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

In the Matter of DOUGLAS KROMER, Appellant

v.

UPS SUPPLY CHAIN SOLUTIONS, Respondent

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 not entitled to a schedule loss of use. The claim was established for an injury to the left shoulder which included a tear of the rotator cuff. Subsequent to surgical intervention, the treating doctor found a 35% schedule loss of use of the left arm. The independent medical examiner offered an opinion of 20% of the left arm. The Judge credited the treating doctor's opinion and found a 35% schedule loss of use of the left arm. Prior schedule loss of use awards taken into account regarding the left arm, there was an overall finding of a 65% schedule loss of use of the left arm. The Board modified the Judge's decision and found the claimant suffered a 20% schedule loss of use of the left arm based upon the left shoulder injury. Because the prior left arm schedule loss of use totaled 30%, which exceed the current 20% schedule loss of use, the Board found the claimant was not entitled to a further schedule loss of use award in the instant matter.

Holding: *Reversed and remitted to the Workers' Compensation Board for further proceedings.*

Discussion: The Court noted that the Board may offset a schedule loss of use award by previous schedule loss of use awards for the same body member regardless of whether the prior injuries involved the same or separate parts of that member. The Court of Appeals clarified that an offset of a schedule loss of use award by previous schedule loss of use awards for the same body member is not required when the claimant demonstrates that a subsequent injury increased the loss of use of the body member beyond that resulting from the prior injury. The Court of Appeals also has found, according to the Courts, that when a claimant fails to proffer evidence sufficient to permit the Board to determine the degree of impairment, and the Board is unable to determine the degree of any increase in schedule loss of use due to the injuries, a decision to offset the claimant's schedule loss of use award would not be irrational. Regarding the case at bar, the Court noted neither medical expert was aware of the claimant's prior schedule loss of use awards for the left arm. Upon review of the doctor's testimony in the instant matter, the Court noted that in this particular case, the evidence warranted the Board's consideration as to the extent to which, if any, the shoulder injury resulted in an increase loss of use of the left arm beyond that which resulted from the elbow injuries. The Board's decision to offset the schedule loss of use award for the left arm based upon the shoulder injury by prior schedule loss of uses for the elbow injury is reversed. Regarding the amount of the schedule loss of use or the percentage, the Court noted that that finding of a 20% schedule loss of use must be reversed and the matter remitted for further consideration as the Board did not address the medical provider's failure to add any value for his finding of a posterior extension defect to the overall schedule loss of use calculation and therefore, did not provide a rational basis for departing from its precedence. In other words, the Court noted that the development of the record in this matter was insufficient to support the Board's finding.

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