

DOCKET NO.

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION --- THIRD DEPARTMENT**

In the Matter of the Claim of

Thomas Johnson,

Claimant-Appellant,

-against-

City of New York,

Employer-Respondent,

-and-

New York State Workers' Compensation Board,

Respondent.

BRIEF FOR CLAIMANT-APPELLANT

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TABLE OF AUTHORITIES

Statutes and Regulations

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Matter of Bell v. Glens Falls Ready Mix Co., 169 A.D.3d 1145, 92 N.Y.S.3d 485 (3rd Dept. 2019)

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PRELIMINARY STATEMENT

Claimant-Appellant Thomas Johnson injured both of his knees on February 15, 2006 while employed by the City of New York. A WCL Judge later found that he had an eighty percent schedule loss of use of his left leg as a result of his left knee injury, and a forty percent schedule loss of use of his right leg as a result of his right knee injury.

Claimant-Appellant also injured both of his hips in a different workplace accident on November 12, 2009, and in that case he was found to have a fifty percent schedule loss of use of his left leg as a result of his left hip injury and a fifty-two and one-half percent schedule loss of use of his right leg as a result of his right hip injury.

A WCL Judge initially issued a decision concluding that the Workers' Compensation Law does not prohibit the entry of awards for two schedule losses involving different parts of the same extremity that, in the aggregate, exceed one hundred percent.

However, based on this Court's decision in Matter of Genduso v. City of New York, the WCL Judge subsequently deducted the schedule loss awards for Claimant-Appellant's hip injuries from the schedule loss awards for his knee injuries. This resulted in awards for a thirty percent schedule loss of use of his left leg as a result of his left knee injury and no schedule loss award at all for his right

knee injury. This decision was upheld by a Workers' Compensation Board Panel in a decision filed on March 29, 2019.

Claimant-Appellant appeals from the decision of the Workers' Compensation Board.

QUESTIONS PRESENTED

Question 1: Did the Workers' Compensation Board err as a matter of law in failing to evaluate the schedule loss of use attributable to deficits in Claimant-Appellant's knee injuries in this case independently from his previous schedule loss of use attributable to deficits in his hips?

Answer 1: Yes. The statute, long-standing judicial and administrative precedent, and the Board's Medical Guidelines all required that Claimant-Appellant's knee injuries in this case be evaluated independently from his unrelated hip injuries.

Question 2: Did the Workers' Compensation Board err as a matter of law in deducting its previous schedule loss award attributable to Claimant-Appellant's hip injuries from the schedule loss award for his knee injuries in this case?

Answer 2: Yes. The statute and judicial precedents do not permit the Board to disqualify Claimant-Appellant from compensation or to reduce his compensation on the basis of a previous unrelated injury.

FACTS

On February 15, 2005, Claimant-Appellant Thomas Johnson (“Johnson”) was employed by Employer-Respondent City of New York (“the City”) as a patient care technician when he slipped and fell off of a bus, injuring his knees. R. 15-17. He was initially treated for these injuries by Dr. Edward Mills. R. 18-25.

On December 21, 2007, the Workers’ Compensation Board (“the Board”) issued a Proposed Decision finding that “Johnson had a work related injury to both knees.” R. 27. This decision became final on January 8, 2008. R. 28.

Johnson had surgery for a tear of the meniscus in his right knee on April 11, 2008. R. 30-32. Following that surgery, he was examined by the City’s orthopedic consultant, Dr. Robert Hyman, who reported that he was totally disabled as a result of his knee injuries. R. 34-38. The Board made an award to Johnson for a period of temporary total disability from January 10, 2008 to June 12, 2008. R. 39, 50.

On November 7, 2013, Dr. William Long filed a “Doctor’s Report of MMI / Permanent Impairment” in which he stated that Johnson had a thirty-five percent schedule loss of “bilateral knee.” R. 63-65. In the attached notes, Dr. Long also indicated that Johnson had also undergone “bilateral total hip replacements with a revision on the right,” along with previous shoulder surgery. R. 67.

Johnson was then examined by the City's orthopedic consultant Dr. Jerrold Gorski on April 16, 2014. R. 72-76. Dr. Gorski took a detailed history which included the previous shoulder surgery, the two hip replacements, and the revision of one of the hip replacements, all unrelated to this accident. R. 73-74. Dr. Gorski stated that he had "been asked to assess Mr. Johnson if he is at maximum medical improvement and if so determine and appropriate schedule loss of use for his bilateral knees." R. 76. He concluded that "I believe that he can be assessed on the basis of the 2012 Workers Comp Guidelines. In regard to the right knee he underwent arthroscopic surgery on the right knee and I believe his schedule loss of use for the right knee thus would be found on page 26 and following. ... I would assess a 10% scheduled loss of use for the right knee on the basis of the meniscectomy. In regard to the left knee my assessment would be a 5% scheduled loss of use." R. 76.

Dr. Long thereafter submitted two additional reports in July and August of 2014 assessing the schedule loss of use of Johnson's hips (which were related to a different accident) as 90% of the right hip and then as 75% of the right hip and 70% of the left hip. R. 80-81, 85-86. Over a year later, in December of 2015, Dr. Long submitted a fourth report stating that Johnson had a forty percent schedule loss of use of each of his knees. R. 92-93. A narrative report was attached to this form discussing the need for a total knee replacement. R. 95-96.

Johnson then went on to have a left total knee replacement on April 11, 2016. R. 100-104. Following that surgery he was once again examined on May 10, 2016 by the City's consultant Dr. Gorski, who reported that he was not at maximum medical improvement but that "I suspect the man will be assessed a schedule loss of use for a total knee replacement" in the future. R. 105-108.

One year later on May 11, 2017, Dr. Long filed a final report in which he stated that Johnson had an eighty percent schedule loss of use of his left knee and a forty percent schedule loss of use of his right knee "per NYS WC Guidelines." R. 109-113. Johnson's attorney then filed a Request for Further Action specifying that Dr. Long was reporting schedule losses of use to the knees and seeking a direction from the Board. R. 114.

The Board issued a notice on September 28, 2017 indicating that it had "received a medical report from Dr. William J. Long which states that the claimant has a permanent impairment resulting in a 80% schedule loss of use of the left knee and 40% of the right knee." R. 115. The notice required the City to either accept Dr. Long's opinion or obtain its own examination. R. 115.

In response to this notice, the City obtained an examination of Johnson on December 11, 2017 by its orthopedic consultant Dr. Parisien. R. 116-120. Although Dr. Parisien took a history that Johnson had undergone bilateral hip surgery, his examination and diagnosis was limited to Johnson's knee injuries. R.

117-120. Based on his evaluation of Johnson's knee injuries, Dr. Parisien concluded that there was "a 27.5% causally related schedule loss of use of the right leg and a 40% causally related schedule loss of use of the left leg" based on the Board's guidelines. R. 119.

On January 22, 2018, the Board issued a Notice of Amended Proposed Decision noting the difference in opinions between Dr. Long and Dr. Parisien and directing the parties to either reach an agreement or conduct depositions of the doctors. R. 123-124. The City objected to this decision, stating that Johnson "received 50% SLU left leg and 52.5% SLU right leg on G022 1579. Claimant cannot have 130% SLU left leg." R. 125. The City requested a hearing on the issue. R. 125. The Board then cancelled the Proposed Decision. R. 126.

A hearing was then held on March 12, 2018. R. 127. It was agreed at the hearing that Johnson had received a fifty percent schedule loss of use to his left leg and a fifty-two and one-half percent schedule loss of use of his right leg in another case as a result of injuries to his hips. R. 128-130. Johnson's attorney contended that the law did not prohibit the entry of an additional award for a schedule loss of use attributable to his knee injuries, even if the outcome would be that the two schedule losses, in the aggregate, amounted to more than one-hundred percent of the leg. R. 129-131. The City contended that the "overall schedule loss of use of the legs" would have to be apportioned between the two cases, thus limiting the

total award to one-hundred percent of the leg. R. 130. The WCL Judge directed both sides to submit memoranda of law on the issue. R. 131.

On April 15, 2018, Johnson's attorney submitted a memorandum of law citing a number of decisions in which the Appellate Division had held that it was permissible for schedule loss awards resulting from different injuries to result in an aggregate finding greater than one hundred percent. R. 135-137. The City did not submit a memorandum in support of its position.

On May 9, 2018, the WCL Judge issued a Reserved Decision in which she adopted Johnson's position. R. 138-139. The WCL Judge noted that Johnson's "doctor and the carrier's consultant have now found a schedule loss of use to his legs based on injuries to his knees. As they are distinct and separate injuries to his knees which were not previously addressed in the prior SLU to the legs, I find that the Board is not limited to a total schedule loss of use of 100%." R. 139. The WCL Judge therefore directed the parties to depose Dr. Long and Dr. Parisien concerning the schedule loss of use attributable to Johnson's knee injuries. R. 139.

Dr. Parisien testified on July 23, 2018. R. 140. He stated that his examination was limited to Johnson's knees and that "based on the Workers' Compensation Guidelines, the Claimant, the schedule loss of use for the left knee should be 40 percent because he had total knee replacement. And schedule loss of use for the right leg should be 17-and-a-half due to the fact that he had arthroscopic

surgery and some limitation of motion.” R. 145-147. Dr. Parisien stated that the figure in his written report, which was 27.5%, was in error and that it should have been 17.5%. R. 146-147.

On cross-examination, Dr. Parisien acknowledged that he had failed to take into account the bone loss associated with Johnson’s total knee replacement, and that the Board’s Guidelines required the assignment of an additional ten to fifteen percent schedule loss based on that element of the evaluation. R. 160-161. He again confirmed that his opinion about schedule loss “will only consist of examination of the bilateral knees.” R. 161.

Dr. Long testified on August 17, 2018. R. 165. Dr. Long testified that he had treated Johnson for both his knee injuries from this accident and his hip injuries from a different case. R. 166-177. Dr. Long stated that although it was “difficult to determine,” he attempted to separate the left knee findings from the effects of Johnson’s hip and back injuries and “felt that the knee, despite having been replaced, was very limited, and so, I know the maximum capped amount is about 80 percent.” R. 178. With regard to the right knee, he stated that his evaluation of a forty percent schedule loss was based on “loss of use 7.4, page 42 of the Workers’ Compensation Guidelines.” R. 181.

On cross-examination, Dr. Long testified that the aggregate of the eighty percent schedule loss of use he had assigned for deficits in Johnson’s left knee and

the previous finding of a fifty percent schedule loss of use for deficits in the left hip would be a one hundred-thirty percent schedule loss of use of the left leg, and similarly that aggregating the previous finding of a fifty-two and one-half percent schedule loss of use for deficits in the right hip and a forty percent schedule loss for deficits in the right knee would be a ninety-two and one-half percent schedule loss of the right leg. R. 185-187. Dr. Long explained that in evaluating schedule loss of use “I’ve been asked a very specific issue related to a very specific joint and I’m providing you the best of my ability to answer that.” R. 188. He went on to testify regarding the findings in Johnson’s left knee that led him to the conclusion that there was an eighty percent schedule loss of use of the left leg attributable to that injury, independent of the unrelated hip injury. R. 189-192.

A final hearing was held on October 30, 2018. R. 198. At this hearing, the City contended that pursuant to the Third Department’s decision in Matter of Genduso v. City of New York, the schedule losses of use previously found for Johnson’s hip injuries should be deducted from any schedule loss of use awarded for his knee injuries. R. 203-204. The WCL Judge then found that Dr. Long’s opinion regarding schedule loss of use was more credible than that of Dr. Parisien, and concluded that Johnson had an “80 percent schedule loss of use of the left leg and a 40 percent schedule loss of use of the right leg.” R. 207.

The WCL Judge went on to find that “[b]ased on the decision in Gendus ... the SLU of the right and left leg that is awarded should be reduced by 52.5 percent of the right leg and 50 percent of the left leg, which was previously awarded in G0221519. Accordingly, the claimant is awarded an additional schedule loss of use award of 30 percent of the left leg and zero percent of the right leg.” R. 207. These findings were memorialized in a Notice of Decision that was filed on November 2, 2018. R. 213.

Johnson appealed this decision on December 3, 2018, contending that (1) the WCL Judge’s decision to deduct the schedule loss of use attributable to Johnson’s knee injuries from the schedule loss of use that had been awarded for his hip injuries was contrary to the WCL Judge’s own previous decision finding that the two schedule losses could be aggregated and exceed one hundred percent; and (2) the decision in Gendus was fact-specific and did not control the outcome in this case. R. 214-225. In rebuttal the City relied on the decision in Gendus. R. 226-230.

Johnson’s appeal was decided by the Board in a Memorandum of Board Panel Decision filed on March 29, 2019. R. 9. After reviewing the facts and procedural history discussed above, the Board found 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 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. In support of this decision, the Board relied upon its 2012 Guidelines and the Appellate Division decision in Genduso. R. 12-13

This appeal ensued. (R. 1).

ARGUMENT

The Workers' Compensation Board's decision was erroneous as a matter of law for two reasons.

First, the statute, nearly a century of judicial and administrative precedents, and the Board's Medical Guidelines all require compensation for injury to the part of the extremity that was involved in an accident, independent from a schedule loss award in a different case for injury to a different part of the extremity. This remains true even when the schedule loss awards from the two different cases, in the aggregate, exceed a 100% schedule loss of use of the extremity.

Second, the Board's decision to deduct the schedule loss award it had made in a different case for injury to a different part of the extremity from its award for schedule loss of use in this case was contrary to the express language of the statute and the decisions of this honorable Court and the Court of Appeals and left Claimant-Appellant with even less compensation than he would have received had he suffered all of his injuries in a single accident.

The Board's decision should therefore be reversed.

POINT I: THE WORKERS' COMPENSATION BOARD ERRED AS A MATTER OF LAW BY FAILING TO EVALUATE CLAIMANT-APPELLANT'S KNEE INJURIES IN THIS ACCIDENT INDEPENDENTLY FROM THE SCHEDULE LOSS OF USE AWARDS IT MADE FOR HIS HIP INJURIES IN A DIFFERENT ACCIDENT.

Workers' Compensation Law §§ 15(3)(a)-(t) provide awards of compensation for permanent partial disability to limbs resulting from workplace accidents. There is no question that the Board should not award compensation that would duplicate an award in a previous case for the same injury. *See, e.g., Matter of Genduso v. New York City Dept. of Educ.*, 164 A.D.3d 1509, 82 N.Y.S.3d 662 (3rd Dept. 2018). Under those circumstances, the Board may properly deduct a prior award for injury to part of an extremity from a later award for re-injury to the same part of that extremity. *Id.*

There is similarly no question that, subject to several well-defined exceptions, the Board should not award compensation in a single case for multiple defects in the same extremity that would exceed the value of the award for amputation of that extremity. *See, e.g., Matter of Bell v. Glens Falls Ready Mix Co.*, 169 A.D.3d 1145, 92 N.Y.S.3d 485 (3rd Dept. 2019). When there are multiple impairments to the same extremity, although the Board must consider all of the relevant deficits, the award for all of those impairments is “encompassed by

awards for the loss of use of the” extremity. Matter of Genduso, 164 A.D.3d at 1510.

However, where the worker injures one part of an extremity in one accident and a different part of the same extremity in a different accident, the law requires the Board to independently evaluate the schedule loss in each case.

Workers’ Compensation Law § 15(3)(u) provides that:

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.

WCL § 15(3)(u) (*emphasis added*).

The statute thus expressly recognizes that a worker may suffer injuries to multiple “parts of” a member identified in paragraphs (a) through (t), and further mandates that “the board shall award compensation” for the loss of use of each part of the affected member. WCL § 15(3)(u) (*emphasis added*).

In the case at bar, not only did the Board fail to award compensation for the loss of use of each part of Johnson’s legs (his hips and his knees), it instead deducted its awards for the injuries to his hips from its later awards for injuries to his knees. This was contrary not only to the requirements of the statute, but to nearly a century of precedent established by the Court of Appeals and this

honorable Court. Moreover, it was inconsistent with numerous decisions of the Board itself, as well as the Board's Medical Guidelines. Finally, it resulted in Johnson receiving less compensation for his knee injuries because of his unrelated hip injuries than he would have received if he was previously uninjured, and even less compensation than if the Board had considered and aggregated all of the deficits in his legs. This decision was fundamentally unfair and should be reversed.

A. The Board's Decision Was Contrary to Longstanding Judicial Precedent That Requires Injuries to Different Parts of the Same Extremity Resulting from Different Accidents to be Evaluated Separately.

In Matter of Zimmerman v. Akron Falls Park – County of Erie, 29 N.Y.2d 815, 327 N.Y.S.2d 652, 277 N.E.2d 668 (1971), the claimant suffered an amputation “of his left hand and forearm six inches below the elbow.” Matter of Zimmerman v. Akron Falls Park – County of Erie, 35 A.D.2d 1030, 316 N.Y.S. 386 (3rd Dept. 1970). In 1924, he “was awarded a schedule loss of use of 80% of his left arm,” which was intended to compensate him “for a 100% loss of his hand.” *Id.*

In 1967, the claimant fell and injured his left shoulder, for which he was awarded a 50% schedule loss of use of the same arm attributable to the shoulder injury, without regard to the prior lower arm amputation. *Id.* In affirming the

award, the Court of Appeals adopted the reasoning of the dissenters at the Appellate Division, who had “correctly concluded: ‘The record clearly indicates that the award made to claimant was limited only to the injury caused by the 1967 accident. Claimant’s 1924 accident did not affect his left shoulder which was injured in the 1967 accident causing the 50% loss of use of his left arm.’” Matter of Zimmerman, 29 N.Y.2d at 817 (*emphasis added*).

Similarly, in Matter of Bazzano v. John Ryan & Sons, 62 A.D.2d 260, 404 N.Y.S.2d 402 (3rd Dept. 1978), an award was made for a 90% schedule loss of use of the claimant’s left hand as the result of a 1956 injury. Matter of Bazzano, 62 A.D.2d at 260. In 1973, the claimant suffered a second accident to a different part of the same hand, which standing alone would have entitled him to a 27.5% schedule loss of use. *Id.*

The Board limited the claimant to a 10% schedule loss of use, finding two injuries to the same extremity could not result in an overall finding of a schedule loss of use greater than 100% of the member. *Id.* Citing the Court of Appeals decision in Matter of Zimmerman, *supra*, this Court reversed the Board and remitted the case for an award of compensation consistent with the medical evidence in the 1973 case, without regard to the prior award for a different part of the left hand in 1956. *Id.*

In Matter of Pellegrino v. Textile Prints Co., 81 A.D.2d 723, 439 N.Y.S.2d 454 (3rd Dept. 1981), the claimant was awarded a 20% schedule loss of use of his right arm in 1967 due to an upper arm laceration. Matter of Pellegrino, 81 A.D.2d at 724. In 1968, he injured his right hand and lower right arm, and was ultimately awarded a 90% schedule loss of use for that injury. *Id.* The carrier appealed, contending that the total schedule loss could not exceed 100% of the arm, and this Court upheld the Board, finding that “[m]edical evidence in the record indicates that the prior injury was different from the instant injury,” and that the “effect of the instant injury upon the entire arm justified the award for the loss of the arm.” *Id.*

It is therefore apparent that the Board must evaluate deficits in different parts of an extremity that result from different accidents separately, rather than – as here – arbitrarily subtracting the award for one set of impairments from an award from an entirely different set of impairments.

For example, it would have been a patent miscarriage of justice for Zimmerman’s left shoulder injury to have been reduced by the award for the amputation of his left forearm (which would have left him with no award at all for his shoulder injury). *See, Matter of Zimmerman, supra.* It would have been equally unjust for Bazzano to have been awarded a 10% schedule loss of use instead of a 27.5% schedule loss of use for his previously undamaged fingers,

simply because he had a prior accident involving a different part of his left hand. *See, Matter of Bazzano, supra.* There would have been no rational basis for Pellegrino to receive less compensation for the injury to his right hand and lower arm because he had a previous laceration to his upper arm, which affected a different function of that arm. *See, Matter of Pellegrino, supra.*

It is equally true that there is no rational basis upon which Johnson should receive no compensation at all for his acknowledged right knee injury, and less than half of the appropriate compensation for his acknowledged left knee injury, simply because he suffered a previous injury to his hips. The Board's decision to do so was contrary to, and would effectively overrule, nearly a century of precedent established by this Court and the Court of Appeals.

This honorable Court has also routinely required that even where the same accident results in injuries to different parts of the same extremity, the deficits should be evaluated independently and aggregated when determining the schedule loss of use of the extremity. While the injuries in this case resulted from two different accidents and therefore require a different analysis, it is important to note that the Board's award to Johnson was even less than that which would have been required had his injuries resulted from a single accident.

In Matter of Deck v. Dorr, 150 A.D.3d 1597, 54 N.Y.S.3d 765 (3rd Dept. 2017), *mot. for lv. den.* 67 N.Y.S.3d 127, 89 N.E.3d 517 (2017), the claimant lost

four fingers and most of the thumb on his right hand in the same accident. Matter of Deck, 150 A.D.3d at 1598-99. The Board found that the loss of the four fingers entitled him to an award for a 100% schedule loss of use of the hand, and also that he was entitled to an award for a 100% schedule loss of use of the thumb on that same hand. *Id.* This would be a total of 319 weeks, equivalent to a 130% schedule loss of use of the hand.

The carrier appealed and this Court affirmed the award, citing, *inter alia*, Matter of Zimmerman, *supra*, Matter of Bazzano, *supra*, and Matter of Pellegrino, *supra*. Matter of Deck, 150 A.D.3d at 1600. The Court held that the Board “could, based upon competent, unrefuted medical evidence, separately evaluate multiple injuries to the claimant’s hand. Indeed, courts have held that, where a claimant suffers multiple injuries to a hand or other body part, the Board is not limited to a 100% SLU award for separate injuries to a hand or other body part.” *Id.* The Court noted that the Board’s Guidelines contain independent criteria for different injuries, permitting them to be evaluated separately. *Id.*

In Matter of Bell v. Glens Falls Ready Mix Co., 169 A.D.3d 1145, 92 N.Y.S.3d 485 (3rd Dept. 2019), the claimant suffered injuries to both his shoulder and his elbow in a work-related accident. Matter of Bell, 169 A.D.3d at 1145. A WCL Judge made an award for a 50% schedule loss of use of the arm attributable to deficits in the shoulder, as well as an award for a 30% schedule loss of use of the

arm attributable to deficits in the elbow. Matter of Bell, 169 A.D.3d at 1146. The Board upheld the award attributable to the shoulder injury, but reduced the award attributable to the elbow injury from 30% to 10% because of a provision in its Guidelines. *Id.*

This Court upheld the Board's decision that the claimant was entitled to an award for the schedule loss of use of his arm based on the deficits in both the shoulder and the elbow, merely limiting the extent of the award for defects in the elbow based on a specific provision in the Board's Guidelines. Matter of Bell, supra. The Court cited Workers' Compensation Law § 15(3)(u) as the basis for the inclusion of an award for Bell's elbow in addition to that for his shoulder injury: "A claimant may receive more than one SLU award for a loss of 'more than one member or parts of more than one member.'" Matter of Bell, 169 A.D.3d at 1146 (fn. 3, *emphasis added*).

B. The Board's Decision Provided Claimant-Appellant With Even Less Compensation Than That Established by Its Own Precedents, Which Require It to Consider All of The Deficits in an Injured Extremity and to Aggregate the Awards in a Single Case.

The Board itself has long acknowledged that it must consider the deficits in each part of an extremity in determining the extent of the schedule loss. For example, in Matter of New York City Dept. of Corrections, 2013 NY Wrk Comp. LEXIS 3723, WCB G042 8233 (April 29, 2013), the claimant injured his shoulder,

elbow and hand. The WCL Judge awarded, and the Board upheld, an award for a schedule loss of use of 50% of the arm consisting of a 40% schedule loss attributable to the deficits in the shoulder in addition to a 10% schedule loss attributable to the deficits in the wrist. *Id.*¹

Similarly, in Matter of NY Life Ins. Co., 2018 NY Wrk. Comp. LEXIS 12039, WCB G167 9572 (December 24, 2018), the claimant injured his left shoulder, elbow and wrist, as well as his left hip, knee and ankle. The Board upheld the WCL Judge's award for a 25% schedule loss of use of the left shoulder and a 20% schedule loss of use of the left elbow totaling a 45% schedule loss of use of the arm, in addition to a 25% schedule loss of use of the left hand. The Board also upheld the WCL Judge's award for a 15% schedule loss of use of the left hip and a 20% schedule loss of use of the left knee totaling a 35% schedule loss of use of the left leg, in addition to a 15% schedule loss of use of the left foot.

The Board has also permitted multiple injuries arising out of the same accident to be awarded separately or to be aggregated in excess of a 100% schedule loss of use of the extremity. In Matter of Rochester City School District, 2017 NY Wrk. Comp. LEXIS 5993, WCB 7070 1860 (February 9, 2017), the claimant injured his left knee and left hip. He was initially awarded a 27.5%

¹ The employer's appeal to the Board did not dispute the propriety of aggregating the deficits in the claimant's shoulder and elbow, but instead disputed the propriety of an independent award for the injury to the hand, which was also upheld by the Board.

schedule loss of use attributable to his left knee injury, which was increased by 22.5% following a further surgery. This resulted in a finding of a 50% schedule loss of use of his left leg as a result of the deficits in his left knee.

The claimant thereafter required a left total hip replacement, after which he was found to have a 60% schedule loss of use of his left leg attributable to deficits in his hip. The WCL Judge determined that the deficits in the claimant's hip were independent of the deficits in his knee and that he was therefore entitled to a 60% schedule loss of use for his hip injury in addition to the previous 50% schedule loss of use for his knee injury, even though the aggregate award exceeded a 100% schedule loss of use of the leg. The Board upheld this decision, finding that "there is no medical testimony here concerning the overall schedule loss of use of the leg as a result of the various surgical procedures," but simply evidence about the appropriate schedule loss for each part of the extremity.

The facts in Matter of Rochester City Sch. Dist. are indistinguishable from those in the case at bar, except that the claimant in Matter of Rochester injured his left knee and hip in the same accident, whereas Johnson injured his knees in one accident and his hips in another. Here, Johnson was previously found – as the result of a different accident - to have a 50% schedule loss of use of his left leg attributable to a left total hip replacement and a 52.5% schedule loss of use of his right leg attributable to a right total hip replacement. R. 125, 128-130. In this

claim, he was then found to have an 80% schedule loss of use of his left leg attributable to independent deficits in his left knee and a 40% schedule loss of use of his left leg attributable to independent deficits in his right knee. R. 207.

As in Matter of Rochester, there was no testimony in this case “concerning the overall schedule loss of use of the leg as a result of the various surgical procedures.” Instead, all of the evidence was limited to consideration of the schedule loss of use attributable to Johnson’s knee injuries. R. 76 (Dr. Gorski), 117-120 (Dr. Parisien), 140-147 (Dr. Parisien), 178-181 (Dr. Long). Indeed, Dr. Long specifically testified that in assessing the schedule loss of use attributable to Johnson’s left knee deficit, he made every effort to separate those findings from the impact of his unrelated left hip injury, while Dr. Parisien testified that his opinion was limited to examination of the knees without regard to the hips. R. 161, 178.

Because the case at bar involved two accidents instead of one, there was no need to aggregate the awards for Johnson’s hip and knee injuries, which should instead have been awarded independently. However, even if both injuries had resulted from the same accident, the Board would have been obligated to consider all of the deficits in arriving at a schedule loss of use of the extremity. Instead, it arbitrarily deducted its previous schedule loss award for injuries to Johnson’s hips from its schedule loss award for his knees. Not only was that approach erroneous

as a matter of law, it left Johnson with less compensation as a result of two accidents than he would have received had his injuries been the result of one accident.

The Board was, of course, obligated to follow its precedent in Matter of Rochester Sch. Dist. or to acknowledge it and explain the departure. *See, e.g., In Re Charles A. Field Delivery Serv.*, 66 N.Y.2d 516, 498 N.Y.S.2d 111, 488 N.E.2d 1223 (1985). Its failure to do so was error as a matter of law and requires reversal.

C. The Board's Guidelines Require Each Part of the Injured Extremity to be Evaluated Independently.

The Board's Guidelines are consistent with the statutory mandate that a schedule loss award should be made for the loss of use of part of a member, even if the outcome is expressed as the percentage loss of use of the limb. WCL § 15(3)(u).

The version of the Guidelines that applied to this case was the December, 2012 New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity ("the 2012 Guidelines").² The 2012 Guidelines provide that a schedule award is assignable for "impairment of extremities." 2012

² <http://www.wcb.ny.gov/content/main/hcpp/ImpairmentGuidelines/2012ImpairmentGuide.pdf>

Guidelines, §§ 1.4, 1.5; p. 10.³ The 2012 Guidelines also provide that a schedule loss is to be calculated based on “the residual permanent physical and functional impairments.” *Id.* The use of the plural – “impairments” – is noteworthy.

In describing the “Role of Examining Health Providers,” the 2012 Guidelines further reinforce that all of the relevant diagnoses and limitations must be considered in assessing the schedule loss of use of an extremity. 2012 Guidelines, § 1.3, p. 9. Physicians are instructed to “[s]tate the work related medical diagnosis(es)” and to then “[i]dentify the affected body part or system.”⁴ The 2012 Guidelines then define impairments for each joint in each extremity, with

³ These sections were incorporated verbatim from the Board’s June, 1996 Medical Guidelines (“the 1996 Guidelines”) § C.2., p. 4. <http://www.wcb.ny.gov/content/main/hcpp/mdguide.pdf>. They were later again incorporated verbatim into the Board’s November, 2017 Workers’ Compensation Guidelines for Determining Impairment (“the 2018 Guidelines”) at §§ 1.4 and 1.5, pp. 7-8. <http://www.wcb.ny.gov/2018-Impairment-Guidelines.pdf>.

⁴ The 2018 Guidelines state that the “Role of Examining Medical Providers” is to “prepare a report on permanent impairment” that “1. Identif[ies] the affected body part or system (include chapter, table number...); 2. Review[s] the relevant medical records and medical history... [and] 4. Report[s] the work-related medical diagnosis(es) and examination findings.” 2018 Guidelines, § 1.3, p. 7. Each of these elements clearly provides for the consideration of multiple diagnoses or impairments in schedule loss evaluation, particularly considering that the Guidelines address each joint in its own chapter, while instructing the examining physician to consult all relevant chapters.

This is conclusively established by the final sentence of § 1.3, which states that “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.” *Id.* (*emphasis added*). This provision clearly establishes that defects in multiple joints resulting from a single accident are to be aggregated, limited only by “the value of amputation.”

separate chapters for the wrist, elbow, shoulder, hip, knee and ankle/foot. 2012 Guidelines, chapters 2.3, 2.4, 2.5, 3.1, 3.2, and 3.3.⁵

As relevant to this case, Chapters 3.1 is entitled “Hip” and includes a “Special Consideration” which provides that “[t]otal hip replacement has an average schedule of 60 - 66 2/3% loss of use of the leg.” 2012 Guidelines, § 3.1, Special Consideration 3, p. 25.⁶ In this case, Johnson was not awarded the “average schedule” for his hip injuries, but instead was awarded a 50% schedule loss for the left hip replacement and a 52.5% schedule loss for right. R. 125.

Knee injuries are addressed separately in Chapter 3.2 of the 2012 Guidelines. 2012 Guidelines, Ch. 3.2. Johnson’s left total knee replacement is addressed by Special Consideration 11 of Chapter 3.2, which provides: “Total knee replacement. Unlike the total hip replacement, there is no significant bone loss with TKR and the 50% given to anatomical loss does not apply. In almost all cases of TKR, knee flexion is usually limited to 90-110 degrees, which is equal to a 35% - 40% loss of use of the leg. Add 10-15% for bone loss and the final

⁵ This is consistent with the approach of the 1996 Guidelines, chapters I.A. 7, 8 and 9; B. 1, 2 and 3. Unlike the 1996 and 2012 Guidelines, in which the upper extremity and lower extremity were each a chapter, and each joint was a sub-chapter, the 2018 Guidelines address each joint in its own chapter – which further establishes that defects in each joint are to be considered separately. 2018 Guidelines, chapters 3, 4, 5, 6, 7, 8.

⁶ This is identical to the provision in Chapter B.1 of the 1996 Guidelines. The 2018 Guidelines address the hip in Chapter 6, providing a new Special Consideration in § 6.5 and a new Table 6.5 for the evaluation of schedule loss for total hip replacement.

schedule is 50%-55% loss of use of the leg.” 2012 Guidelines, Ch. 3.2, Special Consideration 11, p. 28.⁷

It is therefore clear that all of the Board’s Guidelines – 1996, 2012 and 2018 – treat knee and hip injuries separately and include provisions for independent evaluation of deficits in each joint.

The Board’s Guidelines are therefore consistent with the statute, this Court’s decisions, the Board’s decisions, and fundamental fairness by requiring that each impairment that affects an extremity be evaluated independently and separate awards made, except that impairments resulting from a single accident be aggregated in order to determine the schedule loss of use of the extremity.

The Guidelines thus guarantee consideration of all of the injuries arising out of a single accident, while guarding against overcompensation by incorporating provisions that limit aggregation in some circumstances, such as the limitation to 10% for an additional injury to the arm that was involved in Matter of Bell, *supra*, or the provision of the 2018 Guidelines that limits the award for ankylosis of multiple joints resulting from a single accident to the award for amputation.

However, in the case at bar, not only did the Board fail to evaluate Johnson’s hip and knee injuries independently (as it was required to do because they arose

⁷ This provision is identical to the provision in Chapter B.2 of the 1996 Guidelines. The 2018 Guidelines address the knee in Chapter 7, providing a new Special Consideration in § 7.5 and a new Table 7.5 for the evaluation of schedule loss for total knee replacement.

from different accidents), it failed to provide him with even the compensation that would have been appropriate if the injuries arose from the same accident. Had that been the case, then the Board would have been required to assess the loss of function of both his knees and his hips and to arrive at an overall conclusion about the schedule loss of use of his legs taking all of the deficits into account. Instead, the Board arbitrarily deducted its previous award for the schedule loss of use of Johnson's hips from the schedule loss of use for his knees, leaving him with inadequate compensation for either injury.

We therefore respectfully submit that the Board's decision was erroneous as a matter of law and should be reversed.

**POINT II: THE WORKERS' COMPENSATION BOARD
ERRED AS A MATTER OF LAW BY DEDUCTING
DEFICITS IN ONE PART OF AN EXTREMITY
FROM A SCHEDULE LOSS OF USE
ATTRIBUTABLE TO DEFICITS IN A
DIFFERENT PART OF THAT EXTREMITY.**

Instead of making an award to Johnson for his causally related knee injuries, or alternatively determining the overall loss of use of his legs taking both his knee and (unrelated) hip injuries into consideration, the Board instead deducted its previous schedule loss award for deficits in Johnson's hips from its award in this case for deficits in his knees. The outcome was that it made an award for a 30% schedule loss of use of Johnson's left leg despite finding that the deficits in his left

knee justified an 80% schedule loss, and it made no award at all for his right leg despite finding that the deficits in his right knee justified a 40% schedule loss of use. The Board's decision was erroneous as a matter of law.

It contradicts both the express language and the beneficial purpose of the statute to reduce the liability of the employer in a later accident simply because the claimant had a previous injury to a different part of his body. It is equally improper to reduce the claimant's compensation for one injury because he suffered a previous injury.

Workers' Compensation Law § 15(7) provides:

7. Previous disability. The fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury nor preclude compensation for death resulting therefrom; but in determining compensation for the later injury or death his average weekly wages shall be such sum as will reasonably represent his earning capacity at the time of the later injury, provided, however, that an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability except as hereinafter provided in subdivision eight of this section.

WCL § 15(7) (*emphasis added*).

The Court of Appeals has interpreted this statute as creating three requirements:

(1) a previous disability does not disqualify an employee from receiving compensation benefits for a later work-related injury, or disqualify his survivors from receiving a death benefit where the later injury results in the employee's demise; (2) the measure of compensation or death benefits in this situation is the employee's earning capacity at the time of the later work-related injury, which would necessarily reflect any diminished earning capacity due to the previous disability; and (3) generally, the employee shall not receive compensation benefits in excess of those allowed for the later work-related injury considered by itself, which insures that the award is based solely on the diminished earning capacity attributable to the later injury rather than from all disabilities.

Matter of Hronich v. Con Edison, 21 N.Y.3d 636, 645; 975 N.Y.S.2d 714, 718; 998 N.E.2d 377, 381 (2013).

The first and third requirements are both applicable here. The fact that Johnson suffered a previous disability (schedule loss), “does not disqualify [him] from receiving compensation benefits for a later work-related injury.” Hronich, 21 N.Y.3d at 645. Yet with regard to the injury to his right knee, that is precisely what the Board did in reducing his compensation to zero on the basis that he had suffered a previous injury to a different part of his right leg. It similarly “disqualified” him from receiving over half of the benefits attributable to his left knee injury, for the same (improper) reason.

Moreover, Johnson made no claim for “compensation benefits in excess of those allowed for the later work-related injury considered by itself.” *Id.* To the

contrary, he sought only the appropriate awards for the schedule loss of use due to the defects in his knees, specifically without regard to any defects in his hips. The Board's decision to reduce the compensation for the injury to his knees because he had suffered a previous injury was therefore contrary to the express language and intent of the statute. Instead, the proper approach was for the Board – as required by Workers' Compensation Law § 15(7) - to award compensation in each case for the injuries that were caused by that accident, albeit without duplication of the award for a previous injury to the same part of the same extremity.

In Matter of Levitsky v. Workers' Comp. Bd., 126 A.D.3d 1264, 6 N.Y.S.3d 697 (3rd Dept. 2015), this Court reversed the Board's decision to reduce an injured worker's award for the schedule loss of use of his shoulder despite the existence of a prior work-related injury to the same shoulder in the absence of evidence that the previous shoulder injury contributed to the new work-related defects. Matter of Levitsky, 126 A.D.3d at 1265. The same rule should plainly be applied where the previous injury is to a different part of the extremity, and there is no evidence whatsoever that it contributes in any way to the present disability.

The sole basis for the Board's contrary decision was this Court's opinion in Matter of Genduso, *supra*. We respectfully submit that the Board misinterpreted and misapplied that decision.

In Matter of Genduso, the claimant injured his right knee on three occasions, one of which also involved an injury to his ankle. Matter of Genduso, 164 A.D.3d at 1509. In making a schedule loss award for the right leg attributable to the third knee injury, the Board deducted each of its two prior schedule loss awards for the right leg. *Id.*

On appeal, the claimant contended that the Board improperly deducted the entirety of the schedule loss award for the previous injury that involved both the knee and the ankle on the basis that a portion of the schedule loss that was awarded for the right leg injury in that case encompassed the injury to the ankle. Matter of Genduso, 164 A.D.3d at 1509-1510.

This Court upheld the Board’s decision on a substantial evidence basis, noting that “claimant did not seek Board review of the” decision involving the knee and ankle in order to allocate that schedule loss between the leg (for the knee injury) and the foot (for the ankle injury).⁸ Matter of Genduso, 164 A.D.3d at 1510. The Court therefore held that it was proper for the Board to conclude that the entirety of the previous award was attributable to the knee injury and thus to deduct it from a later award for injury to the same knee. *Id.*

⁸ The Board’s 1996 Guidelines, 2012 Guidelines, and 2018 Guidelines all specify that injury to ankle is evaluated as the schedule loss of use of a foot, not a leg. 1996 Guidelines at Ch. I.B.3.; 2012 Guidelines at Ch. 3.3; 2018 Guidelines at Ch. 8.

In short, the decision in Matter of Genduso sets forth the uncontroversial rule that a previous award for injury to part of an extremity may be deducted from a later award for injury to the same part of that extremity so that there is no duplication of the award for the same defects. The decision does not support the proposition for which it was employed by the Board in this case, which is that an injury to part of an extremity in one case may be deducted from a later award for injury to a different part of that extremity in a different case.

In this case, the Board's misapplication of the decision in Matter of Genduso resulted in Johnson receiving no award whatsoever for deficits in his right knee that the Board evaluated as a 40% schedule loss of use, and less than half of the award that should have been entered for deficits that the Board evaluated as an 80% schedule loss of use of his left knee.

We agree that if the Board had made a previous award for deficits in the knee, then it could have properly deducted those awards from a later schedule loss of use that was also attributable to defects in the knee. However, while that was the situation in Matter of Genduso, it is not the case here. As a matter of statute, precedent, and its own Guidelines, it was erroneous for the Board to deduct the prior schedule loss award for Johnson's hip injuries from its later schedule loss award for his knee injuries.

We therefore respectfully submit that the Board was obligated to evaluate Johnson's knee injuries independent of his previous hip injuries, or at a minimum to assess the overall schedule loss of use of his legs taking into consideration both the defects in his hips and the defects in his knees. The Board's decision to deduct the award for defects in Johnson's hips from its award for defects in his knees was completely illogical, since it resulted in a failure to evaluate either his knee injuries independently or the overall loss of use of his legs taking all of the relevant defects into consideration. The decision below should be reversed.

CONCLUSION

The Workers' Compensation Board's decision was erroneous as a matter of law because it failed to evaluate Claimant-Appellant's schedule loss of use in this case independently from its previous schedule loss award in a different case for injury to a different part of the same extremity.

The Board's decision was also erroneous as a matter of law because its deduction of an unrelated award for schedule loss of use from its award in this case was contrary to the express language of the statute and the decisions of this honorable Court and the Court of Appeals.

We therefore respectfully submit that the decision below should be reversed.

Dated: Farmingdale, New York
June 24, 2019



Robert E. Grey

CERTIFICATE OF COMPLIANCE

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

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Robert E. Grey, Esq.