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

In the Matter of ROBERT DIAMOND JR., Respondent

v.

WARREN COUNTY SHERIFF'S OFFICE by and through the
WARREN COUNTY
SELF-INSURANCE PLAN, Appellant

and

WORKERS' COMPENSATION BOARD, Respondent

June 23, 2022

Facts: This is an appeal from a decision of the Workers' Compensation Board which ruled the claimant was entitled to a schedule loss of use award and that apportionment did not apply to the award. The claimant sustained injury to the right ankle and underwent surgery for that injury. An opinion was submitted of a 30% schedule loss of use of the right ankle. There was a prior right ankle injury of approximately forty years prior. The claimant's doctor declined to offer an opinion on apportionment based on the lack of relevant information. The independent medical examiner who evaluated the claimant also found a 30% schedule loss of use of the right ankle but asserted 65% of that was attributable to the prior injury. Ultimately, the Judge found the claimant had a 30% schedule loss of use of the right ankle of which 10.5% was causally related to the instant accident. The Workers' Compensation Board Panel modified the Judge's decision agreeing that there was a 30% schedule loss of use of the right ankle but finding insufficient evidence to support the apportionment decision.

Holding: *Affirmed.*

Discussion: The Court noted that as a general rule, apportionment is not applicable as a matter of law where the preexisting condition was not the result of a compensable injury and the claimant was able to effectively perform his or her job duties at the time of the work-related accident despite the preexisting condition. The Court noted that there is a limited exception to the rule as apportionment could be applicable in a schedule loss of use case if medical evidence establishes the claimant's prior injury, had it been compensable, would have resulted in a schedule loss of use finding. The Court noted that essentially, the prior condition would need to constitute a disability in the compensation sense. The Court noted this is a factual issue for the Board to resolve and if its decision is supported by substantial evidence, it will be affirmed. In the instant case, the Board found insufficient credible evidence to support the application of apportionment and the Court affirmed the Board's decision.

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