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December 21, 2020

Hon. John P. Asiello
Clerk of the Court
New York State Court of Appeals
Court of Appeals Hall
Eagle Street
Albany, New York 12207

Re: *Matter of Liuni v. Gander Mountain*
Mot. No. 2020-911

Dear Mr. Asiello:

This office represents respondent New York State Workers' Compensation Board ("the Board") in the above referenced appeal. Please accept this letter as the Board's response to petitioner's motion for leave to appeal. While we submit that the Third Department correctly resolved the legal question at issue here, and thus this Court need not review its decision, this Court has already granted leave to appeal in another case involving the same legal question. *See Matter of Johnson v. City of N.Y.*, 180 A.D.3d 1134 (3rd Dept. 2020), *lv. granted*, 35 N.Y.3d 915 (October 20, 2020). Accordingly,

we respectfully suggest that the Court should delay further action on this motion until after *Johnson* is resolved.

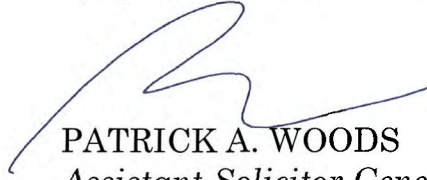
More specifically, the Board agrees with, and joins, the arguments of respondents Gander Mountain, New Hampshire Insurance Co., and Broadspire Services, Inc., that leave to appeal is unwarranted on the merits of this case. The Third Department's decision was both correct in all respects and in harmony with other decisions of this Court and the Third Department. In short, the Board does not err when it reduces the degree of loss of use of a statutorily enumerated body part that resulted from a new injury by the degree of loss of use of the same statutorily enumerated body part that was determined as part of a prior schedule loss of use award. *See generally* WCL § 15(3)(a)-(s); *see also, e.g., Matter of Genduso v. N.Y.C. Dep't of Educ.*, 164 A.D.3d 1509 (3rd Dep't 2018).

This Court has, however, already granted leave to appeal in *Matter of Johnson v. City of N.Y.*, 180 A.D.3d 1134 (3rd Dept. 2020) *lv. granted*, 35 N.Y.3d 915 (October 20, 2020), which involves the same legal issue. As *Matter of Johnson* is significantly ahead of this case on the Court's docket, judicial economy would be best served by staying decision on this motion rather than granting leave in this case and ordering duplicative briefing on an identical issue.

Accordingly, the Board respectfully requests that the Court delay decision on the motion for leave to appeal in this case until it resolves the appeal in

Johnson. Alternatively, if the Court grants leave to appeal in this case during the pendency of *Matter of Johnson*, the Board respectfully requests that any additional proceedings and filing deadlines in this appeal be stayed until after *Matter of Johnson* is resolved.

Respectfully submitted,



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cc:

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