APL 2021-53

To Be Argued By:
BRIAN D. GINSBERG
Time Requested:
10 MINUTES

Court of Appeals of the State of New York

JOSEPH D. LIUNI,

Claimant,

v.

GANDER MOUNTAIN; NEW HAMPSHIRE INSURANCE CO.; BROADSPIRE SERVICES, INC.; AND NEW YORK STATE WORKERS' COMPENSATION BOARD,

Respondents.

BRIEF FOR RESPONDENT NEW YORK STATE WORKERS' COMPENSATION BOARD

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PRELIMINARY STATEMENT

The New York State Workers' Compensation Law establishes a schedule of benefits for employees who sustain permanent, but only partially disabling, work-related injuries to body members (*e.g.*, an arm or leg) or senses (*e.g.*, hearing). These benefits, termed "schedule loss of use awards," are based upon the percentage loss of use of the member or sense that the injury caused. They are intended to provide compensation not for the injury itself, but for the resulting loss of earning power.

This case is similar to *Matter of Johnson v. City of New York*, No. APL 2020-155, currently pending before this Court, in that it requires the Court to determine whether the New York State Workers' Compensation Board correctly calculated a schedule loss of use award for an injury to an employee's body member—here, the left arm—after the employee had already obtained a schedule loss of use award for an earlier injury to that same member. Like in *Matter of Johnson*, the Board in this case made its calculation by applying an adjustment to the percentage loss of use of the member caused by the instant injury: It subtracted the percentage loss of use caused by the injury that had served as the basis for the prior award. As the Board's decision reflects, it viewed this

subtraction as required by Third Department precedent, which appears to have embraced that approach for all successive schedule loss of use awards for injuries to the same member in order to prevent windfall recoveries.

But while the present case is similar to *Matter of Johnson*, it is, in material respects, not the same. Unlike *Matter of Johnson*, the record before the Board in this case included medical evidence that the left-arm impairment caused by the second injury (to the employee's left shoulder) was *not* cumulative of that caused by the first injury (to the employee's left elbow). If that evidence were credited, then subtraction of the percentage loss of use attributable to the prior injury would *not* be necessary to avoid a windfall recovery—and indeed would prevent the employee from being made whole. However, the Board viewed itself as prohibited from considering that evidence by the aforementioned Third Department precedent seemingly requiring a subtraction adjustment as a matter of law. And indeed, on appeal—on the basis of that precedent—the Third Department affirmed the Board's determination, in which the subtraction adjustment had been made.

This Court should vacate the Third Department's decision. It should remit with instructions to permit the Board to consider the medical evidence that the left-arm impairments caused by the employee's successive injuries are distinct, as opposed to cumulative, and to issue the schedule loss of use award the Board finds appropriate in light of such consideration.

The Workers' Compensation Law authorizes the issuance of separate schedule loss of use awards for successive injuries to the same body member. Section 15(7) generally limits awards for an injury to a member to "the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability" caused by prior injuries. And this limitation, in conjunction with the general principle that the burden of proof is on the injured employee to establish the full extent of the compensation to which he or she is entitled, justifies a presumption that impairments caused by successive injuries to the same member are cumulative.

But the presumption is not invariably irrebuttable. Where, as here, there is medical evidence that the impairment to an employee's member or sense caused by an injury for which the employee seeks a schedule loss

of use award is distinct from that caused by an injury for which an earlier award was issued, the Board should be permitted to consider that evidence and, if warranted, to determine that an award based upon the percentage loss of use caused by the injury at issue—without any subtraction—accurately reflects "the compensation allowed for such injury when considered by itself."

QUESTION PRESENTED

When determining a schedule loss of use award for an injury to an employee's body member or sense, may the Workers' Compensation Board consider medical evidence that the injury is distinct from, and not cumulative of, an injury to that member or sense for which the employee obtained an earlier award, and, if appropriate, calculate the relevant percentage loss of use without subtracting the percentage loss of use attributable to the prior injury?

STATEMENT OF THE CASE

A. Statutory Background[1]

The Workers' Compensation Law provides that an employee who suffers an injury that results in the permanent yet partial loss of use of a statutorily specified body member (*e.g.*, an arm or leg) or sense (*e.g.*, hearing) shall be entitled to a "schedule loss of use award," sometimes referred to as an "SLU award" for short. *See* Workers' Compensation Law § 15(3). The award is calculated by multiplying (a) two thirds of the employee's average weekly wages (subject to maximum and minimum compensation rates) by (b) the number of weeks specified in the statutory schedule for the relevant body member or sense injured, and then multiplying by (c) the percentage loss of use of the member or sense caused by the injury, often called the "SLU percentage." *Id.* § 15(3)(a)-(t), (6). Although a schedule loss of use award is, in the end, a monetary sum, such awards are often referred to simply by their loss-of-use percentages (*e.g.*, a "50% schedule loss of use award for the right leg").

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[1] For an expanded discussion of this statutory background, see the brief filed by the New York State Workers' Compensation Board in *Matter of Johnson* (at pp. 3-8).

Section 15(7) of the Workers' Compensation Law addresses the issuance of schedule loss of use awards for body members that have incurred successive injuries. Under that provision, such awards are permissible. An award of compensation for a prior injury "shall not preclude [an employee] from compensation for a later injury." *Id.*

There are restrictions, however. For example, section 15(7) limits the award for the later injury to "such sum as will reasonably represent [the employee's] earning capacity at the time of the later injury." And, as particularly relevant here, "an employee who is suffering from a previous disability shall not receive compensation in excess of the compensation allowed for such [later] injury when considered by itself and not in conjunction with the previous disability." *Id.* Nor, through successive awards, may an employee receive an aggregate amount of compensation exceeding that which would correspond to 100 percent loss of use of the relevant member. Thus, while an award for a prior injury to a member or sense does not preclude outright an award for a subsequent such injury, when issuing that award, the award for the prior injury must be appropriately taken into account in order to ensure that the employee does not receive a windfall recovery.

B. The Ruling of the Workers' Compensation Law Judge

In 2007, while working for respondent Gander Mountain, claimant Joseph D. Liuni sustained an injury to his left elbow that resulted in the rupture of his left distal bicep. (R. 40.) For that injury, claimant received from the Workers' Compensation Board a 22.5% schedule loss of use award for the left arm. (R. 6, 40.) In 2014, claimant, who was still working for Gander Mountain, sustained an on-the-job injury to his left shoulder. (R. 39-40.) He sought compensation for the loss of use of the left arm caused by that injury.

A hearing was held before a Workers' Compensation Law Judge at which claimant, the employer, and the employer's insurance carrier, respondent New Hampshire Insurance Company, appeared through counsel and provided testimonial and documentary evidence. (R. 129-156.) Among this evidence was the deposition testimony and written report of Dr. Richard Saunders, M.D., claimant's medical expert.

Dr. Saunders opined that claimant's 2014 injury constricted the range of motion in his left shoulder and in so doing resulted in a loss of use of the left arm of 27.5%. (R. 42.) Dr. Saunders further opined that this impairment was not cumulative of the impairment that had resulted

from the 2007 injury to claimant's left elbow, and therefore that the 22.5% loss of use of the left arm that had been found in connection with the 2007 injury should not be subtracted in the determination of the instant award.

Specifically, in his written report, Dr. Saunders stated that claimant had "a total of 50% scheduled loss of use of the left arm associated with both of his injuries." (R. 42.) "Of this 50% . . . 27.5% is causally related to his consequential condition in the left shoulder associated with the work injury of [2014]." (R. 42.)

At his deposition, Dr. Saunders elaborated further. "I found 27.5% Scheduled Loss of Use of the left arm based solely on findings of the shoulder." (R. 93.) By contrast, the 22.5% loss of use of the left arm that had been found in connection with the 2007 injury was "based solely on findings at the elbow." (R. 93.) Those impairments "shouldn't be subsumed or combined," Dr. Saunders cautioned. (R. 93.) They were "separate" with respect to relevant "findings on physical examination." (R. 93.)

"They are completely separate pathologies," Dr. Saunders continued in his deposition testimony. (R. 94.) "The elbow problem [was]

a rupture of biceps at the elbow and the shoulder pathology was impingement at the shoulder, and they're not in any way related." (R. 94.) The impairments were "separate and unrelated." (R. 95.)

The Workers' Compensation Law Judge credited the testimony and report of Dr. Saunders and ruled that claimant was entitled to a 27.5% schedule loss of use award for the left arm. (R. 157-158.)

C. The Workers' Compensation Board's Determination on Administrative Appeal.

On administrative appeal, the Workers' Compensation Board modified that ruling. Like the Workers' Compensation Law Judge, the Board found Dr. Saunders credible and agreed that claimant's 2014 shoulder injury caused him a 27.5% loss of use of the left arm. (R. 9.) However, the Board indicated in its decision that it was bound by Third Department precedent to subtract the 22.5% loss of use of the left arm that was found to have resulted from the 2007 elbow injury. (R. 7-9.)

The chief Third Department case the Board identified in this regard was *Matter of Genduso v. New York City Dept. of Education*, 164 A.D.3d 1509 (3d Dept. 2018). (R. 7-8.) In that case, Genduso sought a schedule loss of use award for the right leg based upon a 2013 work-related injury to his right knee. 164 A.D.3d at 1509. The Board determined that

Genduso had incurred 40% loss of use of the right leg. *Id.* However, the Board noted that Genduso had previously received schedule loss of use awards for the right leg based upon prior injuries to his right knee and right ankle. *Id.* The Board subtracted those awards, ultimately issuing Genduso a 7.5% schedule loss of use award for the 2013 injury. *Id.* And the Third Department upheld this determination.

Schedule loss of use awards "are not given for particular injuries, but rather 'for the residual physical and functional impairments,'" the Third Department observed in reviewing Genduso's award. 164 A.D.3d at 1510 (quoting *Matter of Empara v. New Rochelle Sch. Dist.*, 130 A.D.3d 1127, 1129 (3d Dept. 2015)). "Consistent with this observation, neither the statute nor the Board's guidelines lists the ankle or the knee as body parts lending themselves to separate SLU awards." *Id.* "Rather, impairments to these extremities are encompassed by awards for the loss of use of the leg." *Id.*

From these observations, the Third Department in *Matter of Genduso* concluded: "Inasmuch as the [prior awards were] for the loss of use of his right leg, it was not improper for the Board to deduct [them]

from the 40% SLU award that it found applicable to [Genduso's] 2013 injury in arriving at the final SLU award of 7.5%." 164 A.D.3d at 1510.

Relying upon *Matter of Genduso*, the Board here subtracted from the 27.5% left-arm loss-of-use figure offered by Dr. Saunders in connection with claimant's 2014 injury to the left shoulder the 22.5% loss of use of the left arm found in connection with the award for claimant's 2007 injury to the left elbow. (R. 9.) The result was a 5% loss of use of the left arm. (R. 9.) The Board issued claimant a schedule loss of use award based upon that percentage. (R. 9.)

D. The Third Department's Decision Below

On judicial review, the Third Department affirmed the determination of the Workers' Compensation Board.

The Third Department began by reiterating the same general principles it had discussed in *Matter of Genduso* and subsequent cases. "An SLU award is compensation for the residual permanent physical and functional impairments of an extremity, not for the particular injury itself," the court noted. (R. 185 [quoting *Matter of Blair v. State Univ. of New York Syracuse Hosp.*, 184 A.D.3d 941, 942 (3d Dept. 2020)].) "Although more than one SLU award may be given for a loss of use of

more than one member or parts of one member, the SLU award is limited to the statutorily-enumerated members set forth in Workers' Compensation Law § 15(3)." (R. 185 [quoting *Matter of Kleban v. Central New York Psychiatric Ctr.*, 185 A.D.3d 1342, 1343 (3d Dept. 2020)].) "In this regard, to authorize separate SLU awards for a body member's subparts is not authorized by statute or the guidelines and would amount to a monetary windfall for a claimant that would compensate him or her beyond the degree of impairment actually sustained to the statutorily-enumerated body member." (R. 186 [quoting *Matter of Johnson v. City of New York*, 180 A.D.3d 1134, 1136-37 (3d Dept. 2020), *appeal pending*, No. APL 2020-155].)

Based upon these principles, and citing *Matter of Genduso* and its progeny, the Third Department held: "Insofar as the 22.5% SLU award for claimant's 2007 bicep tendon rupture and the 27.5% SLU award for the 201[4] left shoulder injury are both encompassed by awards for loss of use of the left arm, it was proper for the Board to deduct the 2007 SLU award from the 201[4] SLU award, resulting in a 5% SLU award." (R. 186.)

This Court granted leave to appeal. (R. 189.)

ARGUMENT

As its decision indicates, the Workers' Compensation Board ruled as it did here because it felt constrained to do so by Third Department precedent. This Court should clarify that while it is reasonable to presume that impairments caused by successive injuries to the same body member are cumulative, the Workers' Compensation Law does not make such a presumption irrebuttable in all cases. And on that understanding, the Court should vacate the Third Department's decision below and should remit the matter to that court, or to the Board directly, with instructions (i) to permit the Board to consider the medical evidence that the left-arm impairments caused by claimant's successive injuries are distinct, rather than cumulative, and (ii) to issue the schedule loss of use award the Board finds appropriate in light of such consideration.

A. The Third Department's Decision Reflects an Incorrect Understanding of the Workers' Compensation Law Regime for Schedule Loss of Use Awards.

The Third Department's decision below started out correctly. The decision accurately recited the facts of the case, including that the Board had credited evidence that the 2014 injury to claimant's left shoulder resulted in a 27.5% loss of use of the left arm. (R. 184-185.) The decision

then accurately recounted a number of black-letter principles of law governing schedule loss of use awards, such as the principle that "to authorize separate SLU awards for a body member's subparts is not authorized by statute or the [Workers' Compensation Board] guidelines and would amount to a monetary windfall for a claimant that would compensate him or her beyond the degree of impairment actually sustained to the statutorily-enumerated body member." (R. 186 [quoting *Matter of Johnson*, 180 A.D.3d at 1136-37].) However, the Third Department erred in concluding from these principles that, in determining the left-arm schedule loss of use award for the 2014 injury to claimant's left shoulder, the 22.5% loss of use of the left arm underlying the award issued for his 2007 injury to his left elbow necessarily had to be subtracted.

Schedule loss of use awards are made for disabilities "partial in character but permanent in quality." Workers' Compensation Law § 15(3). A schedule loss of use award is "intended to 'compensate for loss of earning power' caused by the permanent partial disability.'" *Matter of Estate of Youngjohn v. Berry Plastics Corp.*, 36 N.Y.3d 595, 600 (2021) (quoting *Matter of Marhoffer v. Marhoffer*, 220 N.Y. 543, 547 (1917)).

"The theory of the New York [Workers' Compensation] law is not indemnity for loss of a member or physical impairment as such but compensation for disability to work." *Matter of Marhoffer*, 220 N.Y. at 546. Accordingly, a schedule loss of use award is intended to serve "as a cushion against a future earning capacity at a time when the security and continuity of an ongoing employment may be gone." *Matter of Landgrebe v. County of Westchester*, 57 N.Y.2d 1, 10 (1982).

Section 15(7) of the Workers' Compensation Law addresses the issuance of schedule loss of use awards for body members that have incurred successive injuries. As particularly relevant here, the award for a later injury must be limited to "the compensation allowed for such [later] injury when considered by itself and not in conjunction with the previous disability," *i.e.*, the impairments caused by prior injuries. *Id.* § 15(7). That is, the new award must be limited to the additional loss of earning power caused by the injury at issue.

In light of these principles, when the impairment caused by the injury for which an employee seeks a schedule loss of use award *is* cumulative of the impairment caused by injuries that have been redressed via prior awards, the subtraction adjustment endorsed by the

Third Department must be performed. Otherwise, there will be a windfall. In the parlance of Workers' Compensation Law § 15(7), without the subtraction adjustment, the award will exceed "the compensation allowed for such [later] injury when considered by itself." Namely, the award will encompass a measure of double-recovery for loss of earning power that had already been redressed.

Moreover, it is reasonable to recognize a presumption that impairments caused by successive injuries to the same member are indeed cumulative. Such a presumption follows from the central importance of avoiding windfall awards, as noted above, as well as the foundational legal principle that "the claimant generally has the burden in the first instance of proving facts sufficient to support his or her claim for compensation," *Matter of Kigin v. State of New York Workers' Compensation Bd.*, 24 N.Y.3d 459, 468 (2014) (citing *Matter of Malacarne v. City of Yonkers Parking Auth.*, 41 N.Y.2d 189, 193 (1976)).

But Workers' Compensation Law § 15(7) does not make the presumption of cumulativity irrebuttable. When there is medical evidence that the impairments are not cumulative, the Board should be permitted to consider that evidence, and, if it finds the evidence credible

and persuasive, find that the injured employee has carried his or her burden of proving that the impairments are independent, and calculate the applicable loss-of-use percentage without any subtraction adjustment. In that instance, the percentage loss of use caused by the injury for which a scheduled loss of use award is being sought will itself be the proper determinant of "the compensation allowed for such injury when considered by itself." *See* Workers' Compensation Law § 15(7). As claimant observes (*see* Claimant Br. 23-24), if such evidence is accepted, then a subtraction adjustment would prevent the employee from being made whole.

Medical evidence of that type is present here. Dr. Saunders, claimant's medical expert, opined that claimant's 2014 injury constricted the range of motion in his left shoulder and resulted in a loss of use of the left arm of 27.5%. (R. 42.) This finding was "based solely on findings of the shoulder," Dr. Saunders explained. (R. 93.) By contrast, the 22.5% loss of use of the left arm that had been found in connection with the 2007 injury was "based solely on findings at the elbow." (R. 93.) Those impairments "shouldn't be subsumed or combined," Dr. Saunders cautioned. (R. 93.) They were "completely separate." (R. 94.) "The elbow

problem [was] a rupture of biceps at the elbow and the shoulder pathology was impingement at the shoulder, and *they're not in any way related.*" (R. 94 [emphasis added].)

B. The Proper Remedy Is Vacatur and Remittal for Further Board Proceedings.

Heeding what it took to be the Third Department's directive in *Matter of Genduso*, the Board did not consider the medical evidence that the left-arm impairment caused by claimant's 2014 injury is distinct from, and not cumulative of, the left-arm impairment caused by his 2007 injury. The evidence thus remains unexamined by the Board to date. And it is the Board's prerogative to decide whether that evidence is credible, and, if credible, whether the evidence is sufficiently persuasive to justify a finding that, indeed, claimant has established that the respective left-arm impairments are distinct rather than cumulative. *See, e.g.*, *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990).

Accordingly, in light of the legal error in the Third Department's decision described above (*supra* pp. 13-18), the proper remedy is vacatur along with a remittal—either to that court or to the Board directly—with instructions permitting the Board to consider the aforementioned

medical evidence and to issue the schedule loss of use award it finds warranted in light of such consideration.

CONCLUSION

The decision of the Third Department below should be vacated. The matter should be remitted with instructions to allow the Board to consider the evidence that the left-arm impairments caused by claimant's successive injuries are distinct, rather than cumulative, and to issue the schedule loss of use award the Board finds appropriate following such consideration.

November 15, 2021

Respectfully submitted,

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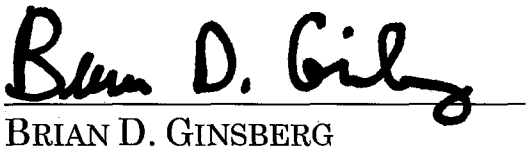
CERTIFICATE OF COMPLIANCE

I hereby certify that the body of the foregoing Brief for Respondent New York State Workers' Compensation Board contains 3,667 words and thus complies with the word limit set by 22 N.Y.C.R.R. § 500.13(c)(1).

November 15, 2021

Respectfully submitted,



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STATE OF NEW YORK
COUNTY OF ALBANY ss:
CITY OF ALBANY

WILLIAM SPORTMAN being duly sworn says:

I am over eighteen years of age and an employee in the office of the Attorney General of the State of New York, attorney for the **Respondent NYS Workers' Compensation Board**, herein.

On the **15th** day of **November, 2021** I served the annexed **Brief for Respondent New York State Workers' Compensation Board** on the attorneys named below, by depositing 1 copy thereof, properly enclosed in a sealed, postpaid wrapper, in the letter box of the Capitol Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Postal Service, directed to the said attorneys at the addresses within the State respectively theretofore designated by them for that purpose as follows:

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