Appellate Division Docket No. 531142
Workers' Compensation Board No. G091 9639

Court of Appeals

of the

State of New York

In the Matter of the Claim of

JOSEPH D. LIUNI,

Claimant-Appellant,

– against –

GANDER MOUNTAIN,

Employer-Respondent,

NEW HAMPSHIRE INSURANCE CO.,

Carrier-Respondent,

BROADSPIRE SERVICES, INC.,

Third-Party Claim Administrator-Respondent,

– and –

WORKERS' COMPENSATION BOARD,

Respondent.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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December 17, 2020

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the Claim Under the
Workers' Compensation Law of

JOSEPH D. LIUNI,

Claimant-Appellant,

-against-

GANDER MOUTAIN,

Employer-Respondent, and

NEW HAMPSHIRE INSURANCE CO.,

Carrier-Respondent, and

BROADSPIRE SERVICES, INC.,

Third-Party Claim Administrator-Respondent,

-and-

WORKERS' COMPENSATION BOARD,

Respondent.

AFFIRMATION IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

W.C.B. No.: G091 9639
Docket: 531142

MARIAH W. DOLCE, an attorney admitted to practice law in the Courts of the State of New York, affirms the following under penalties of perjury:

1. I am an associate in the law firm of Walsh and Hacker, appearing of counsel to the employer, Gander Mountain, and its workers' compensation carrier, New

Hampshire Insurance Co., and its third-party claim administrator, Broadspire Services, Inc., (hereinafter, collectively, "the Respondent" or "the carrier").

2. This affirmation is submitted in opposition to the Notice of Motion for Leave to Appeal to the Court of Appeals dated December 1, 2020 (hereinafter, "the Motion") made on behalf of Joseph D. Liuni (hereinafter, " the Appellant" or "the claimant"), pursuant to CPLR § 5602, Rules of the Court of Appeals (22 NYCRR) §§ 500.21 and 500.22, for leave to appeal to the Court of Appeals (hereinafter, "this Court") from the Memorandum and Order of the New York State Supreme Court Appellate Division, Third Judicial Department, decided and entered on November 13, 2020 (hereinafter, "the decision"), which was served by Notice of Entry dated December 1, 2020.

3. I am sufficiently familiar with the facts and circumstances involving the above-captioned matter to make this affirmation and submit that the Appellant's Motion should be denied in all respects.

APPEAL HISTORY

4. The Appellant, Joseph D. Liuni, submits a Notice of Motion for Leave to the Court of Appeals from a decision by the New York State Supreme Court Appellate Division, Third Judicial Department, affirming a Memorandum of Board Panel Decision by the New York State Workers' Compensation Board ("the Board") filed on January 30, 2020. This decision found that the claimant's injuries to his left bicep and left shoulder are not eligible for separate schedule loss of use ("SLU") awards because they are both encompassed by SLU awards for the left arm, pursuant to Workers' Compensation Law § 15 (3), and thus, it was properly held that the 27.5% SLU for the impairment of the left arm in the case at hand must be reduced by a prior 22.5% SLU

awarded for the same listed body member, resulting in a 5% increase in SLU award for the left arm.

5. The facts underlying this matter arise out of two separate workers' compensation claims involving injuries to the claimant's left arm. The first work-related injury involved the left elbow sustained by the claimant on December 14, 2007 that is the subject of Workers' Compensation Board Number ("WCB No.") 5080 2880. The claimant was awarded a 22.5% SLU of the left arm by Stipulation of the parties involved in that claim. Subsequently, the claimant sustained a consequential injury to the left shoulder as a result of an injury sustained on September 2, 2014 that is the subject of WCB No.: G091 9639 and is the primary subject of the matter before this Court. The claimant was awarded a 27.5% increase in SLU of the left arm based on the legal determination by the Workers' Compensation Law Judge ("WCLJ") that the claimant had an overall 50% SLU of the left arm as a result of the 2014 injury, inclusive of the previous 22.5% SLU awarded for the 2007 injury to the left arm.

6. The carrier appealed the WCLJ's determination to the Workers' Compensation Board on October 30, 2019. By Memorandum of Board Panel Decision filed on January 30, 2020, the WCLJ's determination was modified to find the claimant has a 27.5% SLU of the left arm as a result of the 2014 injury. The Board made an additional finding that pursuant to the Appellate Division, Third Department, decision of Matter of Genduso v. New York City Dept. of Educ., 164 A.D.3d 1509 (2018), the SLU award is reduced by the prior 22.5% SLU awarded for the 2007 injury to the arm, and thus, the claimant has a 5% increase in loss of use of the arm as a result of the 2014 injury.

7. The Appellant appealed the Board Panel Decision to the Appellate Division, Third Department, on or about February 3, 2020. The Appellate Division affirmed the Board Panel Decision by Memorandum and Order of the New York State Supreme Court Appellate Division, Third Judicial Department, decided and entered on November 13, 2020. The Appellate Division highlighted that "[a]lthough 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 statutory-enumerated members set forth in Workers' Compensation Law § 15 (3) (Matter of Kleban v. Central NY Psychiatric Ctr., 185 A.D.3d 1342, 1343 [2020], quoting Workers' Compensation law § 15 [3] [u])." It was found proper for the Board to deduct the 2007 SLU award from the 2016 SLU award, resulting in a 5% SLU award to the claimant as both injuries are encompassed by awards for loss of use of the left arm.

8. The Appellant has now filed a Notice of Motion for Leave to Appeal to the Court of Appeals.

ARGUMENT IN OPPOSITION TO LEAVE FOR APPEAL

THE APPELLANT HAS FAILED TO PRESENT A LEAVEWORTHY ARGUMENT FOR REVIEW BY THIS COURT.

9. Pursuant to the Rules of the Courts of Appeals (22 NYCRR) § 500.22 (b) (4), the Appellant must show that the issues to be addressed by this Court are "novel or of public importance, present a conflict with prior decisions of this court, or involve a conflict among the departments of the Appellate Division." We respectfully submit the arguments set forth by the Appellant are not leaveworthy to justify the valuable time and judicial resources of this Court.

A. The question presented does not involve any conflict with a prior decision of this Court.

10. The Appellant states in the Motion for Leave to Appeal that the issue warrants review by this Court "as it is a matter of substantial and statewide public importance that is continuously affecting a great many of New York's injured workers. Moreover, the decisions of the lower courts appear to conflict with a previous decision of this Court." However, the Appellant fails to mention any discrepancy in the interpretation that a loss of use of more than one part of a statutory-enumerated body member is encompassed in an SLU award for loss of use of that member pursuant to Workers' Compensation Law § 15 (3) (see also New York State Workers' Compensation Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity [2018]). There is also no confusion involving the determination that an "SLU award is compensation for the residual permanent physical and function impairments of an extremity, not the particular injury itself" (Matter of Blair v. SUNY Syracuse Hospt., 184 A.D.3d 941, 942 [2020]; quoting New York State Workers' Compensation Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity § 1.5 at 8 [2018]). The Appellant, instead, relies upon a factually distinct decision by this Court in a poor effort to manipulate the plain language of the statute and guidelines to read that separate SLU awards for the subparts of a statutory-enumerated body member is permitted.

11. The Appellant mistakenly relies upon the determination by this Court in Matter of Zimmerman v. Akron Falls Park-Erie County, 29 N.Y.2d 815 (1971), allow for separate and distinct injuries to different parts of the same extremity for a total SLU award in excess of the statutory-enumerated weeks for the injured extremity (see WCL §

15 [3]). However, that case involved injuries to different injured extremities as a result of separate and distinct accidents, (i.e., 1924 amputation of the left hand to 6 inches below the elbow resulting in loss of use of the hand versus 1967 injury to the left shoulder resulting in loss of use of the arm). The factually distinction was highlighted by the Appellate Division in their determination of Matter of Deck v. Dorr, 150 A.D.3d 1597 (2017), where it was affirmed that the claimant sustained distinct injuries to his four fingers and to his thumb, which had differing impacts to the functionality of his hand, thereby permitting separate SLU [measurements and] awards for the loss of his fingers and the loss of his thumb (see also Matter of Bell v. Glens Falls Ready Mix Co., Inc., 169 A.D.3d 1145 [2019]). The present case does not involve injuries to separately listed body members as in Zimmerman, 29 N.Y.2d 815, or Deck, 150 A.D.3d 1597, but to subparts of the same extremity injured at different times and encompassed by an award for loss of use of the arm per the statute and guidelines (WCL § 15 [3]; New York State Workers' Compensation Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity [2018]).

B. The question presented does not involving an issue of "public importance" within the meaning of this Court's rules.

12. To grant leave to appeal to the Appellant would be to entertain the argument that a separate SLU awards for a body member's subparts is permitted by the plain language of the statute or guidelines when all it does is result in a monetary windfall for a claimant [and his legal representation] that would compensate him [or her] beyond the degree of physical and function impairments of an extremity actually sustained (Matter of Johnson v. City of New York, 180 A.D.3d 1134 [2020]).

13. There is not a single case cited by the Appellant that deviates from the well-established procedure for assessing, determining and awarding schedule loss of use of a listed body member. So, to assert that the application of this procedure "serves to harm those the law was primarily intended to protect" should be an issue directed towards the Legislature that enacted the governing laws of Workers' Compensation or the administrative agency that adopted the guidelines that it wishes to deviate from.

14. The citation to the Legislative intention incorporated into the rationale offered by the Appellate Division in its determination of Matter of Green v. Dutchess County Boces, 183 A.D.3d 23 (2020), has absolutely no relevance to the "issue" before this Court. The issue in that case addressed the effect of an entirely different category of awards for residual permanent impairments from a workplace injury or illness that are not covered by an SLU award—non-schedule awards (classification) (compare WCL §§ 15 [3] with [4]). The issue before this Court raises involves the amount of a schedule award [and "monetary windfall" (Matter of Johnson, 180 A.D.3d 1134)] for loss of a statutory-enumerated body member (see also New York State Workers' Compensation Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity [2018]). "The amount of an SLU award is based upon the body member that was injured and the degree of impairment sustained; it is not allocable to any particular period of disability and is independent of any time that the claimant might lose from work" (Matter of Taher v. Yiota Taxi, Inc., 162 A.D.3d 1288, 1289 [2018]). Neither the statue nor the guidelines list the elbow or the shoulder as body parts lending themselves to separate SLU awards as are the facts in this case (see Genduso, 164 A.D.3d 1509). Rather, permanent

impairments to these members are encompassed by schedule awards for the loss of use of the arm.

RELIEF SOUGHT

WHEREFORE, the Respondent respectfully requests that this Court deny the Appellant's Motion for Leave to the Court of Appeals in its entirety with prejudice, and for such relief as this Court deems just and proper.

DATED: December 17, 2020

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