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DONALD R. STEWART (1949-2021)

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Supreme Court, Appellate Division, Third Department, New York

Matter of JOSEPH MARCELLINO, Appellant

v.

NATIONAL GRID, Respondent

and

WORKERS' COMPENSATION BOARD, Respondent

February 16, 2023

Facts: In 2016, the claimant, a mechanic, sustained injuries to the back, neck, left thumb, left elbow and left hand (carpal tunnel). In 2016 he underwent surgery for the carpal tunnel, left elbow and left thumb injuries. In 2017 the treating doctor found schedule loss of use findings of 30% left arm, 25% to the left wrist and 30% to the left thumb. In 2017 while he was classified as a permanent partial disability and no benefits were awarded.

The case was reopened and in 2020 the carrier's consultant found no schedule loss of use to the left hand, left wrist and left thumb. There was additional litigation during which time the IME opined there is a 15% schedule of the hand based on the guidelines while the claimant's treating doctor testified in accordance with his original opinion. The law judge agreed with the IME and awarded the 15% schedule to the hand and no permanency to the arm or thumb. The Board affirmed and the claimant appealed.

Holding: *Affirmed.*

Discussion: The Court once again noted the issue is a factual one and confirmed the Board's determination would be upheld if supported by substantial evidence. Although the IME did not examine the left elbow or offer a contrary opinion, the Board was permitted to discredit the testimony of the treating

physician having noted that the doctor did not provide evidence that would generate a schedule under the guidelines.

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