

LETITIA JAMES
ATTORNEY GENERAL

BARBARA D. UNDERWOOD SOLICITOR GENERAL DIVISION OF APPEALS & OPINIONS

Telephone (518) 776-2020

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.

51 Kmy

Respectfully submitted,

PATRICK A. WOODS
Assistant Solicitor General

cc:

Mariah W. Dolce, Esq. Walsh & Hacker 18 Corporate Woods Blvd. Albany, New York 12211

Jeff S. Teff, Esq. Kirk & Teff, LLP 10 Westbrook Lane PO Box 4466 Kingston, New York 12402

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)	
) ss:	
COUNTY OF ALBANY)	
William Sportman	, being duly sworn, deposes and says:

I am over eighteen years of age and an employee in the office of LETITIA JAMES, Attorney General of the State of New York, attorney for Respondent(s) herein.

On the Asymptotic day of December, 2020, I served the annexed Letter upon the attorneys named below by depositing a true copy thereof, properly enclosed in a sealed, postpaid wrapper, in a 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 Post Office Department, directed to the said attorneys at the address within the State and Respectively designated by him for that purpose as follows:

Mariah W. Dolce, Esq. Walsh & Hacker 18 Corporate Woods Blvd. Albany, New York 12211

Jeff S. Teff, Esq. Kirk & Teff, LLP 10 Westbrook Lane PO Box 4466 Kingston, New York 12402

Sworn to before me this

 $\frac{2}{2}$ day of December, 2020.

NOTARY PUBIL

CRISTAL R. GAZELONE
Notary Public, Stale of New York
Rog. No. 0 (CA6255001
Qualified in Reusschler County
Commission Expires April 2, 20