APL-2020-00155

To be argued by:
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10 minutes requested

Court of Appeals
State of New York

In the Matter of the Claim of

THOMAS JOHNSON,

Claimant-Appellant,

against

CITY OF NEW YORK,

Employer-Respondent,

and

WORKERS' COMPENSATION BOARD,

Respondent.

BRIEF FOR EMPLOYER-RESPONDENT CITY OF NEW YORK

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PRELIMINARY STATEMENT

The Workers' Compensation Law (WCL) establishes a schedule governing compensation for permanent loss of use for certain enumerated body parts—or "members"—such as legs, arms, and feet. This case involves how to assess the cumulative compensable loss of use of a bodily member when a worker has suffered permanent injuries to multiple parts of the member.

Appellant Thomas Johnson received a "schedule loss of use" award for a permanent partial loss of use of his legs. Later, he sought additional compensation for permanent injuries to other parts of his legs. He did not challenge an administrative judge's factual findings about the percentage loss of use of his legs as of the second award. The Workers' Compensation Board concluded that the combined awards for successive injuries to the same member should equal the total loss of use for the member from both injuries, and thus granted Johnson an award for only the incremental loss of use not already compensated by the first award. The Appellate Division, Third Department, correctly upheld the Board's determination, and this Court should affirm.

Johnson mistakenly presses for a categorical rule that the percentage loss of use for each injury must be added together whenever there are injuries to multiple parts of a member, regardless whether the cumulative loss of use for the member as a whole is less than that sum. He seeks this result even if, as here, the summed awards exceed the maximum award set forth in the statutory schedule for 100% loss of the member in question.

But that approach would violate the core character of the statutory schedule, which is organized based on its enumerated members, not based on parts of those members. The WCL details the compensation due for the permanent loss of use of the listed member—here, the leg—and makes no mention at all of sub-parts such as knees or hips. Johnson's rule would also flout the statutory maximums set in the schedule by the Legislature.

The Board thus properly rejected Johnson's proposed rule. And because Johnson failed to provide any evidence showing the cumulative loss of use of his legs exceeded that found by the administrative judge, despite being asked for such evidence, the Board's award is rational and amply supported.

QUESTION PRESENTED

Where a worker receives two successive workers' compensation awards for two permanent injuries to the same leg, may the Workers' Compensation Board limit the second award such that it compensates the worker for only the established loss of use of the worker's legs in excess of the loss of use covered by the first award?

STATEMENT OF THE CASE

A. "Schedule loss of use" compensation for a permanent partial disability caused by injuries to a worker's legs

1. The statutory framework for compensation for permanent loss of use

Section 15 of the WCL provides compensation for four different types of disabilities: permanent total disability, temporary total disability, permanent partial disability, and temporary partial disability. *Matter of LaCroix v. Syracuse Exec. Air Serv., Inc.*, 8 N.Y.3d 348, 353 (2007) (citing WCL § 15(1), (2), (3), (5)). This appeal concerns compensation for a permanent partial disability—that is, a disability that is "partial in character but permanent in quality." WCL § 15(3) (*see* App. Br. 13).

Permanent partial disability includes, as relevant here, the partial loss of use of one or both legs. *See* WCL §§ 15(3)(b), (s).

More specifically, the appeal concerns "schedule loss of use" or "SLU" awards for permanent partial disability of statutorily enumerated body parts—or "members" in the parlance of the statute. For legs, feet, toes, arms, hands, fingers, and other discrete "members" specifically enumerated in the law, Section 15(3) sets forth the "[n]umber of weeks' compensation" to be provided to a worker who has "lost" that particular member. WCL §§ 15(3)(a) to (*l*); *Matter of Mancini v. Services*, 32 N.Y.3d 521, 526 (2018) (the law assigns a fixed number of weeks' compensation "according to the bodily member … injured"). For each week of compensation, the worker receives two-thirds of his average weekly wages. WCL § 15(3).

A worker who has lost a leg, or experienced "permanent total loss of use" of a leg, is entitled to 288 weeks' compensation for that permanent disability. *Id.* § 15(3)(b), (r). The other enumerated members are assigned other specific "[n]umber of weeks' compensation" for their loss, ranging from 312 weeks (arm) to 15

weeks (pinkie). *See id.* §§ 15(3)(a) to (*l*). Because the law sets forth a schedule dictating the amount of compensation for each particular "member lost," such awards are colloquially known as schedule loss of use awards. *Mancini*, 32 N.Y.3d at 525.

Though the schedule refers to members "lost," it applies to partial loss of use as well. *See* WCL § 15(3)(s). Where a worker has suffered a permanent, partially-disabling injury to an enumerated member (such as a leg), the law provides proportionate compensation for "proportionate loss or loss of use of the member." *Id.* As Johnson correctly explains, the amount of such an award is calculated based on the proportionate loss of use of the limb as compared to the statutory schedule: for example, a 10% loss of use of a leg results in an award of 28.8 weeks of compensation, or one-tenth of the 288 weeks of compensation that would be due for the complete loss of a leg (App. Br. 14; WCL §§ 15(3)(b), (s)).

This statutory schedule thus sets forth the "[n]umber of weeks' compensation" that a worker may receive for each enumerated "[m]ember lost." WCL § 15(3). But the Legislature has also made clear that a worker who experiences permanent

partial disability may, in limited circumstances, be eligible for additional compensation beyond the maximum amounts set forth in the schedule. *See id.* § 15(3)(v). Under Section 15(3)(v), a worker who has experienced a 50% or greater loss or loss of use of an arm, leg, hand, or foot may receive "additional compensation" if, after the expiration of the schedule award, the worker can show (i) impairment of wage-earning capacity due solely to the injury, and (ii) compliance with a rehabilitation program requirement. *See id.*; *Mancini*, 32 N.Y.3d at 526-27.

Section 15(3)(v) provides the only source of additional compensation for a worker who has suffered a permanent partial disability covered by a schedule loss of use award. *See* WCL § 15(3). Johnson does not contend he is entitled to a Section 15(3)(v) award; he claims entitlement only to a schedule loss of use award.

A schedule loss of use award for a permanent partial disability thus reflects a one-time award that, in the Legislature's reasoned judgment, provides full legal compensation for that permanent partial disability, absent the showing described in

Section 15(3)(v). *See* WCL § 25(1)(b) (worker may elect to receive the award as a weekly payment or one lump sum). To show that a partial disability is permanent, and thus compensable with a schedule loss of use award under Section 15(3), a worker typically offers evidence that he has reached "maximum medical improvement" of the impairment underlying the disability—that is, that no further improvement is reasonably expected. *See, e.g.*, *Matter of Nasir v. BJ's Wholesale Club, Inc.*, 189 A.D.3d 1951, 1951 (3d Dep't 2020). Whether a claimant is entitled to a schedule loss of use award and, if so, the percentage of loss of use to be compensated, present factual questions for the Workers' Compensation Board to resolve. *Matter of Maunder v. B & B Lumber Co.*, 166 A.D.3d 1261, 1261 (3d Dep't 2018).

2. The Board's guidelines for assessing loss of use

In the 1980s, a commission established by the Legislature recommended publication of a set of "uniform medical guidelines for the evaluation of functional impairments" to promote

consistency among awards and reduce litigation.[1] Such guidelines were first issued a few years later, and have been updated periodically ever since (2012 Guidelines at 7). *See* WCL § 15(3)(x).

The guidelines set forth rubrics for determining schedule loss of use percentages based on objective criteria such as flexibility measurements and history of medical procedures (*e.g.*, knee replacement). For example, where hip impairment limits anterior flexion of the hip to 25 degrees, that permanent impairment corresponds to 66.7% loss of use of the leg (2012 Guidelines at 25). And where knee impairment limits knee flexion to 25 degrees, that permanent impairment corresponds to 65% loss of use of the leg (*id.* at 27).

The guidelines do not address every possible scenario, but instead set forth clear, administrable formulas for translating individual impairments to loss of use percentages. The guidelines

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[1] Workers' Compensation Board, New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity, at 7 (Dec. 2012) ("2012 Guidelines"), *available at* https://on.ny.gov/3sRRyVC.

also do not address how to combine multiple impairments to the same member (*see* 2012 Guidelines at 48).

B. Johnson's successive injuries to his legs and resulting workers' compensation awards

Appellant Thomas Johnson, while employed as a patient-care technician for the New York City Health and Hospitals Corporation, sustained work-related injuries to his legs and other body parts when, in 2006 and again in 2009, he fell while exiting a vehicle (*see* Record on Appeal ("R") 15, 73). Only his leg injuries are relevant here. Following medical treatment and findings that he had reached maximum medical improvement, Johnson received schedule loss of use awards in 2016 and 2019 based on the injuries to his legs he sustained in these two accidents (*see* R9-14, 223).

This appeal concerns Johnson's challenge to the second of these two workers' compensation awards, which was issued in 2019 based upon his submission of evidence of permanent injury to his knees sustained in 2006. His challenge focuses on the manner in which this 2019 award took into consideration the 2016

award for permanent partial disability to Johnson's legs. The two awards and the underlying evidence are summarized here.

1. The 2016 workers' compensation award for permanent partial loss of use of Johnson's left and right legs, arising from his 2009 accident

This earlier award pertains to the later-occurring injury: Johnson injured his hips, back, neck, and right shoulder while working in 2009 (*see* R10). Record evidence suggests he injured his knees in that 2009 accident as well (R76, 106-07).[2] For example, medical reports from 2014 and 2016 note that although Johnson initially injured his knees in 2006, he reinjured them in this 2009 accident (*id.*).

The parties ultimately agreed to findings for a proposed conciliation decision regarding permanent neck, back, right shoulder, and hip injuries that Johnson sustained in the 2009 accident (*see* R10, 223-24). Based on that agreement, an administrative judge (Carter-Flanagan, W.C.L.J.) issued a

[2] The amicus brief of the Injured Workers Bar Association (IWBA), offered in Johnson's support, incorrectly assumes that "Johnson's 2009 work injury … did not include the knees" (IWBA Br. at 24).

decision in early 2016 (*see id.*). That decision determined that Johnson had suffered a 50% loss of use of the left leg and a 52.5% loss of use of the right leg (*see* R10). The administrative judge issued a statutory loss of use award based on those percentages: 144 weeks of compensation for the 50% loss of use of his left leg, and 151.2 weeks of compensation for the 52.5% loss of use of his right leg (*see* R223)—figures equal to those percentages multiplied by the statutory schedule's 288 weeks of compensation for loss of the use of a leg.[3]

The award referred to Johnson's left and right "legs," and made no mention of whether the awards were related to loss of use of his knees or hips (R223). Johnson did not seek further review of that determination, and he does not directly challenge it here.

[3] The award's 435.6 weeks of compensation for permanent partial disability also included 104.4 weeks of compensation for the 45% loss of use of Johnson's right arm (R223).

2. The 2019 award challenged here, again for permanent partial loss of use of Johnson's legs

Johnson injured both knees while working in 2006 (R15-17; App. Br. 8). According to Johnson's own physician, that 2006 accident also caused impairment to his hips (*e.g.*, R48, 81, 86). Following treatment (*see* R76, 100-04), doctors concluded in 2017 that Johnson had reached maximum medical improvement for his knee injuries (*see* R10, 110, 119). As detailed below, the administrative judge (Schwartz, W.C.L.J.) weighed the medical evidence and concluded that, based on permanent partial disability to his knees caused by the 2006 accident and the prior loss of use award to Johnson for permanent partial disability of his legs, Johnson was entitled to an additional award for 30% loss of use of his left leg and no additional award for his right leg (R213-14). The Board affirmed that award (R9-14).

a. The evidence presented to the administrative judge and the Board

The administrative record contains documentation, testimony, and medical records from 2006—the year of the

accident at issue here (*see* R110)—through late 2018. Before he reached maximum medical improvement of his knees in 2017 (*see* R10, 110, 119), Johnson underwent right knee arthroscopy in 2008, left hip replacement in 2009, right hip replacement in 2013, and left knee replacement in 2016 (*see* R35, 54, 106). At times, such as in 2007, he was found to have a temporary total disability and received workers' compensation on that basis (*e.g.*, R39-40, 50).

The medical evidence reflected the interrelationship between Johnson's knee injuries sustained in 2006—which undisputedly provide the only basis for the award at issue here (R110; App. Br. 8)—and his hip injuries. For example, Johnson's treating physician, Dr. William Long, opined that Johnson's right hip "affect[ed] his overall musculoskeletal health" (R113), and that Johnson's "right hip pain" limited his "ability to optimize his outcome with the left knee" (R112).

Reports from Dr. Long also confirm that the 2006 accident caused injuries to Johnson's hips as well as his knees (R81, 86). In 2008, Johnson told Dr. Long that his 2006 injury was "the starting

point" for his hip symptoms (R48) and, in 2014, Dr. Long opined that the 2006 accident yielded temporary impairment of Johnson's hips (R86). In 2014, Dr. Long concluded that Johnson could perform only "sedentary work" due to his hip injuries, and that his work capabilities at that time required that he "never" operate machinery, climb, or lift or carry anything (R87).

In early 2016, as detailed above (Section B.1, *supra*), Johnson received a workers' compensation award for the injuries to his hips, neck, back, and shoulder that he sustained in 2009. Later that year, Dr. Long opined that Johnson's 2006 accident no longer caused any temporary impairment of his hips, but did result in impairment of his knees (R93). That report noted that Johnson "is doing well with respect to his hips" (R95) and was thus able to perform "light work" (R94)—an improvement over Dr. Long's prior conclusion that, in 2014, Johnson could perform only sedentary work (R87).

The reports and testimony of two physicians, Dr. Long and Dr. Jacques Parisien, provide the only evidence regarding the factual issue at the heart of this appeal: the extent of Johnson's

loss of use of his legs that had not already been compensated in his first schedule loss of use award. Their reports addressed only Johnson's knee impairment, without analyzing its relationship to his prior award for permanent partial loss of use of his legs.

Dr. Parisien, who evaluated Johnson on the employer's behalf (R214), examined only Johnson's knees, not his hips or any other part of his legs (*see* R118, 145, 161). He opined that Johnson suffered from 40% loss of use of his left leg and 17.5% loss of use of his right leg, and that such loss of use was causally related to his work-related injuries (*see* R119, 147-48).

Dr. Long's written report stated that Johnson suffered 80% impairment of his left knee and 40% impairment of his right knee (R110). That report made no conclusions about the loss of use of Johnson's legs as a whole, as opposed to his knees in particular (*id.*). The report also stated, without elaboration, that his opinion about impairment of Johnson's knees was "per NYS WC guidelines" (*id.*). Dr. Long's later testimony confirmed that the 80% and 40% figures were based on the Board's guidelines describing how to calculate the overall loss of use of the leg based

on a knee impairment viewed in isolation (R177-178, 181). Under those guidelines, a knee replacement with an overall assessment of "poor" corresponds to a loss of use of the leg of a "maximum capped at 80%," while a knee with "moderate" flexion deficits corresponds to a 40% loss of use of the leg.[4]

Based on Dr. Long's opinion, Johnson urged that he should received a schedule loss of use award corresponding to 80% loss of use of his left leg and 40% loss of use of his right leg—*in addition to* his prior award for 50% loss of use of his left leg and 52.5% loss of use of his right leg (*see* R129-30). The City objected to that request, explaining that the approach Johnson urged would yield a 130% total award for Johnson's left leg—a 50% loss of use from the first award plus an 80% loss of use from the second award (R130). To help the administrative judge assess what loss of use of Johnson's legs, if any, had not already been compensated by the

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[4] *See* Workers' Compensation Board, Workers' Compensation Guidelines for Determining Impairment, at 44 (Nov. 22, 2017), http://www.wcb.ny.gov/2018-Impairment-Guidelines.pdf ("maximum capped at 80%" for knee replacement); *see id.* at 42 (40% for "moderate" impairment). Dr. Long's testimony referred to the November 2017 guidelines (*see* R181) even though the 2012 version was in effect at the time of his written opinion (*see* R110) and Johnson concedes that the 2012 version governs here (App. Br. 17 n.7).

first award, the City requested that "both parties be directed to produce apportionment report[s] … commenting on the overall schedule loss of use of the legs" (*id.*). The administrative judge directed the parties to depose Dr. Long and Dr. Parisien on that issue (R139).

At his deposition, Dr. Parisien explained that he had examined only Johnson's knees, not his hips (R144-45, 161). He therefore offered no opinion as to whether Johnson suffered any loss of use of his legs beyond the loss of use already compensated in the first award (*see id.*).

Dr. Long declined to offer any opinion as to the cumulative loss of use of Johnson's legs based on his knee and hip impairments, and admitted that those impairments were functionally related (R170, 178, 186). He testified that "a lot of" Johnson's knee pain was "associated with his hips" (R170). He conceded that "part of the difficulty in this specific case" was that Johnson's "clinical function in his knee is somewhat related to the

back and his hip, and it's difficult to determine" (R178).[5] As to his opinion that Johnson experienced 80% loss of use of his left leg, Dr. Long explained that "it's difficult 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" (R178).

As to Johnson's right knee and leg, Dr. Long initially testified that Johnson had not yet achieved maximum medical improvement of his right knee because further care would help improve the knee's condition (R173), but then equivocated on that point (R180). When asked the basis for his conclusion that Johnson suffered a 40% loss of use of the right knee, he explained that he did not document the basis for that opinion but had been told by counsel that the number was 40% (R179, 181). He explained, however, that the 40% figure "t[oo]k in to account to some extent, the back and the hip as well," because "none of these exist in isolation" (R182).

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[5] Ignoring this evidence in its amicus brief supporting Johnson, IWBA incorrectly assumes that Johnson's knee and hip injuries are "separate and discrete" and "not overlapping" (IWBA Br. at 5).

At the time of his deposition, Dr. Long did not know whether Johnson had received a prior award for the partial loss of use of his legs (R183-84). When told by counsel that the prior award related only to Johnson's hips, Dr. Long testified that it would not alter his conclusion about Johnson's knees (*id.*). And when asked whether he would need to examine Johnson's hips and knees to come up with an overall schedule loss of use opinion for Johnson's legs, Dr. Long simply responded that nobody had asked him to do that (R186).

b. The award for the loss of use of Johnson's legs, which compensated him for only the loss of use that had not been covered by the first award

The administrative law judge analyzed the evidence and concluded that Johnson "had an 80% SLU of the left leg and a 40% SLU of the right leg" (R214)—a conclusion that Johnson does not, and cannot, challenge here, as detailed below. The judge then noted that Johnson had previously been compensated for 50% statutory loss of use of his left leg and 52.5% statutory loss of use of his right leg—which reflected compensation for permanent

partial disability to his legs (*id.*). To determine the amount of loss of use of his legs that had not already been compensated in the prior award, the judge subtracted the 50% already compensated for his left leg from the 80% total loss of use of his left leg, and subtracted the 52.5% already compensated for his right leg from the 40% total loss of use of his right leg (*id.*). This yielded a 30% loss of use award for the left leg and a 0% award for the right leg (*id.*).

On administrative appeal, Johnson did not challenge the administrative judge's findings as to his overall loss of use of his legs (*i.e.*, 80% loss of use of his left leg and 40% loss of use of his right leg) (R215-21). Instead, he argued that even though his own doctor declined to opine as to his cumulative loss of use of his legs based on his knee and hip impairments, he should receive an additional loss of use award for 80% and 40% loss of use of his left and right legs, respectively, without regard for his first award for loss of use of his legs (*see id.*).

The Board affirmed the administrative judge's decision (R9-14). Following the Appellate Division's decision in *Matter of*

Genduso v. N.Y.C. Dep't of Educ., 164 A.D.3d 1509 (3d Dep't 2018), the Board explained that neither the WCL nor the Board's own guidelines list parts of the leg—such as knees or ankles—as "'body parts lending themselves to separate [schedule loss of use] awards'" (R13 (quoting *Genduso*)). Because hips and knees are not eligible for separate schedule losses of use, the Board concluded, Johnson's second award for loss of use of his legs had to be "reduced by his prior receipt of schedule losses of use of the legs, regardless of which part of the legs was injured" (R13).

C. Johnson's challenge to the second award and the Appellate Division's decision upholding it

Johnson appealed the Board's second award, arguing that it should have compensated him for the entire permanent loss of use of his legs found by the administrative judge—80% loss of use of his left leg, and 40% loss of use of his right leg—without any reduction of the award to account for his first award for partial loss of use of his legs. The Appellate Division, Third Department upheld the Board's determination. *Matter of Johnson v. City of N.Y.*, 180 A.D.3d 1134 (3d Dep't 2020).

Looking to the text of the statute, the Court concluded that the law does not list the knee or hip as a statutorily enumerated member, nor as "body parts or members lending themselves to separate SLU awards." *Johnson*, 180 A.D.3d at 1136. Rather, under the WCL and the Board's own guidelines, impairments to knees and hips are "encompassed by awards for the loss of use of the leg, which is the applicable statutorily-enumerated body member." *Id.*

The Court concluded that Johnson was precluded from challenging the administrative judge's findings that he sustained an 80% schedule loss of use of the left leg and a 40% schedule loss of use of the right leg, because he raised no such challenge with the Board. *Johnson*, 180 A.D.3d at 1137. The Court further held that, in determining the appropriate award based upon those losses of use, it was within the Board's sound discretion to deduct Johnson's prior award for partial loss of use of his legs. *Id.* The Court noted that separate awards for subparts could confer a "monetary windfall" by compensating the worker "beyond the

degree of impairment actually sustained to the statutorily-enumerated body member." *Id.* at 1136-37.

ARGUMENT

THE BOARD APPROPRIATELY COMPENSATED JOHNSON FOR THE LOSS OF USE NOT ALREADY COVERED BY HIS PRIOR AWARD

The Workers' Compensation Board has broad discretion to make loss of use findings that determine the level of compensation due to an injured worker under the WCL. Such determinations must be upheld upon judicial review so long as they are supported by substantial evidence and not contrary to law.

Here, the Appellate Division correctly upheld the Board's findings and award. Johnson does not contest the administrative judge's factual finding that, at the time of the award he challenges here, he had experienced an 80% permanent loss of use of his left leg and 40% permanent loss of use of his right leg. Based on these undisputed findings, and applying the statute's schedule for permanent loss of use of a leg, the Board appropriately concluded that Johnson's second award should be for only the demonstrated

loss of use of his legs above and beyond what had already been compensated in the first award.

The administrative judge offered Johnson the opportunity to adduce additional evidence that the impairment found for his knee injuries caused further loss of use of his legs distinct from, and in addition to, the losses caused by the hip impairments that had already been compensated for by the first award. Johnson was unable to make this showing. His bald contention on appeal that his knee and hip impairments were "unrelated" is insufficient to remedy that failure of proof, particularly because his own doctor testified that his knee and hip impairments were functionally related. On this record, the Board rationally concluded that the second award should be reduced by the loss of use already compensated for by the first award.

Johnson's theory on appeal is that the impairments were unrelated because they pertained to different parts of an enumerated member. He asks for a legal rule that awards for such "unrelated" impairments cannot be offset against each other. But his proposed rule is inconsistent with the statutory schedule and

its per-member limits. Critically, the statute compensates injured workers for the loss of use of particular enumerated members, and does not mention sub-parts like knees or hips. The approach Johnson urges would replace the Legislature's choice of enumerated members with a broader list, and would effectively expand the amount of per-member compensation well beyond the amounts set by lawmakers.

Nor do practical considerations support the categorical approach Johnson urges. Although he seems to assume that impairments of the knee and hip cause distinct losses of use of the legs, that need not be the case. For instance, a person who has significant difficulty walking because he cannot bend his hip would not necessarily suffer an additional (and compensable) loss of use of his leg if he subsequently became unable to fully bend his knee. Even though that knee impairment, if unaccompanied by a serious hip impairment, would cause a meaningful overall loss of use of the leg, it might add nothing (or very little) to the existing loss of use caused by the hip impairment.

The Board has therefore rationally chosen to require a claimant in Johnson's position to show that two awards for loss of use of the same member reflect distinct, non-overlapping impairments in order to avoid offset of the second award. Johnson cites no authority requiring a different result and, contrary to his suggestions otherwise, the Board's award followed both its past practices and published guidelines.

A. The WCL supports an appropriate offset when two awards arise from impairments to different parts of a statutorily enumerated member.

Johnson makes no challenge to the administrative judge's factual findings regarding the loss of use of his legs and concedes that offset is appropriate where successive awards relate to the same sub-part of a statutory member (App. Br. 5, 17). But he argues that, as a matter of law, the Board is absolutely forbidden the Board from deducting a prior loss of use award from a subsequent loss of use award for the same enumerated member if the two awards arise from impairments to different parts of the

same member. His proposed categorical rule finds no support in the WCL.

1. The statutory schedule is organized around the enumerated members—not their sub-parts, as Johnson would have it.

The Workers' Compensation Law contains a detailed, precise schedule for calculating the compensation due to workers for the permanent partial loss of use of specific enumerated members, such as legs and arms. A categorical rule that required the rote addition of successive loss of use awards involving the same enumerated member, with offset forbidden simply because those awards involved different sub-parts of the member, would be wholly inconsistent with the statutory schedule. Indeed, such an approach would effectively nullify the Legislature's choice to organize the statutory schedule based on a carefully defined list of enumerated members and would double or triple the per-member compensation amounts that the Legislature decreed.

At its core, the statutory schedule is defined by its list of 12 distinct bodily members. For each of those listed members, the schedule specifies an award formula—a number of weeks to be

multiplied by two-thirds of the worker's weekly salary. That formula represents the award amount for total loss of the defined member and serves as the starting point for calculating the proportionate award due for partial loss of use of the member. Schedule loss of use awards are thus unequivocally based on the loss of use of the statutorily enumerated members, not their sub-parts. WCL §§ 15(3)(a) to (*l*).

As relevant here, for permanent partial disability due to impairments to a part of a claimant's leg, the amount of compensation is calculated based on the loss of use of the leg as a whole—not the loss of use of the knee, or hip, or other part of the leg. *See* WCL §§ 15(3)(a) to (*l*). The schedule does not authorize awards, or set compensation levels, for loss of use of the knee or hip. *Id.* Rather, as the Appellate Division explained, impairments to hips or knees are "encompassed by awards for the loss of use of the leg, which is the applicable statutorily-enumerated body member." *Johnson*, 180 A.D.3d at 1136.

Johnson is mistaken in arguing that Section 15(3)(u) effectively rewrites the list of enumerated members by mandating

separate awards for each sub-part of a member (*see* App. Br. 14-16). While the subsection's title is ambiguous, the clear statutory text takes precedence. *People v. Page*, 35 N.Y.3d 199, 204 n.3 (2020). That text expressly requires separate awards only in cases involving injuries to "*more than* one member or parts of *more than* one member." WCL § 15(3)(u) (emphasis added).

Section 15(3)(u) thereby confirms that the statutory schedule is organized around its list of enumerated members. Johnson's incorrect interpretation would effectively replace the Legislature's carefully crafted list of enumerated members—the schedule's defining feature—with a new and longer list organized in terms of *parts* of members that are each eligible for their own awards without regard for other parts of the same member.

Johnson's argument based on Section 15(7) is equally baseless (App. Br. 24-26). That subsection directs 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." This provision merely provides that the fact of prior compensation alone shall not bar a further award. Johnson

himself concedes that the provision does not authorize duplicative awards or always bar offset (*see* App. Br. 5, 17). The question is *when* the Board may order offset. Section 15(7) says nothing on that point. It certainly does not suggest that the limit of the Board's discretion is based on sub-parts of members that the statute never mentions.

2. Johnson's proposed rule would essentially nullify the schedule's per-member maximums for total loss of use.

Johnson's incorrect interpretation of the law would also effectively double the compensation amounts that the Legislature wrote into the law. The Legislature determined that loss of use of a leg should result in 288 weeks of compensation. But under Johnson's reading of the law, a worker who experienced serious knee and hip injuries would receive twice that—576 weeks of compensation—so long as each injury, viewed alone, could be deemed to have caused 100% loss of use of the leg. This would, as the Appellate Division noted, yield "a monetary windfall for a claimant that would compensate him or her beyond the degree of

impairment actually sustained to the statutorily-enumerated body member." *Johnson*, 180 A.D.3d at 1136-37.

Nothing in the statute supports such a result. Indeed, the statute provides only one means by which a claimant can obtain compensation exceeding the usual statutory limits: Section 15(3)(v) articulates particular criteria under which a worker may receive "additional compensation" beyond the amounts listed in the schedule. Johnson, however, does not contend he meets Section 15(3)(v)'s requirements for additional compensation.

But Johnson nevertheless argues he was entitled to compensation beyond the amounts listed in the schedule, under the theory that successive loss of use awards for the same enumerated member *must* be added together, as a matter of law, whenever the individual suffers "unrelated" injuries to different parts of the same enumerated member (App. Br. 4-5). Leaving aside that Johnson's doctor contradicted Johnson's evidence-bare assertion that his hip and knee injuries here are "unrelated" (*see* Section D, *infra*), Johnson's argument about "unrelatedness" is also legally baseless.

The statute sets forth a schedule for loss of use of enumerated members. It says nothing about awards for loss of use of "related" or "unrelated" *parts* of members. Indeed, by combining certain body parts (the knee and hip) into single enumerated members (the leg), the Legislature has indicated that knee injuries and hip injuries are *necessarily* related for the purpose of schedule of loss awards: both injuries contribute to the ultimate question of the loss of use of the leg as a whole.

Even the IWBA's amicus brief supporting Johnson contradicts his argument on this point. The IWBA correctly concludes that, under the statute, the critical inquiry in multiple-injury cases is the *cumulative* loss of use of the entire member based on the multiple injuries (IWBA Br. at 10, 21, 25).[6] Although the IWBA differs from the Board about how cumulative losses ought to be determined here (*see* IWBA Br. at 26; Section D,

[6] This is true regardless of whether the worker's multiple injuries occurred in a single accident or multiple accidents: in either case, the critical inquiry is the *cumulative* loss of use based on the multiple injuries. Johnson is therefore mistaken that the Board's approach treats workers differently depending on whether they were injured in one accident or two (App. Br. 26-27).

infra), the IWBA admits that the WCL does not "require[]" any particular outcome in that regard (IWBA Br. at 8).

B. This Court's precedent does not limit the Board's authority to offset awards involving a single statutory member.

Underpinning Johnson's misreading of the WCL is the incorrect proposition that the statutory schedule's per-member compensation limits do not actually represent a limit on the amount of compensation available for the permanent loss of use of each enumerated member. Johnson offers no alternative theory—much less a plausible one—as to what the statute's per-member limits *do* represent. But he argues that, under this Court's ruling in *Zimmerman v. Akron Falls Park-Erie County*, 29 N.Y.2d 815 (1971), the Board lacks authority to limit compensation to 100% of the per-member limits (App. Br. 18-20). He is mistaken.

In *Zimmerman*, this Court upheld a Board decision involving losses to *two* enumerated members (arm and hand). *See* 29 N.Y.2d at 817 (reversing for the reasons stated in dissent below). The Court simply held that substantial evidence supported the Board's award on that case's unusual facts. *Id.* The Court did not conclude

that the law required a particular outcome, or that the Board lacked authority to avoid duplicative awards for injuries to a single enumerated member. *Id.*

The claimant in *Zimmerman* received, in 1924, a schedule loss of use award based solely on the loss of his entire left hand. *Zimmerman*, 35 A.D.2d at 1031 (Herlihy, J. dissenting). Decades later, the claimant received a prosthesis and was able to "work[] regularly" and "'do[] heavy work with his left arm.'" *Id.* He suffered a left shoulder injury in the late 1960s, more than 40 years after he lost his hand, and the Board awarded him compensation for 50% loss of use of his left arm based on that decades-later shoulder injury. *See id.* Without any analysis, this Court reversed the Appellate Division and upheld the Board's award. 29 N.Y.2d 815.

Pointing to the fact that the reversed Appellate Division opinion characterized Zimmerman's first award as "'a schedule loss of 80% of his left arm'" (App. Br. 18 (quoting *Zimmerman*, 35 A.D.2d at 1030)), Johnson argues that this Court upheld a second award that, in combination with the first, exceeded 100% of the

statutory limit for loss of use of the arm (App. Br. 18-19). But it was the dissenting opinion in the Appellate Division that this Court went on to endorse, and that opinion explained that the first award was made solely for loss of use of the hand. *Zimmerman*, 35 A.D.2d at 1031 (Herlihy, J. dissenting).

In *Zimmerman*, the worker sustained injuries to his hand and his arm. The successive awards in that case may have exceeded the statutory limit for loss of use of the arm alone, but they came nowhere near the combined limits for losses of *both* an arm and a hand. Nothing in *Zimmerman*, nor in the lower court decisions following it,[7] require the Board to grant successive

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[7] The lower-court decisions that Johnson cites (App. Br. 19-22) all involve injuries to multiple enumerated members and, at most, confirm the Board's broad discretion to craft awards that, based on the evidence presented, compensate a worker for injuries to multiple enumerated members that, in sum, may exceed the 100% maximum for just one of those members. *See Matter of Deck v. Dorr*, 150 A.D.3d 1597 (3d Dep't), *lv. denied* 67 N.Y.S.3d 127 (2017) (upholding Board's award involving multiple enumerated members (hand and thumb)); *Matter of Pellegrino v. Textile Prints Co.*, 81 A.D.2d 723 (3d Dep't 1981) (same, for arm and hand); *Matter of Bazzano v. John Ryan & Sons*, 62 A.D.2d 260 (3d Dep't 1978) (where administrative judge found loss of use of hand based on amputation of fingers—which are separately enumerated members—the Board erred in reducing award based on a separate loss of use of the hand sustained 16 years prior).

awards whose sum would exceed 100% of the statutory limit for a single enumerated member.[8]

Here, in contrast with *Zimmerman* and the lower court decisions following it, all of Johnson's relevant injuries were to the same enumerated member (the leg). The Board appropriately followed the loss of use schedule's framework for such injuries, which permits compensation up to 288 weeks per leg. That the Board may have legal authority to award additional compensation where there is an injury to *another* enumerated member (such as the foot) is consistent with the law as written, but also entirely beside the point here.

C. The Board's guidelines and past practices are fully consistent with offsetting awards that relate to a single statutory member.

Nor do the Board's guidelines support Johnson's proposed rule barring offset. The guidelines do not require a blinkered analysis of each particular injury without consideration of the

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[8] The IWBA's amicus brief in support of Johnson seemingly concedes this fundamental point: the IWBA never argues that precedent *requires* a particular approach here (*see* IWBA Br. at 15-16, 18).

overall loss of use of a member, as Johnson wrongly suggests. And the Board's own decisions confirm that the Board does not, and has not, interpreted its guidelines in the manner that Johnson now claims is mandatory.

Johnson's argument about the Board's guidelines rests solely on the fact that the guidelines provide rubrics or formulas for calculating loss of use based on particular discrete impairments (App. Br. 16-18). For example, in determining loss of use of the leg, the applicable guidelines set forth various common impairments—such as impaired abduction of the hip or knee—and corresponding percentages for loss of use of the leg (2012 Guidelines at 25-28). These include a chart of percentages for loss of use of the leg based on limitations in anterior flexion of the hip (*id.* at 25), and another chart for loss of use of the leg based on limitations in knee flexion (*id.* at 27).

The guidelines list more than 15 hip impairments and 15 knee impairments and, for each, the corresponding loss of use percentages for the leg (2012 Guidelines at 25-28). As Johnson points out, the guidelines do not explicitly address the extent of

loss of use of the leg for combinations of such injuries to *both* the knee and the hip (App. Br. 16-18), for which there would be hundreds of potential combinations of multiple injuries (*see* 2012 Guidelines at 25-28).

The guidelines' silence on that front simply leaves such complex inquiries to the judgment and discretion of the Board and examining physicians. Indeed, the guidelines explicitly recognize that the "cumulative effect" of multiple injuries may be relevant to determining an award, before declining to provide a formula for such situations: "the guidelines do not provide for a mathematical combination of medical impairments" (2012 Guidelines at 48). Contrary to Johnson's argument, the guidelines do not *forbid* assessment of the cumulative effect of multiple injuries to a single member (*see* App. Br. 16-18); rather, they simply offer no mathematical formula for that complicated inquiry.

Amicus IWBA's conclusory assertion that the "guidelines instruct to add the deficits together for an overall cumulative schedule loss of use of the leg" (IWBA Br. at 23) finds no support in the guidelines. Indeed, IWBA does not even cite the guidelines

in support of that incorrect proposition (*id.*). Rather, it cites a single Board decision that refers to the guidelines just once, in a passage where the Board was simply summarizing the employer's interpretation of the guidelines on an unrelated issue. *Matter of Earl T. Wadhams Inc.*, 2016 NY Wrk. Comp. LEXIS 8346, at *5, WCB 067 5404 (August 19, 2016).

Furthermore, the IWBA's position about how to apply the guidelines rests on a fundamental misapprehension of the facts of this case. Simple addition of the guidelines percentages is appropriate, IWBA argues, because Johnson's loss of use of his legs "involve[s] separate and discrete permanent injuries to the knees versus the hips" (IWBA Br. at 5).[9] The IWBA cites nothing to support that crucial assumption, because there is nothing it could cite. Johnson's own doctor conceded that his knee and hip impairments were functionally related (*see* R170, 178).

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[9] The IWBA also incorrectly assumes that Johnson's 2009 work injury "did not include the knees" (*compare* IWBA Br. at 24 *with* R76, 106-07) and that Johnson's 2006 work injury "did not include the hips" (*compare* IWBA Br. at 24 *with* R48, 81, 86).

And such relatedness of knee and hip injuries is not unique to Johnson's case. It is not hard to envision scenarios where the cumulative loss of use is less than the sum of the losses of use from each impairment viewed in isolation. For example, a worker with zero flexion of the hip would have immense difficulty walking, regardless of the condition of the worker's knee. The guidelines thus indicate an 80% loss of use of the leg based on such hip impairment (2012 Guidelines at 26). But, as noted above, when a worker cannot bend a hip, additional mild or moderate impairment to the same leg's knee might have little impact on his overall use of the leg—that is, the worker might experience little incremental difficulty walking as a result of the knee impairment.

Thus, even though the guidelines indicate that mild to moderate impairment of knee flexion, *without* some other permanent leg injury, corresponds to a 7.5% to 40% loss of use of the leg (2012 Guidelines at 27), nothing in the guidelines indicates that such percentage losses should be simply added to previous losses to determine the cumulative loss of use of a worker's legs due to multiple impairments. In the case of the worker discussed

just above, simple addition of the guidelines percentages for his serious hip and moderate knee impairments could lead to the conclusion that the worker experienced more than 100% loss of use of the leg—a factual impossibility whose resulting award would exceed the statutory maximum for loss of use of a leg.

It is well within the Board's authority to interpret its guidelines in a manner that avoids such results. And neither the three prior Board decisions that Johnson cites (App. Br. 21-22), nor the single decision the IWBA cites (IWBA Br. at 21-22), compels a different conclusion. None hold that the guidelines-based percentages for sub-parts of enumerated members *must* be mechanically added together to determine the cumulative overall loss of use of the enumerated member. Rather, each presents a fact-dependent analysis of the particular medical evidence presented.[10]

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[10] *See Matter of N.Y.C. Dep't of Corrections*, 2013 NY Wrk. Comp. LEXIS 3723, WCB G042 8233 (April 29, 2013) (upholding award for impairments to two different enumerated members, the arm and hand); *Matter of Rochester City Sch. Dist.*, 2017 NY Wrk. Comp. LEXIS 5993, WCB 7070 1860 (February 9, 2017) (declining to award a claimant more than 100% of the schedule amount for loss of use of his leg); *Matter of NY Life Ins. Co.*, 2018 NY Wrk.

(cont'd on next page)

For this reason, there is also no merit to Johnson's argument that the Board's decision here represented an unexplained departure from past Board precedent (App. Br. 23). The Court should not even reach that unexhausted argument: Johnson did not cite any prior Board decisions he claimed the Board was obligated to follow during the administrative proceedings (*see* R217-21), thus raising no occasion for the Board to explain any purported departure from such past Board precedent. *See generally Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d 516, 518 (1985).

In any event, the Board's rejection of Johnson's categorical rule here did not constitute a departure from the earlier, fact-dependent Board decisions that Johnson cites. Each of those earlier cases, like this one, hinged on the particular medical evidence presented and the specific factual findings rendered by

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Comp. LEXIS 12039, WCB G167 9572 (December 24, 2018) (declining to disturb administrative judge's factual findings about the loss of use of enumerated members based on injuries to parts of those members); *Wadhams*, 2016 NY Wrk. Comp. LEXIS 8346 (crediting the sole medical opinion that opined as to the cumulative loss of use of the employee's leg based on hip and knee impairments).

the administrative judge. That alone renders them distinguishable from this case, because the administrative judge and Board have broad discretion to make loss of use findings and to determine the extent to which the loss of use of an enumerated member has already been compensated in a prior award.

D. The Board's determination was rational on the record here.

With Johnson's arguments for a categorical legal bar to offsetting awards dispatched, the case becomes a straightforward application of substantial-evidence principles. Where the Board's determination meets the requirements of the WCL and substantial evidence supports the award, courts are bound to uphold it. *Johannesen v. N.Y.C. Dep't of Hous. Pres. & Dev.*, 84 N.Y.2d 129, 138-39 (1994); *see also Matter of Grover v. State Ins. Fund*, 33 N.Y.3d 971, 972 (2019) (summarily affirming where substantial evidence supported Board's determination). Here, Johnson raises no substantial-evidence challenge to the administrative judge's factual findings. Those factual findings

compel affirmance, based on the statute's schedule for permanent loss of use of a leg.

Applying the WCL's legal framework for schedule loss of use awards, the Board appropriately upheld Johnson's second award—the one he challenges here—based on the administrative judge's uncontested factual findings about the overall loss of use of his legs. The administrative judge found that at the time of the second award Johnson suffered an 80% loss of use of his left leg and a 40% loss of use of his right leg (R214).

At the threshold, Johnson did not administratively challenge the administrative judge's findings regarding his loss of use of his legs. And because he never challenged those factual findings with the Board, he is precluded from challenging them on appeal—as the Appellate Division held, and Johnson does not dispute. *Johnson*, 180 A.D.3d at 1137. This ends the inquiry: Johnson cannot now collaterally attack the administrative judge's findings as to the cumulative loss of use of his legs at the time of the second award.

In any event, such a challenge would fail. After making findings regarding Johnson's permanent loss of use, the administrative judge calculated the compensation owed to Johnson by comparing his overall loss of use with his prior award for loss of use of his legs (R214). While his overall loss of use was 80% loss of use of his left leg and 40% loss of use of this right leg, his prior award had already compensated him for 50% loss of use of his left leg and 52.5% loss of use of his right leg. The administrative judge thus awarded him compensation only for the established loss of use above and beyond what had been compensated in the recent first award. For his left leg, this meant an award for 30% loss of use of his left leg. For his right leg, where the established loss of use at the time of the second award was less than what had been compensated in the first award, he received no additional compensation.

This determination appropriately followed the loss of use schedule crafted by the Legislature. The administrative judge made findings as to Johnson's demonstrated loss of use of his legs—the only relevant inquiry under the loss of use schedule—

and compared the newly established loss of use against the loss of use that was recently compensated (R214).

Johnson's attempt to compel a modification of this award impermissibly rewrites the administrative judge's factual findings to include additional loss of use of his legs that the administrative judge simply did not find. For Johnson to be eligible for a second award of more than 30% loss of use of his left leg, he would have needed to establish an overall loss of use of that leg that exceeded 80%. And to establish entitlement to a second award for loss of use of his right leg, he would have needed to establish an overall loss of use of that leg that exceeded 52.5%, the loss of use for which he had already been compensated. He could have tried to prove, for example, that he suffered from 100% loss of use of both legs, based on the cumulative effect of his knee and hip injuries.

Johnson failure to present evidence on the cumulative loss of use of his legs followed the administrative judge's explicit invitation for him to do so. Appropriately following the WCL's directive that loss of use of *the leg*—not the knee or hip—presents the ultimate inquiry, the administrative judge requested medical

testimony about Johnson's cumulative loss of use of his legs in light of all permanent impairments to his legs, including those previously compensated in the first award (*see* R139). It was rational to place that evidentiary burden on Johnson, who was "the party having the better … access to" such information (*see* R48, 63, 69, 83, 94, 101, 112, 170, 178 (Johnson's doctor examined his knees and hips many times, and testified about the relationship between Johnson's knees and his hips). *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 220 (2002); *see generally Matter of Poverelli v. Nabisco/Kraft Co*, 123 A.D.3d 1309, 1310 (3d Dep't 2014) (claimant bears burden of establishing that injury was employment-related). Indeed, even the IWBA's brief supporting Johnson concedes that the crucial factual issue was the "combined permanen[t loss of use] attributable to the knees and hips" (IWBA Br. at 25), and the IWBA does not dispute that it was appropriate for the Board to require Johnson, not the employer, to make that showing.

Johnson failed to establish any cumulative loss of use beyond the 80% (left leg) and 40% (right leg) percentages found by

the administrative judge. Johnson's treating physician declined to opine regarding the cumulative loss of use his legs that Johnson suffered as a result of all of his permanent impairments—including those that had been previously compensated—because, the doctor explained, nobody had asked him to perform that inquiry (R186). In his brief, Johnson expressly concedes that he offered no evidence about his overall loss of use of his legs (App. Br. 22).

Johnson maintains that he did not need to offer evidence of the cumulative loss of use of his legs because his hip and knee injuries were "unrelated" (App. Br. at 4, 7, 8, 9, 12, 15, 22, 25, 30, 32) or "wholly unrelated" (App. Br. at 27). But the conclusion does not follow from the premise: the question is not whether the injuries are related, but whether the loss of use of his legs resulting from them, functionally speaking, is additive. Nor does Johnson have evidentiary support for his bald assertion of "unrelatedness" in any event. His own doctor reached the opposite conclusion: Dr. Long testified that Johnson's knee pain was "associated with his hips" (R170), that Johnson's "clinical function

in his knee" was "related to" his hip (R178), and that Johnson's "right hip pain" limited his "ability to optimize his outcome with the left knee" (R112). Thus, even under Johnson's incorrect legal theory about "unrelated" impairments to the same member, his appeal fails for lack of proof.

After Johnson failed to offer any evidence as to the cumulative loss of use of his legs based on his hip and knee impairments, it was well within the administrative judge's discretion to conclude that he suffered 80% loss of use of his left leg and 40% loss of his right leg, and furthermore that only 30% loss of use of his left leg was not already covered by his first award. And it was well within the Board's discretion to uphold that award—especially where Johnson did not even contest the administrative judge's key findings about his overall loss of use of his legs at the time of the second award.

CONCLUSION

This Court should affirm the order of the Appellate Division.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 9,268 words, not including the table of contents, the table of cases and authorities, the statement of questions presented, this certificate, and the cover.

Daniel Matza-Brown /cp

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