APL-2020-00155

COURT OF APPEALS
of the
STATE OF NEW YORK

Thomas Johnson,
Claimant-Appellant,

- against -

City of New York,
Employer-Respondent,

- and –

NEW YORK STATE WORKERS' COMPENSATION BOARD,
Respondent.

REPLY BRIEF FOR APPELLANT THOMAS JOHNSON

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Respondents' contentions can be divided into three categories.

First, Respondents portray the record as having some ambiguity about the relevant facts. They then use this supposed ambiguity as the foundation for their argument that there is no distinction to be drawn between hip deficits and knee deficits and that the Board was therefore entitled to deduct the former from latter instead of considering them independently. However, Respondents' attempt to reframe the record in order to better support their position is wholly meritless.

Second, Respondents offer a variety of statutory arguments regarding Workers' Compensation Law §§ 15(3)(a)-(m) and (p), 15(7), and 15(3)(u). However, Respondents' arguments find no support in either the text of the statute or this Court's decisions. To the contrary, both the text of the statute and longstanding precedent directly contradict Respondents' position.

Third, Respondents suggest that the Court should defer to the Workers' Compensation Board's interpretation of the statute because its approach is the "most administrable and equitable" one. There is no reason why the Court should defer to the Board on a question of statutory interpretation. Moreover, there is no rational reason why Respondents' approach is more "administrable," and it is most certainly the least equitable approach that could possibly be envisioned.

POINT I: RESPONDENTS' ATTEMPT TO REFRAME THE RECORD TO BETTER SUIT THEIR POSITION IS WHOLLY MERITLESS.

Both Respondent Workers' Compensation Board ("the Board") and Respondent City of New York ("the City") devote a considerable portion of their briefs to the specious argument that "the record contains no credited medical evidence delineating between the degree of loss of use attributable to each of [Claimant-Appellant's] accidents." Brief for Respondent Board at p. 21; *see also* Brief for Respondent Board at pp. 21-23, Brief for Respondent City at pp. 12-21, 24, and 43-49. Respondent City additionally claims that there is an "interrelationship" between Claimant-Appellant Johnson's ("Johnson's") knee and hip injuries and that the hip injuries should have been included in the knee case. Brief for Respondent City at p. 13.

The record is crystal clear in its contradiction of Respondents' arguments.

While Johnson's claims were pending, a question arose as to whether his 2006 case should include his hips in addition to his knees. R. 51, 52, 59. However, Respondent City's orthopedic consultant opined that Johnson's hip issues were unrelated to his knee injuries. R. 58. As a result, the Board established Johnson's 2006 claim only for injuries to his knees and established his 2009 claim only for injuries to his hips and other body parts, not including his knees. A. 3, 4-5, R. 9, 10, 27, 129-131, 135-136, 138-139, 217-218.

Having argued before the Board that Johnson's hips should not be established as part of his 2006 knee injury case and having accepted the Board's decision to establish the hips as a separate claim unrelated to this case, Respondent City cannot now be heard to argue that Johnson's hip injuries should be considered part of the 2006 case. *See, e.g.*, Ford Motor Credit Co. v. Colonial Funding Corp., 215 A.D.2d 435, 436; 626 N.Y.S.2d 527, 528 (2nd Dept. 1995). Its position in this regard is belied not only by its own arguments below but also by all of the previous decisions in the case.

Respondents go on to contend that the evidence and administrative finding that Johnson had an eighty percent loss of use of his left leg and a forty percent loss of use of his right leg in the 2006 case was inclusive of deficits stemming from his hips.[1] Brief for Respondent Board at pp. 21-23, Brief for Respondent City at pp. 43-49. Respondents thus attempt to portray the Board's decision to deduct the previous award for Johnson's hip injuries from its later award as the product of a rational decision to separate the impact of the 2006 injuries from the 2009 injuries.

Respondents' attempt to reframe the record to better suit their position is wholly meritless.

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[1] Respondents make no effort to explain how Johnson's right knee injury, which the City's consultant evaluated as a twenty-seven and one-half percent loss of use of the leg, somehow improved the overall function of his leg from fifty-two and one-half percent (the finding following his hip injury) to forty percent (with the addition of his knee injury).

Johnson's orthopedic surgeon, Dr. William Long, submitted a report in the 2006 case in which he explicitly stated that Johnson had schedule losses of eighty percent of his left knee and forty percent of his right knee. R. 109-110. Johnson's attorney submitted a "Request for Further Action" to the Board asserting that very same specific claim. R. 114. The Board issued a "Notice Regarding Possible Award for Permanent Injury (SLU)" in which it clearly directed the City to respond to Dr. Long's opinion about the loss of function of Johnson's knees. R. 115.

Respondent City then obtained an examination of Johnson by its consultant Dr. Parisien, who opined that there was a forty percent schedule loss of use of the left leg and a twenty-seven and one-half percent schedule loss of use of the right leg. R. 119. In that Dr. Parisien's examination was limited to Johnson's knees, his opinion was necessarily confined to deficits in the knees and exclusive of the hips. R. 117-119.

When a hearing was held, Johnson's attorney advised the WCL Judge that evidence had been submitted concerning the schedule loss of use of the knees, and that the prior awards attributable to the hips were unrelated. R. 129-130. As both Respondents conspicuously omit to mention, the question of whether the knee injuries could be evaluated and an award made independent of the previous award for the unrelated hip injuries was then argued and decided in Johnson's favor,

without appeal or objection by the City. R. 135-139.

The testimony of Dr. Parisien and Dr. Long further clarified that their evaluations were based solely on the deficits in Johnson's knees and were completely independent of his hip injuries. Dr. Parisien testified that his opinion of a forty percent schedule loss of use of the left knee and a twenty-seven and one-half percent schedule loss of use of the right knee was based strictly on findings in the knees and his interpretation of the Board's guidelines for knee injuries. R. 145-148, 161.

Dr. Long also testified that although "his clinical function in his [left] knee is somewhat related to the back and his hip, and it's difficult to determine," he attempted to "parse down how much of that is the knee and the hip and the back but I had to make a determination and that was the number I came up with" as a schedule loss of use for the knee alone. R. 177-178. With regard to Johnson's right knee, Dr. Long concluded that there was a forty percent schedule loss "associated with the arthritis he has, and moderate limitations" based on the Board's guidelines for knee injury evaluation. R. 181.

On cross-examination, the City's attorney specifically asked Dr. Long whether the previous awards for schedule loss of use of the hips would impact his opinion about the schedule loss of use of Johnson's knees:

Q: If I were to tell you that his left leg for the

> hip, had closed out for a 50 percent schedule loss of use, and his right leg for the right hip closed out on a 52 and a half percent schedule loss of use, would that affect your opinion on his schedule loss of use of the knees in this case?
>
> A. No. In fact, I would have expected with the revision hip replacement that he had on the right, that he would have had a larger award for schedule loss of use and the metal on metal in his left hip would have resulted in a larger schedule loss of use. But that does not affect my opinion of his knees.

R. 184.

Although Dr. Long thereafter refused to "play an adding game" with the City's attorney about the overall result of the schedule losses for the knees in addition to the schedule losses of the hips (R. 186), the record is perfectly clear that both his and Dr. Parisien's evaluations of Johnson's knees were based solely on the deficits in those joints and did not include any deficits in the hips or any part of the schedule losses of use that had previously been awarded for the hip injuries.

Respondents' motive in attempting to recharacterize the medical evidence in the case is perfectly transparent: If the schedule loss opinions in the 2006 case were duplicative of those in the 2009 case because they considered the same deficits, then the Board's decision to deduct one from the other would be rational. Unfortunately for Respondents, the record refutes their effort to reframe it in search of greater support their argument.

To the contrary, the unavoidable conclusion is that Johnson received independent schedule loss evaluations for his knee and hip injuries. Respondents are therefore unable to evade the resolution of this appeal as a question of law, not fact –or obfuscate the unavoidable fact that the Board and the Court below chose to deduct an award made for one injury from an award for an entirely different injury without any rational basis in the record.

We therefore respectfully submit that the Court should disregard Respondents' efforts to reframe the record in order to better suit their arguments.

POINT II: NEITHER THE PLAIN LANGUAGE OF THE STATUTE NOR THIS COURT'S DECISIONS SUPPORT RESPONDENTS' POSITION.

All parties agree that three provisions of the statute are relevant to the decision in this case: Workers' Compensation Law §§ 15(3)(a)-(m) and (p), 15(7) and 15(3)(u). However, Respondents erroneously view Sections 15(3)(a)-(m) and (p) in isolation and misinterpret Sections 15(7) and 15(3)(u) as they relate to this case.

A. Workers' Compensation Law § 15(3)(a)-(m) and (p).

Respondents correctly observe that Workers' Compensation Law §§ 15(3)(a)-(m) and (p) "identify[] specific body members and senses" for which schedule loss awards are appropriate. Brief for Respondent Board at p. 5; Brief for Respondent

City at pp. 27-28. *See, e.g.*, Matter of Mancini v. Services, 32 N.Y.3d 521, 93 N.Y.S.3d 652, 118 N.E.3d 191 (2018); Matter of Estate of Youngjohn v. Berry Plastics Corp., 2021 N.Y. Slip. Op. 02017 (April 1, 2021), 2021 WL 1215870.

However, Respondents then illogically leap to the conclusion that any injury to a member specified in the statute necessarily involves the same deficits as any other injury to that member, and that therefore any earlier award for schedule loss of use to a limb must be deducted from any later award for schedule loss of use to that same limb. Respondents' sole authority for this position is the Appellate Division's aberrational decision in Matter of Genduso v. New York City Dept. of Educ., 164 A.D.3d 1509, 82 N.Y.S.3d 662 (3rd Dept. 2018), which the Board has seized upon in order to create a new administrative policy that contradicts a century of administrative and judicial precedent. *See*, Point III, *infra*.

As a practical matter, it is unusual for a worker to injure the entirety of one of the statutorily enumerated members. More typically, an accident will involve injury to one part of the limb – in this case a knee in one accident, and a hip in another. In recognition of this fact, the Board has for decades promulgated guidelines that prescribe how to evaluate the schedule loss of use of a limb based on the deficits or loss of function in each joint. NYS Workers' Compensation Board Medical Guidelines, June, 1996; New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity, December, 2012 ("the 2012

Guidelines"); Workers' Compensation Guidelines for Determining Impairment, November, 2017 ("the 2018 Guidelines").[2]

Under the Board's schedule loss process, a physician is obligated to assess the deficits in the affected part of the limb. *See, e.g.*, 2018 Guidelines, § 1.3; 2012 Guidelines, § 1.3. The result is expressed as a percentage of the statutorily enumerated limb in order to calculate the appropriate award for the injury. *See*, Matter of Walczyk v. Lewis Tree Svc, 134 A.D.3d 1364, 22 N.Y.S.3d 257 (3rd Dept. 2015).

However, the fact that a worker has injured one part of a limb and received an award for schedule loss of use does not *ipso facto* mean that any later injury to that limb is duplicative of the prior award. Often, as here, the later injury involves a different part of the limb and presents a different set of deficits and loss of function. The fact that injury to part of a limb is expressed as an injury to the whole limb for purposes of calculating the award does not provide a basis for the automatic deduction of any earlier award from any later award involving the same limb.

To the contrary, the Board is obligated to evaluate each injury independently and to make an appropriate award for the impact of that injury upon the limb. *See*,

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[2] Prior to 1996 schedule losses of use were determined based on examinations conducted by impartial physicians employed by the Board, who utilized unpublished versions of the Board's guidelines. The Board first published guidelines in 1994 when it transferred the schedule loss evaluation process to the parties.

e.g., Matter of Pellegrino v. Textile Prints Co., 81 A.D.2d 723, 439 N.Y.S.2d 454 (3rd Dept. 1981). When the deficits from a later injury overlap the deficits from a previous injury, the Board will of course make an appropriate deduction for the pre-existing findings or apportion the overall loss of function between the two injuries. *See, e.g.*, Matter of Wilcox v. Niagara Mohawk Power Corp., 69 A.D.3d 1264, 893 N.Y.S.2d 708 (3rd Dept. 2010). However, when the deficits do not overlap because a different part of the limb is involved, there is no basis for such a deduction.[3]

Respondents correctly observe that a schedule loss award is intended to compensate an injured worker for the statutorily presumed loss of wage-earning capacity that flows from a work-related injury to a limb. Brief for Respondent Board at p. 16; *see, e.g.*, Dietrick v. Kemper Ins. Co., 76 N.Y.2d 248, 557 N.Y.S.2d 301, 556 N.E.2d 1108 (1990). However, their ensuing leap to the conclusion that a worker may never receive more than the statutory number of weeks for multiple injuries to a limb – even if the injuries occur in different workplace accidents – is both legally and logically erroneous. Brief for Respondent Board at pp. 16-17; Brief for Respondent City at pp. 30-32.

The Respondents mistakenly view the schedule losses contained in Workers'

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[3] The Board could, perhaps, aggregate the deficits from both injuries and apportion the result between the cases. However, as set forth below this would create the potential for later injuries to go uncompensated or undercompensated, which would be contrary to the benevolent purpose of the statute. *See*, Post v. Burger & Gohlke, 216 N.Y. 544, 111 N.E. 351 (1915); Surace v. Danna, 248 N.Y.18, 161 N.E. 315 (1928).

Compensation Law §§ 15(3)(a)-(m) and (p) as a sort of "lifetime cap," as opposed to the method of calculating the value of the award in any given case.

Under Respondents' approach, a worker who suffered a below-knee amputation in a workplace accident, received an award for a one hundred percent loss of use of the leg, returned to work, and then suffered an amputation at the hip as the result of a second accident would receive no compensation at all for the later injury – just as Johnson received no compensation for his right knee injury simply because he had previously injured his right hip.

This argument has repeatedly been rejected by the Courts both as a matter of statutory construction and because it would be patently inequitable to reduce or deny compensation to an injured worker simply because s/he had a previous injury that affected a different part of the limb. *See*, Matter of Zimmerman v. Akron Falls Park – County of Erie, 29 N.Y.2d 815, 327 N.Y.S.2d 652, 277 N.E.2d 668 (1971); Matter of Bazzano v. John Ryan & Sons, 62 A.D.2d 260, 404 N.Y.S.2d 402 (3rd Dept. 1978); Matter of Deck v. Dorr, 150 A.D.3d 1597, 54 N.Y.S.3d 765 (3rd Dept. 2017), *lv. to app. den.* 67 N.Y.S.3d 127, 89 N.E.3d 517 (2017); Matter of Pellegrino, *supra*.

Respondents attempt to distinguish Zimmerman, *supra*, on the basis that "the previous award was not made for the same statutorily-enumerated member." Brief for Respondent Board at pp. 29-31; Brief for Respondent City at pp. 33-36. Respondents point to the fact that Zimmerman's previous injury (an amputation

below the elbow) was treated as a "loss of the hand," for which the award was expressed as an 80% schedule loss of use of the arm.[4] Zimmerman, *supra*. Respondents therefore assert that because the award was "really" for a hand instead of an arm, Zimmerman is somehow distinguishable from the case at bar.

Respondents are mistaken. In both Zimmerman and the case at bar, there was an earlier injury that was expressed as a loss of use of the limb followed by a later injury that affected a different part of the limb and was capable of independent schedule loss evaluation. The Zimmerman Court succinctly stated as the basis for its decision the fact that the earlier injury did not affect the same part of the limb as the later injury, thus finding no reason to deprive the injured worker of the appropriate compensation due for the later injury. Zimmerman, *supra*. That logic is equally applicable to the case at bar, in which the earlier and later accidents involved different functions of the same limb and there is no evidence that the earlier injury affected the same part of the limb as the later injury.

If Respondents' approach were adopted, then an employer who hired a worker

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[4] In fact, a complete loss of the hand would be equal to 244 weeks of compensation, which is equivalent to a 78% loss of use of the arm (244/312 = .78), not an 80% loss. Moreover, the Board's current guidelines consider forearm amputation as an "elbow" (arm) injury and assess amputation as falling between an 80% and 95% loss of use of the arm, depending on the location. 2018 Guidelines at § 2.4 (Table 2.8); cf 2012 Guidelines at § 4.6 and 1996 Guidelines at § 8, which are identical. It thus seems likely that the award for Zimmerman's amputation was in fact an award for loss of use of the arm, as opposed to an award for loss of the hand which was expressed as a percentage of the arm.

with a pre-existing injury would have a reduced incentive to provide a safe workplace and the injured worker's benefit would be reduced simply because of the fortuitous (for the later employer) circumstance that the worker had a previous injury.

In the analogous situation of employers who sought to deny lost wage payments based on immigration status, this Court found that creating such an employer windfall "would not only diminish the protections afforded by the Labor Law, it would also improvidently reward employers" by reducing their liability. Balbuena v. IDR Realty, LLC, 6 N.Y.3d 338, 359; 812 N.Y.S.2d 416, 427; 845 N.E.2d 1246, 1257 (2006).[5]

Respondents' attempt to reframe the record is aimed squarely at avoiding the applicability of Zimmerman to the case at bar. In recognition of the fact that the rule in Zimmerman would be controlling if Johnson's two injuries involved different parts of the limb and had different functional impacts, the Respondents go to great lengths to portray Johnson's injuries as "overlapping" and the medical evidence as unclear. Unfortunately for Respondents, the record is quite clear and does not support their position. *See*, Point I, *supra*.

Respondent City also raises the shopworn specter of "double compensation," for Johnson's left leg injuries, arguing that an injured worker cannot be permitted to

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[5] Notably, the rule in Balbuena has been applied equally to workers' compensation cases. *See*, Matter of Amoah v. Mallah Mgmt, LLC, 57 A.D.3d 29, 866 N.Y.S.2d 797 (3rd Dept. 2008).

receive a total of 576 weeks of benefits (2 x 288) for the impact of two leg injuries, while apparently conceding that it would be acceptable for multiple extremity injuries to the hand and arm to receive a total of 556 weeks of benefits (244 for the hand + 312 for the arm) - even if the "hand" injury was expressed as an arm schedule (as in Zimmerman). Brief for Respondent City at pp. 30-36.

The Legislature and the Courts have been clear, however, that the evil to be avoided is not "overcompensation" but undercompensation – which is exactly what occurred here. This Court and the Appellate Division have consistently rejected the argument that an otherwise-appropriate award for a work-related injury should be reduced or denied simply because it would, in combination with a prior award, exceed a one-hundred percent loss of the member.[6] *See*, Zimmerman, *supra*, Bazzano, *supra*, Deck, *supra*, and Pellegrino, *supra.*

The Legislature's approach to this issue is discussed below.

B. Workers' Compensation Law § 15(7).

The Legislature has explicitly stated that the existence of a prior injury may not be used to diminish compensation for a later injury. Workers' Compensation

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[6] In the case of Johnson's right knee, the combination of the schedule loss awards in his 2006 and 2009 cases would not exceed one hundred percent. Although Respondents rely upon the claim that a combination of schedule losses cannot exceed one hundred percent of a limb in disputing the schedule loss of use of Johnson's left knee, they are silent about the fact that a schedule loss award for Johnson's right knee injury would not violate their proposed rule.

Law § 15(7) provides in pertinent part that "[t]he fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury." WCL § 15(7).

For decades, the statute has been interpreted as creating a rule against apportionment where the previous injury "was not a disability in a compensation sense." *See, e.g.,* Carbonaro v. Chinatown Sea Food, Inc., 55 A.D.2d 756, 389 N.Y.S.2d 640 (3rd Dept. 1976); Matter of Wilcox, *supra*, Matter of Levitsky v. Garden Time, Inc., 126 A.D.3d 1264 6 N.Y.S.3d 697 (3rd Dept. 2015).

The statute further provides "that an employee who is suffering from a previous disability shall not receive compensation for a later injury when considered by itself and not in conjunction with the previous disability." WCL § 15(7). Respondent Board's interpretation of this clause is legally erroneous, as its claim that the statute supports its position. Brief for Respondent Board at pp. 19-21.

First, it is Johnson's position, not Respondents', that is precisely in accordance with the statute. Johnson seeks no more than the benefits directed by the plain language of the statute: "compensation for a later injury when considered by itself and not in conjunction with the previous disability." WCL § 15(7). Johnson has made no claim that he should receive a larger schedule loss for his knee injuries by virtue of the fact that he had previous hip injuries. He simply seeks compensation for the knee injuries he suffered in this accident, no more and no less. To the contrary, it

is the Respondents who contend that he should receive less, in direction contravention of the plain language of the statute. Johnson's claim is protected by the statute; Respondents' defense is not.

Moreover, Respondent Board substantially misrepresents the legislative history of Section 15(7). It describes the statue as being "enacted [in 1915] specifically to limit the exposure of employers and carriers to liability for new injuries, as opposed to pre-existing injuries," citing State Indus. Comm. v. Newman, 222 N.Y. 363, 118 N.E. 794 (1918). While this is true as far as it goes, it omits the following century of judicial construction and legislative amendment of the statute.

In Matter of Schurick v. Bayer Co., 272 N.Y. 217, 5 N.E.2d 713 (1936), the Court explained that the statutory amendment discussed in Newman was intended only to overrule a specific decision (Schwab v. Emporium Forestry Co., 216 N.Y. 712, 111 N.E. 1099 (1915)) in which the combination of a pre-existing hand amputation and the work-related loss of the contralateral hand resulted in a permanent total disability.[7]

Moreover, in 1945, the Legislature again amended Workers' Compensation Law § 15(7) to add an additional clause: "except as hereinafter provided in

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[7] Matter of Schurick also originated the rule that a pre-existing condition that does not impair the worker's wage-earning capacity is not a "disability" for purposes of apportionment under Workers' Compensation Law § 15(7).

subdivision eight of this section." Laws of 1945, ch. 872. Respondent Board omits any mention of this clause or of its relationship to Workers' Compensation Law § 15(8), which – contrary to its position – imposes full liability on the employer for the loss of wage-earning capacity associated with a workplace accident, even when a previous permanent physical impairment contributes to the disability. WCL § 15(8).

Thus, in Matter of Bechler v. Hecht's, 283 A.D. 901, 130 N.Y.S.2d 26 (3rd Dept. 1954), the injured worker lost the thumb and little finger on his left hand, resulting in a schedule loss award for a forty-five percent loss of use of the hand. Matter of Bechler, 283 A.D at 901. He was later involved in a second accident in which his left index finger was amputated. *Id.* The Board found that as a result of the combination of both accidents, he had a ninety-five percent loss of use of his hand, of which it allocated fifty percent to the new accident. *Id.*

The employer and carrier appealed, contending that Workers' Compensation Law § 15(7) limited their liability to the schedule loss of use of the index finger related to their accident (forty-six weeks of compensation), as opposed to fifty percent of a hand (one hundred and twenty-two weeks of compensation) based on the contribution of their accident to the overall loss of use of the hand. *Id.*

Noting the impact of the additional amendment to Section 15(7) and the enactment of Section 15(8), the Court upheld the Board's decision. *See also*, Matter of Worden v. General Drop Forge Corp., 285 A.D. 910, 137 N.Y.S.2d 671 (3rd Dept.

1955).

We therefore respectfully submit that Respondent Board has failed to fully apprehend the history, meaning and purpose of Workers' Compensation Law § 15(7). Contrary to Respondent Board's argument, the statute provides precisely the relief sought by Johnson in this case: an evaluation of the disability that resulted from this accident without regard to his unrelated previous injuries. Moreover, and again contrary to Respondent Board's argument, the statute would, in conjunction with Workers' Compensation Law § 15(8), entitle the Board to make an award for his overall disability and to assign greater liability to this case than would result from an evaluation of the new injuries standing alone. However, Johnson does not seek greater compensation as a result of his previous condition; he simply seeks to avoid the diminution of his present award on the basis of the previous unrelated injuries.

C. Workers' Compensation Law § 15(3)(u).

Respondents are also mistaken in their contention that Workers' Compensation Law § 15(3)(u) does not contemplate awards for schedule loss of use based on injury to part of one of the members listed in Workers' Compensation Law § 15(3)(a)-(l). Brief for Respondent Board at pp. 25-29, Brief for Respondent City at pp. 28-29.

The statute is entitled "Total or partial loss of use of more than one member or

parts of members" and prior to 2009 went on to provide that "[i]n 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 to t ... the board shall award compensation for the loss or loss of use of each such member or part thereof, which awards shall run consecutively." WCL § 15(3)(u).

It is beyond dispute that the plain language of the statute contemplated that compensation may be awarded for injury to "parts of members" and that if an award was made for loss of use of "a member or part thereof, [such] awards shall run consecutively." WCL § 15(3)(u).

Respondent Board attempts to distract the Court's attention from the Legislature's clear contemplation of awards for injury to "parts of members" by focusing on the amendment of the statute to provide for consecutive payment of schedule loss awards. However, Respondent's argument only reinforces Johnson's case.

Respondent Board correctly observes that in Matter of Hoffman v. Chatham Elec. Light, Heat and Power Co., 249 N.Y. 433, 164 N.E. 341 (1928), the Court of Appeals held that the Board could not – as it had been – award compensation for all injuries sustained in an accident by ruling that the awards were payable consecutively. Matter of Hoffman, 249 N.Y. 433; Brief for Respondent Board at Addendum p. 8. Instead, the Board was limited to directing payment of only the

longest award, on the theory that the loss of wage-earning capacity of the shorter awards would be duplicative and thus violate the maximum weekly payment limitation in Workers' Compensation Law § 15(6). *Id.*

Respondent Board further correctly observes that the Legislature promptly amended the statute to add Workers' Compensation Law § 15(3)(u) in order to authorize the consecutive payment of schedule loss awards and to overrule the Court's decision in Matter of Hoffman. Brief for Respondent Board at Addendum pp. 7-12.

What Respondent Board fails to mention, however, is that the core purpose of the statutory amendment was to ensure that injured workers were fully compensated for each schedule loss injury that they suffered, without loss or diminution of an award for one injury simply because the worker had also suffered another injury.

The 1929 Report of the Industrial Survey Commission submitted by Respondent Board specifically states that its purpose included "liberalizing [workers' compensation] benefits," with authorization for consecutive awards for multiple schedule loss injuries suffered in a single accident being one such example. Brief for Respondent Board at Addendum pp. 11-12. The Commission was particularly concerned that a worker might lose "part of a hand and part of a foot or part of a hand and part of an eye" and have one of the injuries go uncompensated. *Id* at p 12. The worker "would be entitled to no compensation whatsoever notwithstanding that his

injuries may have been serious and are permanent. This naturally breeds a feeling of distrust and dissatisfaction in the mind of the injured person." *Id.*

It is clear that the position taken by Respondents in this case is diametrically opposed to the very purpose the Legislature had in mind when it originally enacted Workers' Compensation Law § 15(3)(u): to liberalize benefits and to ensure that a work-related injury that resulted in the loss or loss of use of a member or part of a member did not go uncompensated.[8] Instead, Respondents affirmatively seek to deny Johnson all compensation for an injury that Respondent City's own consultant assessed as a twenty seven and one-half percent loss of use of his right leg and the Board assessed as a forty percent use of that leg, and to reduce cut his compensation for the injury to his left leg by more than half from an eighty percent schedule loss to a thirty percent schedule loss. It is difficult to envision a position less consistent with the Legislature's purpose in enacting Workers' Compensation Law § 15(3)(u).

We therefore respectfully submit that Respondents' arguments are contrary to the plain language and core purpose of the statute, which is to provide compensation to injured workers for work-related loss or loss of use of limbs or part thereof, as well as the manner in which this Court has interpreted it.

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[8] In 2009 the Legislature further amended Workers' Compensation Law § 15(3)(u) to substitute lump sum payment of schedule loss awards for consecutive payments. Laws of 2009, ch. 351, §§ 1, 2. This was not intended to remove the statute's provision of compensation for "parts of members," but instead to further maximize the benefit of schedule loss awards for the injured worker. *See*, Matter of Estate of Youngjohn, *supra*.

POINT III: RESPONDENTS OFFER NO VALID REASON WHY THE COURT SHOULD DEFER TO THE WORKERS' COMPENSATION BOARD'S NEW AND NOVEL INTERPRETATION OF THE STATUTE.

The remainder of Respondents' arguments amount to a request that the Court simply defer to the Board's new and novel interpretation of the statute. These arguments are wholly meritless.

It is well-established that the Board's "statutory reading and analysis" is entitled to no deference from the Court. *See, e.g.*, Matter of Belmonte v. Snashall, 2 N.Y.3d 560, 566; 780 N.Y.S.2d 541, 544; 813 N.E.2d 621, 624 (2004); Matter of DeMayo v. Rensselaer Polytech Inst., 74 N.Y.2d 459, 548 N.Y.S.2d 630, 547 N.E.2d 1157 (1989). As discussed in Point II, *supra*, the issue presented herein is squarely a matter of statutory construction. As a result, the Board's interpretation of the law should be given no weight whatsoever.

This is especially true in view of the fact that the Board's decision in this case stems from a new and novel interpretation of the statute that it developed in 2018 and which contradicts nearly a century of previous precedent. Although Respondents deny that the Board's decision in Matter of Genduso, *supra*, created a new administrative policy in contravention of its prior decisions, it is noteworthy that they are unable to point to a single case prior to 2018 in which the Board or the Appellate Division sanctioned the deduction of an award for previous injury to one part of a

limb from a later award for injury to a different part of the limb.

Instead, every reported case involving apportionment between two compensable injuries involves the same part of the same limb. *See, e.g.*, Matter of Wilcox, *supra* (ankle); Matter of Picone v. Putnam Hosp., 153 A.D.3d 1461, 60 N.Y.S.3d 603 (3rd Dept. 2017) (knee); Matter of Sanchez v. STS Steel, 154 A.D.3d 1027, 61 N.Y.S.3d 727 (3rd Dept. 2017) (knee); Matter of Scally v. Ravena Coeymans Selkirk Cent. Sch. Dist., 31 A.D.3d 836, 819 N.Y.S.2d 137 (3rd Dept. 2006) (knee); Matter of Sattanino v. Sanitary Dist. No. 6, 68 A.D.3d 1381, 890 N.Y.S.2d 220 (3rd Dept. 2009) (knee); Matter of Guarnieri v. Movielabs, Inc., 130 A.D.2d 854, 516 N.Y.S.2d 127 (3rd Dept. 1987) (knee).

By contrast, prior to Matter of Genduso, *supra*, every reported case that involved different portions of the same limb resulted in either independent awards in each case (s*ee*, Matter of Zimmerman, *supra*, Matter of Deck, *supra*, Matter of Bazzano, *supra*, Matter of Pellegrino, *supra*) or increased compensation intended to account for the combined impact of both injuries (*see*, Matter of Worden, *supra*, Matter of Bechler, *supra*).

It is thus apparent that the Board's decision in Matter of Genduso, *supra*, to deduct the entire schedule loss award resulting from a prior injury that involved both a knee and an ankle from a later schedule loss award for an injury involving only the knee was a departure from both its previous precedents and longstanding judicial

interpretation of the statute. However, instead of treating that decision as a product of the unique facts in the case, the Board instead used it to create a new administrative policy in which it deducts every prior injury to a limb from every later injury to a limb, regardless of whether the earlier and later injuries are in any way related. *See*, Matter of Blair v. SUNY Syracuse Hosp., 184 A.D.3d 941, 125 N.Y.S.3d 490 (3rd Dept. 2020); Matter of Kleban v. Central New York Psych Ctr., 185 A.D.3d 1342, 128 N.Y.S.3d 318 (3rd Dept. 2020); Matter of Covington v. New York City Dept. of Corr., 187 A.D.3d 1285, 129 N.Y.S.3d 863 (3rd Dept. 2020); Matter of Rickard v. Central New York Psych Ctr., 187 A.D.3d 1260, 132 N.Y.S.3d 174 (3rd Dept. 2020); Matter of Hluska v. Central New York Psych Ctr., 188 A.D.3d 1381, 132 N.Y.S.3d 338 (3rd Dept. 2020); Matter of Rybka v. Central New York Psych. Ctr., 188 A.D.3d 1389, 132 N.Y.S.3d 341 (3rd Dept. 2020); Matter of Liuni v. Gander Mountain, 188 A.D.3d 1043, 135 N.Y.S.3d 201, *mot. for lv. to app. granted* 36 N.Y.3d 908 (2021); Matter of Neely v. New York City Dept. of Corr., 191 A.D.3d 1093, 137 N.Y.S.3d 749; Matter of Green v. New York City Dept. of Educ., 191 A.D.3d 1091, 137 N.Y.S.3d 750 (3rd Dept. 2021).

Respondent Board's attempt to harmonize its position in this case with its argument to this honorable Court in Matter of O'Donnell v. Erie County, 35 N.Y.3d 14, 124 N.Y.S.3d 12, 146 N.E.3d 1171 (2020) is utterly without merit. In Matter of O'Donnell, Respondent Board took the position that because its decision in the case –

which had been unanimously affirmed by the Appellate Division – "departed from its established purported precedent," the matter should be remanded so that it could conform its decision to its previous "line of internal administrative precedent." Matter of O'Donnell, 35 N.Y.3d at 22.

Conversely, in the case at bar Respondent Board takes the position that because its decision in Matter of Genduso was upheld by the Appellate Division, it has *carte blanche* not only to depart from its long line of administrative precedents, but to disregard judicial precedent as well, including the Court's decision in Matter of Zimmerman, *supra*.

As this honorable Court noted in Matter of O'Donnell, "an agency's bare representation that it failed to follow internal precedent would [not ordinarily] be grounds for vacatur and remand to the agency." Matter of O'Donnell, 35 N.Y.3d at 22. It is equally true that an agency's bare representation that it has decided to change its administrative policy should not be grounds for affirmance, particularly when the new policy is contrary to the statute, well-established judicial precedent, and the fundamental purpose of the Workers' Compensation Law.

There is also no merit to Respondent Board's conclusory contention that deducting an earlier schedule award made for injury to one part of a limb from a later schedule award made for injury to a different part of that limb is "the fairest and most administrable rule across the entire universe of similar cases." Brief for Respondent

Board at p. 2, 18.

Respondent Board offers no meaningful explanation of how deducting an earlier schedule loss award from an unrelated later schedule loss award is more "administrable" – most likely because it cannot. The Board is obligated to evaluate the loss or loss of use of a limb attributable to an accident. WCL § 15(3)(a)-(t). It has promulgated guidelines and processes to do so, and it is an activity in which it has performed thousands of times each year for over one hundred years.

There are cases in which the injured worker has no previous injury, cases in which the accident affects multiple parts of the same limb, cases in which there is a previous injury to the same part of the limb, and cases in which there is a previous injury to a different part of the limb. Regardless of which circumstance is presented, the Board must engage in the same well-established process. If there is no previous injury or if the previous injury affected a different part of the same limb, the Board must evaluate the extent to which the accident affects the function of the limb in accordance with its guidelines and assign a schedule loss of use for the injury. If there is a previous injury that involves the same part of the limb, then the Board must evaluate overall loss of function of the affected part of the limb and apportion it between the old and new injuries.

The deduction of an unrelated previous injury does not make this process "more administrable," it makes it less so. If unrelated earlier injuries are not

considered in schedule loss evaluation, then the Board need only perform one task: make an award of compensation for the causally related injury. By contrast, if unrelated injuries to the same limb are to be considered, then the Board must first evaluate all of the deficits in the limb, then aggregate them, and then apportion the overall loss of function between the two accidents, before finally making an award. In short, the Board's approach in this case is precisely the opposite of the "most administrable" policy.

Finally, Respondent Board's contention that its new approach is the "fairest" strains credulity. What Johnson and other injured workers seek is no more than the appropriate measure of benefits that the statute provides for a work-related injury. If the worker suffers several different injuries – whether in one accident or multiple accidents – then each injury should be evaluated and compensated independently in order to ensure proper compensation. Not only is this patently fair, it is what the plain language of the statute requires. WCL § 15(7).

Respondent Board's approach could not possibly be more unfair. In essence, it proposes that when a worker suffers multiple injuries to different parts of the same limb, only the greatest injury should be compensated, and the rest ignored as "duplicative." It does not even suggest (as it might have) that the impact of all of the injuries should be aggregated and then apportioned among the relevant accidents in order to provide at least some measure of compensation for each injury as a portion

of the limb.[9] Instead, it proposes to limit compensation to the injury that creates the greatest loss of use, while disregarding any other injuries to the same limb.

This essentially re-creates the very same situation that existed following Matter of Hoffman, *supra*, in which a worker who has multiple unrelated injuries could only be compensated for the most serious one, with all other compensation being forfeited. The Legislature, of course, deemed this so unfair that it amended the statute to enact Workers' Compensation Law § 15(3)(u), directing the consecutive payment of schedule loss awards for members or parts of members specifically to ensure that each and every injury was appropriately compensated. WCL § 15(3)(u).

We therefore respectfully submit that there is no merit Respondent Board's contention that its new and novel approach is the "fairest and most administrable rule," and that instead the opposite is true.

[9] This would, of course have required it to request that the Court overrule its previous decision in Matter of Zimmerman, *supra*, which neither Respondent does directly.

CONCLUSION.

Respondents' effort to recharacterize the record in order to better support their arguments is entirely baseless. Contrary to Respondents' arguments, the record is perfectly clear that the loss of function of Johnson's knees was wholly independent of the loss of function of his hips, and was evaluated as such by both his treating physician and Respondent City's consultant.

Respondents' reliance on Workers' Compensation Law §15(7) is completely misplaced. Workers' Compensation Law § 15(7) provides precisely the relief that Johnson seeks: compensation for this injury without regard to his unrelated previous disability. Respondents' position regarding Workers' Compensation Law § 15(3)(u) is also incorrect. Not only does that statute specifically envision that schedule loss awards should be provided for injury to part of a member, it was originally enacted to ensure the payment of compensation for each compensable injury – the precise outcome that Johnsons asks for and that Respondents seek to avoid.

Finally, Respondent Board's new and novel interpretation of the statute is entitled to no deference, and its claim that it would be the "most administrable and equitable rule" is unable to survive even superficial scrutiny.

The decision below should therefore be reversed.

Dated: Farmingdale, New York
May 14, 2021

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR §1250.8(j) that the foregoing brief was prepared by a computer.

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Dated: Farmingdale, New York
May 14, 2021

Robert E. Grey, Esq.