To be Argued by: DANIEL A. BRONK
Time Requested: 10 minutes

COURT OF APPEALS

of the

STATE OF NEW YORK

In the Matter of the Claim of

THOMAS JOHNSON,

Claimant-Appellant,

-against-

CITY OF NEW YORK,

Employer-Respondent,

-and-

WORKERS' COMPENSATION BOARD,

Respondent.

APL-2020-00155

BRIEF FOR *AMICUS CURIAE* INJURED WORKERS' BAR ASSOCIATION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice for the Court of Appeals of the State of New York, the Amicus Curiae certify the following:

1. Amicus Injured Workers' Bar Association is a nonprofit organization incorporated pursuant to Section 402 of the New York Not-For-Profit Corporation Law as a Type A Corporation under Section 201 of the New York Not-For-Profit Corporation Law.
2. The Amicus entity does not have any parents, subsidiaries, or affiliates.

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QUESTION PRESENTED

Did the Appellate Division, Third Department err as a matter of law in affirming the Workers' Compensation Board's determination that the Claimant's schedule loss of use awards of the legs for permanent injuries to his knees in this case must be reduced by separate and distinct permanent injuries to his hips?

The Injured Workers' Bar Association respectfully submit that the answer is: "Yes."

INTEREST OF AMICUS CURIAE

The Injured Workers' Bar Association ("IWBA") is a New York State-wide organization comprised of attorneys who concentrate their practice in the representation of injured workers. Many of its members practice exclusively in the area of Workers' Compensation Law helping injured workers and their families obtain the legal benefits that they are entitled to under the law for their work-related injuries. The IWBA also endeavors to protect the rights and interests of New York's injured workers by fostering legal education, addressing vital legal developments, advocating a policy agenda, engaging the administrative policy process, and surveying relevant legislative activity.

The experience and research of the IWBA relative to these purposes place it in a unique position to offer to this Court a broader perspective on the legal issues involved in this case than the positions of the individual parties might otherwise permit.

The matter presented is of great importance to injured workers of this State. Given the IWBA's longstanding experience and interest in protecting the rights of New York's injured workers and their families, it respectfully submits this brief with the hope that it may prove of some assistance to this Honorable Court.

PRELIMINARY STATEMENT

This brief is submitted on behalf of the Injured Workers Bar Association ("IWBA") as amicus curiae. A motion for amicus curiae status is submitted herewith.

This appeal arises out of a decision of the Appellate Division, Third Judicial Department, dated February 6, 2020.[1] The Appellate Division affirmed a decision of the New York State Workers' Compensation Board.

This case presents a straightforward question involving statutory interpretation and prior case precedent. Amicus curiae challenge the interpretation of Workers' Compensation Law (or "WCL") § 15 (3) and (7) applied by the Appellate Division *sub judice* to deprive Claimant of the compensation award to which he is entitled under the WCL due to separate and distinct injuries to both knees. The Appellate Division has misinterpreted WCL §15(3) and (7) in a manner that is:

1. Contrary to the plain language of the statute;
2. Contrary to established case precedent;
3. Contrary to the Workers' Compensation Board's own permanency guidelines;

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[1] The Appellate Division's decision herein is reported at *Matter of Johnson v. City of N.Y.*, 180 A.D.3d 1134 (3rd Dept. 2020).

4. Unfair to injured workers because it creates disparate results between workers with similar injuries; and
5. Contrary to the Board's established practice of taking judicial notice of prior schedule loss of use awards.

The Appellate Division's ruling should be reversed because it is erroneous as a matter of law and is contrary to established case precedent.

JURISDICTION

This Court has subject matter jurisdiction over the issues raised in this appeal. The decision and order of the Appellate Division, Third Judicial Department was a final determination of the issues in this case. This Court has granted leave to appeal pursuant to CPLR 5602(a)(1)(i).

PROCEDURAL HISTORY AND FACTS

On February 15, 2006, Claimant-Appellant Thomas Johnson ("Claimant") was involved in a serious work-related accident. At that time, while working as a patient care technician for the City of New York ("City"), Mr. Johnson fell while getting off a bus and landed on his knees, injuring both knees. R. 44.[2] The Workers' Compensation Board ("Board") established Mr. Johnson's first workers'

[2] References are to the Record on Appeal herein.

compensation case, WCB #0071 0370, for both knees as a result of the 2006 work-related accident. R. 9. As a result of the injuries he suffered in the 2006 accident, Mr. Johnson underwent a right knee arthroscopy in April 2008 and a left total knee replacement in April 2016. R. 9-10.

On November 12, 2009, the Mr. Johnson was involved in a second work-related accident while employed by the City. The Board established the second case, WCB #G0221519, for injuries to Mr. Johnson's neck, back, right shoulder and both hips. R. 10. On January 12, 2016, The Board found that several of the injuries sustained by Mr. Johnson in his 2009 accident were permanent and awarded Mr. Johnson scheduled losses of use as follows: 45.00% schedule loss of use of the right arm; 50.00% schedule loss of use of left leg (based on the permanent disability in his left hip); and 52.50% schedule loss of use of the right leg (based on the permanent disability in his right hip) . R. 10.

Subsequently, the Board awarded Mr. Johnson schedule loss of use awards for both legs based on the permanent disability that he has in both knees due to his 2006 accident. It is those awards that are at issue in this Appeal.

It is important to note that Mr. Johnson's permanent injuries to his legs arising out of first (2006) and second (2009) work related accidents are <u>not</u> overlapping. They involve separate and discrete permanent injuries to the knees versus the hips.

At issue in this appeal are Mr. Johnson's schedule loss of use awards attributable to the permanent knee injuries he suffered in the 2006 accident. The parties submitted permanency evidence to the Board in this case with the filing of a May 11, 2017 C-4.3 form[3] from treating physician Dr. Long, and a December 11, 2017 IME Report by Dr. Parisien who evaluated Mr. Johnson on behalf of the City. R. 10.

On May 9, 2018, Workers' Compensation Law Judge ("WCLJ") Schwartz submitted a Reserved Decision finding that Mr. Johnson's permanency determination in the present case would not be limited to a schedule loss of use of 100% because Mr. Johnson's losses of use to his legs in the 2009 case had been based on permanent injuries to his hips, whereas the current schedule of loss of use awards are based on permanent injuries to his knees. Judge Schwartz noted that the 2006 knee injuries were not addressed in the schedule loss of use awards in the 2009 case. R. 10, 134, 138-139. Neither party appealed from the May 9, 2018 Reserve Decision. The Board directed the parties to take the depositions of Drs. Long and Parisien on the issue of the schedule loss of use awards attributable to Mr. Johnson's knee injuries. R. 139.

After this discovery was completed, Law Judge Schwartz found she credited the testimony of Mr. Johnson's treating physician, Dr. Long, and awarded Mr.

[3] Doctor's Report of MMI/Permanency Impairment.

Johnson an 80% schedule loss of use to the right leg (based solely on the right knee), and 50% schedule loss of use to the left leg (based solely on the left knee). R. 214. However, the Law Judge held that, based on a recent decision from the Third Department in *Matter of Genduso v. N.Y.C. Dept. of Educ.*, 164 A.D.3d 1509 (3rd Dept. 2018), she would deduct from the schedule loss of use awards in this file for the permanent injuries to Mr. Johnson's knees the prior awards of 50% schedule loss of use of the left leg, and 52.5% schedule loss of use of the right leg that had been previously awarded by the Board as a result of Mr. Johnson's permanent hip injuries in the 2009 case. R. 214.

Mr. Johnson appealed, and the Board affirmed the Law Judge's decision on March 29, 2019. Mr. Johnson appealed the Board's decision to the Appellate Division, Third Department. In an opinion filed February 6, 2020 the Appellate Division affirmed the Board's decision. R. 3-7. On October 20, 2020, this Court granted Mr. Johnson's Motion for Leave to Appeal the decision of the Appellate Division. R. 1.

ARGUMENT

POINT I: THE APPELLATE DIVISION'S REDUCTION OF THE SCHEDULE LOSS OF USE AWARDS ATTRIBUTABLE TO PERMANENT INJURIES TO MR. JOHNSON'S KNEES FOR SEPARATE AND DISTINCT INJURIES TO MR. JOHNSON'S HIPS IS WITHOUT STATUTORY OR REGULATORY AUTHORITY.

Nothing in the Workers' Compensation Law requires a deduction from a schedule loss of use award due to a prior schedule loss of use award for a permanent disability sustained in a different portion of the same limb.

In interpreting the statutory language of the WCL, it must be remembered that this Court has stated that the Workers' Compensation Law "*was designed to provide economic support efficiently to the employee injured on the job . . . and to place the cost of such support upon the employer . . .. As a remedial statute serving humanitarian purposes, the Workers' Compensation Law should be liberally construed.*" Burns vs. Robert Miller Construction, Inc., 55 N.Y.2d 501 (1982).

Workers' Compensation Law §15(3) provides for compensation for permanent partial disabilities to the extremities, including the leg. The statute provides that "*in case of disability partial in character but permanent in quality . . . compensation . . . shall be paid to the employee for the period named in this subdivision.*" Workers' Compensation Law §15(3)(b) provides for a schedule of two hundred eighty-eight weeks for each leg injury.

Workers' Compensation Law §15(3)(s) expressly provides for partial loss or partial loss of use of any member included in Workers' Compensation Law 15(3) when it states: "*Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.*"

This Court has affirmed that an injured worker may receive compensation for injuries less than a complete loss of the listed limb or a complete loss of use of the listed limb. Mancini vs Services, 32 N.Y.3d 521 (2018).

Workers' Compensation Law §15(3)(u) expressly provides for schedule loss of use awards for injuries to more than one member listed in Workers' Compensation Law §15(3)(a). It reads: *"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 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).

The Legislature's plain language evinces an intent that these statutory provisions create a formula in which compensation for a schedule loss of use "*shall be paid*" for either the "*loss or loss of use*" of a limb regardless of whether the injury

affects the entire limb or only "*part thereof.*" WCL §15(3), WCL §15(3)(s), and WCL §15(3)(u).

The percentage loss of use of the limb is applied to the statutory schedule to determine the number of weeks payable at the applicable total disability rate. The award is payable in one lump sum minus the amount previously paid in indemnity benefits.

Nothing in the WCL §15(3) provides for a reduction of any schedule loss of use for an enumerated body part due to a prior or subsequent injury to the same body part or part thereof.

WCL §15(3)(b) lists the leg as a scheduled member. It does not define what constitutes a leg injury. Instead, the Legislature authorized the Board to promulgate permanency guidelines pursuant to WCL §15(3)(x). The Board has adopted permanency guidelines for the leg with separate and distinct criteria for determining a schedule loss of use for knee or hip that result in permanent deficits to the knee or hip. It has been both Board practice and established case precedent to calculate a schedule loss of use of the leg within a single case by adding the schedule loss of use values provided by the permanency guidelines for the knee and hip to calculate an overall cumulative value for the leg. Nothing in the Board's permanency guidelines requires a deduction of the schedule loss of use attributable to the hip from the knee or vice versa.

This is not to say that an injured worker can be compensated twice for the same deficit. If two accidents affect the same part of an extremity, then the compensation for the second accident would be limited to any increase in the prior deficit due to the second accident (i.e. knee for knee or hip for hip). However, nothing in the statue or the Board's Permanency Guidelines provide any authority for the deduction of a different deficit in a different part of the same limb (i.e. reducing a schedule loss of use of the leg based on deficits in the knee by a prior schedule loss of use of the leg for deficits in the hip).

Accordingly, the Appellate Division erred when it erroneously interpreted WCL §15(7) as requiring a deduction of any prior schedule loss of use to an enumerated body part or limb from the schedule loss of use for a separate and distinct injury to a different part of the same limb resulting in a permanent deficit.

The Appellate Division in this case stated: "Inasmuch as the 50% SLU award and the 52.50% SLU award made with regard to claimant's 2009 injury were for the loss of use and impairment of his left and right legs, respectively, it was not improper for the Board to deduct those percentages from the subsequent 80% SLU award and 40% SLU award made for the 2006 injury and resulting impairment to claimant's left and right legs, respectively (see Workers' Compensation Law § 15 [7])." *Matter of Johnson v. City of N.Y.,* 180 A.D.3d 1134, 1137 (App. Div. 3rd Dept. 2020) (emphasis added). The Appellate Division relied on Workers' Compensation Law

§ 15 (7), and, secondarily, on Workers' Compensation Law § 15 (3) to affirm the Board's reduction of Claimant's schedule loss of use (or "SLU") award for his 2006 injury by the amount of the schedule loss of use award for his 2009 injury. Without this reduction, the Appellate Division maintained, it would amount to a "monetary windfall" for the claimant that would compensate him beyond the degree of impairment actually sustained to the statutorily-enumerated body member. R. 6. However, an examination of these two WCL subsections shows they do not cause any such windfall but, on the contrary, the plain statutory language, legislative intent and precedent call for a compensation award for the full loss of Claimant's 2006 knee injury.

WCL §15 (7), states as follows:

> 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 except as hereinafter provided in subdivision eight of this section."

WCL §15 (7) (emphasis added).

WCL §15 (7) expressly states that an injured worker is not precluded from recovering for a later injury. Rather, the recovery for any such subsequent injury is, quite logically, limited to whatever deficits or disability are attributable to that new injury.

For example, if an injured worker had a prior left elbow injury resulting in a laxity of the elbow with hyperextension deficit, he/she may receive a 10% schedule loss of use of the left arm. 2018 Workers' Compensation Guidelines for Determining Impairment, Chapter 4.5(1), pg. 27. If the same worker later injured the same arm at the shoulder and was left with a range of motion deficit in the shoulder of abduction to ninety degrees, the Board's permanency guidelines instruct that a 40% schedule loss of use is to be awarded. 2018 Workers' Compensation Guidelines for Determining Impairment, Chapter 5, Table 5.4(a). The prior practice of the Board and the established case precedent has been to award an overall 50% schedule loss of use of the left arm in the second case based on the cumulative schedule loss of

use awards to both the elbow and shoulder with the Board permitting the carrier in the shoulder case to deduct or offset from the new overall 50% schedule loss of use the prior 10% schedule loss of use awarded for the left elbow. This practice comports with WCL §15 (7) because the carrier in the left shoulder case does not pay compensation for the "later injury in excess of the compensation allowed for such injury when considered by itself." WCL §15 (7)(emphasis added).

The Appellate Division's error is in not awarding a cumulative schedule loss of use for the separate and distinct injuries to different parts of the same member/limb and then deducting the prior schedule loss of use. The Appellate Division's error arises when it fails to add the cumulative schedule loss of use awards for separate and distinct injuries to different parts of the same member/limb for an overall schedule loss of use based on the combined functional deficits to the injured member/limb. It compounds that error by instructing a deduction from the second schedule loss of use award for the prior schedule loss of use award thereby depriving the injured worker of some or all the compensation provided under the statute for the permanent injury caused by the second injury to the same limb. Using the example above, the Appellate Division would deduct the prior 10% schedule loss of use for the permanent injury to the injured worker's left elbow from the 40% schedule loss of use for the permanent injury to the left shoulder awarding only a

30% schedule loss of use. The injured worker would receive only part of the overall award authorized under the statute for the permanent left shoulder injury.

If the same injuries had occurred in the opposite chronological order or if the Board addressed permanency in the opposite order, application of the Appellate Division's holding would deprive the injured worker of any schedule loss of use award whatsoever for the permanent injury to the left elbow (10% SLU – 40% SLU = 0% SLU).

Of course, if the later schedule loss of use was based on an injury to the same part of the same limb and the same deficits, the deficits related to the subsequent injury would be subtracted when calculating the overall schedule in order to avoid a duplicative award, consistent with WCL §15(7).

Neither WCL §15(3) or (7) provide statutory authority for the Appellate Division's deduction of a prior schedule loss of use award for a separate and distinct injury to a different part of the same limb resulting in a permanent deficit.

POINT II: THE APPELLATE DIVISION'S REDUCTION OF THE SCHEDULE LOSS OF USE AWARDS ATTRIBUTABLE TO PERMANENT INJURIES TO MR. JOHNSON'S KNEES FOR SEPARATE AND DISTINCT INJURIES TO MR. JOHNSON'S HIPS IS CONTRARY TO ESTABLISHED CASE PRECEDENT.

This Court has previously ruled that an injured worker can receive a schedule loss of use that incorporates two separate and distinct injuries to the same body part

when both result in permanent disability (deficits) to different parts of the same limb. Zimmerman Akron Falls Park--County of Erie, 29 N.Y.2d 815, 277 N.E.2d 668, 327 N.Y.S.2d 652 (1971). In Zimmerman, the injured worker had suffered a prior work-related injury to the left arm resulting in a partial amputation of the left arm at the forearm and was awarded an 80% schedule loss of use by the Board. The first injury did not involve any injury to the left shoulder. After the first injury, he was successfully using a prosthesis on his lower left arm. Later, he sustained a second, separate and distinct work-related injury to the left shoulder and the Board awarded a 50% schedule loss of use attributable solely to the left shoulder. On appeal, the Appellate Division attempted to deduct the prior schedule loss of use due to the amputation at the left forearm from the permanent injury to the left shoulder arising out of the later work-related accident. The dissenters at the Appellate Division stated:

> *The record clearly indicates that the award made to the 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. The injury here is the loss of use of only one member, an arm, and compensation should be awarded for that loss. After the 1967 accident claimant was more seriously handicapped than he had been prior to that accident, and*

such injury constituted a separate and distinct injury and should be so regarded in awarding benefits.

Zimmerman, 35 A.D.2d 1030, 1031 (3d Dept. 1970) *rev.* 29 N.Y.2d 815 (1971).

This Court stated: "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.'" Id.. This Court reversed and awarded the 50% schedule loss of use of the left arm based on the separate and distinct injury to the left shoulder.

In Bazzano vs. John Ryan & Sons, the Appellate Division held that the claimant's injury in 1956 resulting in a 90% schedule loss of use of the left hand did not include any defects in the small or ring finger thereby permitting an additional 27 ½% schedule loss of use of the left hand based on a 1973 work injury resulting in the amputation of the left small and ring finger. 62 A.D.2d 260 (3d Dept. 1978). The Third Department cited to this Court's decision in Zimmerman in support of its ruling.

In Pellegrino vs. Textile Prints Corp., the Appellate Division held that the claimant's injury in 1966 resulting in a 20% schedule loss of use of the right arm was separate and distinct from the 1979 injuries to the claimant's right hand and

lower right arm thereby permitting a 90% schedule loss of use of the right arm solely due to the 1979 injury. 81 A.D.2d 723 (3d Dept. 1981). The Appellate Division stated that:

> *[t]he resultant effect of the instant injury upon the entire arm justified the award for loss of the arm. Medical evidence in the record indicates that the prior injury was different from the instant injury. The medical reports show that the 1968 injury to the hand was superimposed upon the prior injury and resulted in a greater disability to the entire arm.*

Id., at 724 (emphasis added). The Appellate Division cited to this Court's ruling in Zimmerman and the Appellate Division's prior ruling in Bazzano as legal authority for its ruling.

In this case, the Appellate Division's ruling contravenes prior case precedent from this Court in Zimmerman and the Appellate Division's own prior rulings in Bazzano and Pellegrino that an injured worker can receive a schedule loss of use for two separate and distinct injuries to the same body part that both result in permanent deficits to different parts of the same limb. Moreover, it ignores the overall greater disability caused by two injuries in combination.

POINT III: THE APPELLATE DIVISION'S REDUCTION OF THE SCHEDULE LOSS OF USE AWARDS ATTRIBUTABLE TO PERMANENT INJURIES TO MR. JOHNSON'S KNEES FOR SEPARATE AND DISTINCT INJURIES TO MR. JOHNSON'S HIPS IS CONTRARY TO THE BOARD'S PERMANENCY GUIDELINES.

The Legislature authorized the Board to promulgate permanency guidelines pursuant to WCL §15(3)(x). The Board has issued three different guidelines that address permanency in the extremities with a schedule loss of use. In 1996, the Board issued the State of New York Workers' Compensation Board Medical Guidelines. [4] In 2012, the Board issued the New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity.[5] In 2017, the Board issued the Workers' Compensation Guidelines for Determining Impairment[6] that became effective on January 1, 2018.

All three of the Board's guidelines describe schedule awards as follows:

A schedule award is given not for an injury sustained, but for the residual permanent physical and functional impairments. Final adjustment of a claim by a schedule award must comply with the following medical requirements:

[4] wcb.ny.gov/content/main/hcpp/mdguide.pdf
[5] wcb.ny.gov/content/main/hcpp/ImpairmentGuidelines/2012ImpairmentGuide.pdf
[6] wcb.ny.gov/2018-Impairment-Guidelines.pdf

1. *There must be a permanent impairment of an extremity, permanent loss of vision or hearing, or permanent facial disfigurement, as defined by law.*
2. *The impairment must involve anatomical or functional loss such as soft tissue, bone, sensation, atrophy, scarring deformity, mobility defects, loss of power, shortening, impaired dexterity or coordination.*
3. *The claimant must be at maximum medical improvement.*
4. *No residual impairments must remain in the systemic area (i.e., head, neck, back, etc.) before the claim is considered suitable for schedule evaluation of an extremity or extremities involved in the same accident. Workers' Compensation Law 15 prescribes the value for a percentage loss or loss of use of body members. See Chapter 8: Weeks by Percentage Loss of Use of Body Part for a table containing the appropriate number of weeks of compensation provided by percentage of loss.*

2012 New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity, Chapter 1.5 Schedule Awards.

All of the Board's guidelines include separate criteria for each injured extremity, including the foot, ankle, knee, hip, fingers, thumb, wrist, elbow, and shoulder. In all three of the Board's guidelines, the criteria for schedule loss of use

awards for listed members/extremities include separate criteria at different joints in that extremity. The criteria for the hand and/or wrist result in a schedule loss of use of the hand. The criteria for the elbow and/or shoulder result in a schedule loss of use of the arm. The criteria for the foot and/or ankle result in a schedule loss of use of the foot. The criteria for the knee and/or hip result in a schedule loss of use of the leg.

The Board's 2012 guidelines apply to the determination in this case because the medical evidence of permanency was filed prior to January 1, 2018. The Board's 2012 guidelines for the lower extremities in Chapter 3 establish permanency guidelines with separate and distinct criteria for permanent deficits to the hip (Section 3.1) and knee (Section 3.2) to calculate an overall schedule loss of use of the leg. There is no overlap between the permanency criteria for the knee and hip. Each section measures separate functional losses, range of motion, and defects in each respective joint.

It has been both Board practice and established case precedent to calculate a schedule loss of use of the leg by adding the schedule loss of use values provided by the applicable permanency guidelines for the knee and hip to an overall cumulative value for the leg. In the Matter of Earl T. Wadhams, Inc., 2016 NY Wrk. Comp. Lexis 8346, WCB G067 5404 (08/19/16)(45% SLU left leg overall comprised of

20% SLU left knee and 25% SLU left hip). This practice has been applied by the Board uniformly under all three versions of the permanency guidelines.

Nothing in the Board's permanency guidelines requires a deduction of the schedule loss of use attributable to the hip from the knee or vice versa. The Appellate Division's determination to reduce the schedule loss of use awards attributable to permanent injuries to Mr. Johnson's knees for separate and distinct injuries to Mr. Johnson's hips is contrary to the Board's Permanency Guidelines and the application of those guidelines in prior cases.

POINT IV: THE APPELLATE DIVISION'S DETERMINATION TO REDUCE THE SCHEDULE LOSS OF USE AWARDS ATTRUBUTABLE TO PERMANENT INJURIES TO MR. JOHNSON'S KNEES FOR SEPARATE AND DISTINCT INJURIES TO MR. JOHNSON'S HIPS IS UNFAIR BECAUSE IT CREATES DISPARATE RESULTS BETWEEN WORKERS WITH SIMILAR INJURIES.

As noted above in the Wadhams case, it is an established Board practice, supported by case precedent, to add the permanent deficits and functional losses for the knee and hip to calculate an overall schedule loss of use to the leg when both the knee and the hip are injured in one work related injury. This practice is a recognition by the Board that the permanency guidelines for the knee and hip address separate and distinct injuries with potential for separate and distinct deficits or functional losses

in the leg. It is also a recognition that the overall permanent loss of use of the leg from an injury to both joints can be greater than a separate injury to either joint alone. As stated in the Board's permanency guidelines, a schedule loss of use award is given for the "residual permanent physical and functional impairments" to the listed member. Thus, the Board's permanency guidelines require an evaluation of the overall schedule loss of use for the listed member, including any injury to each joint included in a given member to account for the entire disability to that member.

In cases where the work injury involves two joints in one member, such as the knee and the hip, the Board's permanency guidelines instruct to add the deficits together for an overall cumulative schedule loss of use of the leg. See Wadhams, supra.

Logic dictates that the same approach should be used for two permanent injuries occurring to the same member in work related injuries occurring at different times. The injuries are permanent. One cannot argue that a second permanent injury to the same member/limb does not result in a greater overall "residual permanent physical and functional impairment." The effect on the injured worker is a cumulative one, whether the injuries occur simultaneously or not.

However, the Appellate Division's determination treats the injured worker with two work injuries to two different joints of the same member differently depending on whether the injuries occurred at the same time or in separate accidents.

Moreover, the Appellate Division erroneously instructs that any prior schedule loss of use to the member is to be deducted from a new schedule loss of use regardless of whether the prior schedule loss of use was based on deficits in a different joint.

In this case, Mr. Johnson had two separate work-related injuries resulting in separate and distinct injuries to two different joints in his leg: hip and knee. His 2009 work injury resulted in permanent injuries to both hips and did not include the knees. In accordance with the Board's permanency guidelines for the leg, the Board awarded a 50% schedule loss of use of the left leg and a 52.5% schedule loss of use of the right leg based solely on the Board's permanency criteria for the hip. His 2006 work injury resulted in permanent injuries to both knees and did not include the hips. In accordance with the Board's permanency guidelines for the leg, the Board found an 80% schedule loss of use of the left leg and a 40% schedule loss of use of the right leg based solely on the Board's permanency criteria for the knee.

Thereafter, the Board reduced the schedule loss of use awards for the knees by the previous schedule loss of use awards for the hips citing to the Appellate Division's prior decision in Matter of Genduso v. City of New York, 164 A.D.3d 1509, 82 N.Y.S.3d 662 (3rd Dept. 2018). After the deduction of the prior schedule loss of use awards, Mr. Johnson received a 30% schedule loss of use attributable to his left knee injury and 0% schedule loss of use award for the right knee. This approach was affirmed by the Appellate Division.

To deduct a prior schedule loss of use award to the same member for a separate and distinct injury to a different joint in the same member simply because the injuries to the two different joints occurred at separate times results in disparate treatment of injured workers. The injured worker with injuries to two separate joints in the same limb/member occurring in one work related accident is awarded the cumulative value of the schedule loss of use awards for each joint. For example, if Mr. Johnson had injured both his hips and knees in one accident, he would have received a schedule loss of use award for each leg based on the combined permanency attributable to the knees and hips. However, because his knee injuries occurred in a separate work-related accident from the work-related accident that caused his hip injuries, he is treated differently and unfairly by subtracting the value of the schedule loss of use award he received for his knee injuries from the schedule loss of use award for his hip injuries. This disparate treatment is at odds with the Board's own permanency guidelines and established case precedent.

This practice also ignores that the prior injuries were adjudged by the Board to be permanent based on "residual permanent physical and functional impairments." By definition, the permanent injury did not go away. The Appellate Division's deduction of the prior schedule loss of use award effectively eliminates the prior permanency finding.

It is respectfully submitted that, when an injured worker sustains permanent and disabling injuries to a single limb/member due to separate injuries, sustained in separate accidents, to different joints of that limb/member, the only fair and equitable approach that comports with the Board's permanency guidelines is to combine the overall schedule loss of use calculations for each joint to determine a single, overall schedule loss of use and, then, allow the carrier in the case where the later award is made to deduct the amount of the prior schedule loss of use. Thus, the carrier in the case where there is a later schedule loss of use award pays only that portion of the schedule loss of use award attributable to the injury for which that carrier is responsible.

To follow the Appellate Division's approach is to deprive workers injured in two separate accidents of the schedule loss of use award intended by the Legislature and provided for in the Board's permanency guidelines. The Appellate Division's approach treats them differently than a worker with the same injuries arising out of one work-related accident. There is no rational basis or reasonable explanation for such a disparate result. To do so is fundamentally unfair.

Again, if the later schedule loss of use was based on an injury to the same joint in the same limb with the same deficits, there would be no addition of the schedule loss of use awards in order to avoid a duplicative award, consistent with WCL §15(7).

POINT V: THE APPELLATE DIVISON'S FAILURE TO TAKE JUDICIAL NOTICE OF THE PRIOR SCHEDULE LOSS OF USE AWARD FOR A DIFFERENT JOINT IN THE SAME MEMBER TO AWARD THE CUMULATIVE SCHEDULE LOSS OF USE OF BOTH INJURIES IGNORES THE BOARD'S PRACTICE OF TAKING JUDICIAL NOTICE OF PRIOR SCHEDULE LOSS OF AWARDS IN MANY OTHER CIRCUMSTANCES FOR THE BENEFIT OF THE CARRIER.

The Board routinely takes judicial notice of prior schedule loss of use awards. For example, the Board will *sua sponte* search for any prior schedule loss of use awards to the same member and allow the carrier to deduct that prior schedule loss of use award from a later schedule loss of use, whenever the prior schedule loss of use resulted from an injury to the same joint of the limb/member. The Board's action is a benefit to the carrier.

Similarly, the Board will take notice of any prior injury to the same body part for the purpose of apportionment of indemnity, medical or both to the prior claim. The Board's action is a benefit to the carrier.

The Board will even take notice of a prior nonwork-related injury to the same member that would have resulted in a schedule loss of use under the Board's permanency guidelines. Matter of Scally vs. Ravena Coeyman's Selkirk Central

School District, 31 A.D.3d 836 (3d Dept. 2006). The Board's action is a benefit to the carrier.

Here, Mr. Johnson asks only that the Board be required to take judicial notice that the prior schedule loss of use awards for the legs were based solely on "residual permanent physical and functional impairment" of the hips and that the schedule loss of use awards determined by the Law Judge in this case were based solely on "residual permanent physical and functional impairment" of the knees. The injuries to the hips were separate and discrete from the injuries to the knees. This Court should direct the Board to award the cumulative, overall schedule loss of use for each leg that includes the permanent functional deficits in both the knee joint and the hip joint. The carrier in this case should be permitted to take credit for the amount of the prior schedule loss of use awards from the cumulative schedule loss of use award thus avoiding any duplicative award. The carrier in this case will only pay for that portion of the overall permanent functional deficits in the leg attributable to the injury in this file.

Since the Board routinely takes judicial notice of prior schedule loss of use awards and permanency findings to benefit the carrier, it is only fair that the Board do the same to prevent an unjust reduction of a claimant's schedule loss of use in cases such as this one.

CONCLUSION

The decision of the Third Department in *Johnson v. City of New York* is:

1. contrary to the plain language of the statute;
2. contrary to established case precedent;
3. contrary to the Board's own permanency guidelines;
4. unfair to injured workers because it creates disparate results between injured workers with similar injuries; and
5. contrary to the Board's established practice of taking judicial notice of prior schedule loss of use and permanency awards to benefit the carrier.

The *Johnson* decision adversely affects thousands of injured workers represented by members of the Injured Workers' Bar Association, who are now at risk of having or have already had schedule of loss awards to which they are legally entitled reduced or eliminated entirely. We therefore respectfully request that the decision below be reversed, and the Law Judge's Reserved Decision awarding the schedule loss of use awards for the knees be reinstated without reduction for the prior schedule loss of use awards for the hips.

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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), Daniel A. Bronk, an attorney for the Amicus Curiae, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6999 words, which complies with the limitations stated in § 500.13(c)(1).