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DONALD R. STEWART (1949-2021)
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Supreme Court, Appellate Division, Third Department, New York

In the Matter of DANIEL FIATO, Appellant

v.

NEW YORK STATE DEPARTMENT OF TRANSPORTATION, et al, Respondents

and

WORKERS' COMPENSATION BOARD, Respondent

Decided June 17, 2021

Facts: Appeal from decision of Workers' Compensation Board which ruled that claimant was entitled to a 15% schedule loss of use award for the left leg as well as denial of claimant's Application for Reconsideration and from a decision of the Board finding that the Workers' Compensation Law lacked jurisdiction to review Board Decision.

The claimant suffered a meniscal tear to the left knee as a result of a work-related accident. The claimant had surgery to repair the injury and was found to have a 20% schedule loss of use of the left leg. Subsequent to that finding, the claimant underwent total left knee replacement surgery and there was a finding of an increase in schedule loss of use of 35% to the left leg. The Judge found that the 2012 Guidelines for determining permanent impairment would apply to this matter despite the fact the claimant had the total knee replacement surgery in 2017 and the increase in schedule was found in 2018. In a Decision filed July 16, 2019, the Workers' Compensation Board reversed the Judge's decision and found the 2018 Guidelines would apply. The Board then found a 35% schedule loss of use of the left leg and further found that this finding resulted in an increase of 15% schedule loss of use payable over the previously awarded 20% SLU. The claimant filed an Appeal.

Holding: *Affirmed.*

Discussion: The Court noted that schedule loss of use awards are not given for particular injuries but are made to compensate an injured worker for his or her loss of earning power or capacity

that is presumed to result from residual permanent physical and functional impairments to statutorily enumerated by members. The 2018 Guidelines went into effect on January 1, 2018 and the statute repealed the 2012 Guidelines as of that same date. Additionally, the Court noted that if there is one examination conducted before January 1, 2018, the Board will then determine degree of permanent disability using the 2012 Guidelines. Where the first medical evaluation of schedule loss of use occurs on or after January 1, 2018, then it will be governed by the 2018 Guidelines. The Court noted that with respect to the increase in schedule loss of use, those medical opinions were offered in the year 2018 and therefore, the 2018 Guidelines would be used. Additionally, as the claimant previously received a 20% schedule loss of use, the responsibility for payment would be guided by the increase of 15% schedule loss of use.

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