

**STEWART, GREENBLATT, MANNING & BAEZ**

**ATTORNEYS AT LAW**

MADGE E. GREENBLATT (RET.)  
ROBERT W. MANNING  
RICARDO A. BAEZ  
DAVID J. GOLDSMITH  
PETER MICHAEL DeCURTIS  
LAURETTA L. CONNORS  
JOHN K. HAMBERGER  
LISA LEVINE  
ANDREA L. De SALVIO  
KRISTY L. BEHR  
RAYMOND J. SULLIVAN  
LUKE R. TARANTINO  
THOMAS A. LUMPKIN  
DIANE P. WHITFIELD

**6800 JERICHO TURNPIKE**

**SUITE 100W**

**SYOSSET, NY 11791**

**516-433-6677**

**FAX 516-433-4342**

**DONALD R. STEWART (1949-2021)**

**KAFI WILFORD (2003-2010)**

**MICHAEL H. RUINA (1992-2016)**

**JAMES MURPHY**  
**OF COUNSEL**

Supreme Court, Appellate Division, Third Department, New York

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

In the Matter of WESLEY HARMON, Appellant

v.

OFFICE OF CHILDREN AND FAMILY SERVICES, Respondent

and

WORKERS' COMPENSATION BOARD, Respondent

June 9, 2022

Facts: Claimant sustained an injury to the left shoulder in 2018. In 2020, the attending physician found that the claimant had reached maximum medical improvement and had a schedule loss of use of 20% for range of motion deficits and 10% for a partial thickness rotator cuff tear for total schedule loss of use of 30%. The independent medical examiner concluded that the claimant had reached maximum medical improvement and found a 50% schedule loss of use. Following testimony, a Workers' Compensation Law Judge found that the claimant had a 50% loss of use of the left arm. The carrier appealed and modified the award to a 20% loss of use based upon the opinion of the attending physician and subtracting the additional loss of use found for the diagnosis of a partial thickness rotator cuff tear. The claimant appealed that decision.

Holding: *Affirmed.*

Discussion: The Court held that whether a claimant is entitled to a schedule loss of use award and the percentage thereof are factual questions for the Board to resolve. Consequentially, judicial review is limited, and the Board's determination will not be disturbed as long as it is supported by substantial evidence. The Review Panel had determined that the opinion of the attending physician was more credible, and the Court held that the Board was entitled to rely on that opinion. The Court also noted that the 2018 Guidelines no longer include a special consideration adding a 10% deficit value for a rotator cuff tear so that the Board was within its discretion to reduce the attending physician's schedule loss of use calculation.

*Stewart, Greenblatt, Manning & Báez*