To be Argued by: ROBERT E. GREY
Time Requested: 10 minutes

APL-2020-00155

COURT OF APPEALS
of the
STATE OF NEW YORK

Thomas Johnson,
Claimant-Appellant,

- against -

City of New York,
Employer-Respondent,

- and –

NEW YORK STATE WORKERS' COMPENSATION BOARD,
Respondent.

BRIEF FOR APPELLANT THOMAS JOHNSON

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over this appeal pursuant to CPLR § 5602. The order of the Appellate Division was a final determination of the case, and this Court granted Claimant-Appellant leave to appeal on October 20, 2020. Matter of Johnson v. City of New York, 2020 N.Y. LEXIS 2367, Motion No. 2020-380 (Oct. 20, 2020). R. A-1 - A-2.

This appeal presents a question of law that is novel and of great public importance. The question presented is whether the Workers' Compensation Board may properly deduct a prior award for "schedule loss of use" attributable to an injury to one part of a limb from a later schedule loss award for injury to a different part of the same limb. R. 217-221, A-3 – A-7.

Workers' Compensation Law § 15(3) requires the Board to award compensation for the loss or loss of use of each member or part thereof. R. A-4 – A-5. Pursuant to the statute, the Workers' Compensation Board has promulgated guidelines that provide for the independent evaluation of each part of an extremity in determining compensation for schedule loss of use. R. A-4 – A-5. This honorable Court has held that compensation should be awarded for the loss of function of one part of a limb without regard to a previous injury or disability involving a different part of the same limb. 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).

R. 218-219.

In addition, Workers' Compensation Law § 15(7) provides "that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury." R. A-6.

Finally, the Board's approach creates the paradoxical result that a worker who has been found to have a significant loss of function of a limb under the Board's own guidelines may receive a substantially reduced award – or no award at all – simply because he or she has a previous injury to an entirely different part of that limb. R. A-3 – A-7.

The decision below is therefore contrary to the statute, the Board's own guidelines, well-established precedent, and the fundamental purpose of the Workers' Compensation Law. This issue concerns a great number of workers' compensation cases and therefore presents an issue of great public importance over which this honorable Court has jurisdiction.

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PRELIMINARY STATEMENT

The issue to be decided in this case is whether the Workers' Compensation Board may properly deduct a prior award for "schedule loss of use" attributable to an injury to one part of a limb from a later schedule loss award for injury to a different part of the same limb.

The Appellate Division, Third Department found that "to authorize separate SLU awards for a body member's subparts is not authorized by the statute or the guidelines." R. A-6. It further found that an impairment to any part of a limb is "encompassed by [an] award[] for the loss of use of the" member, and that any previous award for schedule loss of use of a limb should be deducted from any later award for schedule loss of use of the same limb, regardless of whether the same "subpart" of the limb was affected. R. A-5.

The Appellate Division therefore upheld the Workers' Compensation Board's deduction of a previous award for a 50% schedule loss of use resulting from an unrelated injury to Claimant-Appellant's left hip from its finding that there was an 80% schedule loss of use resulting from an injury to his left knee in this case (leaving him with an award for a 30% schedule loss of use of the left leg for his left knee injury), as well as its deduction of a previous award for a 52.5% schedule loss of use resulting from an unrelated right hip injury from its finding that there was an 40% schedule loss of use resulting from the injury to his right

knee in this case (leaving him with no award at all for the his right knee injury).

The Appellate Division's decision was erroneous as a matter of law and was contrary to the interests of justice.

It is not uncommon for a worker to injure one part of a limb – an elbow, shoulder, hip, or knee – return to work, and later suffer a second injury to that same limb. Where the new injury involves the same part of the limb, such as a new knee injury superimposed upon an old knee injury, the physical deficits overlap and the previous award for schedule loss of use of the limb is generally deducted from the new award for schedule loss of use of the same limb.

However, where the new injury involves a different part of the limb, the physical deficits do not overlap, and must therefore be considered independently. This situation is expressly provided for by two different provisions of the Workers' Compensation Law (*WCL §§ 15(3)* and *15(7)*), in addition to well-established precedent (*see, e.g.*, 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)) and the Workers' Compensation Board's guidelines for schedule loss evaluation (Workers' Compensation Guidelines for Determining Impairment, First Edition, November 22, 2017). Moreover, it would be illogical and contrary to the interests of justice to deduct a previous award for one injury from a later award for an entirely different injury.

The decision below was therefore erroneous as a matter of law and should be reversed.

QUESTIONS PRESENTED

Question 1: Did the Appellate Division, Third Department err as a matter of law in upholding the Workers' Compensation Board's decision to deduct its previous schedule loss of use awards for unrelated injuries to Claimant-Appellant's hips from its later awards for schedule loss of use attributable to his knee injuries?

Answer: Yes. The Workers' Compensation Law provides compensation for the loss or loss of use of each part of a limb, and also provides that a previous injury does not preclude compensation for a later injury.

STATEMENT OF FACTS

Claimant-Appellant Thomas Johnson ("Johnson") injured both of his knees on February 15, 2006 while working for Employer-Respondent City of New York ("the City"). R. 15-17. As a result of this accident he eventually had surgery to both of his knees, including a left total knee replacement. R. 76, 100-104.

Johnson's orthopedic surgeon, Dr. William Long, ultimately reported that there was a forty percent schedule loss of use of the right leg and an eighty percent schedule loss of use of the left leg attributable to his knee injuries. R. 109-115. The City's orthopedic consultant, Dr. Parisien, reported that the knee injuries had resulted in "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." R. 119.

Johnson had also injured both of his hips in a different workplace accident on November 12, 2009. R. 125. That case had previously been resolved with findings and awards for a fifty percent schedule loss of use of the left leg as a result of the left hip injury and a fifty-two and one-half percent schedule loss of use of the right leg as a result of the right hip injury. R. 223-224.

The City initially contended that Dr. Long's opinion could not be considered because the finding of an eighty percent schedule loss of use of the left leg attributable to the left knee injury in combination with the previous finding of a fifty percent schedule loss of use of the left leg attributable to the unrelated hip injury would

exceed a one-hundred percent schedule loss of use of the leg. R. 125, 127-132. However, after Johnson submitted a memorandum of law citing the relevant decisions by the Court of Appeals and the Appellate Division Third Department, a WCL Judge rejected the City's argument and held that "[a]s there 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 100%." R. 135-139.[1]

Dr. Long and Dr. Parisien subsequently testified that their respective schedule loss evaluations were based solely on the deficits in Johnson's knees pursuant to the Workers' Compensation Board's ("the Board") impairment guidelines, without regard to his unrelated hip injuries. R. 140-192. At a hearing held on October 30, 2018, the WCL Judge adopted Dr. Long's opinion 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" as a result of his knee injuries. R. 207, 213-214.

However, the WCL Judge then proceeded to reduce the schedule loss awards for Johnson's knee injuries in this case by the schedule loss awards that had previously been made for his hip injuries. R. 207, 213-214. These deductions left Johnson with an award for a thirty percent schedule loss of use for his left knee

[1] The City did not appeal from this decision.

injury and no award at all for his right knee injury.[2] R. 207, R. 213-214. In making these deductions, the WCL Judge relied upon the opinion in Matter of Genduso v. City of New York, 164 A.D.3d 1509, 82 N.Y.S.3d 662 (3rd Dept. 2018), which had been recently decided.

Johnson administratively appealed the WCL Judge's decision, contending that it was contrary to the previous decision finding that the schedule losses were "distinct and separate" and should be awarded independently and that the WCL Judge's reliance on Matter of Genduso was misplaced. R. 214-225.

In a Memorandum of Board Panel Decision filed on March 29, 2019, the Board upheld the WCL Judge's decision, finding that "the claimant's injuries to the hips and knees would not be eligible for separate schedule losses of use, but would be encompassed by a leg schedule, and so the claimant's present receipt of schedule losses of use of the legs must be reduced by his prior receipt of schedule losses of use of the legs, regardless of which part of the leg was injured." R. 13.

In a Memorandum and Order dated February 6, 2020, the Appellate Division, Third Department affirmed the Board's Decision. R. A-3 – A-7. The Appellate Division reasoned that because the statute refers only to the "leg" and not "the knee or the hip," any prior award for schedule loss of use the "leg" should

[2] Notably, each of these findings was less than the figure the City's consultant Dr. Parisien had opined was "causally related" to the February 15, 2006 accident. R. 119.

be deducted from any later schedule loss of use of the "leg," regardless of whether the two accidents involved the same set of impairments. R. A-5 – A-6.

On October 20, 2020, this Court granted Johnson's motion for leave to appeal from the Appellate Division's Memorandum and Order. R. A-1.

ARGUMENT

POINT I: THE COURT BELOW ERRED AS A MATTER OF LAW BY ALLOWING THE WORKERS' COMPENSATION BOARD TO DEDUCT A "SCHEDULE LOSS OF USE" AWARD RESULTING FROM AN UNRELATED INJURY TO ONE PART OF A LIMB FROM A SCHEDULE LOSS OF USE AWARD IN A LATER CASE INVOLVING INJURY TO A DIFFERENT PART OF THAT LIMB.

The Appellate Division, Third Department erred as a matter of law in finding that it was proper to deduct a previous "schedule loss" award that was made for an unrelated injury to one part of a limb from a later schedule loss award for injury to a different part of the same limb.

The decision below failed to properly apply Workers' Compensation Law § 15(3), which expressly provides that a schedule loss award may be made for injury to a "member or part thereof;" guidelines that the Workers' Compensation Board has promulgated pursuant to that provision; and well-established judicial and administrative precedents on this issue.

The decision below was also contrary to Workers' Compensation Law § 15(7), which provides that the presence of a prior injury shall not preclude compensation for a later injury.

Finally, the decision below was contrary to the interests of justice because it resulted in a situation in which an undisputed permanent loss of use for which the

statute requires an award instead went uncompensated.

For all of these reasons, the decision below was erroneous as a matter of law and should be reversed.

A. The Workers Compensation Law, the Board's guidelines, and well-established precedent all provide that compensation is due for schedule loss of use resulting from injury to part of a limb.

1. The statute provides compensation for the schedule loss of use of part of an extremity.

Workers' Compensation Law § 15(3) provides that "in case of disability partial in character but permanent in quality ... compensation ... shall be paid to the employee for the period named in this subdivision." WCL § 15(3). Where, as here, the injury involves a leg, subdivision (b) of the statute defines the period as two hundred and eighty-eight weeks. WCL § 15(3)(b).

A worker need not suffer the complete loss or loss of use of a limb in order to receive compensation for what is known as a "schedule loss of use." *See, e.g.* Matter of Mancini v. Services, 32 N.Y.3d 521, 525; 93 N.Y.S.3d 652, 654; 118 N.E.3d 191, 194 (2018). Instead, Workers' Compensation Law § 15(3)(s) provides that "[c]ompensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member." WCL § 15(3)(s).

Where a worker has multiple injuries arising out of the same accident, the

statute provides compensation for the loss of use of each part of each member involved in the accident, regardless of whether the loss is total or partial. Workers' Compensation Law § 15(3)(u) provides:

> Total or partial loss or loss of use of more than one member or parts of members. In any case in which there shall be a loss or loss of use of more than one member or parts of more than one member set forth in paragraphs a through t, inclusive, of this subdivision, but not amounting to permanent total disability, the board shall award compensation for the loss or loss of use of each such member or part thereof, which awards shall be fully payable in one lump sum upon the request of the injured employee.

WCL § 15(3)(u).

Taken as a whole, these statutory provisions create a framework in which compensation for schedule loss of use "shall be paid" for either the "loss or loss of use" of a limb, regardless of whether the loss is "total or partial" and regardless of whether the injury affects the entire limb or only "part thereof." WCL §§ 15(3), 15(3)(s), 15(3)(u). The amount of the award is calculated based on the proportionate loss of the limb as compared to the statutory schedule, so (for example) a ten percent loss of use of the leg results in an award for twenty-eight and four-fifths weeks of compensation.[3] WCL §§ 15(3)(b), (s).

Here, Johnson's knee injuries resulted in a partial loss of use of each of his

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[3] 288 weeks x .10 = 28.8 weeks.

legs, for which the statute mandated compensation in proportion to the loss of use of each leg. WCL §§ 15(3)(b), (s). The Workers' Compensation Board, after evaluating the medical evidence and applying its guidelines[4], concluded that the loss stemming from the knee injuries was eighty percent of Johnson's left leg and forty percent of his right leg. R. 11-14. Thus, under the statutory formula, the appropriate award would have been two hundred thirty and two-fifths weeks for Johnson's left leg and one hundred fifteen and one-fifth weeks for his right leg. WCL §§ 15(3)(b), (s), (u).[5]

Instead, the Board subtracted the compensation it had previously awarded for Johnson's unrelated hip injuries - which affected an entirely different part of his legs – and awarded him only eighty six and two-fifths weeks of compensation for his left knee injury and no compensation at all for his right knee injury.[6] R. 11, 14, 213.

The decision below was therefore inconsistent with the statute because it erroneously conflated every injury to an extremity listed in WCL § 15(3)(a)-(m) with every other injury to the same extremity, regardless of whether the impairments are related or unrelated. This failed to provide Johnson with the amount of compensation the statute required for the loss of use of his legs that he had suffered in this accident. As a result, the decision below was erroneous as a matter of law and should be

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[4] *See*, Point I.A.2., *infra*.
[5] 288 x .80 = 230.4; 288 x .40 = 115.2.
[6] 288 X .30 = 86.4; 288 X 0 = 0.

reversed.

2. The Board's guidelines provide compensation for the schedule loss of use of part of an extremity.

Over the decades, in furtherance of the statute the Workers' Compensation Board has promulgated a series of guidelines for the evaluation of schedule loss of use. *See,* NYS Workers' Compensation Board Medical Guidelines, June, 1996; New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity, December, 2012; Workers' Compensation Guidelines for Determining Impairment, November, 2017.

Every edition of the Board's guidelines has provided that schedule loss of use should be determined by reference to the specific part of the extremity that was affected by the accident. *Id.* Thus, for upper extremity injuries the guidelines address the wrist, elbow and shoulder separately, and for lower extremity injuries the guidelines address the foot and ankle, knee, and hip separately. *See*, 1996 Guidelines, chapters I.A.7 (wrist), I.A.8 (elbow) and I.A.9 (shoulder); I.B.1 (hip), I.B.2. (knee) and I.B.3.(ankle and foot); 2012 Guidelines, chapters 2.3 (wrist), 2.4 (elbow), 2.5 (shoulder), 3.1 (hip), 3.2 (knee), and 3.3 (ankle and foot); 2018 Guidelines, chapters 3 (hand and wrist), 4 (elbow), 5 (shoulder), 6 (hip and femur),

7 (knee and tibia), 8 (ankle and foot).[7]

Notably, there is no provision in the Board's guidelines that calls for the deduction of a schedule loss of use in one part of a limb to be deducted from a schedule loss of use involving a different part of the same limb. To the contrary, the Board's guidelines provide for deficits in different parts of the upper and lower extremity to be evaluated independently, resulting in separate schedule loss of use findings for (as relevant here) the knee and the hip.

The Board's guidelines mirror the statute, which is also devoid of any provision requiring the deduction of a previous award for schedule loss of use of a limb from a later award for schedule loss of use of that same limb. WCL § 15(3).

To be sure, there is no basis upon which the same deficit should be compensated twice. If two accidents affect the same part of the extremity, then compensation in the second accident would be limited to any increase in the previous deficits resulting from that accident.[8] However, neither the statute nor the Board's guidelines provide any authority for the deduction of a different deficit in

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[7] The 1996, 2012 and 2018 Guidelines are available at http://www.wcb.ny.gov/content/main/hcpp/mdguide.pdf, http://www.wcb.ny.gov/content/main/hcpp/ImpairmentGuidelines/2012ImpairmentGuide.pdf, and http://www.wcb.ny.gov/2018-Impairment-Guidelines.pdf, respectively. In the case at bar, the 2012 Guidelines were applied, but there is no difference in any issue of the Guidelines that is relevant to the issue presented by this case.

[8] This issue is considered in the Board's 2018 Guidelines, which explicitly require consideration of previous injuries to the affected joint and comparison to the contralateral extremity. 2018 Guidelines at § 1.3.

a different part of the limb. The court below erred by creating such a rule in the absence of any statutory or regulatory authority.

The decision below was therefore contrary to the guidelines the Board has promulgated pursuant to the statute for the evaluation of schedule loss of use and should be reversed.

3. Well-established judicial and administrative precedents provide compensation for the schedule loss of use of part of an extremity, even where the combined awards would exceed one hundred percent of the limb.

The decision below was also contrary to well-established judicial and administrative precedents concerning multiple injuries involving the same extremity.

This Court considered the issue 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). In Matter of Zimmerman, the claimant suffered an amputation "of his left hand and forearm six inches below the elbow" and "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." Matter of Zimmerman v. Akron Falls Park – County of Erie, 35 A.D.2d 1030, 316 N.Y.S. 386 (3rd Dept. 1970).

After returning to work, Zimmerman then injured his left shoulder and a second award was made, this time for a fifty percent schedule loss of use of the left

arm. *Id.* Rejecting the employer's contention that Zimmerman could not receive two awards that in the aggregate exceeded one hundred percent of the arm, this Court held that "'[t]he 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 ninety percent schedule loss of use of the claimant's left hand. Matter of Bazzano, 62 A.D.2d at 260. After returning to work, Bazzano injured a different part of the same hand, which standing alone would have entitled him to a twenty-seven and one-half percent schedule loss of use of the hand. *Id.*

Although the Board found that the award in the second case should be limited to a ten percent loss of use of the hand (for a total of one hundred percent in conjunction with the first award) the Appellate Division reversed based on the holding in Matter of Zimmerman and ruled that the award in the second case should be based on the new injuries without regard to the previous schedule loss award. *Id.*

The same result pertained in Matter of Pellegrino v. Textile Prints Co., 81 A.D.2d 723, 439 N.Y.S.2d 454 (3rd Dept. 1981), where the Board made an award for an injury to the claimant's arm without regard to a previous schedule loss award

involving a different part of the same arm. The Appellate Division upheld the Board's decision, 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.*

The rule that injuries to different parts of the same extremity should be evaluated separately and independent awards made has also been applied when both injuries occur in the same 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 Appellate Division upheld the Board's finding that Deck was entitled to a one hundred percent schedule loss of use of his hand as a result of the loss of four fingers, as well as an award for a one hundred percent loss of use of the thumb.[9] *Id.* 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

[9] As in Matter of Zimmerman, *supra*, Matter of Bazzano, *supra*, and Matter of Pellegrino, *supra*, these awards, in the aggregate, exceeded a one hundred percent loss of use of the hand.

criteria for different injuries, permitting them to be evaluated separately. *Id*; *see also*, Point I.A.2., *supra*.

Similarly, 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 Appellate Division upheld the Board's decision that the claimant was entitled to compensation for injuries to both his shoulder and elbow that resulted from the same accident. Matter of Bell, 169 A.D.3d at 1145. Citing Workers' Compensation Law § 15(3)(u), the Court found that "[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).

There are also numerous administrative precedents holding that schedule loss awards should be made independently for each part of an injured extremity. *See, e.g.*, Matter of New York City Dept. of Corrections, 2013 NY Wrk Comp. LEXIS 3723, WCB G042 8233 (April 29, 2013) (award for a fifty percent schedule loss of use of the arm consisting of a forty percent schedule loss for a shoulder injury plus a ten percent schedule loss of use for a wrist injury); Matter of NY Life Ins. Co,, 2018 NY Wrk. Comp. LEXIS 12039, WCB G167 9572 (December 24, 2018) (award for a forty-five percent schedule loss of use of the arm consisting of a twenty-five percent schedule loss of use for the shoulder and a twenty percent schedule loss of use for the elbow, as well as a twenty-five schedule loss of use of the left hand, in addition to a thirty-five percent schedule loss of use of the leg consisting of a twenty percent

schedule loss of use for a knee injury and a fifteen percent schedule loss of use for a hip injury); Matter of Rochester City School District, 2017 NY Wrk. Comp. LEXIS 5993, WCB 7070 1860 (February 9, 2017) (award for a fifty percent schedule loss of use of the leg due to a knee injury in addition to an award for a sixty percent schedule loss of use of the same leg due to a hip injury).

Matter of Rochester City Sch. Dist., *supra*, is virtually 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. 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).

The decision below was therefore erroneous as a matter of law because it was contrary to well-established judicial and administrative precedents and should be reversed.

B. Workers' Compensation Law § 15(7) provides that the presence of a prior injury shall not preclude compensation for a later injury.

The decision below also violated Workers' Compensation Law § 15(7). The statute provides that:

> 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*).

This honorable Court has interpreted the statute as creating three rules.

First, 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.

Second, 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.

Third, the employee may 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. *See*, 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 rules are both applicable here.

The fact that Johnson suffered a previous disability (the schedule loss of his right leg resulting from his unrelated hip injury), "does not disqualify [him] from receiving compensation benefits for a later work-related injury." Hroncich, 21 N.Y.3d at 645. The Board and the court below violated this rule by completely disqualifying Johnson from compensation for the acknowledged forty percent loss of use of his right leg due to the knee injury in this case on the basis that he had a previous injury to a different part of that same leg. It similarly disqualified him from more than half of the benefits he would otherwise have received for his left knee injury for the same improper reason (the previous schedule loss award for his left hip injury).

Johnson has made no claim for "compensation benefits in excess of those allowed for the later work-related injury considered by itself." Matter of Hronich, *supra*. To the contrary, he simply sought compensation for the schedule loss of use that was attributable to the knee injuries he suffered in this accident. The Board and

the court below denied him that compensation solely because another award had been made previously in a different case that involved a different injury. These decisions violated Workers' Compensation Law § 15(7).

The decision below was therefore erroneous as a matter of law and should be reversed.

C. The decision below was contrary to the fundamental purpose of the Workers' Compensation Law and the interests of justice.

The Workers' Compensation Law is social legislation that was intended to be interpreted liberally in favor of the injured worker. *See, e.g.*, Post v. Burger & Gohlke, 216 N.Y. 544, 553-554; 111 N.E. 351 (1915); Surace v. Danna, 248 N.Y.18, 20-23; 161 N.E. 315 (1928); Matter of Johannesen v. New York City Dept. of Housing Preservation & Development, 84 N.Y.2d 129, 615 N.Y.S.2d 336, 638 N.E.2d 981 (1994). The legal rule created by the decision below is contrary to the benevolent purpose of the statute and creates a number of consequences that are substantially contrary to the interests of justice.

As discussed in Point I.A.3., a worker who injures two parts of the same extremity in a single accident is entitled to have his or her schedule loss of use evaluated based on consideration of all of the deficits in the extremity. WCL § 15(3)(u), Matter of Rochester Sch. Dist., *supra*, Matter of Deck, *supra*, Matter of

Bell, *supra*. However, if that same worker suffers the same injuries in two different accidents, the court below has authorized the deduction of the first award from the second, even if (as here) the deficits are wholly unrelated. This creates two classes of injured worker: those who are injured in one accident and receive compensation for all of their injuries, and those who are injured in two accidents and do not.

Thus, had Johnson injured his knee and his hip in a single accident, the Board would have awarded him compensation based on the impact of all of the deficits in his leg, but because the injuries occurred in two different accidents it made no award at all for the loss of function of his right knee and substantially reduced the statutory compensation for the loss of function of his left knee.

It would have been patently unjust for Zimmerman's left shoulder injury to have been reduced by the award for the unrelated amputation of his left forearm, which (as here) would have left him with no award at all for his shoulder injury. Matter of Zimmerman, *supra*. Bazzano was not limited to a ten percent schedule loss of use instead of the medically determined twenty-seven and one-half percent schedule loss of use for his previously undamaged fingers simply because he had a prior accident involving a different part of his left hand. 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 merely because he had a previous laceration to his upper arm, which presented a different set of impairments. Matter of

Pellegrino, *supra*.

It is noteworthy that the award entered by the Board in this case (a thirty percent schedule loss of use of the left leg and zero schedule loss of use of the right leg) was even less than the employer's consultant agreed was related to the accident (a forty percent schedule loss of use of the left leg and a twenty-seven and one-half percent schedule loss of use of the right leg). It is difficult to perceive any merit in a legal rule that results in an award of benefits that is significantly less than the most conservative possible view of the record – in this case less than the employer's own evidence about the extent of the causally-related injury.

Both the Board and the Court below relied heavily upon the Appellate Division's recent decision in Matter of Genduso v. New York City Dept. of Educ., 164 A.D.3d 1509, 82 N.Y.S.3d 662 (3rd Dept. 2018) as the authority for their decisions. This reliance was, however, misplaced because (1) the decision in Matter of Genduso was based on the unique facts of that case; (2) the legal analysis in the opinion was mere *dicta*, and (3) to the extent it laid a foundation for the rule that the court below applied in this case, it was erroneous as a matter of law.

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 the entirety of both of its two prior schedule loss awards

for the right leg. *Id.*

On appeal, the claimant contended that the Board erred when it deducted the entirety of one of his prior schedule loss awards because the award in that case was not limited to his knee, but also included a significant injury to his ankle.[10] Matter of Genduso, 164 A.D.3d at 1509-1510. The claimant argued that the Board should have allocated that prior award between the knee and the ankle and deducted only the portion of the award that was attributable to the knee injury from the later knee injury. *Id.*

The Appellate Division 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).[11] 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 to deduct it from a later award for injury to the same knee. *Id.*

The decision in Matter of Genduso was therefore based on the fact that the earlier schedule loss had not been allocated between two sites of injury (the ankle and

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[10] The claimant did not dispute the propriety of deducting the entirety of the other prior award, which like the third case involved only the knee.

[11] 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.

the knee), and that absent such an allocation the Board was entitled to conclude the entirety of the prior schedule loss was attributable to the same site of injury as was involved in the later accident.

That is not the situation here, in which there is perfect clarity that one accident involved only Johnson's hips, and the other involved only his knees. Under the circumstances of this case, there is no basis upon which the Board could have properly concluded that the deficits caused by the injury in this case overlapped or included the deficits in the unrelated case. This case is therefore wholly distinguishable from Matter of Genduso.

Both the Board and the court below pointed to the statement in Matter of Genduso that "neither the statute nor the Board's guidelines lists the ankle or the knee as body parts lending themselves to separate SLU awards. Rather, impairments to these extremities are encompassed by awards for the loss of use of the leg. Matter of Genduso, 164 A.D.3d at 1510. However, the Court's decision did not depend on that analysis, rendering it mere *dicta*. Moreover, it was erroneous *dicta*, because the Board's guidelines (which were cited in the decision) in fact do not include the ankle as part of the leg, but instead provide that deficits in the ankle should be evaluated as a schedule loss of use of the foot. *See*, 1996 Guidelines, chapter I.B.3.; 2012 Guidelines, chapter 3.3; 2018 Guidelines, chapter 8.

Finally, to the extent that the decision in Matter of Genduso provided a basis

for the decision below, we respectfully submit that it was erroneous as a matter of law.

First, the *dicta* in Matter of Genduso was contrary to the statute and the Board's guidelines for the reasons set forth in Points I.A.1. and 2., *supra*.

Second, not only was the *dicta* in Matter of Genduso contrary to the precedents discussed in Point I.A.3., *supra*, it would improperly overrule and invalidate that line of cases. Matter of Zimmerman, *supra*, Matter of Bazzano, *supra*, and Matter of Deck, *supra*, as well as numerous agency decisions following those cases all stand for the proposition that an injured worker who suffers injuries to different parts of a limb is entitled to have each loss evaluated independently, even if the combined awards exceed one hundred percent of the limb. By contrast, under the *dicta* in Matter of Genduso, an injured worker could never have combined awards in excess of one hundred percent of a limb, because any earlier award would always be deducted from any later award, imposing a *de facto* limit of one hundred percent.

Finally, the *dicta* in Matter of Genduso was contrary to Workers' Compensation Law § 15(7) for the reasons set forth in Point I.B., *supra*.

The decision below was therefore contrary to the fundamental purpose of the Workers' Compensation Law and to the interests of justice and should be reversed.

CONCLUSION.

The Appellate Division, Third Department erred as a matter of law in finding that it was proper to deduct a previous "schedule loss" award that was made for an unrelated injury to one part of a limb from a later schedule loss award for injury to a different part of the same limb.

The decision below failed to properly apply Workers' Compensation Law § 15(3), which expressly provides that a schedule loss award may be made for injury to a "member or part thereof;" guidelines that the Workers' Compensation Board has promulgated pursuant to that provision; and well-established judicial and administrative precedents on this issue.

The decision below was also contrary to Workers' Compensation Law § 15(7), which provides that the presence of a prior injury shall not preclude compensation for a later injury.

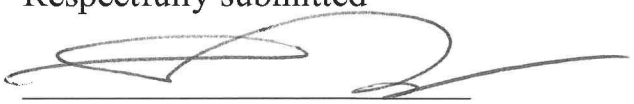
Finally, the decision below was contrary to the interests of justice because it resulted in a situation in which an undisputed permanent loss of use for which the statute requires an award instead went uncompensated.

For all of these reasons, the decision below was erroneous as a matter of law

and should be reversed.

Dated: Farmingdale, New York
December 8, 2020

Respectfully submitted



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CERTIFICATE OF COMPLIANCE

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

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Robert E. Grey, Esq.