State of New York
Court of Appeals

In the Matter of the Claim for Benefits under the Worker's Compensation Law Made by

THOMAS JOHNSON,

Claimant-Appellant,

v.

CITY OF NEW YORK and WORKERS' COMPENSATION BOARD,

Respondents.

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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Appellate Division, Third Department, AD No. 529417

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PRELIMINARY STATEMENT

Respondent Workers' Compensation Board (the "Board") submits this memorandum in opposition to claimant's motion for leave to appeal from a decision and order of the Appellate Division, Third Department, entered February 6, 2020. *Johnson v. City of New York,* 180 A.D.3d 1134 (3rd Dep't, February 6, 2020). The Third Department affirmed a decision of the Workers' Compensation Board, which ruled, among other things, that claimant-appellant (claimant) sustained a 30% schedule loss of use of his left leg and a 0% schedule loss of use of his right leg as a result of a February 2006 accident. The Third Department held that, in determining those awards, the Board had permissibly reduced the total percentage loss of use to each of claimant's legs by the percentage loss of use to each of those legs that claimant had previously been awarded for a November 2009 accident. The motion for leave should be denied. Third Department's decision does not meet the Court's leave-grant criteria and was, in any case, correctly decided.

STATEMENT OF THE CASE

This case involves an award pursuant to the Workers Compensation Law (WCL) for a schedule loss of use. When a worker is injured in a work-related accident, the worker will be entitled to a schedule loss of use award if the worker's injury results in a permanent partial disability stemming from the loss, or loss of use of, one of a list of specifically enumerated bodily members. *See* WCL § 15 (a)-(m). Such awards are made based upon the percentage of the loss of use of the member.

Claimant sustained a work-related injury to both his right and left knees in February 2006 when he slipped and fell on snow while exiting a hospital bus. (R[1]15-17, 76, 100-04.) On November 12, 2009, claimant sustained additional work-related injuries and subsequently made a

[1] Page references with the prefix "R" refer to the Record on Appeal before the Appellant Division, Third Department.

claim for workers' compensation benefits, which resulted in the establishment of benefits for injuries to his neck, back, right shoulder, and both hips, injuries that affected the claimant's use of his legs. In connection with this subsequent claim, on January 12, 2016, the Board awarded him a schedule loss of use consisting, as relevant here, of a 50% loss of use of the left leg and a 52.5% loss of use of the right leg. (R. 125).

Thereafter, a workers' compensation law judge heard evidence on the degree of impairment and permanency caused by the earlier 2006 incident. (R. 109-115, 119.) The workers' compensation law judge concluded that claimant had sustained, overall, an 80% loss of use of the left leg and a 40% loss of use of the right leg. (R. 207.) Because claimant had previously received schedule awards for both legs in connection with the 2009 claim, however, the workers' compensation judge reduced those awards by the awards previously made to calculate the loss of use attributable to the earlier, 2006 incident. (R. 207.) Thus, for the left leg, the workers' compensation judge awarded a schedule loss of use of 30% (80% minus the 50% already awarded) and for the right leg, a loss of use of 0% (because the 40% award was less than the larger 52.5% award previously made). (R. 213.) Upon administrative review, the Board Panel affirmed the WCLJ's decision. (R.13.) Among other things, the Board rejected claimant's argument that he should receive separate schedule awards for his 2006 injuries to the hips and knees, reasoning that "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." (R. 13.)

On direct appeal, the Appellant Division, Third Department, affirmed. *Johnson v. City of New York*, 180 A.D.3d 1134 (3rd Dep't, February 6, 2020). The Third Department held that schedule awards are "limited to only those statutorily enumerated members listed in Workers' Compensation Law §15(3)," which do not include the hips or knees. The Third Department reasoned that, because the 50% loss of use and 52.5% loss of use awards made with regard to

claimant's 2009 injury were for the loss of use and impairment of claimant's left and right legs, respectively, the Board properly deducted those percentages from the subsequent 80% loss of use and 40% loss of use that claimant was found to have incurred in all, in order to establish how much of those awards should be attributed to claimant's 2006 injury and resulting impairment to claimant's left and right legs, respectively. Slip. Op.at 3-4.

The motion for leave to appeal to this Court followed.

ARGUMENT

LEAVE TO APPEAL SHOULD BE DENIED

Claimant's motion for leave to appeal should be denied. The Appellate Division's decision presents no novel and important issue, there is no contrary authority from this Court, and there is no conflict among the departments of the Appellate Division requiring the Court's resolution. *See* 22 N.Y.C.R.R. §500.22(b)(4).

Contrary to claimant's arguments, the Third Department's decision is consistent with that court's precedents. Specifically, the Third Department has since held that the loss of use of a member incurred in an earlier accident may be deducted from a calculation of loss of use for a later accident where the awards involve the same statutorily enumerated member. In *Matter of Kleban* v. *Central NY Psychiatric Ctr.*, 2020 N.Y. App. Div. LEXIS 4322, 2020 NY Slip Op. 04221 (3rd Dep't July 23, 2020), for example, the claimant had previously received a schedule loss of use award of 28.75% loss of use for his arm because of a shoulder injury. When he later sustained an injury to the elbow on the same arm, and was found to have incurred a loss of use to that arm of 20% in all, the Board found he was not entitled to an additional schedule loss of use award because the degree of impairment from the later injury was less than the degree of impairment for which he had already been given an award for the same arm. Similarly, in *Matter*

of Blair v. SUNY Syracuse Hosp., 184 A.D.3d 941 (3rd Dep't 2020), the claimant received a prior schdule award of 25% loss of use of his arm for an elbow injury. When the claimant later injured the shoulder on the same arm, resulting in a finding of a 45% loss of use of the arm, the Board determined that the loss of use for the subsequent injury alone was 20% (45% minus the 25% previously awarded).

Prior decisions by the Third Department are in accord. In *Matter of Genduso v. NYC Dep't of Educ.*, 164 A.D.3d 1509 (3rd Dep't 2018), the claimant had been awarded two prior schedule loss of use awards for injuries to the knee and ankle of his right leg, totaling a 32.5% loss of use for the leg. When he injured his right leg a third time, and his total loss of use was found to be 40%, the Board subtracted the prior 32.5% for purposes of calculating the 7.5% loss of use attributable to the new injury.

Claimant's reliance on *Matter of Zimmerman v. Akron Falls Park-County of Erie*, 29 N.Y.2d 815 (1971), and its progeny is misplaced. (*See* Mot. at 15.) In *Matter of Zimmerman*, this Court reversed a Third Department ruling that would have disallowed any additional award where claimant's initial injury resulted in the amputation (and thus total loss of use) of the left hand and then, decades later, claimant suffered a left shoulder injury that caused loss of use of his left arm. *See id.* at 817; *see also Matter of Zimmerman*, 35 A.D.2d 1030, 1032 (1970) (Herlihy, J. dissenting), *rev'd* 29 N.Y.2d 815 (1971). In *Zimmerman*, unlike here, the Board had expressly found that claimant's earlier hand amputation had no effect on claimant's wage-earning capacity decades later when he injured his shoulder and thereby lost some use of his arm. *Id. Zimmerman* does not hold, as claimant argues (Mot. at 4), that a prior schedule loss of use award for a bodily member is always irrelevant when awarding a subsequent schedule loss of use award for a bodily member that theoretically encompasses the same site. The *Zimmerman* Court simply held that the prior schedule loss of use award was not relevant to the subsequent loss of use on the particular

facts of the case, because the prior injury to the hand was distinct from and had no bearing on the subsequent injury to the arm, a factual determination within the Board's purview. The Board made no similar factual finding in this case. Indeed, no such inference would have been reasonable, given how close in time the injuries were sustained.

Moreover, claimants' injuries in this case were both to the same statutorily enumerated member, his legs. But in *Zimmerman*, the two awards were pursuant to different statutorily enumerated members; WCL § 15(3)(c) permitted the first award in *Zimmerman* for loss of the amputated hand while WCL § 15(3)(a) permitted the second separate award for the loss of use of the arm due to the subsequent shoulder injury. Similarly, in *Matter of Deck v. Dorr*, 150 A.D.3d 1597 (3d Dep't 2017), upon which claimant also relies (Mot. at 4), there were two awards, but also two separate statutorily enumerated members. There, the claimant was first awarded a 100% loss of use of his hand under WCL § 15(3)(c) (establishing the schedule for a "hand"), and later allowed a second award for the 100% loss of use of the thumb on the same hand under WCL § 15(3)(f) (establishing the schedule for a "thumb").

Claimant points to no other Third Department decision issued in the past 39 years that is relevant to the calculation at issue here. *Matter of Bell v. Glens Falls Ready Mix Co., Inc.*, 169 A.D.3d 1145 (3rd Dep't 2019), did not involve multiple awards but rather one award that encompassed multiple injuries—to the right shoulder and right elbow—which had to be combined into a single schedule loss of use award for the right arm. *Matter of Levitsky v. Workers' Compensation Bd.*, 126 A.D.3d 1264 (3rd Dep't 2015), similarly did not involve multiple schedule loss of use awards. Rather, *Levitsky* concerned an apportionment of liability between prior and subsequent injuries when one of the injuries was compensable as a work-related injury and the other was not.

This Court's review of the Third Department's decision here is unwarranted for two additional reasons. First, a decision from this Court would not be of much precedential value in future schedule loss of use cases. The decision in this case, like those in *Deck* and *Bell*, adhered to the now-outdated New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity, issued in 2012. Those guidelines were superseded in 2018, and any decision interpreting them would be of limited use in future cases.

Second, and in any case, the Third Department's decision was correct. Claimant is mistaken that WCL § 15(3)(u) and WCL § 15(7) require an independent second schedule loss of use award. (Mot. at 13-22.) WCL § 15(3), in paragraphs (a) through (t), recognizes that a worker may suffer injuries to multiple body parts and mandates, "that 'the board shall award compensation' for the loss of use of each part of the affected member." But WCL §15(3)(a) through (t) provides only twelve specifically enumerated body parts subject to schedule for injuries, and its reference to "parts" does not mean that separate awards must be made for each and every possible bodily part of a member at a more granular level than the Legislature provided for. Where the Legislature sought to provide more granular breakdowns so as to support such awards, it has done so expressly. *Compare* WCL § 15(a) (arm) *with* WCL § 15(c) (hand). Rather, the reference to "parts" is to make clear that a claimant will be entitled to an award even if it is not the case that the *entire* member is injured; *i.e.* where one part of an enumerated member is injured but other parts of the same member are not. Claimant's tortured interpretation of WCL § 15(3)(u) is, thus, not consistent with the provision's plain meaning.

Nor does claimant's interpretation make sense in the context of the overall structure of the WCL. Claimant would have it that every new injury to an enumerated member must be considered as if the member was, at that point, at 100% functionality, regardless of prior injuries, including those that resulted in previous schedule loss of use awards. But other parts of the WCL expressly

contemplate reinjury to the same bodily member and account for the effect of the earlier injury. For example, WCL § 15-8(d) shifts liability to the Special Disability Fund where a reinjury to the same body part "result[s] in a permanent disability caused by both conditions that is materially and substantially greater than that which would have resulted from the subsequent injury or occupational disease alone."

WCL § 15(7) also does not assist claimant here. That provision states that "[t]he fact that an employee has suffered a previous disability or received compensation therefore shall not preclude him from compensation for a later injury" but also expressly requires that awards for subsequent injuries take into account the already-reduced wage-earning capacity from the earlier injury. And § 15(7) additionally requires "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." Those requirements were all satisfied here. Claimant received awards for both the 2006 and 2009 incidents; he was not preluded by an award for that previous incident from receiving an award for that later one. At the same time, the Board made sure that claimant did not receive duplicative awards.

Finally, claimant is wrong to suggest that the Board and Third Department misapplied its prior holding in *Matter of Genduso v. NYC Dep't of Educ.*, 164 A.D.3d 1509 (3rd Dep't 2018). As claimant concedes (Mot. at 20), *Genduso,* stands for the proposition that a previous award for an injury to a part of an extremity may be deducted from a later award to the same part of that extremity, so that there is no duplication of awards. Claimant contends that *Genduso* does not apply simply because different parts of the same extremity were at issue in this case. But that assertion mischaracterizes the awards that claimant actually received here. The schedule loss of use awards claimant received were not for subsidiary bodily parts of a statutorily enumerated member, like hips or knees, but for claimant's legs. The Legislature chose to identify legs, a bodily

part that encompasses the hips and knees, as the appropriate member for a schedule loss of use award. Indeed, even in *Genduso,* parts of the legs were identified: knee and ankle.

Accordingly, there is no issue of novel or public importance, nor any conflict among the applicable precedent, warranting this Court's intervention. The motion for leave should be denied.

CONCLUSION

For the foregoing reasons, the motion for leave to appeal should be denied.

Dated: New York, New York
August 24, 2020

Respectfully submitted,

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