15 and its subsections, but it is at odds with what the Board actually held in *Genduso*, which was at bottom a substantial evidence edict, not intended to be invariably applied as

black-letter law. Indeed, each injured worker deserves at least to be individually considered, with each case adjudged based upon its particular facts and the evidence adduced.

A. The Board's holding is contrary to the intent of the Legislature, as demonstrated by the plain language and historical development of WCL § 15 and its pertinent subsections

It is well settled that, "'[w]hen presented with a question of statutory interpretation, [a court's] primary consideration is to ascertain and give effect to the intention of the Legislature'" (*Samiento v. World Yacht Inc.,* 10 NY3d 70, 77-78 [2008], quoting *Matter of DaimlerChrysler Corp. v. Spitzer*, 7 NY3d 653, 660 [2006] [internal quotation marks and citation omitted]). "'As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving full effect to the plain meaning thereof'" (*Matter of Youngjohn v. Berry Plastics Corporation*, 2021 N.Y. Slip Op. 02017 at 10 [2021], quoting *Matter of Raynor v. Landmark Chrysler*, 18 NY3d 48 [2011]). Further, courts are "guided in [their] analysis by the familiar principle 'that a statute...must be construed as a whole and that its various sections must be considered together and with reference to each other'" (*Town of Aurora v. Village of E. Aurora*, 32 NY3d 366, 372 [2018], quoting *Matter of New York County Lawyers' Assn. v. Bloomberg*, 19 NY3d 712, 721 [2012]). Courts should "give [a] statute a sensible and practical over-all construction, which is consistent

with and furthers its scheme and purpose and which harmonizes all its interlocking provisions" (*Matter of Long v. Adirondack Park Agency*, 76 NY2d 416, 420 [1990]).

Deference "is generally accorded to an administrative agency's interpretation of statutes it enforces when the interpretation involves some specialized knowledge" (*Matter of Belmonte v. Snashall*, 2 NY3d 560, 565-66 [2004], quoting *Matter of Gruber [New York City Dept. of Personnel]*, 89 NY2d 225, 231 [1996]). By contrast, "where 'the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency'...In such circumstances, the judiciary need not accord any deference to the agency's determination, and is free to ascertain the proper interpretation from the statutory language and legislative intent" (*Matter of Gruber*, supra, *at* 231-232 [citations omitted]).

Though the prime indicator of legislative intent is the plain language of the statute, it seems worthy of a brief moment to contextualize the mindset of the drafters of WCL § 15 and its subsections, given that the relevant text has been in more or less its present form since the inception of New York's compensation law. Following the constitutional invalidation of the initial 1910 WCL in *Ives v. South Buffalo R. Co.* (201 NY 271 [1911]), the Legislature undertook the arduous process

of first amending the State Constitution (N.Y. Const. Art. 1, § 18) and then formally reenacting the workers' compensation legislation. It is likely a fair supposition that the country's economy nearer the turn of last century was far more grounded in strenuous labor-type activities than is today's labor market; it hence seems dubious that the Legislature that had so recently toiled to ensure the passage of this utmost humanitarian act would have intended to forever limit each injured worker to compensation for permanent injury to only one of the joints of each major member.

That said, over a century after the enactment of the WCL, it is not clear why the Legislature would have linguistically crafted WCL § 15 [3] to describe losses of use to an "arm" or a "leg," as opposed to separating injuries to the upper extremity into elbow and shoulder losses of use, and injuries to the lower extremity into hip and knee, and reducing the respective number of weeks attributable to each. But given the broad remedial nature of the statute, the Legislature could not possibly have intended the use of the broader terms "arm" and "leg" to proscribe an injured worker from ever being separately compensated for injuries to the various joints in the arm or leg, which again would have the net effect of limiting each worker to only one major injury to each usable limb over the entire course of their working life.

In point of fact, the statute does not by its text forbid a worker from receiving a separate loss of use of the "arm" for injuries to the elbow and shoulder joints in that limb, or state anywhere that one must be subsumed within the other, an indication the Legislature could very plainly have set forth in an affirmative manner had that been its intention. Quite the contrary, the statute has provided since its inception that: "The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury" (L. 1913, c. 816 [then § 15 (6)] [Appellant Addendum at 1]).

The section was quickly amended to add the language: "...provided, however, that an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability" (L. 1915, c. 615 [Appellant Addendum at 2]). The modern version adds only: "...except as hereinafter provided in subdivision eight of this section." (L. 1945, c. 872 [Appellant Addendum at 6]).

Appellant respectfully submits that the meaning of WCL § 15 [7], read harmoniously with the remaining provisions of WCL § 15, is plain: In cases of

multiple injuries, each employer shall be liable for the fair share of costs associated directly with a work injury or disease sustained during its employ, but not additional sums. This represents a reasonable means of balancing the worker's interest in receiving fair compensation for multiple work injuries against the employers' interests in paying only the sums commensurate with their respective liabilities.

This comprehension of the legislative intent underlying WCL § 15 [7] is further supported when viewed through the prism of later historical developments. While the 2007 amendments to the WCL essentially rendered defunct the provisions of WCL § 15 [8], that subdivision was intended to offset the costs of an employer made liable for expenses greater than that it would alone bear when an employee with a pre-existing condition becomes further disabled as a result of a workplace accident.[1] Because WCL § 15 [7] affirmatively provides that each employer shall be liable for only the costs associated with the injury incurred in its employ, the addition of § 15 [8] was necessary to ensure an employer would be reimbursed for additional costs if a work injury superimposed upon a pre-existing

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[1] WCL § 15 [8] was "specifically meant to encourage employers to hire injured veterans returning to the workplace after World War II. The legislative intent was to provide an incentive for employers to hire disabled persons by permitting employers to obtain reimbursement for payments of compensation and medical payments from the [Special Fund for Second Injuries]." *See*, Weiss and Balter, *New York Workers' Compensation Handbook*, at 2-22 [2020].

permanent impairment resulted in a "permanent disability caused by both conditions that is materially and substantially greater than that which would have resulted from the subsequent injury or occupational disease alone..." (WCL § 15 [8][d]). Notwithstanding, WCL § 15 [7] has remained in essentially its present formulation since the statute's inception.

Once again, the drafters of the statute, presumed like all Legislatures to comprehend the meaning of the terms they utilize, could clearly have stated in WCL § 15 that an injured worker may not receive separate schedule loss of use awards for permanent injury to the elbow and shoulder, or to the knee and hip, but instead they indicated precisely the reverse. Appellant submits that the statutory language is unambiguous and cannot support the Board's interpretation.

Appellant's foregoing contentions are further buttressed by the language of WCL § 15 [3] [u]. WCL § 15 [3] [u] has two elemental aspects, one of which has been altered through its history, one of which has not.

WCL § 15 [3] [u], in its present form, provides: "In any case in which there shall be a loss or loss of use of more than one member *or parts of more than one member* set forth in paragraphs a through t, inclusive, of this subdivision, but not amounting to permanent total disability, the board shall award compensation for the loss of use of each such member or part thereof, which awards shall be fully

payable in one lump sum upon the request of the injured employee" (WCL § 15 [3] [u] [emphasis supplied]).

The noted subsection first specifically authorizes the Board to make SLU awards to members or *parts* of members as set forth in paragraphs a through t, and then separately sets forth the manner in which such multiple loss of use awards shall be paid. This indication is borne out by both the plain language of WCL § 15 [3] [u] and its historical development.

Prior to the 1929 amendment to this subsection, the law was unclear as to the manner in which multiple SLU awards for various body parts were to be paid to an injured worker. As explained by the Report of the Industrial Survey Commission in 1929, that amendment was proposed as a result of a claim in which the Board had awarded separate SLU findings and made them to run consecutively, but the Court in *Matter of Hoffman v. Chatham Electric Light, Heat and Power Co.* (249 NY 433 [1928] [citing *Matter of Marhoffer v. Marhoffer*, 220 NY 543 [1917]) forbade the Board from doing this, holding instead that any time a worker sustained multiple SLU injuries, the case would as a matter of law need to be forever treated as an overall nonschedule permanent partial disability or "classification" case, in which future compensation would be determined based upon wage earning capacity, similar to cases of spinal injuries and other nonschedule permanency awards (Report of the Industrial Survey Commission [1929] [Appellant Addendum 7-9])

The Industrial Board in 1929 recommended legislative action to overrule the Court's decision in *Hoffman* and "provide that the schedule of awards for permanent partial disability, which amount to less than permanent total disabilities, shall be made by the Board to run consecutively" (Report of the Industrial Survey Commission [1929], at 45 [Appellant Addendum at 9]). This revision was implemented and the statute was amended to include the language "which awards shall run consecutively" (L. 1929, c. 302 [Appellant Addendum at 5]).

Yet in accordance, as this Court later observed, prior to the 2009 amendment to the compensation law, SLU awards were required "to be paid periodically on a biweekly basis...with lump sum awards issued only in particular cases when deemed advisable by the Board 'in the interests of justice'" (*Matter of Youngjohn v. Berry Plastics Corp.*, 2021 N.Y. Slip Op., 02017 [April 1, 2021], at 8 [citations omitted]). When presented in 2007 with the question of whether an SLU award could be paid as a lump sum, this Court overruled the same based upon the existing statutory text, specifically that of WCL § 25 (*see Matter of LaCroix v. Syracuse Exec. Air. Serv., Inc.,* 8 NY3d 348 [2007] [the Court noted though that while ancillary to its central holding, "Section 15 (3) (u), for example, provides that two or more schedule loss of use awards for permanent partial disabilities 'shall run consecutively'" (at 355)]). The Legislature thereafter amended WCL § 15 [3] [u], in direct response to *LaCroix*, to allow for payment of an SLU award in one lump

sum allocable to no particular period (L 2009, c. 351). As previously noted, while the aspect of this subsection governing the manner of payment of multiple SLU awards has been altered over time, the aspect authorizing the Board to make multiple SLU awards for major members or *parts* thereof has never changed.

Furthermore, reading WCL § 15 [3] [u] in literally its plainest fashion, albeit working backwards through the pertinent subclauses, any argument that the section forbids multiple SLU awards for various joint injuries within the arm or leg becomes untenable. Indeed, this section by its exact language refers to injuries to members "set forth in paragraphs a through t..." Sections 15 [3] [a] and [b] denote the pertinent members as being an "arm" and "leg." Hence, if the section affirmatively permits awards for "parts of more than one member set forth in paragraphs a through t," it is clearly stating that the Board may make awards for permanent injuries to *parts* of the "arm" and "leg," which shall run consecutively (prior to 2009), a reading which is consistent with WCL §§ 3 and 15 [7] when read together in harmony. Put another way, it does not seem sensible that the Legislature would specifically and by its precise wording authorize separate SLU awards for various *parts* of the "arm" if it did not intend to give the Board the authority to make separate SLU awards for various parts of the arm. Put yet another way, had the Legislature desired to make clear that various parts of an "arm" or "leg" were not subject to separate and consecutive SLU awards, it could

easily have started the list at WCL § 15 [3] [c], exempting [a] (arm) and [b] (leg). It did not.

In the "absence of any evidence of a contrary legislative intent, provisions of a statute that are unchanged by an amendment are generally 'continued in effect, with the same meaning' as prior to the amendment" (*Matter of Estate of Youngjohn v. Berry Plastics Corp.*, 2021 N.Y. Slip Op., 02017 [April 1, 2021] [citing McKinney's Cons Laws of NY, Book 1, Statutes § 193, Comment at 359]). It is notable that while the Legislature has amended WCL § 15 [3] [u] several times during the statute's history, to make room for payment for SLU awards in various manner, WCL § 15 [3] [u] has never been modified to remove the "parts of more than one member" language, which could have been accomplished simultaneous with any of the various historical amendments.

B. This Court has previously affirmed that WCL §§ 15 [3] and [7] read in harmony do not proscribe separate schedule loss of use awards

This Court has not only eschewed a restrictive reading of the schedule loss of use paragraphs, but rather has read this section – and the words "arm" and "leg" – so expansively as to permit separate and distinct injuries to various joints of a single appendage to yield summed awards in excess of the statutorily enumerated 312 and 288 weeks. In *Matter of Zimmerman v. Akron Falls Park-Erie County* (29 NY2d 815 [1971]), this Court reversed a decision of the Appellate Division (35

AD2d 1030 [3d Dept. 1970]) that prohibited the claimant from receiving separate SLU awards for a left forearm amputation and a left shoulder injury totaling 130 percent of his arm. In so holding, the Appellate Division opined that, "the Legislature had no intention to compound awards as the board has done here" (*see id.*, at 1030). In reversing, this Court held (29 NY2d, at 817):

> There was substantial medical evidence that the claimant suffered a 50% loss of use of his arm attributable solely to the 1967 accident, and this the board properly found, 'in view of the restricted motion of the left shoulder and in spite of the prior left forearm amputation.' Thus, as the dissenters at the Appellate Division correctly concluded: 'The record clearly indicates that the award made to claimant was limited only to the injury caused by the 1967 accident. Claimant's 1924 accident did not affect his left shoulder which was injured in the 1967 accident causing the 50% loss of use of the left arm' (See Workmen's [sic] Compensation Law § 15, subd. 7).[2]

C. The Board's decision in *Genduso* was a substantial evidence holding and was not meant to be applied in unwavering black-letter form

Appellant additionally submits that *Genduso* was itself a fact-specific decision, and the notion of arbitrarily subsuming one loss of use within another in every case of multiple joint injuries actually represents a misapprehension of the Board's determination. While the Appellate Division's affirmation was arguably

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[2] The Third Department adhered to this rationale in *Matter of Pellegrino v. Textile Prints Corp.* (81 AD2d 723 [3d Dept. 1981]).

the correct result, certain language contained within the decision has led to the current situation.

In the underlying claim in *NYC Dept. of Education* (2017 WL 667430 [WCB No. G101 3459, February 10, 2017]), the claimant's most recent accident occurred on October 16, 2013, an injury to his right knee, and his doctor ultimately concluded that he had a 40 percent SLU of his right leg. The claimant had previously received a 12.5 percent SLU of his right leg in WCB No. 0013 6312 as well as a 20 percent SLU of his right leg in WCB No. 0982 8188 (established for the right ankle, with a consequential right knee injury). The WCLJ found that the claimant had a causally related 7.5 percent SLU in the 2013 claim (an overall 40 percent SLU of the right leg, 32.5 percent having been previously awarded).

In his appeal to the Board, the claimant requested that 12.5 percent of the preexisting SLU not be considered in the present equation, alleging that this aspect of the permanency in WCB No. 0982 8188 was actually due to an ankle defect not associated with his right knee. While the Board acknowledged that there were two body sites injured, it reviewed the report of the claimant's attending physician in that file who plainly stated that his opinion viz. permanent impairment was relative to the "right leg."

The Board's ultimate rationale for including the entirety of the prior leg schedules in the present deduction was that, "While an injury to the claimant's right ankle was established in WCB#09828188, *the medical evidence clearly associates the claimant's residual permanent physical and functional impairments with his right leg*" [emphasis supplied]. The Board's apparent reasoning for deducting the entirety of the prior leg SLU was that the ankle injury was incidental to the permanency finding of 20 percent, and thus claimant's request to now divide the prior percentage between the knee and ankle was not supportable. This seems to be merely a substantial evidence decision, and a correct one at that.

While the Third Department likely reached the proper result in affirming the Board, the Court's statement that: "...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 loss of use of the leg" has led to the conclusion that the decision purposefully fashioned a new black-letter rule that injuries to different joints within a single extremity may never be separately compensated as a matter of law, whether the defects arise from a single or from multiple accidents.[3] Yet it does not otherwise

[3] Actually, the statute separately lists the foot (WCL § 15[3][d]), as do the relevant Guidelines (New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity ch. 3.3 at 29 [2012]; Workers' Compensation Guidelines for Determining Impairment ch. 8 at 46 [2017], available at:

appear from a review of the *Genduso* decision that the intention was to depart from longstanding precedent and create a wholly new doctrine to substantially limit compensation for permanent loss as provided for by the statute and Board Impairment Guidelines.

D. The Board's application of the *Genduso* principle in this manner serves to magnify, rather than minimize disparities between schedule loss of use and nonschedule permanent disability awards

Though the subsections of WCL § 15 at issue in this case were not directly affected by the 2007 WCL amendments, it is notable that the application of the *Genduso* principle in this manner tends to magnify, rather than minimize, disparities between schedule loss of use awards and nonschedule awards, the latter being a goal sought by the Legislature in connection with the 2007 amendments (*see*, *Matter of Mancini v. Office of Children & Family Servs.*, 32 NY3d 521 [2018]; *Matter of Green v. Dutchess County Boces*, 183 AD3d 23 [3d Dept. 2020], lv. denied, 36 NY3d 1044 [2021]). In cases involving multiple injuries to the spine, a finding of a permanent loss of wage-earning capacity under WCL § 15 [3] [w]

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http://www.wcb.ny.gov/content/main/hcpp/ImpairmentGuidelines/ImpGuideOverview.jsp [last visited May 12, 2021]), for loss of use purposes, and permanent defects of the ankle are considered in connection with these sections. Likewise, the Guidelines divide the elbow and shoulder for separate loss of use assessment in both the 2012 and 2017 versions (2012 Ch. 2.4 and 2.5 at 22, 23; 2018 Ch. 4, 5 at 26, 29). The same can be said of the 1996 State of New York Workers' Compensation Board Medical Guidelines (p. 19, 13-14).

based upon one part of the spine (e.g. lumbar, thoracic, cervical) is considered in conjunction with and in addition to any other such finding based upon a different spinal segment – whether the situation involves a single or multiple accidents – and one is not subsumed within the other, subject to the statutory cap on weekly benefits viz. the overall loss of wage earning capacity percentage (*see e.g.*, *Matter of Garratt-Chant v. Gentiva Health Servs.*, 179 AD3d 1421 [3d Dept. 2020]). Analogous to the Third Department's observation in *Green*, there appears "no basis to distinguish SLU and nonscheduled awards where the plain language" of WCL § 15 and its subsections applies to all awards (*Green*, at 6).

E. The evidence in this case supports only the single conclusion that the claimant has an overall 50 percent SLU of the left arm resulting from his two work injuries, with 27.5 percent causally related and payable in this case

The facts of this case support a finding that the claimant's causally related loss of use percentage stemming from his 2014 injury and left shoulder surgery is medically separate and distinct, and thus should be considered payable in addition to the SLU percentage previously awarded relative to his 2007 accident and resulting left biceps surgery.

The claimant's 2007 injury involved a left distal (elbow level) biceps tendon rupture and repair, and his schedule award in that case was based upon the pathology and surgical procedure as well as resulting permanent defects at the

elbow joint. The record contains the operative report of Dr. Soyer dated March 5, 2008, detailing the claimant's left distal biceps tendon surgery, Dr. Soyer's October 30, 2009 schedule loss of use narrative, and Dr. Bhanusali's February 8, 2010 SLU report (R. 112-14, 116-17, 119-124).

In his October 30, 2009 report, Dr. Soyer details an examination of the claimant's left elbow, including range of motion testing, and states, "Given his weakness and inability to perform certain activities, his permanent disability is 25% loss of use for the left upper extremity" (R. 116-17). Dr. Bhanusali examined on February 3, 2010, and concluded: "Regarding the schedule loss of use, he has 20% schedule loss of use as per medical guidelines compensation board 1996 edition of the left upper extremity. This includes 10% loss because of the biceps tendon tear repair surgery and 10% for the mild deficiency of flexion of the left elbow, that gives a total of 20% schedule loss of use for the left upper extremity" (R. 123). These records evidence that the defects resulting in the left arm SLU claimant received in his 2007 case were entirely localized to the left elbow joint.

The 2014 injury, by contrast, involved only the left shoulder, with surgery to repair rotator cuff pathology, and an SLU based solely upon defects of motion in the shoulder joint. Dr. Saunders testified unequivocally that from an orthopedic perspective, the two injuries resulted in separate and distinct pathologies, giving rise to different permanent defects at different joints in the left upper extremity,

supporting his medical opinion that the SLU findings should likewise be separately considered (R. 93-95). The carrier's Dr. Petroski offered no medical opinion on this point, leaving Dr. Saunders' assessment as the sole medical evidence of record viz. the issue at bar.

Appellant thus respectfully submits that the only competent evidence in this case supports a finding that the claimant's losses of use of his left elbow and left shoulder are separate and distinct and should be payable as such. In this instance, substantial evidence simply does not support the Board's determination (*see Matter of Zimmerman, supra*).

POINT II

The Board's application of the *Genduso* principle in unwavering black-letter form produces unsound results which are contrary to the humanitarian purpose and intended construction of New York's Workers' Compensation

This Court has repeatedly avowed it is a "fundamental principle that the Workers' Compensation Law is to be liberally construed to accomplish the economic and humanitarian objects of the act" (*Matter of Smith v. Tompkins County Courthouse*, 60 NY2d 939, 941 [1983]; *see also*, *Matter of Johannesen v. New York City Dept. of Hous. Preserv. & Dev.*, 84 NY2d 129 [1994]).

Apart from pure points of law, Appellant respectfully submits that the notion of forbidding a worker from ever receiving two separate schedule awards based upon distinct joint injuries and permanent functional losses resulting therefrom is flatly contrary to sound reason and logic, as well as the fundamental humanitarian purpose of our state's Workers' Compensation Law. A century past its origin, the vast majority of those who need access the compensation system remain engaged in physical and labor-type employments, vocations prone to multiple injuries over the course of a decades-long career. To limit the compensation of such a worker viz. each useful bodily member to the most severe injury that occurs, which is the net effect of arbitrarily subsuming an SLU award for one part within that made for another, serves only to harm those the law was primarily intended to protect. Such a result could not possibly have been intended by the Legislature that promulgated this humanitarian act and should not be countenanced by this Honorable Court.

CONCLUSION

WHEREFORE, Appellant respectfully requests that this Honorable Court reverse the decision of the Appellate Division filed November 12, 2020, and remand the case for further proceedings not inconsistent with the Court's determination.

Dated: May 13, 2021
Kingston, New York

Respectfully Submitted,

Justin S. Teff, Esq.
Kirk & Teff, LLP
10 Westbrook Lane
P.O. Box 4466
Kingston, New York 12402
(845) 338-4477
Attorney for Appellant

AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Justin S. Teff, an attorney in the law firm of Kirk & Teff, LLP, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,761 words, which complies with the limitations stated in § 500.13(c)(1).

Justin S. Teff, Esq

APPELLANT ADDENDUM

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ity, except the particular cases mentioned in subdivision three of this section, an injured employee shall receive sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage earning capacity thereafter in the same employment or otherwise during the continuance of such partial disability, but not in excess of three thousand five hundred dollars, except as otherwise provided in this chapter.

5. Limitation. The compensation payment under subdivisions one, two and four and under subdivision three except in case of the loss of a hand, arm, foot, leg or eye, shall not exceed fifteen dollars per week nor be less than five dollars per week; the compensation payment under subdivision three in case of the loss of a hand, arm, foot, leg or eye, shall not exceed twenty dollars per week nor be less than five dollars a week; provided, however, that if the employee's wages at the time of injury are less than five dollars per week he shall receive his full weekly wages.

6. Previous disability. The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury.

§ 16. Death benefits.—If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

1. Reasonable funeral expenses, not exceeding one hundred dollars;

2. If there be a surviving wife (or dependent husband) and no child of the *deaceased under the age of eighteen years, to such wife (or dependent husband) thirty per centum of the average wages of the deceased during widowhood (or dependent widowerhood) with two years' compensation in one sum, upon remarriage; and if there be surviving child or children of the deceased under the age of eighteen years, the additional amount of ten per centum of such wages for each such child until of the age of eighteen years; in case of the subsequent death of such surviving wife (or dependent husband) any surviving child of the deceased employee, at the time under eighteen years of age, shall have his compensation increased to fifteen per centum of such wages, and the same shall be payable until he shall reach the age of eighteen years; provided that the total amount payable shall in no case exceed sixty-six and two-thirds per centum of such wages.

3. If there be surviving child or children of the deceased under the age of eighteen years, but no surviving wife (or dependent husband) then for the support of each such child until of the age of eighteen years, fifteen per centum of the wages of the deceased, provided that the aggregate shall in no case exceed sixty-six and two-thirds per centum of such wages.

*So in original.

Chap. 615.

AN ACT to amend the workmen's compensation law, in relation to previous disability.

Became a law May 12, 1915, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision six of section fifteen of chapter eight hundred and sixteen of the laws of nineteen hundred and thirteen, entitled "An act in relation to assuring compensation for injuries or death of certain employees in the course of their employment and repealing certain sections of the labor law relating thereto, constituting chapter sixty-seven of the consolidated laws," as re-enacted and amended by chapter forty-one of the laws of nineteen hundred and fourteen, is hereby amended to read as follows: L. 1913, ch. 816, § 15, subd. 6, as re-enacted by L. 1914, ch. 41, amended.

6. Previous disability. The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, [1]provided, however, that an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability.

§ 2. This act shall take effect immediately.

[1] Remainder of sentence new.

to the injury, and not to exceed in total the sum of three thousand five hundred dollars, except as otherwise provided in this chapter.

5. Limitation. The compensation payment under subdivisions one, two and four and under subdivision three except in case of the loss of a hand, arm, foot, leg, or eye, shall not exceed fifteen dollars per week nor be less than five dollars per week; the compensation payment under subdivision three in case of the loss of a hand, arm, foot, leg or eye, shall not exceed twenty dollars per week nor be less than five dollars a week; provided, however, that if the employee's wages at the time of injury are less than five dollars per week he shall receive his full weekly wages.

6. Previous disability. The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, provided, however, that an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability.

7. Permanent total disability after permanent partial disability. If an employee who has previously incurred permanent partial disability through the loss of one hand, one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed period of weeks special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: The insurance carrier shall pay to the state treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of one hundred dollars. The state treasurer shall be the custodian of this special fund, and the commission shall direct the distribution thereof.

§ 4. Section sixteen of such chapter, as re-enacted by chapter forty-one of the laws of nineteen hundred and fourteen, and

§ 16, as amended by L. 1914, ch. 316, amended.

a. If there be a surviving wife (or dependent husband) and no child of the deceased under the age of eighteen years, to such wife (or dependent husband.)

b. If there be a surviving wife (or dependent husband) and surviving child or children of the deceased under the age of eighteen years, one-half shall be payable to the surviving wife (or dependent husband) and the other half to the surviving child or children.

The board may in its discretion require the appointment of a guardian for the purpose of receiving the compensation of the minor child. In the absence of such a requirement by the board the appointment for such a purpose shall not be necessary.

c. If there be a surviving child or children of the deceased under the age of eighteen years, but no surviving wife (or dependent husband) then to such child or children.

An award for disability may be made after the death of the injured employee.

5. Temporary partial disability. In case of temporary partial disability resulting in decrease of earning capacity, the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the accident and his wage earning capacity after the accident in the same or another employment but shall not exceed in total three thousand five hundred dollars.

6. Maximum and minimum compensation for disability. Compensation for disability shall not exceed twenty dollars per week nor be less than eight dollars per week; provided, however, that if the employee's wages at the time of injury are less than eight dollars per week, he shall receive his full weekly wages.

7. Previous disability. The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, provided, however, that an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability.

8. Permanent total disability after permanent partial disability. If an employee who has previously incurred permanent partial disability through the loss of one hand, one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed period of weeks special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional

§ 121-a. **Proof of dependency in foreign countries.** In cases involving the dependency of aliens residing in foreign countries, transcripts of birth or marriage certificates, also documents and affidavits, certified by a local official or local magistrate and authenticated as to such official or magistrate by the secretary of state or other official having charge of foreign affairs, or a United States consul,[1] in said foreign country, shall be received in evidence for the purpose of proving dependency.

§ 2. This act shall take effect immediately.

CHAPTER 301

AN ACT to amend the workmen's compensation law, in relation to the loss or loss of use of more than one member or parts of more than one member

Became a law April 5, 1929, with the approval of the Governor. Passed, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

¶ u added to § 15, subd. 3.

Section 1. Subdivision three of section fifteen of chapter eight hundred and sixteen of the laws of nineteen hundred thirteen, entitled "An act in relation to assuring compensation for injuries or death of certain employees in the course of their employment and repealing certain sections of the labor law relating thereto, constituting chapter sixty-seven of the consolidated laws," as re-enacted by chapter forty-one of the laws of nineteen hundred fourteen and amended by chapter six hundred and fifteen of the laws of nineteen hundred twenty-two and as last amended by chapter seven hundred and fifty-four of the laws of nineteen hundred twenty-eight, is hereby amended by adding a new paragraph u, to read as follows:

u. Total or partial loss or loss of use of more than one member or parts of members. In any case in which there shall be a loss or loss of use of more than one member or parts of more than one member set forth in paragraphs a to t, both inclusive, of this subdivision, but not amounting to permanent total disability, the board shall award compensation for the loss or loss of use of each such member or part thereof, which awards shall run consecutively.

§ 15, subd. 3, ¶ u re-numbered ¶ v.

§ 2. Paragraph u of subdivision three of section fifteen of such act is hereby re-numbered to read paragraph v.

§ 3. This act shall take effect immediately.

[1] Words "or a United States consul," new.

stituting chapter sixty-seven of the consolidated laws," as re-enacted by chapter forty-one of the laws of nineteen hundred fourteen, and amended throughout by chapter six hundred fifteen of the laws of nineteen hundred twenty-two, is hereby amended to read as follows:

7. Previous disability. The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, provided, however, that an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability[1] except as hereinafter provided in subdivision eight of this section.

§ 2. Subdivisions eight and eight-a of section fifteen of such chapter, subdivision eight having been last amended by chapter five hundred eighty-eight of the laws of nineteen hundred forty-one, and subdivision eight-a having been added by chapter seven hundred forty-nine of the laws of nineteen hundred forty-four, are hereby repealed, and such section is hereby amended by inserting therein a new subdivision, to be subdivision eight, to read as follows:

Subds. 8, 8-a, repealed. New subd. 8, added.

8. Disability following previous permanent physical impairment. (a) Declaration of policy and legislative intent. As a guide to the interpretation and application of this subdivision, the policy and intent of this legislature is declared to be as follows:

First: That every person in this state who works for a living is entitled to a reasonable opportunity to maintain his independence and self-respect through self-support even after he has been physically handicapped by injury or disease;

Second: That any plan which will reasonably, equitably and practically operate to break down hindrances and remove obstacles to the employment of partially disabled persons honorably discharged from our armed forces, or any other physically handicapped persons, is of vital importance to the state and its people and is of concern to this legislature;

Third: That it is the considered judgment of this legislature that the system embodied in this subdivision, which makes a logical and equitable adjustment of the liability under the workmen's compensation law which an employer must assume in hiring employees, constitutes a practical and reasonable approach to a solution of the problem for the employment of physically handicapped persons.

(b) Definition. As used in this subdivision, "permanent physical impairment" means any permanent condition due to previous

[1] Rest of sentence new matter added.

Legislative Document (1929) No. 75

STATE OF NEW YORK

REPORT

OF THE

Industrial Survey Commission

Transmitted to the Legislature March 19, 1929

ALBANY
J. B. LYON COMPANY, PRINTERS
1929

and for the keeping of statistical records and reporting to the Department.

(j) That the sum of $50,000 be appropriated for the use of the Department in enforcing the employment agencies law during the first year of its operation.

(k That provision be made for the transfer to the State Department of Labor of any employee in the competitive civil service class of any city whose duties relate exclusively to employment agencies, upon request of the industrial commissioner and the approval of the State Civil Service Commission.

(l) That the provisions of the General Business Law relating to employment agencies be repealed.

WORKMEN'S COMPENSATION LAW

A large part of the attention of your commission during the past three years has been devoted to the consideration of problems arising under the Workmen's Compensation Law. Through recommendations of the commission numerous amendments have been made, all with the object of bettering the law, liberalizing its benefits, clarifying and simplifying its procedure. Your commission has sought the advice and cooperation of the Industrial Commissioner and the Industrial Board, of the Attorney General, of the Superintendent of Insurance, of the Compensation Inspection Rating Board, the Association of Casualty and Surety Executives, State Federation of Labor, the Associated Industries, representatives of mutual insurance companies, State Insurance Fund and Self Insurers. Your commission has sought wherever possible to bring about agreement of the various interests involved to avoid misunderstandings and to bring about the most cooperative relations.

Consecutive Awards. It has been always been the practice in this State where an injured workman sustained permanent partial disabilities of more than one member to award the number of weeks applicable to each such partial disability and to provide that the awards shall run consecutively. Recently, however, the Court of Appeals decided in the cases of Hoffman v. Chatham Electric Light, Heat and Power Co. and others reported at 249 N. Y. 433, that consecutive awards may not be made in such cases and that where more than one permanent partial disability exists, the claim must be adjudicated under that paragraph of the law which refers to all other cases than those coming under the schedule, where the compensation shall be 66 2/3 per centum of the difference between the average weekly wage at the time of the injury and the claimant's wage earning capacity thereafter during the continuance of such partial disability. The effect of this decision is to overturn the long-established practice in New York and to preclude the Industrial Board from making specific awards of compensation where permanent damage has been done to more than one member in the same accident. No specific award therefore may

be made in any such case. This creates a feeling of hardship on the part of the injured worker. It is impossible to effect a commutation of the award and its payment in a lump sum. The claimant, therefore, no matter how intelligent or capable he may be, is precluded from capitalizing his injury to the extent of making himself self-supporting. He is thrown back upon the payment of continuing compensation or reduced earnings which necessitates continuing proof of his inability to earn full wages. In such a case, a man who had lost part of a hand and part of a foot or part of a hand and part of an eye might in the service of his employer find himself suffering no loss of earnings if he continued in the same employ or even a different employment with the same wage earning capacity. He would be entitled to no compensation whatsoever notwithstanding that his injuries may have been serious and are permanent. This naturally breeds a feeling of distrust and dissatisfaction in the mind of the injured person. The fact that he may not be entitled to compensation now, however, does not mean that he may not later on be entitled to the compensation for the same injury. Thus, if the claimant five years or ten years later loses his job and by reason of his injury is unable to obtain new employment, he may then come in and have compensation awarded to him. It will readily be seen that not only is this situation unsatisfactory to the injured workman, but it creates a condition of serious prejudice to the employer or to the insurance company. The whole theory of insurance security depends upon the premiums received each year being sufficient to pay the losses incurred during that year. Under the law as it now is interpreted, a claimant may come back years later even though his claim has long since been closed and obtain an award of compensation. The reserve on his case may have been taken down by the insurance company; in fact, the losses for the year in which the accident occurred may have been entirely adjusted. This would tend to throw the computation of the insurance company's liabilities entirely out of balance.

We recommend, therefore, that the compensation law be amended so as to provide that the schedule of awards for permanent partial disabilities, which amount to less than permanent total disabilities, shall be made by the Board to run consecutively.

Laundries. Group 14 of section 3 of the Compensation Law provides that the law shall apply to all work in various kinds of occupations and places. Among the occupations therein listed, we find the term "laundries, power". The Attorney General has ruled that by reason of the modifying word "power" in connection with laundries, it can not be held to relate to hand laundries. Therefore work in hand laundries where not more than four workmen or operators are engaged does not now come under the Compensation Law. The growth of the hand laundry business has been very great and the business has some elements of definite hazard. If a person working in a hand laundry meets with an