Appellate Division Case No. 529417

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the Claim of
THOMAS JOHNSON,

Claimant-Appellant,

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

- v -

CITY OF NEW YORK and
NEW YORK STATE WORKERS' COMPENSATION BOARD,

Respondents.

PLEASE TAKE NOTICE that upon the annexed affirmation of Robert E. Grey, Esq. sworn to on May 14, 2020, upon the Record on Appeal and the Briefs submitted to the Supreme Court of the State of New York, Appellate Division, Third Judicial Department and upon all of the papers and proceedings herein, the Claimant-Appellant will move this court, at the Court of Appeals, Albany, New York on Monday, the 8th day of June, 2020 in the Court of Appeals, occurring more than 13 days after the service and filing of this notice and of the indexed affirmation for an

ORDER granting the Claimant-Appellant leave to appeal in this matter,

ALL TOGETHER WITH such other and further relief as this court deems just and proper.

Dated: Farmingdale, New York
May 14, 2020

Robert E. Grey, Esq.

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Appellate Division Case No. 529417

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of the Claim of
THOMAS JOHNSON,

Claimant-Appellant,

- v. -

CITY OF NEW YORK and
NEW YORK STATE WORKERS'
COMPENSATION BOARD,

Respondents.

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

Robert E. Grey, being an attorney duly licensed to practice law before the courts of the State of New York, affirms the following under the penalties of perjury:

1. I am a partner in the law firm of Grey & Grey, LLP, attorneys for the Claimant-Appellant herein.

2. I submit this affirmation in support of a motion for leave to appeal the decision of the Appellate Division, Third Judicial Department in this matter dated February 6, 2020. Exhibit A.

PROCEDURAL HISTORY

3. In a decision filed on November 2, 2018, Workers' Compensation Law Judge Schwartz found that the Employer-Respondent's liability for payment of an award for Claimant-Appellant's knee injuries should be reduced by a previous award for an unrelated injury to his hips. This decision resulted in Claimant-Appellant receiving no compensation at all for his right knee injury, and an award below the minimum level established by the Workers' Compensation Board's guidelines for his left knee injury. Exhibit B.

4. This decision was affirmed by a Panel of the Workers' Compensation Board (Lobban, Higgins, Paprocki) in a Memorandum of Board Panel Decision filed on March 29, 2019. Exhibit C.

5. Claimant-Appellant appealed the Board's decision to the Appellate Division, Third Judicial Department. In a Memorandum and Order filed February 6, 2020, the Appellate Division affirmed the Board's decision. Exhibit A.

JURISIDICTIONAL STATEMENT

6. No prior motion for leave to appeal has been filed. On March 12, 2020, Claimant-Appellant served the Respondents with the order of the Appellate Division and Notice of Entry dated February 6, 2020. Claimant-Appellant has not received the decision with Notice of Entry from any Respondent. This motion is timely pursuant to CPLR § 5513(b).

7. This Court has jurisdiction over this appeal pursuant to CPLR § 5602; the order of the Appellate Division was a final determination of the case.

8. This appeal presents a question of law that is novel and of great public importance. The question presented is whether an award of workers' compensation benefits for "schedule loss of use" attributable to an injury to one part of a limb can properly be deducted from an award for a later injury involving an entirely different part of the same limb.

9. Workers' Compensation Law §§ 15(3)(a)-(t) provide awards of compensation for permanent loss or loss of use of various limbs, or "members" known as "schedule loss of use." WCL §§ 15(3)(a)-(t).

10. Workers' Compensation Law § 15(3)(u) expressly provides that "the board shall award compensation for the loss or loss of use of each … member or part thereof." WCL § 15(3)(u), *emphasis added*.

11. Workers' Compensation Law § 15(7) expressly provides that "[t]he fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury." WCL § 15(7), *emphasis added*.

12. This Court has held that compensation for schedule loss of use due to the loss of function of one part of a limb should be awarded without regard to previous injury or disability involving a different part of the 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).

13. The Appellate Division, Third Department and the Workers' Compensation Board adhered to these provisions of the statute and the rule in Matter of Zimmerman for decades - until its decision in this case. *See, e.g.*, Matter of Bazzano v. John Ryan & Sons, 62 A.D.2d 260, 404 N.Y.S.2d 402 (3rd Dept. 1978); Matter of Pellegrino v. Textile Prints Co., 81 A.D.2d 723, 439 N.Y.S.2d 454 (3rd Dept. 1981); Matter of Deck v. Dorr, 150 A.D.3d 1597, 54 N.Y.S.3d 765 (3rd Dept. 2017), *lv. to app. den.* 67 N.Y.S.3d 127, 89 N.E.3d 517 (2017); Matter of Bell v. Glens Falls Ready Mix Co., 169 A.D.3d 1145, 92 N.Y.S.3d 485 (3rd Dept. 2019); Matter of New York City Dept. of Corrections, 2013 NY Wrk Comp. LEXIS 3723, WCB G042 8233 (April 29, 2013); Matter of NY Life Ins. Co., 2018 NY Wrk. Comp.

LEXIS 12039, WCB G167 9572 (December 24, 2018); Matter of Rochester City School District, 2017 NY Wrk. Comp. LEXIS 5993, WCB 7070 1860 (February 9, 2017).

14. The Appellate Division's decision in this case is directly contradictory to the statute, this Court's decision in Zimmerman, prior precedent, and the interests of justice.

15. The Appellate Division's decision would substantially reduce, and in many cases effectively eliminate all compensation for schedule loss of use where the injured worker had a previous disability to a different part of the limb, as demonstrated by the outcome of this case.

16. This is an issue that affects approximately 25,000 injured workers each year,[1] a significant number of whom have suffered previous injury in the course of their employment.

17. The Court therefore has jurisdiction to grant leave to appeal in order to address the Appellate Division's departure from the statute, the

[1] The New York State Workers' Compensation Board reports that it assembled 168,432 claims in 2019. New York State Workers' Compensation Board 2019 Annual Report, at p. 5; available at http://www.wcb.ny.gov/content/main/TheBoard/publications.jsp. The New York Compensation Insurance Rating Board (NYCIRB) reports that 19.2% of claims made in 2019 were for permanent partial disability. 2019 State of the System, at p. 19; available at http://www.nycirb.org/state-of-the-system/2019/. Although NYCIRB does not differentiate between non-schedule and schedule permanent partial disability, upon information and belief approximately eighty percent of the permanent partial disability claims reported by NYCIRB are for schedule loss of use. Thus, 19.2% x .8 = 15.36% of all claims; 168,432 x .1536 = 25,871 schedule loss claims annually.

precedent established by this Court, and the interests of justice concerning a novel issue which is of great public importance.

QUESTION PRESENTED

18. Question: Did the Appellate Division, Third Department err as a matter of law in concluding that compensation awards for schedule loss of use of the leg resulting from injuries to Claimant-Appellant's hips should be deducted from subsequent compensation awards for schedule loss of use of the leg resulting from injuries to his knees?

19. Answer: Yes. The court below erred by limiting its analysis to the text of Workers' Compensation Law § 15(3)(b), and failed to consider the relevant provisions of Workers' Compensation Law §§ 15(3)(u) and 15(7), as well as the rule established by this Court, its own previous precedents, and the practical impact of its decision.

STATEMENT OF FACTS

20. Claimant-Appellant Thomas Johnson ("Johnson") injured both of his knees on February 15, 2006 while employed by the City of New York.

R. 15-17.[2] He eventually had arthroscopic surgery to the right knee and a left total knee replacement as a result of that accident. R. 76, 100-104.

21. Claimant-Appellant's orthopedic surgeon, Dr. William Long, ultimately evaluated him as having a forty percent schedule loss of use of his right leg and an eighty percent schedule loss of use of his left leg as a result of his knee injuries. R. 109-115.

22. The Employer-Respondent's orthopedic consultant, Dr. Parisien, evaluated Claimant-Appellant as having "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 applicable to his knee injuries. R. 119.

23. Claimant-Appellant had 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. R. 125.

24. Employer-Respondent 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 knee injury in the 2006

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[2] "R." references are to the Record on Appeal before the Appellate Division, Third Department.

accident, in conjunction with the previous finding of a fifty percent schedule loss of use of the left leg attributable to the 2009 hip injury, would exceed a one-hundred percent schedule loss of use of the leg. R. 130.

25. Employer-Respondent's argument was rejected by the WCL Judge, who found that Claimant-Appellant'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. Employer-Respondent did not appeal from this decision.

26. Dr. Long and Dr. Parisien then testified that their respective schedule loss evaluations were based solely on the deficits in Claimant-Appellant's knees pursuant to the Workers' Compensation Board's ("the Board's") impairment guidelines, without regard to his unrelated hip injuries. R. 140-192.

27. At a hearing held on October 30, 2018, the WCL Judge concluded that the Claimant-Appellant 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.

28. However, the WCL Judge went on to reduce Claimant-Appellant's schedule loss of use awards for his knee injuries by fifty-two and a half percent for the right leg and fifty percent for the left leg which were awarded to the claimant due to his 2009 hip injury. Accordingly, Claimant-Appellant was ultimately awarded a thirty percent schedule loss of use of his left leg and nothing for his right leg injury. R. 207. These findings were memorialized in a Notice of Decision that was filed on November 2, 2018. R. 213.

29. Claimant-Appellant appealed the WCL Judge's decision contending that 1) her decision was contrary her previous findings in this case and 2) this case was distinguishable from any precedent put forth by the Employer-Respondent such that its outcome could not be controlled by any prior holding. R.214-225.

30. In a Memorandum of Board Panel Decision filed on March 29, 2019, the Board affirmed 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, regardless of which part of the leg was injured." R. 13.

31. In a decision dated February 6, 2020, the Appellate Division, Third Department affirmed the Board. (Exhibit A).

32. Claimant-Appellant now moves for leave to appeal to this honorable Court from the decision of the Appellate Division, Third Department.

ARGUMENT

33. Workers' Compensation Law §§ 15(3)(a)-(t) provide awards of compensation for permanent loss or loss of use of various limbs, or "members" known as "schedule loss of use." WCL §§ 15(3)(a)-(t).

34. 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*).

35. Workers' Compensation Law § 15(7) expressly provides that "[t]he fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury." WCL § 15(7) (*emphasis added*).

36. In Majewski v. Broadalbin-Perth Cent. School Dist., 91 N.Y.2d 577, 673 N.Y.S.2d 966, 696 N.E.2d 978 (1998), the Court held that:

> "It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature." As the clearest indicator of legislative intent is

> the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof. As we have stated:
>
> "In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning."

Majewski, 91 N.Y.2d at 986 (*cit. omit.*).

37. To the extent that the terms of a statute are self-explanatory, the court need look no further. "When the legislature enacted the statutes and when the Governor signed them into law, they stood for what their words manifested." People v. Graham, 55 N.Y.2d 144, 151; 432 N.E.2d 790, 447 N.Y.S.2d 790 (1982). "It is not allowable to interpret what had no need of interpretation, and when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. McCluskey v. Cromwell, 11 NY 593, 601 (1854).

38. **POINT I: THE BOARD'S DECISION TO DEDUCT THE CLAIMANT'S PREVIOUS AWARD FOR LOSS OF USE OF HIS HIPS FROM HIS SUBSEQUENT AWARD FOR LOSS OF USE OF HIS KNEES VIOLATES THE PLAIN LANGUAGE OF WCL § 15 (3)(U) AS WELL AS WELL SETTLED LAW.**

39. Workers' Compensation Law § 15(3)(u) 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*).

40. The fact that the Legislature specifically included the terms "parts of" and "parts thereof" in the statute makes it clear that the Board must award compensation for the loss of use of each part of a member. Id. If the Legislature wished to restrict the statute to only "members" then it easily could have omitted "parts" from the statute. Since it has not, the Board cannot now disregard the clear language of the statute in order to restrict its plain meaning.

41. This Court has held that compensation for schedule loss of use due to the loss of function of one part of a limb should be awarded without regard to previous injury or disability involving a different part of the 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).

42. In Matter of Zimmerman, 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.

43. 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, this Court 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*).

44. The Appellate Division, Third Department and the Workers' Compensation Board adhered to these provisions of the statute and the rule

in Matter of Zimmerman for decades - until its decision in this case. *See, e.g.*, Matter of Bazzano v. John Ryan & Sons, 62 A.D.2d 260, 404 N.Y.S.2d 402 (3rd Dept. 1978); Matter of Pellegrino v. Textile Prints Co., 81 A.D.2d 723, 439 N.Y.S.2d 454 (3rd Dept. 1981); Matter of Deck v. Dorr, 150 A.D.3d 1597, 54 N.Y.S.3d 765 (3rd Dept. 2017), *lv. to app. den.* 67 N.Y.S.3d 127, 89 N.E.3d 517 (2017); Matter of Bell v. Glens Falls Ready Mix Co., 169 A.D.3d 1145, 92 N.Y.S.3d 485 (3rd Dept. 2019); Matter of New York City Dept. of Corrections, 2013 NY Wrk Comp. LEXIS 3723, WCB G042 8233 (April 29, 2013); Matter of NY Life Ins. Co,, 2018 NY Wrk. Comp. LEXIS 12039, WCB G167 9572 (December 24, 2018); Matter of Rochester City School District, 2017 NY Wrk. Comp. LEXIS 5993, WCB 7070 1860 (February 9, 2017).

45. In fact, the 2012 New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity ("the 2012 Guidelines") promulgated by the Board itself are consistent with the statutory mandate and make clear 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).

46. For instance, Chapter 3.1 of the 2012 Guidelines 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. 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.

47. 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 schedule is 50%-55% loss of use of the leg." 2012 Guidelines, Ch. 3.2, Special Consideration 11, p. 28.

48. 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.

49. 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) since there was no rational basis to do so.

50. 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 violates the plain language of the statute and is contradictory to well settled precedent established by this Court, the Appellate Division and the Board itself.

51. **POINT II: THE BOARD'S DECISION TO DEDUCT THE CLAIMANT'S PREVIOUS AWARD FOR LOSS OF USE OF HIS HIPS FROM HIS SUBSEQUENT AWARD FOR LOSS OF USE OF HIS KNEES VIOLATES THE PLAIN LANGUAGE OF WCL § 15(7) AS WELL AS WELL SETTLED LAW.**

52. The Board's decision also violates the express provision of Workers' Compensation Law § 15(7) that "[t]he fact that an employee has suffered previous disability or received compensation therefor shall not preclude him from compensation for a later injury." WCL § 15(7). The Board's decision contradicts the plain language of the statute since it precludes the claimant from a proper award for his injury to his knees

because he had another accident where he injured his hips. Essentially, the Board has penalized Johnson for suffering more than one work accident.

53. This Court has interpreted WCL § 15(7) 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).

54. 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." Hroncich, 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.

55. 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 and to precedent set forth by this Court.

56. 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.

57. In Matter of Levitsky v. Workers' Comp. Bd., 126 A.D.3d 1264, 6 N.Y.S.3d 697 (3rd Dept. 2015), the Appellate Division, Third Department, 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.

58. But again, The Board violates the plain language of the statute and contradicts well settled law without a rational basis by arbitrarily subtracting the award for one set of impairments (his hips) from an award for an entirely different set of impairments (his knees).

59. The sole basis for the Board's contrary decision was the Appellate Division, Third Department's opinion in Matter of Genduso, 164 A.D.3d 1509, 82 N.Y.S.3d 662 (3rd Dept. 2018). We respectfully submit that the Board misinterpreted and misapplied that decision.

60. 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.

61. There is no dispute that if the Board had made a previous award for deficits in Johnson's 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 without violating the plain language of the statute and well-settled law. 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.

62. 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.

63. 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.

64. The Appellate Division, Third Department erred as a matter of law by limiting its analysis to the text of Workers' Compensation Law § 15(3)(b), and failed to consider the relevant provisions of Workers' Compensation Law §§ 15(3)(u) and 15(7), as well as the rule established by this Court, its own previous precedents, and the practical impact of its decision. Based on the plain language of WCL § 15(3)(u) and 15(7) and well settled law, an award of workers' compensation benefits for "schedule loss of use" attributable to an injury to one part of a limb cannot properly be deducted from an award for a later injury involving an entirely different part of the same limb. The Appellate Division's decision should therefore be reversed.

65. WHEREFORE, Claimant-Appellant respectfully requests that this honorable Court grant leave to appeal to this Court from the decision of the Appellate Division, Third Judicial Department dated December 19, 2019.

ALL TOGETHER WITH such other and further relief as to this Court may seem just and proper.

Dated: Farmingdale, New York
May 14, 2020

Robert E. Grey, Esq.

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EXHIBIT A

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: February 6, 2020 529417

In the Matter of the Claim of
THOMAS JOHNSON,
Appellant,
v
MEMORANDUM AND ORDER
CITY OF NEW YORK,
Respondent.

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: January 15, 2020

Before: Lynch, J.P., Clark, Devine, Pritzker and Colangelo, JJ.

Grey & Grey, LLP, Farmingdale (Robert E. Grey of counsel), for appellant.

Pritzker, J.

Appeal from a decision of the Workers' Compensation Board, filed March 29, 2019, which ruled, among other things, that 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.

In February 2006, claimant, a patient care technician, sustained work-related injuries when he slipped on snow and fell to the ground while exiting a hospital bus. His subsequent claim for workers' compensation benefits was established for injuries to both his knees, for which he ultimately underwent

right knee arthroscopy in 2008 and a left knee replacement in April 2016. In November 2009, claimant sustained additional work-related injuries, and his subsequent claim for workers' compensation benefits was established for injuries to his neck, back, right shoulder and both hips. As a result of those November 2009 work-related injuries, he was awarded, in January 2016, a 45% schedule loss of use (hereinafter SLU) of his right arm, a 50% SLU of his left leg and a 52.50% SLU of his right leg. Subsequent to the January 2016 award, the parties submitted evidence of permanency with regard to the 2006 injuries. That evidence consisted of a May 2017 report from William Long, claimant's treating physician, and a December 2017 independent medical examination report from J. Serge Parisien, a physician who evaluated claimant on behalf of the self-insured employer.

Following depositions of the physicians, a Workers' Compensation Law Judge (hereinafter the WCLJ) found that claimant sustained an 80% SLU of use of his left leg and a 40% SLU of his right leg. However, given that claimant had previously received SLU awards for both his left leg and right leg for the injuries sustained in 2009, the WCLJ ultimately reduced the 80% SLU of the left leg by the prior 50% SLU award for the left leg and reduced the 40% SLU of the right leg by the prior 52.50% SLU award for the right leg. The reductions resulted in a SLU of 30% for claimant's left leg and a 0% SLU for the right leg. Upon administrative review, the Workers' Compensation Board upheld the determination of the WCLJ. The Board found, among other things, that claimant's injuries to his hips and knees are not eligible for separate SLU awards because they are both encompassed by awards for the SLU of the legs. As such, the Board determined that claimant's present SLU awards of the legs must be reduced by his prior SLU awards of the legs, regardless of which non-member parts of the leg were injured. Claimant appeals.

We affirm. "Workers' Compensation Law § 15 (3) sets forth SLU awards that the Board may make resulting from permanent injuries to certain body parts, losses of hearing or vision and facial disfigurements" (Matter of Genduso v New York City Dept. of Educ., 164 AD3d 1509, 1510 [2018]; see Workers' Compensation

Law § 15 [3] [a]-[t]; Matter of Taher v Yiota Taxi, Inc., 162 AD3d 1288, 1289 [2018], lv dismissed 32 NY3d 1197 [2019]). Such awards are "not given for particular injuries" (Matter of Genduso v New York City Dept. of Educ., 164 AD3d at 1510; see New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity § 1.5 at 10 [2012] [hereinafter guidelines]), but they are made to compensate an injured worker for his or her loss of earning power or capacity that is presumed to result, as a matter of law, from the "residual permanent physical and functional impairments to statutorily-enumerated body members" (Matter of Maunder v B & B Lbr. Co., 166 AD3d 1261, 1261 [2018] [internal quotation marks and citation omitted]; see Matter of Estate of Youngjohn v Berry Plastics Corp., 169 AD3d 1237, 1238 [2019], lv granted 34 NY3d 903 [2019]; Matter of Bell v Glens Falls Ready Mix Co., Inc., 169 AD3d 1145, 1146 & n 1 [2019]; Matter of Walczyk v Lewis Tree Serv., Inc., 134 AD3d 1364, 1365 [2015], lv denied 28 NY3d 902 [2016]). "The amount of an SLU award is based upon the body member that was injured and the degree of impairment sustained; it is not allocable to any particular period of disability and is independent of any time that the claimant might lose from work" (Matter of Taher v Yiota Taxi, Inc., 162 AD3d at 1289; see Matter of Keselman v New York City Tr. Auth., 18 AD3d 974, 976 [2005], appeal dismissed 5 NY3d 880 [2005], lv denied 6 NY3d 708 [2006]).

As relevant here, neither Workers' Compensation Law § 15 (3) nor the guidelines lists the knee or the hip as a statutorily-enumerated member or "as body parts or members lending themselves to separate SLU awards" (Matter of Genduso v New York City Dept. of Educ., 164 AD3d at 1510; see New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity ch 3 at 25-28, 43 [2012]). Rather, as the Board found here, impairments to these body parts or extremities are encompassed by awards for the loss of use of the leg, which is the applicable statutorily-enumerated body member (see Workers' Compensation Law § 15 [3] [b]; New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity ch 3 at 25-28, 43 [2012]). Although, as claimant avers, a claimant may receive more than one SLU award for a "loss of use of more than one member or parts of members"

(Workers' Compensation Law § 15 [3] [u]; see Matter of Bell v Glens Falls Ready Mix Co., Inc., 169 AD3d at 1146 n 1), "such SLU awards are nonetheless limited to only those statutorily-enumerated members listed in Workers' Compensation Law § 15 (3)" (Matter of Bell v Glens Falls Ready Mix Co., Inc., 169 AD3d at 1146 n 1). In this regard, to authorize separate SLU awards for a body member's subparts is not authorized by statute or the guidelines and would amount to a monetary windfall for a claimant that would compensate him or her beyond the degree of impairment actually sustained to the statutorily-enumerated body member (see generally Matter of Taher v Yiota Taxi, Inc., 162 AD3d at 1289). Inasmuch as the 50% SLU award and the 52.50% SLU award made with regard to claimant's 2009 injury were for the loss of use and impairment of his left and right legs, respectively, it was not improper for the Board to deduct those percentages from the subsequent 80% SLU award and 40% SLU award made for the 2006 injury and resulting impairment to claimant's left and right legs, respectively (see Workers' Compensation Law § 15 [7]). Accordingly, the Board properly found that claimant was entitled to a 30% SLU (80% minus 50%) for the loss of use his left leg and a 0% SLU (40% minus 52.50%) for the loss of use of his right leg resulting from his 2006 work-related injury (see Matter of Bell v Glens Falls Ready Mix Co., Inc., 169 AD3d at 1148; Matter of Genduso v New York City Dept. of Educ., 164 AD3d at 1510; cf. Matter of Picone v Putnam Hosp., 153 AD3d 1461, 1462 [2017]). Finally, inasmuch as claimant did not seek Board review of the WCLJ's factual determination that he sustained an 80% SLU of the left leg and a 40% SLU of the right leg with respect to his 2006 injury (compare Matter of Bell v Glens Falls Ready Mix Co., Inc., 169 AD3d at 1146; Matter of Maunder v B & B Lbr. Co., 166 AD3d at 1261), he is precluded from challenging those percentages now (see Matter of Genduso v New York City Dept. of Educ., 164 AD3d at 1510). To the extent that claimant's remaining contentions are properly before us, they have been considered and found to be without merit.

Lynch, J.P., Clark, Devine and Colangelo, JJ., concur.

ORDERED that the decision is affirmed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court

EXHIBIT B

Clarissa M. Rodriguez
Chair

STATE OF NEW YORK
WORKERS' COMPENSATION BOARD
PO BOX 5205
BINGHAMTON, NY 13902-5205
www.wcb.ny.gov
(877) 632-4996

State of New York - Workers' Compensation Board

In regard to Thomas Johnson, WCB Case #0071 0370

NOTICE OF DECISION

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At the Workers' Compensation hearing held on 10/30/2018 involving the claim of Thomas Johnson at the Queens hearing location, Judge Lisa Schwartz made the following decision, findings and directions:

The claimant has a 30.00% schedule loss of use of the Left Leg, and 0.00% schedule loss of use of the Right Leg entitling claimant to 86.4 weeks of benefits.

THE EMPLOYER OR INSURANCE CARRIER IS DIRECTED TO PAY AWARD AS FOLLOWS:

for disability over a period of			at rate		Type of Disability
weeks	from	to	per week	the sum of	
64.4	2/15/2006	5/11/2007	$400.00	$25,760.00	Permanent Partial Disability
22.0	1/10/2008	6/12/2008	$400.00	$8,800.00	Temporary Total Disability

- Temporary total disability.

TOTAL AWARD IS $34,560.00, less payments already made.

FEES:

In addition to claimant's award, the carrier or insurance carrier are directed to pay the following fee TO DOCTOR for testimony:

Sum of	To
$400.00	Dr. William Long

DECISION: No protracted healing period.

Carrier is directed to take credit for prior payments. In Matter of Genduso v New York City Department of Education __AD3d__, 2018 N.Y. Slip Op. 05981, the claimant had previously been awarded an 8.5% SLU of the right leg based on a right ankle injury and argued that an SLU of the right leg based on a subsequent right knee

*** Continued on next page ***

Claimant -	Thomas Johnson	Employer -	Dr. Susan Smith McKinney
Social Security No. -		Carrier -	Health & Hospital Corp.
WCB Case No. -	0071 0370	Carrier ID No. -	W843502
Date of Accident -	02/15/2006	Carrier Case No. -	08190611930
District Office -	NYC	Date of Filing of this Decision–	11/02/2018

ATENCION:

Puede llamar a la oficina de la Junta de Compensacion Obrera, en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclamacion(caso).

injury should not be reduced by the SLU attributed to the prior ankle injury. The Board disagreed and found that the later leg SLU for the claimant's knee injury should be reduced by the amount of the prior leg SLU for the ankle. The Court affirmed, finding that neither the statute nor the Board's guidelines lists the ankle or the knee as body parts lending them to separate SLU awards. Rather, impairments to these extremities are encompassed by awards for the loss of use of the leg. (See Workers' Compensation Law §15[3][b]; New York State Guidelines for Determining Impairment and Loss of Wage Earning Capacity 8§ at 43[2012].

In this case, the case is established for the bilateral knees. Dr. William Long the claimant's treating doctor examined the claimant, reviewed records including surgical records and MRIs and concluded that the claimant had an 80% SLU of the left leg and a 40% SLU of the right leg.

The carrier's consultant Dr. Serge Parisien examined the claimant and concluded that the claimant had a 40% SLU of the left leg and a 27 ½ % SLU of the right leg. I find the opinion of Dr. Williams Long as the treating doctor more credible that Dr. Parisien. Notably, Dr. Parisien acknowledged that he failed to consider several conditions noted in the MRI and surgical records in determining the SLU. Based on the totality of the evidence, I accept Dr. Long's opinion and find the claimant had an 80% SLU of the left leg and a 40% SLU of the right leg.

Based on the decision in Genduso, I find that in the present case, the SLU of the right and left leg awarded should be reduced by the 52.5% SLU of the right leg and 50% SLU of the left leg previously awarded in WCB # G0221519. Accordingly, the claimant is awarded an additional SLU award of 30% to the left leg and 0% to the right leg in this case.

The third party action was settled with consent per the prior decision 12/22/15. No further action is planned by the Board at this time.

Information about Payment of Awards

Payment of an award of compensation must be issued within 10 days, except where the carrier has filed an application to the board for a modification, rescission or review of the award. If payment is not timely, the Board imposes a penalty equal to 20% of the unpaid compensation (WCL § 25[3][f]). That penalty is payable to the claimant.

Payment of installments of compensation must be issued within 25 days of becoming due, or else the carrier shall pay an additional amount of 20% of the compensation then due, plus $300, to the claimant, unless the Board excuses the late payment upon an application by the carrier. WCL § 25(1)(e).

Claimant -	Thomas Johnson	Employer -	Dr. Susan Smith McKinney
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EXHIBIT C

Clarissa M. Rodriguez
Chair

ADMINISTRATIVE REVIEW DIVISION
WORKERS' COMPENSATION BOARD
PO BOX 5205
BINGHAMTON, NY 13902
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State of New York - Workers' Compensation Board

In regard to Thomas Johnson, WCB Case #0071 0370

MEMORANDUM OF BOARD PANEL DECISION

keep for your records

Opinion By: Loren D. Lobban
Mark D. Higgins
Ellen O. Paprocki

The claimant requests review of the decision of the Workers' Compensation Law Judge (WCLJ) filed on November 2, 2018. The self-insured employer (SIE) filed a rebuttal.

ISSUES

The issues presented for administrative review are:

1. Whether consideration will be given to the SIE's argument in its rebuttal that the schedule loss of use opinion of treating physician Dr. William Long is not credible.

2. Whether it was proper to find that the schedule losses of use to the legs that were awarded to the claimant in associated case WCB Case No. G0221519 should be deducted from the schedule losses of use to the legs that are awarded to the claimant in the present case.

FACTS

The present case was previously established for February 15, 2006 injuries to both knees that were sustained while the claimant was working for the SIE as a patient care technician. The claimant underwent a right knee arthroscopy in April 2008 and a left total knee replacement in

*** *Continued on next page* ***

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Date of Accident -	02/15/2006	Carrier Case No. -	08190611930
District Office -	NYC	Date of Filing of this Decision–	03/29/2019

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April 2016. The claimant was found to have settled his third-party action with consent for $200,000.00, netting him $115,432.08.

The claimant also has an associated case (WCB Case No. G0221519) that is established for a November 12, 2009 work accident that occurred while the claimant was working for the SIE. That case is established for injuries to the neck, back, right shoulder, and both hips. In a WCLJ decision filed on January 12, 2016, the claimant was awarded schedule losses of use pursuant to a C-312.5 (Agreed Upon Findings and Awards for Proposed Conciliation Decision) agreement: 45.00% schedule loss of use of the right arm, 50.00% schedule loss of use of the left leg, and 52.50% schedule loss of use of the right leg.

The parties subsequently submitted permanency evidence in the present case with the filing of the May 11, 2017 C-4.3 (Doctor's Report of MMI/Permanent Impairment) form by treating physician Dr. Long and the December 11, 2017 independent medical examination report of Dr. Jacques Parisien who evaluated the claimant on behalf of the SIE.

When the case came on calendar on March 12, 2018, the claimant's attorney argued that, pursuant to case law, the claimant was not prohibited from receiving a schedule loss of use that would be in excess of 100.00% when considering the prior schedule loss of use awarded in the claimant's associated case. The WCLJ directed memoranda of law on this issue and the issue of apportionment.

The claimant's attorney submitted a memorandum of law on the issues, and the WCLJ filed a Reserved Decision on May 9, 2018. The WCLJ found from a review of the case law submitted by the claimant that the Board would not be limited to a schedule loss of use of 100.00% in the present situation, because the claimant's prior schedule losses of use to the legs in his associated case had been based on his hip injuries, whereas the current schedule losses of use to the legs are based on injuries to his knees, and the 2006 knee injuries were not previously addressed in the prior schedule losses of use in the associated case. The WCLJ directed the parties to take medical testimony by deposition on the issue of permanency.

The parties subsequently deposed Drs. Long and Parisien, and the claimant's present case and associated case returned to the trial calendar on October 30, 2018, at which time both sides gave summations. The claimant's attorney requested that the WCLJ award schedule losses of use in accordance with the opinion of Dr. Long: 80.00% of the left leg and 40.00% of the right leg. The SIE's representative asserted that the independent medical examiner had provided the more credible schedule loss of use opinion, and the representative also raised the recent case of *Matter of Genduso v New York City Dept. of Education*, 164 AD3d 1509 (2018), arguing that the prior

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schedule losses of use awarded in the associated case would have to be deducted from the schedule losses of use awarded in the present case. The WCLJ found that Dr. Long had provided the more credible opinion regarding schedule losses of use, but that the schedule losses of use awarded in the present case would have to be reduced by the schedule losses of use awarded in the associated case, pursuant to *Genduso*, 164 AD3d 1509 (2018).

As memorialized in the WCLJ decision filed on November 2, 2018, the claimant was found to have an 80.00% schedule loss of use of the left leg and a 40.00% schedule loss of use of the right leg as per the more credible opinion of Dr. Long; however, based on *Genduso*, 164 AD3d 1509 (2018), the left leg schedule loss of use was reduced by the 50.00% schedule loss of use awarded in WCB Case No. G0221519 for a final schedule loss of use award of 30.00% of the left leg, and the right leg schedule loss of use was reduced by the 52.50% schedule loss of use awarded in WCB Case No. G0221519 for a final schedule loss of use of the right leg of 0.00%. There was no protracted healing period. Dr. Long was awarded a deposition fee, and no further action was directed.

LEGAL ANALYSIS

In his application for review, the claimant solely objects to the WCLJ's finding that the schedule losses of use awarded in the present case must be reduced by the schedule losses of use previously awarded in WCB Case No. G0221519. The claimant argues that, in making this finding, the WCLJ contradicted the finding she made in the May 9, 2018 Reserved Decision, and the WCLJ has gone against binding legal precedent from both the Appellate Division and the Court of Appeals, citing to *Matter of Deck v Dorr*, 150 AD3d 1597 (2017), *Matter of Pellegrino v Textile Prints Corp.*, 81 AD2d 723 (1981), *Matter of Zimmerman v Akron Falls Park-Erie County*, 29 NY2d 815 (1971), *reversing* 35 AD2d 1030 (1970), and *Matter of Bazzano v Ryan & Sons*, 62 AD2d 260 (1978). The claimant argues that the injuries were different between his 2006 accident and his 2009 accident, with the schedule losses of use in his 2009 case being based solely on his hip injuries and the schedule losses of use in the present case being solely based on his knee injuries, and that *Genduso* is, therefore, distinguishable from the facts presented in the instant situation. The claimant requests a reversal of the finding that the schedule losses of use in the present case must be reduced by the prior schedule losses of use awarded in the associated case.

In rebuttal, the SIE contends that the WCLJ properly relied on *Genduso*, because a schedule loss of use is given to specifically denoted extremities (i.e. the leg) and is not given to parts of the leg. As such, the WCLJ properly deducted the previously awarded schedule losses of use to the legs. The SIE also argues that the schedule loss of use opinion of treating physician Dr. Long is

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not credible.

12 NYCRR 300.13

Pursuant to 12 NYCRR 300.13(b)(3)(i), an application for review shall be filed with the board within thirty days after the notice of the filing of the decision.

"'Workers' Compensation Law § 23 requires a party seeking review of a WCLJ decision to file a written application for review with the Board within 30 days of the filing of the decision' (*Matter of Hyland v Matarese*, 56 AD3d 841 [2008] [citations omitted]; *see* 12 NYCRR 300.13[b][3][i]; *Matter of Toner v Michael Hanley Moving & Stor.*, 40 AD3d 1199 [2007], *lv denied* 9 NY3d 808 [2007])" (*Matter of Stojanov v Eastman Kodak Co.*, 72 AD3d 1153 [2010]).

As provided in 12 NYCRR 300.13(b)(4)(ii), the Board may deny review of an application that is not filed within 30 days.

In the present case, the SIE asserts in its rebuttal that Dr. Long's schedule loss of use opinion, which the WCLJ found to be credible, should be found incredible. In order for the SIE to have properly appealed the WCLJ's credibility determination and finding regarding schedule losses of use, the SIE would have had to file an RB-89 (Application for Board Review) form setting forth its assertion within 30 days of the filing of the November 2, 2018 WCLJ decision. Instead, the SIE set forth its assertion in its RB-89.1 (Rebuttal of Application for Board Review) form and the assertion was not filed until January 2, 2019, which is well past 30 days from the filing of the November 2, 2018 WCLJ decision. The Board Panel declines to exercise its discretion pursuant to Workers' Compensation Law (WCL) § 123 and 12 NYCRR 300.13(b)(4)(ii) to consider the untimely filed argument regarding credibility and schedule losses of use, because the SIE does not explain why it did not place its assertion in a timely filed RB-89 form.

Schedule losses of use

The Board Panel finds that there is no merit to the claimant's application for review. Initially, the Board Panel notes that the WCLJ did not err in reversing the finding she had made in the May 9, 2018 Reserved Decision with respect to the issue of whether the claimant's total schedule loss of use of a leg must be limited to 100.00%. Inasmuch as it was her own prior decision that she determined was incorrect, the WCLJ was free to make a different determination as long as there was a reasoned basis for doing so. In this case, the Appellate Division had made a ruling subsequent to the filing of the May 9, 2018 Reserved Decision on the specific issue before the WCLJ. In *Genduso*, 164 AD3d 1509, which was decided on

*** *Continued on next page* ***

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September 6, 2018, the Court ruled that, when a schedule loss of use is awarded for a permanent impairment of an extremity, any subsequent award for impairment to any other part of the same extremity will be subject to a credit for the prior award. The Court explained that "neither [WCL § 15(3)] nor the Board's guidelines lists the ankle or the knee as body parts lending themselves to separate [schedule loss of use] awards. Rather, impairments to these extremities are encompassed by awards for the loss of use of the leg (*see* WCL § 15[3][b]; New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity § 8, at 43 [2012])" (*id.*). Likewise, in the present situation, 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 legs was injured.

The claimant argues that *Genduso* may be distinguished from the several cases that he cites in his application for review; however, the Board Panel finds that *Genduso* is on point with the exact issue in the present case and it is the Appellate Division's most recent ruling on the issue. As such, and pursuant to *Genduso,* the WCLJ in the present case properly determined that the claimant's currently awarded schedule losses of use must be reduced by the prior schedule losses of use awarded in WCB Case No. G0221519.

Therefore, the Board Panel finds, upon review of the record and based on a preponderance of the evidence, that it has exercised its discretion under 12 NYCRR 300.13(b)(4)(ii) to deny consideration of the SIE's untimely filed assertion with respect to credibility and schedule losses of use, and it was proper to find that the schedule losses of use to the legs that were awarded to the claimant in associated case WCB Case No. G0221519 should be deducted from the schedule losses of use to the legs that are awarded to the claimant in the present case.

CONCLUSION

*** *Continued on next page* ***

Claimant -	Thomas Johnson	Employer -	Dr. Susan Smith McKinney
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ACCORDINGLY, the WCLJ decision filed on November 2, 2018 is AFFIRMED. No further action is directed.

All concur.

Loren D. Lobban

Mark D. Higgins

Ellen O. Paprocki

Claimant -	Thomas Johnson	Employer -	Dr. Susan Smith McKinney
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