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Supreme Court, Appellate Division, Third Department, New York

In the Matter of the Claim of

Franja ARIAS, Appellant,

v.

City of New York, Respondent

WORKERS' COMPENSATION BOARD, Respondent.

February 27, 2020

Facts: This claim was established for right carpal tunnel syndrome, right ankle, right hand, right ring finger, neck, and back injuries. The claimant returned to work at full duty and was later classified with a 40% loss of wage-earning capacity. The claimant appealed arguing that, under the *Taher* decision, she was entitled to a schedule loss of use award because she had no current loss of earnings. The Board disagreed and maintained its position that because the claimant's condition is amenable to classification, she cannot also receive a schedule loss of use. The claimant appealed.

Holding: Reversed and remitted.

Discussion: The Court found that the Board incorrectly disregarded its prior decision in the *Taher* case and that the Workers' Compensation Law permits simultaneous classification and schedule loss of use awards for injuries that arise out of the same incident where the claimant has returned to work at pre-injury wages. Furthermore, the Court specifically addressed the Board's "assumption" that it had overlooked the 2018 permanency guidelines. In making its ruling, the Court found that those guidelines, as well as those that preceded it, including section 1.5(4) on which the Board relied, is an "ambiguous provision" and does not reflect a "fair and considered judgement" of the circumstances.

The Court also rejected the Board's argument that to withhold a schedule loss of use award in favor of "virtual banking" of non-schedule cap weeks was unnecessarily complicated and failed to consider the issue of what would occur if the claimant died for non-causally related reasons.

The Board made similar findings using the same rational in two other cases decided the same day, Saputo v. Newsday and Fernandez v. New York University Benefits. Essentially, if the claimant's conditions are amenable to both a schedule loss of use and classification, and the claimant has returned to work at pre-injury wages, the claimant is entitled to a schedule loss of use award.

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