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Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of Thomas JOHNSON, Appellant  
v  
CITY OF NEW YORK, Respondent  
and  
WORKERS' COMPENSATION BOARD, Respondent

Matter of Joseph D. LIUNI, Appellant  
v  
GANDER MOUNTAIN, Respondent  
and  
WORKERS' COMPENSATION BOARD, Respondent

April 21, 2022

## Facts:

Two cases with similar issues were presented to the Court of Appeals, regarding the issue of whether or not a schedule loss of use award in one claim must always be reduced by a percentage loss resulting from a prior award to a different part of the same body member.

In *Johnson*, the claimant sustained an injury to both knees in 2006. He sustained a subsequent injury to both hips in 2009 and first received a schedule loss of use award for the 2009 case. He was found to have a 50% loss of use of the left leg and a 52.5% loss of use of the right leg. In the 2006 case the claimant's doctor subsequently reported a loss of 80% of the left leg and 40% of the right leg. The claimant did not submit evidence that the schedules were solely due to the 2006 case.

In *Liuni*, the claimant had a left elbow injury in 2007 and received a 22.5% loss of use award. In 2014 the claimant sustained an injury that included the left shoulder. The claimant's doctor indicated the claimant has a 27.5% loss of use of

the left arm due to the 2014 injury. The doctor noted there was a total 50% loss and attributed 22.5% to the 2007 claim.

In each claim the Appellate Court, Third Department stated that separate awards for a member's subpart (shoulder and elbow) are not authorized because the statute encompasses the body member and not subparts. In each case the Appellate Court reduce the schedule in consideration of the prior award.

Holding: *Affirmed in Johnson and Reversed in Liuni.*

Discussion: The major difference between the cases was that in *Liuni*, the claimant offered evidence as to the degree of loss of use attributable to the accident in question. In a footnote (number 1) the majority of the Court confirmed that this decision does not overrule the Appellate Division's decision in *Genduso v. City of New York*, 164 AD3d 1609 (3<sup>rd</sup>. Dept., 2018). (In *Genduso*, the claimant had a prior injury that included the ankle but the schedule award was to the leg. The claimant sustained a subsequent injury and the court confirmed that the prior schedule would be deducted because the finding was to the leg). The Court went on to confirm that the law mandates that any subsequent schedule award must measure any diminished earning capacity due to the previous disability and that the award should not exceed the benefits allowed for the subsequent injury considered by itself. Ultimately, the claimant will need to argue the issue of schedule loss of use attributable to the current injury in order to avoid a reduction in the schedule award from a prior incident.

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