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Supreme Court, Appellate Division, Third Department, New York

In the Matter of the claim of BARBARA ROBINSON, Appellant

v.

WORKMEN'S CIRCLE HOME, Respondent

and

NEW YORK STATE INSURANCE DEPARTMENT OF  
LIQUIDATION BUREAU et al., Respondent

and

Workers' Compensation Board, Respondent

Decided August 2, 2018

**Facts:** The claimant, a certified nurse's assistant, filed a claim in 2011 for an injury to her right shoulder. Various awards were made at either temporary total disability or temporary partial disability. The total indemnity paid was \$133,807.48. Ultimately, in August 2016, the claimant was determined to have a 42.5% schedule loss of use of the right arm which resulted in an award in the amount of \$102,494.50 "less payments already made".

The Judge made a determination that the claimant's disability exceeded the schedule loss of use award and no money was owed to the claimant.

On appeal to the Board Panel, the claimant argued that the credit against the schedule loss of use should have been limited to the periods of temporary total disability alleging that there is no legal authority permitting a credit against the SLU award for temporary partial disability. The Board disagreed and held that there is no basis to distinguish between temporary total and temporary partial disability payment when crediting prior awards against an SLU. This appeal ensued.

**Holding:** *Affirmed.*

**Discussion:** It was the claimant’s position that the credit against an SLU award only applies for prior temporary total disability payments and not temporary partial disability payments. The Court held that the carrier was entitled to a credit for both temporary total and temporary partial in order to avoid “an unjustifiable double recovery.” The Court also reiterated that SLU awards are not allocated to any particular period of disability and cited numerous cases on this issue. Therefore, there was no basis to treat the carrier’s temporary total disability payments and temporary partial disability payments in a disparate fashion. To do otherwise would result in a significant windfall to the claimant.

*Stewart, Greenblatt, Manning & Báez*