APL-2020-00155

TO BE ARGUED BY: PATRICK A. WOODS
TIME REQUESTED: 10 MINUTES

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.

BRIEF FOR RESPONDENT

LETITIA JAMES
Attorney General
State of New York
Attorney for Workers' Compensation Board
The Capitol
Albany, New York 12224
(518) 776-2020
(518) 915-7723 (*f*)
Patrick.Woods@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
ANDREA OSER
Deputy Solicitor General
PATRICK A. WOODS
Assistant Solicitor General of Counsel

Dated: May 5, 2021

Reproduced on Recycled Paper

TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT 1

QUESTION PRESENTED 3

STATUTORY BACKGROUND 3

STATEMENT OF THE CASE 8

ARGUMENT 14

WORKERS' COMPENSATION LAW § 15(3) REQUIRES THAT NEW SCHEDULE LOSS OF USE AWARDS ACCOUNT FOR PRIOR SCHEDULE LOSS OF USE AWARDS FOR INJURIES TO THE SAME STATUTORILY-ENUMERATED BODY PART

A. The Board Properly Determined Claimant's Schedule Loss of Use in Accordance with the Statute. 15

1. The Statutory Text and Purpose Support the Board's Determination. 15

2. To the Extent the Board's Determination Turns on the Interpretation of the Statute, It Is Entitled to Deference. 24

B. There is No Other Basis for Reversal 25

CONCLUSION 35

AFFIRMATION OF COMPLIANCE

ADDENDUM

TABLE OF AUTHORITIES

CASES **PAGE**

Ace Fire Underwriters Co. v. Special Funds Conserv. Comm.,
28 N.Y.3d 1084 (2016) 8n

American Economy Ins. Co. v. State of New York,
30 N.Y.3d 136 (2017) 8n

Bazzano v. John Ryan and Sons,
62 A.D.2d 260 (3d Dep't 1978) 31

El-Dehdan v. El-Dehdan,
26 N.Y.3d 19 (2015) 27

Gefers v. N.Y. Window Cleaning Co.,
224 A.D. 79 (1928) 28

Hoffman v. Chatham Electric Light, Heat and Power Co.,
249 N.Y. 433 (1929) 28

Johnson v. City of New York,
180 A.D.3d 1134 (3d Dept. 2020) 12

Landgrebe v. County of Westchester,
57 N.Y. 2d 1 (1982) 16

Lantry v. State,
6 N.Y.3d 49 (2005) 32

Matter of Bell v. Glens Falls Ready Mix Co., Inc.,
169 A.D.3d 1145 (3d Dep't 2019) 30

Matter of Deck v. Dorr,
150 A.D.3d 1597 (3d Dep't 2017) 30

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

Matter of Genduso v. N.Y.C. Dep't of Educ.,
164 A.D.3d 1509 (2018) 11, 12, 32

Matter of Gonzalez v. Annucci,
32 N.Y.3d 461 (2018) 24

Matter of Estate of Youngjohn v. Berry Plastics Corp.,
2021 N.Y. Slip Op., 02017 (April 1, 2021)............................ 5, 16, 26

Matter of LaCroix v. Syracuse Exec. Serv., Inc.,
8 N.Y.3d 348 (2007) 5

Matter of Mancini v. Off. of Children and Family Servs.,
32 N.Y.3d 521 (2018) 4

Matter of Marhoffer v. Marhoffer,
2020 N.Y. 543 (1917) 16

Matter of O'Donnell v. Erie County,
35 N.Y.3d 14 (2020) 33

Matter of Raynor v. Landmark Chrysler,
18 N.Y.3d 48 (2011) 3-4, 8n

Matter of Schmidt v. Falls Dodge, Inc.,
19 N.Y.3d 178 (2012) 4

Pajak v. Pajak,
56 N.Y.2d 394 (1982) 27

Pellegrino v. Textile Prints Corp.,
81 A.D.2d 723 (3d Dep't 1981) 31

TABLE OF AUTHORITIES (cont'd)

CASES (cont'd) **PAGE**

Schurdick v. Bayer Co.,
272 N.Y. 217 (1936) 20n, 21

State Indus. Com. v. Newman,
222 N.Y. 363 (1918) 19-20

Terrace Ct., LLC. v. N.Y.S. Div. of Hous. & Comm'y Renewal,
18 N.Y.3d 446 (2012) 31

Zimmerman v. Akron Falls Park–County of Erie,
29 N.Y.2d 815 (1971) 29-30

ADMINISTRATIVE DETERMINATIONS

Matter of N.Y. Life Ins. Co.,
2018 N.Y. Wrk. Comp. LEXIS 12039 (2018) 32

Matter of N.Y.C. Dep't of Corr.,
2013 N.Y. Wrk. Comp. LEXIS 3723 (2013) 32

Matter of Rochester City Sch. Dist.,
2017 N.Y. Wrk. Comp. LEXIS 5993 (2017) 32

MISCELLANEOUS

Letter of Henry D. Sayer, Executive Secretary, Industrial Survey Commission, April 3, 1929 *reprinted in* Bill Jacket for ch. 301 (1929) 28-29

Report of the Industrial Survey Commission 44-45 (1929) 29

THE WORKERS' COMPENSATION GUIDELINES FOR DETERMINING IMPAIRMENT (2017) 25, 33-34

TABLE OF AUTHORITIES (cont'd)

PAGE

STATE STATUTES (cont'd)

Workers' Compensation Law
§ 10(1) 3
§ 13 4
§ 15 .... *passim*
§ 15(3)(a) 5, 6, 16
§ 15(3)(b) 5, 6
§ 15(3)(c) 5, 6, 30
§ 15(3)(d) 5
§ 15(3)(e) 5
§ 15(3)(f)-(l) 6
§ 15(3)(m) 6
§ 15(3)(n) 6
§ 15(3)(o) 6
§ 15(3)(p) 5
§ 15(3)(q) 6
§ 15(3)(u) 7, 25-27
§ 15(3)(x) 25
§ 15(6) 19
§ 15(7) .... *passim*
§ 16 4
§ 15(8) 8n, 17n, 20n
§ 50 4

McKinney's Cons. Laws of N.Y., Book 1,
Statutes § 74 27

PRELIMINARY STATEMENT

Since its original enactment, New York's Workers' Compensation Law has provided benefits for those who sustain permanent, but only partially disabling, injuries to body members or senses, according to a statutory schedule. These "schedule loss of use" awards are not compensation for the injury itself, but for the loss of earning power associated with the loss or loss of use of the member or sense.

This case requires the Court to determine whether the Workers' Compensation Board appropriately calculated a second schedule loss of use award, where the claimant had previously obtained an award for a loss or loss of use of the same member or sense as a result of a separate accident. In the decision below, the Third Department upheld the Board's process of subtracting the degree of loss of use determined for the first award from the degree of loss of use from the second award to yield the resulting additional degree of loss of use to the same member or sense.

This Court should affirm. Section 15(7) of the Workers' Compensation Law generally limits subsequent awards for injuries

to the same statutorily-listed member or sense to the "compensation allowed for such injury when considered by itself and not in conjunction with the previous disability." Accordingly, when making a schedule loss of use award for an injury distinct from one that gave rise to a prior award for the same body member or sense, the Board must determine how much of the total loss of use of the member or sense at the time of the new award is solely attributable to that distinct injury.

Subtracting the degree of loss of use found in a prior award from the degree loss of use for a new award is the fairest and most administrable rule across the entire universe of similar cases. By subtracting out the prior loss of use to the same member or sense, the Board ensures to the greatest degree possible that similarly injured claimants receive similar compensation, regardless of whether their injuries occurred as part of one accident or two.

Indeed, the Board's subtraction method is especially reasonable where, as here, there is no credited medical evidence expressly parsing the loss of use attributable solely to the injuries giving rise to the second award. In such cases, the Board can

determine a total degree of loss of use, but lacks the evidentiary foundation necessary to determine how much of that the degree of loss of use is entirely additional to the degree of loss of use found in an earlier award.

QUESTION PRESENTED

Does the Worker's Compensation Law require that a schedule loss of use award account for the value of a prior schedule loss of use award, if the two awards are for loss of use of the same statutorily-enumerated body member or sense?

STATUTORY BACKGROUND

The Workers' Compensation Law (WCL) requires an employer to "secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury." WCL § 10(1). "An employer must secure the compensation for his employees by obtaining coverage from the New York State Insurance Fund, purchasing coverage from an approved private insurance carrier or obtaining approval from the Board to self-insure." *Matter of Raynor v. Landmark*

Chrysler, 18 N.Y.3d 48, 53 (2011) (citing WCL § 50). Benefits available under the WCL include medical benefits, *see* WCL § 13, wage-related compensation benefits, *see id.* § 15, and in the case of death, funeral expenses and death benefits payable to the employee's survivors, *see id.* § 16. The calculation of wage-related compensation benefits depends on the duration and nature of the disability.

The WCL establishes four classifications of disability: (1) permanent total disability, (2) temporary total disability, (3) permanent partial disability, and (4) temporary partial disability. *See Matter of Schmidt v. Falls Dodge, Inc.*, 19 N.Y.3d 178, 181 (2012). Wage-related compensation benefits for permanent partial disabilities are governed by WCL § 15(3) and provide payments to the injured worker.

"A worker who suffers a permanent partial disability typically qualifies for one of two broad categories of primary award under WCL § 15(3)—referred to colloquially as a 'schedule loss of use' award or a 'non-schedule' benefit—depending on the nature of the injury." *Matter of Mancini v. Off. of Children and Family Servs.*, 32

N.Y.3d 521, 525 (2018). This case concerns a schedule loss of use award.

WCL § 15(3)(a)-(t) identifies specific body members and senses. An employee who suffers the permanent loss or loss of use of a body member or sense set forth in WCL § 15(3)(a)-(t) is entitled to receive a schedule loss of use award, often abbreviated as an "SLU award," "because the statute assigns—as by a schedule—a fixed number of lost weeks' compensation according to the bodily member injured." *Matter of LaCroix v. Syracuse Exec. Serv., Inc.*, 8 N.Y.3d 348 (2007); *see also Matter of Estate of Youngjohn v. Berry Plastics Corp.*, 2021 N.Y. Slip Op., 02017 at 5 (April 1, 2021). A schedule loss of use award is calculated by multiplying two thirds of the employee's average weekly wages (subject to maximum and minimum compensation rates) by the number of weeks specified in the statutory schedule for the particular enumerated body member or sense disabled. WCL §§ 15(3)(a)-(t), 15(6).

The Legislature enumerated the arm (WCL § 15(3)(a)); leg (WCL § 15(3)(b)); hand (WCL § 15(3)(c)); foot (WCL § 15(3)(d)); eyes and vision (WCL § 15(3)(e), (p)); specific fingers and toes, multiple

fingers and toes, and parts thereof (WCL § 15(3)(f)-(l), (n), (p), (q)); and hearing in one or both ears (WCL § 15(3)(m)). Some statutorily-enumerated body members are parts of larger body members. For example, the thumb is individually listed in the statute and assigned its own schedule, WCL § 15(3)(f) (75 weeks), but is also part of the hand, which has its own, higher value, schedule, WCL § 15(3)(c) (244 weeks). And both the thumb and hand are parts of the arm, which has its own, still higher, value schedule. WCL § 15(3)(a) (312 weeks). The Legislature did not, however, choose to provide separate schedules for all parts of the statutorily-enumerated body members. For example, the statute provides a schedule for the leg, WCL § 15(3)(b) (288 weeks), but does not provide separate schedules for the knees, hips, or ankles.

The statute also provides rules for awards that involve different degrees of loss of use resulting from the same injury or injuries to multiple members. For example, an amputation of a hand or leg "at or above the wrist or ankle," respectively, is to be treated as the proportionate loss of the limb, rather than the loss of the hand or foot. *See* WCL § 15(3)(o). And where there is a loss or

loss of use of "more than one member or parts of members," awards are to be made for each of the enumerated parts. WCL § 15(3)(u).

The statute also addresses awards for a repeatedly injured body member. WCL § 15(7) generally provides that a prior award of compensation "shall not preclude [a claimant] from compensation for a later injury," but limits the value of the subsequent award to "such sum as will reasonably represent his earning capacity at the time of the later injury." Because awards for injuries incurred later in time are not necessarily made after the award for the earlier injury, the phrase "later injury" is understood to cover situations where there is an award issued later in time, even if the injury giving rise to the later award was suffered first.[1] And the later award is limited to "the compensation allowed for such injury when

[1] For example, because a schedule loss of use award is for a permanent loss of use of a member, the Board's regulations require a finding of "maximum medical improvement" before a schedule loss of use award can be issued. *See* 12 N.Y.C.R.R. § 324.1(e) ("A finding of maximum medical improvement is a normal precondition for determining the permanent disability level of a claimant."). As happened here, a second injury may receive a schedule loss of use award before the first injury if the second injury reaches maximum medical improvement before the first injury does.

considered by itself and not in conjunction with the previous disability." WCL § 15(7).[2] Thus, a prior award for an injury to the same member does not preclude a new award based on an injury incurred at a different time, but the permanent loss of earning power reflected in the prior award must be accounted for when making the new award.

STATEMENT OF THE CASE

This case involves awards for two separate workplace injuries to claimant's legs, the administrative proceedings for which overlapped in time. In February 2006, claimant sustained a work-related injury to his left and right knees. (Record on Appeal ("R")

---

[2] The exception to this limitation is where the new and old injuries act together to either cause a total disability, WCL § 15(8)(c), or create a permanent partial disability "caused by both conditions that is materially and substantially greater than that which would have resulted from the subsequent injury or occupational disease alone." WCL § 15(8)(d). Awards made under that provision had previously been offset by a special fund to reimburse carriers for the unexpectedly catastrophic degree of additional disability, *Ace Fire Underwriters Co. v. Special Funds Conserv. Comm.*, 28 N.Y.3d 1084, 1085 (2016), but that fund has since been closed by the Legislature*, see American Economy Ins. Co. v. State of New York*, 30 N.Y.3d 136, 142 n.2 (2017); *Matter of Raynor v. Landmark Chrysler*, 18 N.Y.3d 48, 53 (2011). Claimant has never argued in this case that WCL § 15(8) applies.

15-17, 76, 100-04.) He underwent surgeries to address those injuries in 2008 and 2016. (R. 9-11.) The schedule loss of use award for these injuries was not made until after a second injury had occurred, and an award had been made for that second injury.

Specifically, in 2009, claimant sustained injuries to his neck, back right shoulder, and both hips in a separate incident. In January 2016, claimant received, as a result of the hip injuries, a 50% schedule loss of use award for loss of his left leg and 52.5% schedule loss of use award for loss of use of his right leg. (R. 125).

In 2017, the claimant and carrier submitted evidence regarding the permanency of the 2006 knee injuries and the related degree of loss of use. (R. 109-115, 119.) Although there was evidence from three medical experts, the workers' compensation law judge credited only claimant's medical expert. Claimant's expert opined that claimant had incurred a medical impairment to his left knee of 80% and a medical impairment to his right knee of 40%. (R. 177-78.) In offering those opinions, claimant's expert said that he was "taking into account to some extent, the back and the hip" because "none of these exist in isolation." (R. 182-83.) Claimant's expert was

pressed by counsel to simply add the degree of loss of use awarded for claimant's earlier injury to the degree of loss of use the expert found in this case from examining claimant's knees and thereby render an opinion on the total loss of use to date. (R. 185-87.) The expert would not, however, translate his view of medical degrees of impairment to a percentage loss of use of the full legs that accounted for injuries to the claimant's hip and back. (R. 185-187.) Rather, he insisted on limiting his opinion to the degree of impairment of claimant's knees without addressing any interplay of the injury to claimant's hips. (R. 185-87.)

Finding claimant's expert to be the most credible on degree of impairment, the WCLJ relied on that expert's opinion on that issue and determined that claimant had now incurred—in all—an 80% loss of use of his left leg and a 40% loss of use of his right leg. (R. 207, 214.) However, because claimant had previously received schedule loss of use awards for both legs in connection with the 2009 claim, the WCLJ reduced those percentage losses by the percentage losses previously awarded. The WCLJ thus reduced the 80% loss of use of the left leg by the prior 50% loss of use for that leg, leaving

claimant with a 30% schedule loss of use award for the left leg. (R. 207, 213.) And the WCLJ reduced the 40% loss of use of the right leg to 0%, because subtracting the full prior 52.5% loss of use would have resulted in a negative number. (R. 207, 213.) The subject awards are thus summarized as follows:

	Left leg	Right leg
2017 cumulative loss of use after max improvement from knee injuries	80%	40%
Prior 2009 loss of use from hip injuries	50%	52.2%
2017 loss of use awards for knee injuries alone	30%	0%

In rendering those awards, the WCLJ departed from an earlier ruling in the proceeding that the percentage loss of use from the 2009 claim should not be deducted. (R. 138-39.) The WCLJ explained that an intervening Third Department decision, *Matter of Genduso v. N.Y.C. Dep't of Educ.*, 164 A.D.3d 1509 (2018), changed the analysis. (R. 214.) In *Genduso*, the Third Department upheld the Board's similar reduction of a schedule loss of use award

by the percentage loss of use of a prior award for the same statutorily-enumerated body member. *Id.* at 1510.

Claimant administratively challenged this reduction, arguing that reducing his awards based on a different injury to a different part of his legs contradicted binding caselaw from this Court and the Third Department. (R. 217-221.) Nevertheless, upon administrative review, the Board affirmed the WCLJ's decision, also expressly relying on the Third Department's decision in *Genduso*. (R. 9-13.) The Board concluded that, "the claimant's injuries to the hips and knees would not be eligible for separate schedule losses of use, but would be encompassed by a leg schedule, and so the claimant's present receipt of schedule losses of use of the legs must be reduced by his prior receipt of schedule losses of use of the legs, regardless of which part of the leg was injured." (R. 13.)

On claimant's appeal to the Appellant Division, Third Department, that court affirmed. *Matter of Johnson v. City of New York*, 180 A.D.3d 1134 (3d Dept. 2020). The Third Department held that schedule loss of use awards are "limited to only those statutorily enumerated members listed in Workers' Compensation

Law §15(3)," *id.* at 1136, and "[i]nasmuch as the 50% SLU award and the 52.5% 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," *id.* at 1137 (citing WCL §15(7)).

This Court granted claimant leave to appeal.

ARGUMENT

WORKERS' COMPENSATION LAW § 15(3) REQUIRES THAT NEW SCHEDULE LOSS OF USE AWARDS ACCOUNT FOR PRIOR SCHEDULE LOSS OF USE AWARDS FOR INJURIES TO THE SAME STATUTORILY-ENUMERATED BODY PART

This Court should affirm the Third Department's holding that the Board properly reduced the claimant's schedule loss of use award by the degree of loss of use he had previously suffered for injuries to the same statutorily-enumerated members—his left and right legs. The Board correctly held that the total loss of use following an injury should be reduced by the degree of loss of use awarded for another injury to the same statutorily-enumerated body member. The Board's interpretation of WCL § 15(3) is in accordance with the statutory text, consistent with this Court's understanding of the function of schedule loss of use awards, and entitled to deference. Claimant's contrary arguments are misplaced.

A. The Board Properly Determined Claimant's Schedule Loss of Use in Accordance with the Statute.

The Third Department correctly sustained the Board's interpretation of the Workers' Compensation Law to require that any new schedule loss of use award for injuries to a member that has been injured in two separate instances account for the diminished loss of use reflected in an earlier loss of use award. Claimant's argument that new schedule loss of use awards for the same statutory member may be made without regard to the previously found loss of use, so long as they involve injury to a different non-statutory part of the same member, is contrary to the statutory structure and this Court's cases explaining the nature of schedule loss of use awards. Moreover, it would have the incongruous result of permitting awards for the loss of more than 100% of the use of an enumerated member.

1. The Statutory Text and Purpose Support the Board's Determination.

Awards made under WCL § 15(3) are made for disabilities "partial in character but permanent in nature." This Court has

repeatedly explained that a schedule loss of use award is "intended to 'compensate for loss of earning power' caused by the permanent partial disability,'" and is not an award in the nature of compensation for damages for an injury. *Matter of Estate of Youngjohn*, 2021 N.Y. Slip Op., 02017 at 5-6 (quoting *Matter of Marhoffer v. Marhoffer*, 220 N.Y. 543, 547 (1917)). "The theory of the New York law is not indemnity for loss of a member or physical impairment as such but compensation for disability to work." *Matter of Marhoffer*, 220 N.Y. at 546.

Accordingly, a schedule loss of use award is "to be seen as an award for a dignitary loss or as a cushion against a future earning capacity at a time when the security and continuity of an ongoing employment may be gone." *Landgrebe v. County of Westchester*, 57 N.Y. 2d 1, 6 (1982). The statute thus treats a schedule loss of use award as corresponding to a permanent diminishment in a worker's ability to earn a wage as a result of the loss, or permanent loss of use, of one of the body parts enumerated in WCL § 15(3)(a)-(t). Moreover, it follows that the diminishment for loss of an enumerated body part cannot logically exceed 100% of the use of

that body part, no matter how many times or in how many ways that body part is injured.

Further, because a schedule loss of use award is made for a permanent diminishment in wage earning capacity due to the loss of use of the affected member, WCL § 15(7) requires that a new schedule loss of use award for an injury to a member must take account of the fact that a prior award has already compensated the claimant for some percentage of loss of use. WCL § 15(7) provides that a new award is allowed where "an employee has suffered a previous disability or received compensation therefor," but the award must "reasonably represent [the employee's] 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 in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability."[3] And as we have explained, *supra* at 7,

---

[3] As noted *supra* at 8 n.2, WCL § 15(8) provides an exception where additional compensation may be available under circumstances not at issue in this appeal.

because awards are not necessarily made in the same order in which injuries are incurred, WCL § 15(7) applies where, as here, there is a later-issued award for an earlier-suffered injury.[4] WCL § 15(7) thus requires that the new award be limited to the *additional* loss of earning power caused by the injury for which that new award is being made.

Subtracting the degree of loss of use previously awarded from the degree of loss of use of the same member when making a new schedule loss of use award is the most administrable and equitable method of complying with this statutory command. Schedule loss of use awards are intended to compensate for a degree of loss of use of a member that is legally understood to be permanent. Accordingly, once such an award has been rendered, that degree of loss of use has been accounted for and should not be compensated a second time as part of a later schedule loss of use award for the same statutory member. Were it otherwise, a claimant who reinjured the

[4] Indeed, though the parties disagree about the import of WCL § 15(7) in this case, there is no dispute that the provision applies here. (*See* Cl. Br. at 24-26.)

same statutory member in a separate accident would receive a greater schedule loss of use award in toto than someone who ultimately suffered the same loss of use, but whose award was determined in a single determination.

Claimant complains that the Board's method of subtraction is unfair and contrary to the "benevolent purpose of the statute" because, in this instance, he will not receive compensation for more than 100% of the use of his legs and he will receive no additional award for the injury to his right knee. (Cl. Br. at 26-27.) But, on the medical evidence claimant offered, that is precisely the outcome that Legislature intended when it added the limitation on subsequent recoveries to the Workers' Compensation Law.

In *State Indus. Com. v. Newman*, 222 N.Y. 363 (1918), this Court explained that the limiting language of WCL § 15(7) (then WCL § 15(6)) was enacted specifically to limit the exposure of employers and carriers to liability for new injuries, as opposed to pre-existing injuries. The Court explained that the Legislature in 1915 added the limitation 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." *Id.* at 366-67. This limitation on the value of a subsequent award was intended to limit new awards to the loss specifically attributable to a new injury, standing alone, in order to eliminate any disincentive that might otherwise have existed against hiring previously disabled workers. *Id.* As the Court explained:

> Manifestly, the [pre-1915] law was a hindrance to those who, having lost a hand or another member, sought to become employees under the act, because the loss of the remaining member subjected the employer to the payment of compensation substantially greater than it would in case the employee had the other two members.

Id. at 367.[5] And this Court subsequently explained that this limitation on new awards applies where, as here, the existence of a

[5] Perhaps to mitigate the potential harshness of this rule to catastrophically injured claimants, the following year the Legislature added a version of the exception that is now found in WCL § 15(8). *See Matter of Schurdick v. Bayer Co.*, 272 N.Y. 217, 220 (1936).

prior disability is not in doubt. *See Matter of Schurdick v. Bayer Co.*, 272 N.Y. 217, 220 (1936).

Thus, WCL § 15(7) requires that the award for a new schedule loss of use involving the same statutorily-enumerated member must be limited to the additional loss of use, above and beyond the limitations already compensated by the prior award. And that is precisely what the Board did in this case when it subtracted the degree of loss of use of claimant's legs determined in his earlier schedule loss of use award from the degree of loss of use of his legs established by his medical expert in this case.

Making the calculation of the degree of loss of use solely attributable to the injury for which a new award is sought by simple subtraction of the prior award is especially reasonable where, as here, there was no credited medical opinion isolating the loss of use of each leg from the new injuries alone, as opposed to the cumulative loss of use of those legs from the injuries combined. Contrary to claimant's contention (Cl. Br. at 22), the record contains no credited medical evidence delineating between the degree of loss of use attributable to each of his accidents.

Claimant's expert, Dr. Long, upon whose testimony the WCLJ and Board relied, refused to opine on the total degree of impairment to claimant's legs from the combination of the injuries to claimant's hips and knees, or even more specifically the degree of disability to claimant's legs from just the knee injuries alone without interference from the injuries to claimant's hips. (R. 185-188.) Indeed, Dr. Long noted the difficulty that he had making a finding on the degree of impairment to claimant's legs because of the prior injury to claimants' hips. (R. 177-78.) Dr. Long testified that "part of the difficulty in this specific case, which makes it somewhat different, is that his clinical function in his knee is somewhat related to the back and his hip, and it's difficult to determine" and that "it is difficult to parse down how much of that is the knee and the hip and the back." (R. 178.) Given that the injury to claimant's hips occurred while claimant was already undergoing treatment for the injury to his knees, his expert's refusal to parse the degree of loss of use between the two injuries was understandable.

Nor did the testimony of Dr. Parisien, New York City's expert, which was not credited by the WCLJ in any case, engage at all with

the factual issue of how much of the loss of use of claimant's legs could be attributed solely to the knee injuries, to the exclusion of any effects from the injuries to his hips. (R. 117-120, 140-147.)

Accordingly, the Board reasonably affirmed the WCLJ's decision to accept claimant's expert's loss of use testimony as establishing the relevant loss of use percentages for claimant's *cumulative* loss of use of his legs, even though it was not expressly presented as such. Dr. Long's testimony was the only credited testimony regarding *any* particular loss of use. And, based on that testimony, the Third Department in turn properly sustained as appropriate the Board's finding of an 80% loss of use of claimant's left leg and a 40% loss of use of claimant's right leg, as well as the deductions, respectively, of the prior 50% loss of use of claimant's left leg and the 52.5% loss of use of his right leg that had previously been awarded. (R. 125.) This Court should, accordingly, affirm the Third Department's decision.

2. To the Extent the Board's Determination Turns on the Interpretation of the Statute, It Is Entitled to Deference.

To the extent there is a question about the proper interpretation of the schedule loss of use provisions of WCL § 15(3) and WCL §15(7), the Board's interpretation of those provisions is entitled to judicial deference. While the statutory text and legislative history point strongly toward the Board's resolution of this issue, as explained *supra* at 14-23, how those provisions operate when there are multiple loss of use awards to the same statutorily-enumerated member, and how best to receive evidence on that issue, involve questions as to which the Board possesses the kind of "knowledge and understanding of operational practices" and factual details that warrants deference to its interpretation. *Matter of Gonzalez v. Annucci*, 32 N.Y.3d 461, 471 (2018). Such determinations are factually intensive, involving medical findings as to the degree of a claimant's disability and the extent to which that disability is attributed to the most recent injuries or injuries earlier incurred. Indeed, the Legislature implicitly recognized the Board's expertise in this area when it amended the Workers'

Compensation Law in 2007 to direct the Board to create the permanency impairment guidelines. *See* WCL § 15(3)(x); *see also* Workers' Compensation Guidelines for Determining Impairment 2 (2017) (AG Addendum at 002) (noting WCL § 15(3)(x) was a statutory instruction to "adopt revised guidelines for the evaluation of medical impairment and determination of permanency with respect to injuries which are amenable to a schedule loss of use award").

B. There is No Other Basis for Reversal

Claimant advances a hodgepodge of other arguments to challenge the Board's determination and the Third Department's decision affirming it. None has merit.

First, claimant is mistaken that WCL § 15(3)(u) permits multiple, wholly separate schedule loss of use awards for injuries to different *unenumerated* parts of an enumerated body member. (*See* Cl. Br. 13-16.) While that provision requires the Board to issue separate schedule loss of use awards for the loss or loss of use of each member or part thereof "in any case," the provision refers to

injuries to multiple enumerated body members or *enumerated* parts thereof incurred in a single accident, *i.e.,* in any one case.

WCL § 15(3)(u) provides:

> Total or partial loss or loss of use of more than one member or parts of members. 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 or 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.

The provision does not support the proposition that *unenumerated parts* of the same statutorily-enumerated member can be the subject of multiple, entirely separate awards. Such a reading would not only be incompatible with WCL § 15(7)'s limitation on awards for subsequent injuries, discussed *supra* at 17-21, but out of harmony with the overall structure of WCL § 15. Such discordant interpretations of the Workers' Compensation Law are to be avoided. *See Matter of Estate of Youngjohn*, 2021 N.Y. Slip Op. 02017 at 10-11 (collecting cases).

The phrase "parts of more than one member" in WCL § 15(3)(u) refers to the statutorily-enumerated parts of more than one member, such as the hand and foot, that were injured in a single accident. The enumeration of some parts of statutorily-enumerated body members and not others demonstrates this intention. Where the Legislature intended to allow for separate awards for parts of a larger body member, such as the arm or leg, "it knew how to do so" and did so expressly. *El-Dehdan v. El-Dehdan*, 26 N.Y.3d 19, 34 (2015) (citing McKinney's Cons. Laws of N.Y., Book 1, Statutes § 74; *Pajak v. Pajak*, 56 N.Y.2d 394, 397 (1982)). The absence of express schedules for other parts of the arm and leg, such for as the hips and knees involved in this case, strongly suggests that the Legislature did not intend such omitted parts to give rise to separate awards, but rather that injuries to those parts should be aggregated into the award for the entire statutorily-enumerated member.

Indeed, the legislative history of WCL § 15(3)(u) shows that the Legislature had no intention of providing for additional awards based on unenumerated parts of body members when it enacted

that provision. To the contrary, the Legislature intended to restore the Board's ability to make multiple awards for injuries to different statutorily-enumerated members or enumerated parts thereof arising out of the same accident, and to have those awards run consecutively. The enactment of WCL § 15(u) overruled this Court's decision in *Matter of Hoffman v. Chatham Electric Light, Heat and Power Co.*, 249 N.Y. 433 (1929), which had, among other things, affirmed a decision of the Third Department holding that a non-schedule award must issue where "multiple injuries result in a greater aggregate disability than the loss of use of any one member, for which a schedule award can be made." *Gefers v. N.Y. Window Cleaning Co.*, 224 A.D. 792, 792 (1928), *aff'd sub nom Hoffman v. Chatham Electric Light, Heat and Power Co.*, 249 N.Y. 433 (1929). A letter from the Secretary of the State Industrial Commission, the forerunner of the Workers' Compensation Board, which recommended adding the provision to the Legislature, makes plain that the provision was intended to restore the Commission's earlier practice and apply "where *an* injury results in the loss of parts of *more than one member* to make schedule awards for each loss

involved." Letter of Henry D. Sayer, Executive Secretary, Industrial Survey Commission, April 3, 1929 *reprinted in* Bill Jacket for ch. 301 (1929) at 4-5 (AG Addendum at 008-009) (emphasis added); *see also* Report of the Industrial Survey Commission 44-45 (1929) (AG Addendum at 011-012).

Second, there are no precedents that contradict the Board's determination in this case. Neither *Matter of Zimmerman v. Akron Falls Park-County of Erie*, 29 N.Y.2d 815 (1971), nor the Third Department cases upon which claimant relies prohibit the Board's approach. (*See* Cl. Br. at 18-23.) Here, there are two awards for different injuries to the same statutorily-enumerated body part and no credited medical testimony explicitly delineating between the loss of use from the earlier injury and the loss of use from the new injury. None of the cases claimant cites involve this situation.

In *Zimmerman*, the previous award was not made for the same statutorily-enumerated member and there was an express medical finding that the earlier injury did not affect the later injury. As the Third Department dissenters explained in that case, the earlier award was for the loss of the *Zimmerman* claimant's hand

under WCL § 15(3)(c), not for the loss of use of his arm due to the later shoulder injury under WCL §15(3)(a). *Matter of Zimmerman*, 35 A.D.2d 1030, 1032 (3d Dep't 1970) (Herlihy, J. dissenting) *rev'd,* 29 N.Y.2d 815, 817 (1971). Moreover, in *Zimmerman*, the prior injury took place decades earlier, and the "record clearly indicate[d] 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." 29 N.Y.2d at 817.

The Third Department cases claimant cites (which are mostly relied upon only by each other and are not binding on this Court in any event), are similarly distinguishable. *Matter of Bell v. Glens Falls Ready Mix Co., Inc.*, 169 A.D.3d 1145 (3d Dep't 2019), involved a single schedule loss of use award that aggregated injuries to a claimant's right shoulder and right wrist into a single schedule loss of use award for his right arm. *Matter of Deck v. Dorr*, 150 A.D.3d 1597 (3d Dep't 2017), involved separate awards for 100% loss of claimant's right hand and 100% loss of claimant's right thumb, but those awards were permissible because the hand and thumb are

separately enumerated statutory members. And while there were two awards for the same statutory member in *Matter of Pellegrino v. Textile Prints Corp.,* 81 A.D.2d 723, 724 (3d Dep't 1981), and *Matter of Bazzano v. John Ryan and Sons*, 62 A.D.2d 260 (3d Dep't 1978), in each of those cases there was a factual finding based on medical evidence as to the additional (*i.e.*, incremental) loss of use solely attributable to the new injury. That kind of medical evidence was absent here.

Nor do the Board's prior administrative decisions cited by claimant present a problem or require distinguishing under principles of administrative stare decisis. (*See* Cl. Br. 21-23.) Principles of administrative stare decisis only come into play when an agency "deviates from its established rule" on a particular legal issue. *See Matter of Terrace Ct., LLC. v. N.Y.S. Div. of Hous. & Comm'y Renewal*, 18 N.Y.3d 446, 453 (2012). None of the administrative decisions cited by claimant turned on the same legal issue involved in this case: how to value a second, later-issued schedule loss of use award for an injury to the same statutorily-enumerated member as a prior award. All of them, in fact, turned

on a different legal question: how to aggregate injuries arising from one accident into unified schedule loss of use awards for the relevant statutorily-enumerated body parts. *See Matter of N.Y. Life Ins. Co.*, 2018 N.Y. Wrk. Comp. LEXIS 12039 (2018) (schedule loss of use awards for the left arm, left leg, left hand, and left foot determined by aggregating injuries to left shoulder, left elbow, left wrist, left hip, left knee, and left ankle); *Matter of N.Y.C. Dep't of Corr.*, 2013 N.Y. Wrk. Comp. LEXIS 3723 (2013) (schedule loss of use award for the left arm determined by aggregating injuries to wrist and shoulder incurred in the same accident); *Matter of Rochester City Sch. Dist.*, 2017 N.Y. Wrk. Comp. LEXIS 5993 (2017) (injuries to left hip and left knee sustained in the same accident aggregated into single schedule loss of use award for the left leg).

And, in any case, the Board made clear that it was relying on newly issued Third Department precedent, specifically *Genduso* (R. 11-13). Doing so was sufficient to satisfy any obligation the Board had to explain why it was now applying the rule that it did. *See generally Lantry v. State*, 6 N.Y.3d 49, 58-59 (2005). Given that claimant did not argue to the Board that the WCLJ's determination

was contrary to the Board's own administrative precedent or flag the determinations that it has subsequently pointed to on appeal (*see* R. 217-221), claimant should not be heard to argue that the Board violated any obligation it had to distinguish particular administrative precedent. Thus, this case is unlike the recent case of *Matter of O'Donnell v. Erie County*, 35 N.Y.3d 14 (2020), where the Board conceded error to this Court for failing to acknowledge and distinguish prior administrative precedents that had been brought to its attention during the underlying proceeding.

Finally, there is no merit to claimant's insistence that the underlying determination contradicts the Board's own guidelines. The Workers' Compensation Guidelines for Determining Impairment provide instruction on how to use medical evidence regarding a degree of impairment of an unenumerated part of a statutorily-enumerated body member to determine loss of use of that member. Before providing any other information, the Guidelines explain that "A distinction is made between disability and impairment. Impairment is a purely medical determination made by a medical professional, and is defined as any anatomic or

functional abnormality or loss." THE WORKERS' COMPENSATION GUIDELINES FOR DETERMINING IMPAIRMENT 6 (2017) (AG Addendum at 003). By contrast, "[d]isability is a legal determination that reflects the impact of a workplace injury [*i.e.,* the impairment] on a claimant's ability to work. The Workers' Compensation Law Judge establishes the level of disability based on the available medical evidence and other relevant information." *Id.* Moreover, the Guidelines go on to note that "Workers' Compensation Law Section 15" not the Guidelines themselves, are what "prescribes the value for a percentage loss or loss of use of body members," *id.* at 8 (AG Addendum 005), and provide a table listing the appropriate members for a schedule loss of use award and the corresponding degree of disability that parallels the body parts enumerated in the statute, *id.* at 64 (AG Addendum 006).

Accordingly, there is no other basis for this Court to depart from the Third Department's holding that the Board appropriately deducted the degree of loss of use found as part of claimant's earlier awards for schedule loss of use of his legs from the underlying

awards for schedule loss of use of his legs sustained in a separate accident.

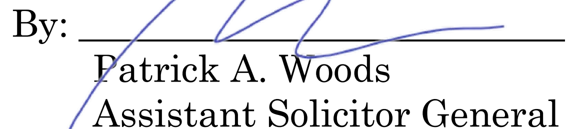
CONCLUSION

The decision of the Appellate Division, Third Department should be affirmed.

Dated: Albany, New York
May 5, 2021

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for the Workers' Compensation Board



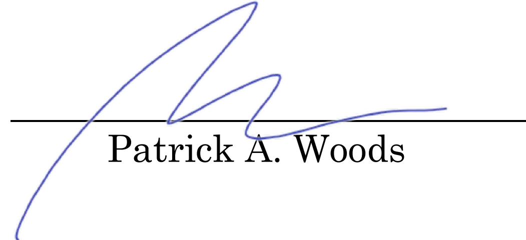
By: ___________________________
Patrick A. Woods
Assistant Solicitor General

BARBARA UNDERWOOD
Solicitor General
ANDREA OSER
Deputy Solicitor General
PATRICK A. WOODS
Assistant Solicitor General
of Counsel

The Capitol
Albany, New York 12224
(518) 776-2020
Patrick.Woods@ag.ny.gov

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), Patrick A. Woods, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 7,516 words, which complies with the limitations stated in § 500.13(c)(1).



Patrick A. Woods

ADDENDUM

AG ADDENDUM

TABLE OF CONTENTS

PAGE

Excerpts from Workers' Compensation Guidelines for Determining Impairment (2017) 001

Excerpts from Bill Jacket for ch. 301 (1929) 007

Excerpts from Report of the Industrial Survey Commission (1929) 010

Workers' Compensation Guidelines for Determining Impairment

First Edition, November 22, 2017

Workers' Compensation Board

Forward

Legislation enacted in April 2017 [WCL§15(3)(x)] directed the Board to consult with "representatives of labor, business, medical providers, insurance carriers, and self-insured employers regarding revisions to permanency impairment guidelines, including permitting review and comment by such representatives' chosen medical advisors…", to adopt revised guidelines for the evaluation of medical impairment and determination of permanency with respect to injuries which are amenable to a schedule loss of use award pursuant to paragraphs (a) through (v) of subdivision 3 of section 15 of the WCL. As the law directs, these Guidelines are to be "…reflective of advances in modern medicine that enhance healing and result in better outcomes." [WCL§15(3)(x)]

Therefore, these revised permanency guidelines supersede those sections of the Board's 2012 Impairment Guidelines concerning medical evaluation of injuries amenable to a schedule loss of use (chapters 1 through 8 of the 2012 Guidelines), as well any other provision of the 2012 Impairment Guidelines which are inconsistent with these Guidelines.

Chapter 1: Introduction

Disability is a legal determination that reflects the impact of a workplace injury on a claimant's ability to work. The Workers' Compensation Law Judge establishes the level of disability based on the available medical evidence and other relevant information. Medical evidence may be submitted by the claimant's health provider, a medical consultant for the employer and/or an independent medical examiner.

A distinction is made between disability and impairment. Impairment is a purely medical determination made by a medical professional, and is defined as any anatomic or functional abnormality or loss. Competent evaluation of impairment requires a complete medical examination and accurate objective assessment of function. These Guidelines provide the medical provider with a uniform process for evaluating an individual's impairment resulting from a medically documented work related injury or illness.

1.1 Types of Disability Under the Workers' Compensation Law

This law establishes the following types of disability in workers' compensation cases:

1. Temporary total disability
2. Permanent total disability
3. Temporary partial disability
4. Permanent partial disability

Evaluation of permanent disability occurs when there is a permanent impairment remaining after the claimant has reached maximum medical improvement (MMI). These Guidelines were created for purposes of determining impairment for permanent disabilities.

1.2 Maximum Medical Improvement (MMI)

A finding of MMI is based on a medical judgment that (a) the claimant has recovered from the work injury or illness to the greatest extent that is expected and (b) no further improvement is reasonably expected. The need for palliative or symptomatic treatment does not preclude a finding of MMI. In cases that do not involve surgery or fractures, MMI cannot be determined prior to 6 months from the date of injury or disablement, unless otherwise stated or agreed to by the parties.

1.3 Role of Examining Medical Providers

Medical providers are obligated to provide the Board and the parties their best professional opinion of the claimant's medical condition, degree of impairment, and functional abilities. These Guidelines provide detailed criteria for determining the severity of a medical impairment, with a greater weight given to objective findings. It is the responsibility of the medical provider to submit medical evidence that the Board will consider in making a legal determination about disability.

Medical providers should not infer findings or manifestations that are not drawn from the physical examination or test reports, but rather medical providers should look to the objective

findings of the physical examination and data contained within the medical records of the patient. This methodology is intended to foster consistency, predictability and inter-rater reliability for determining impairment.

In order to prepare a report on permanent impairment, the medical provider should do the following:

1. Identify the affected body part or system (include chapter, table number, class, and severity level for non-schedule disabilities) and review the Guidelines (for body parts not covered by the Guidelines, see Chapter on Other Injuries and Occupational Diseases [Default Guideline]).
2. Review the relevant medical records and medical history.
3. Perform a thorough physical examination.
    a. To measure active range of motion (ROM), medical providers should generally utilize a goniometer. In order to measure the maximum range of active motion, three repeat measurements should be taken.
    b. Deficits should be measured by comparing to the baseline reading of the contralateral member, if appropriate. Using the contralateral is not appropriate where the opposite side has been previously injured or is not otherwise available for comparison.
4. Report the work-related medical diagnosis(es) and examination findings, including appropriate specific references to the relevant medical history, examination, and test results.
5. Follow the recommendations to establish a level of impairment.
6. For a non-schedule permanent disability, evaluate the impact of the impairment(s) on claimant's functional and exertional abilities. See Medical Impairment and Functional Assessment Guidelines in the 2012 New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity.
7. When determining the value of a schedule loss of use, the total value of several range of motion deficits should not exceed the value of full ankylosis of the joint. The sum of multiple ankylosed joints of a major member cannot exceed the value of amputation. However, digits may exceed these values due to loading.

1.4 Types of Final Evaluation Examinations

Examining medical providers will conduct final evaluation examinations in connection with the following categories of awards:

1. A Schedule Award for:
    a. Impairment of extremities (including nervous system impairment that impacts use of extremities)
    b. Loss of vision
    c. Loss of hearing
    d. Facial disfigurement
2. Non-Schedule Award for:
    a. Classification as permanent partial disability
    b. Classification as permanent total disability

Medical providers evaluating a claimant located in New York, and medical providers located in New York who perform evaluations, must be authorized by the Workers' Compensation Board. For medical providers outside of New York, any evaluation performed must comport with these Guidelines, including the use of any forms prescribed by the Chair.

1.5 Schedule Awards

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:

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 physical damage to bone, muscles, cartilage, tendons, nerves, blood vessels, and other tissues.
3. The claimant must have reached 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 Section 15 prescribes the value for a percentage loss or loss of use of body members. See Appendix A: 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.

1.6 Non-Schedule Awards (Classification)

Non-schedule awards include permanent impairments that are not covered by a schedule, such as conditions of the spine and pelvis, lungs, heart, skin, and brain, as well as impairments of the extremities that are not amenable to a schedule award as described below.

Schedule Impairments Subject to Classification
Examples of impairments of the extremities not amenable to a schedule award:

1. Progressive and severe painful conditions of the major joints of the extremities such as the shoulders, elbows, hips and knees with one or more of the following:
    a. Objective findings of acute or chronic inflammation of one or more joints such as swelling, effusion, change of color or temperature, tenderness, painful range of motion, etc.
    b. X-ray evidence of progressive and severe degenerative arthritis.
    c. Minimal or no improvement after all modalities of medical and surgical treatment have been exhausted.
2. Chronic painful condition of an extremity commonly affecting the distal extremities such as the hands and feet, with one or more of the following:
    a. Complex regional pain syndrome (reflex sympathetic dystrophy), Sudeck's atrophy or chronic painful extremity syndrome.
    b. Objective findings or chronic swelling, atrophy, dysesthesias, hypersensitivity or changes of skin color and temperature such as mottling.

APPENDIX A

Table of Weeks by Percentage Loss of Use of Body Part:

	5%	7 1/2%	8 1/3%	10%	12 1/2%	15%	16 2/3%	20%	25%	30%	33 1/3%	35%	37 1/2%	40%	45%
Arm	15 3/5	23 2/5	26	31 1/5	39	46 4/5	52	62 1/5	78	93 3/5	104	109 1/5	117	124 4/5	140 2/3
Hand	12 1/5	18 3/10	20 1/3	24 2/5	30 1/2	36 3/5	40 2/3	48 4/5	61	73 1/5	81 1/3	85 2/8	91 1/2	97 3/5	109 4/5
Thumb	3 3/4	5 5/8		7 1/2	9 3/8	11 1/4	12 1/2	15	18 3/4	22 1/2	25	26 1/4	28 1/8	30	33 3/4
First Finger	2 3/10			4 3/5	5 3/4	6 4/5	7 2/3	9 1/5	11 1/2	13 4/5	15 1/3	16 1/10	17 1/4	18 2/5	20 7/10
Second Finger	1 1/2			3	3 3/4	4 1/2	5	6	7 1/2	9	10	10 1/2	11 1/4	12	13 1/2
Third Finger	1 1/4			2 1/2	3 1/8	3 3/4	4 1/6	5	6 1/4	7 1/2	8 1/3	8 3/4	9 3/8	10	11 1/4
Fourth Finger	3/4			1 1/2	1 7/8	2 1/4	2 1/2	3	3 3/4	4 1/2	5	5 2/5	5 5/8	6	6 3/4
Leg	14 2/5	21 3/5		28 4/5	36	43 1/5	48	57 3/5	72	86 2/5	96	100 4/5	108	115 1/5	129 3/5
Foot	10 1/4	15 3/8	17 1/2	20 1/2	25 5/8	30 3/4	34 1/6	41	51 1/4	61 1/2	68 1/3	71 3/4	76 7/8	82	92 1/4
Great Toe	1 9/10	2 17/20		3 4/5	4 3/4	5 7/10	6 1/3	7 3/5	9 1/2	11 2/5	12 2/3	13 3/10	14 1/4	15 1/5	17 1/10
Other Toes	4/5			1 3/5	2	2 2/5	2 2/3	3 1/5	4	4 4/5	5 1/3	5 3/5	6	6 2/5	7 1/5
Eye	8	12		16	20	24	26 2/3	32	40	48	53 1/3	56	60	64	72

	50%	55%	60%	62 1/2%	65%	66%	70%	75%	80%	83 1/3%	85%	87 1/2%	90%	95%	100%
Arm	156	171 3/5	187 1/5	195	202 4/5	208	218 2/5	234	249 3/5	260	265 1/5	273	280 4/5	296 2/3	312
Hand	122	134 1/5	146 2/5	152 1/2	158 3/5	162 2/3	170 4/5	183	195 1/5	203 1/3	207 2/5	213 1/2	219 3/5	231 4/5	244
Thumb	37 1/2	41 1/4	45	46 7/8	48 3/4	50	52 1/2	56 1/4	60	62 1/2	63 3/4	65 5/8	67 1/2	71 1/4	75
First	23	25 3/10	27 3/5	28 3/4	29 9/10	30 2/3	32 1/5	34 1/2	36 4/5	38 1/3	39 1/10	40 1/4	41 2/5	43 7/10	46
Second	15	16 1/2	18	18 3/4	19 1/2	20	21	22 1/2	24	25	25 1/2	26 1/4	27	28 1/2	30
Third	12 1/2	13 3/4	15	15 5/8	16 1/4	16 2/3	17 1/2	18 3/4	20	20 5/6	21 1/4	21 7/8	22 1/2	23 3/4	25
Fourth	7 1/2	8 1/4	9	9 3/8	9 3/4	10	10 1/2	11 1/4	12	12 3/4	13 1/8	13 1/2	14 1/4	14 1/4	15
Leg	144	158 2/5	172 4/5	180	187 1/5	192	201 3/5	216	230 2/5	240	244 4/5	252	259 1/5	273 3/5	288
Foot	102 1/2	112 3/4	123	128 1/8	133 1/4	136 2/3	143 1/2	153 3/4	164	170 5/6	174 1/4	179 3/8	184 1/2	194 3/4	205
Great Toe	19	20 9/10	22 4/5	23 3/4	24 7/10	25 1/3	26 3/5	28 1/2	30 2/5	31 2/3	32 3/10	33 1/4	34 1/5	36 1/10	38
Other Toes	8	8 4/5	9 3/5	10	10 2/5	10 2/3	11 1/5	12	12 4/5	13 1/3	13 3/5	14	14 2/5	15 1/5	16
Eye	80	88	96	100	104	106 2/3	112	120	128	133 1/3	136	140	144	152	160

1929
Year

301
Chapter

The New York State Library

Legislative Reference Section

Albany, N. Y.

Bill Jacket Collection

NEW YORK STATE LIBRARY
MICROFILMED
DATE Aug 3, 1966
NO. OF PRINTED BILLS 1
NO. OF EXPOSURES
EXCLUSIVE OF BILLS 5

AG Addendum 007

[illegible]
MEMBERS OF SENATE
[illegible]
MEMBERS OF ASSEMBLY
[illegible]
REPRESENTING GENERAL PUBLIC
[illegible] K. HART
REPRESENTING EMPLOYERS
[illegible]
REPRESENTING LABOR

STATE OF NEW YORK

INDUSTRIAL SURVEY COMMISSION

JOINT LEGISLATIVE COMMITTEE ON MANUFACTURING AND MERCANTILE BUSINESS

HENRY D. SAYER, EXECUTIVE SECRETARY

300 LEXINGTON AVENUE, NEW YORK CITY

April 3rd, 1929

Hon. Franklin D. Roosevelt, Governor,
Executive Chamber,
Albany, New York.

Dear Sir:

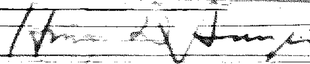
I desire to call to your attention Senate Bill Introductory #1410, Print #1659, proposed by Mr. Gates, to amend the Workmen's Compensation Law relative to the right of the Board to make consecutive awards in any case where an accidental injury results in the loss or loss of use of parts of more than one member. This Bill is recommended by the Industrial Survey Commission in its report to the Legislature on March 19th. The Bill adds to Sub-Division three of Section Fifteen of the Compensation Law a new paragraph. This Sub-Division contains many paragraphs all relating to injuries that result in a permanent partial disability. These disabilities are compensated for definite periods of weeks in lieu of continuing disability for loss or partial loss of wage earning capacity.

It had always been the practice of the Board where an injury results in the loss of parts of more than one member to make schedule awards for each loss involved, such awards running consecutively. About a year ago, the Court of Appeals denied the right of the Board to make such consecutive awards and held that where an injury resulted in the loss of use of parts of more than one member the schedules did not apply, and that such injury must be considered on the basis of loss of earnings. To adjudge a case on the basis of loss of earning would generally entail carrying the case along for a period of years, possibly for life, with continuing controversy over the wage earning capacity and a controverted hearing possibly every time that a change in the status of the injured person took place. It has been generally agreed by the administrators of the Law, as well as by those liable for the payment of compensation, that such practice would involve great hardship in many cases on the injured worker and would inject extremely difficult and troublesome administrative procedure.

The amendment proposed in this Bill would obviate the difficulties just mentioned and would permit the Board to treat all such cases on the basis of the schedules contained in the Law, and would be more satisfactory to all concerned. The amendment definitely re-establishes the Law to permit that to be done which for many years was done until the Court of Appeals' decision.

I am informed that the Industrial Commissioner and members of the Industrial Board are heartily in favor of this amendment.

Yours very truly,



Executive Secretary.

HDS.C

Legislative Document (1929) No. 75

STATE OF NEW YORK

REPORT

OF THE

Industrial Survey Commission

Transmitted to the Legislature March 19, 1929

ALBANY
J. B. LYON COMPANY, PRINTERS
1929

AG Addendum 010

and for the keeping of statistical records and reporting to the Department.

(j) That the sum of $50,000 be appropriated for the use of the Department in enforcing the employment agencies law during the first year of its operation.

(k That provision be made for the transfer to the State Department of Labor of any employee in the competitive civil service class of any city whose duties relate exclusively to employment agencies, upon request of the industrial commissioner and the approval of the State Civil Service Commission.

(1) That the provisions of the General Business Law relating to employment agencies be repealed.

WORKMEN'S COMPENSATION LAW

A large part of the attention of your commission during the past three years has been devoted to the consideration of problems arising under the Workmen's Compensation Law. Through recommendations of the commission numerous amendments have been made, all with the object of bettering the law, liberalizing its benefits, clarifying and simplifying its procedure. Your commission has sought the advice and cooperation of the Industrial Commissioner and the Industrial Board, of the Attorney General, of the Superintendent of Insurance, of the Compensation Inspection Rating Board, the Association of Casualty and Surety Executives, State Federation of Labor, the Associated Industries, representatives of mutual insurance companies, State Insurance Fund and Self Insurers. Your commission has sought wherever possible to bring about agreement of the various interests involved to avoid misunderstandings and to bring about the most cooperative relations.

Consecutive Awards. It has been always been the practice in this State where an injured workman sustained permanent partial disabilities of more than one member to award the number of weeks applicable to each such partial disability and to provide that the awards shall run consecutively. Recently, however, the Court of Appeals decided in the cases of Hoffman v. Chatham Electric Light, Heat and Power Co. and others reported at 249 N. Y. 433, that consecutive awards may not be made in such cases and that where more than one permanent partial disability exists, the claim must be adjudicated under that paragraph of the law which refers to all other cases than those coming under the schedule, where the compensation shall be 66 2/3 per centum of the difference between the average weekly wage at the time of the injury and the claimant's wage earning capacity thereafter during the continuance of such partial disability. The effect of this decision is to overturn the long-established practice in New York and to preclude the Industrial Board from making specific awards of compensation where permanent damage has been done to more than one member in the same accident. No specific award therefore may

be made in any such case. This creates a feeling of hardship on the part of the injured worker. It is impossible to effect a commutation of the award and its payment in a lump sum. The claimant, therefore, no matter how intelligent or capable he may be, is precluded from capitalizing his injury to the extent of making himself self-supporting. He is thrown back upon the payment of continuing compensation or reduced earnings which necessitates continuing proof of his inability to earn full wages. In such a case, a man who had lost part of a hand and part of a foot or part of a hand and part of an eye might in the service of his employer find himself suffering no loss of earnings if he continued in the same employ or even a different employment with the same wage earning capacity. He 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. The fact that he may not be entitled to compensation now, however, does not mean that he may not later on be entitled to the compensation for the same injury. Thus, if the claimant five years or ten years later loses his job and by reason of his injury is unable to obtain new employment, he may then come in and have compensation awarded to him. It will readily be seen that not only is this situation unsatisfactory to the injured workman, but it creates a condition of serious prejudice to the employer or to the insurance company. The whole theory of insurance security depends upon the premiums received each year being sufficient to pay the losses incurred during that year. Under the law as it now is interpreted, a claimant may come back years later even though his claim has long since been closed and obtain an award of compensation. The reserve on his case may have been taken down by the insurance company; in fact, the losses for the year in which the accident occurred may have been entirely adjusted. This would tend to throw the computation of the insurance company's liabilities entirely out of balance.

We recommend, therefore, that the compensation law be amended so as to provide that the schedule of awards for permanent partial disabilities, which amount to less than permanent total disabilities, shall be made by the Board to run consecutively.

Laundries. Group 14 of section 3 of the Compensation Law provides that the law shall apply to all work in various kinds of occupations and places. Among the occupations therein listed, we find the term "laundries, power". The Attorney General has ruled that by reason of the modifying word "power" in connection with laundries, it can not be held to relate to hand laundries. Therefore work in hand laundries where not more than four workmen or operators are engaged does not now come under the Compensation Law. The growth of the hand laundry business has been very great and the business has some elements of definite hazard. If a person working in a hand laundry meets with an

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.

CtAp Docket No. APL-2020-00155

STATE OF NEW YORK
COUNTY OF ALBANY ss:
CITY OF ALBANY

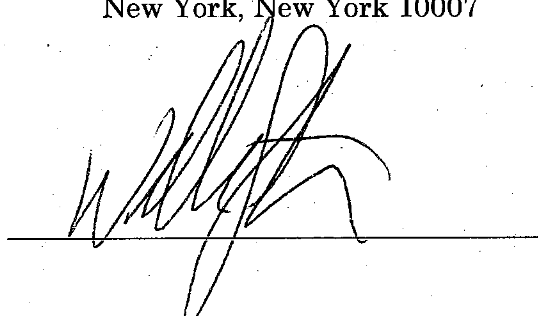
WILLIAM SPORTMAN being duly sworn says:

I am over eighteen years of age and an employee in the office of the Attorney General of the State of New York, attorney for the **Respondent Workers' Compensation Board**, herein.

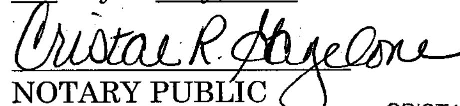
On the **5th** day of **May, 2021** I served the annexed **Brief for Respondent** on the attorneys named below, by depositing 3 copies hereof, properly enclosed in a sealed, postpaid wrapper, in the letter box of the Capitol Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Postal Service, directed to the said attorneys at the addresses within the State respectively theretofore designated by them for that purpose as follows:

Robert E. Grey, Esq.
GREY & GREY LLP
360 Main Street
Farmingdale, New York 11735

Daniel Matza-Brown, Esq.
NEW YORK CITY LAW DEPARTMENT
100 Church Street
New York, New York 10007



Sworn to before me this
5th day of May, 2021



NOTARY PUBLIC

CRISTAL R. GAZELONE
Notary Public, State of New York
Reg. No. 01GA6259001
Qualified in Rensselaer County
Commission Expires April 2, 2024