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MEMORANDUM TO ALL CLIENTS OF STEWART GREENBLATT MANNING & BAEZ

RE: PERTINENT FEBRUARY, 2020 APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT DECISIONS

February, 2020 was a particularly bad month for the New York State Workers' Compensation Board. The Appellate Division, Third Judicial Department reversed the Board in the case of Matter of Sanchez v. Jacobi Medical Center, _____ N.Y.S3d ____ (decided February 20, 2020) in which the Court decided that the Board did not comply with Section 15 of the Workers' Compensation Law. The Court specifically indicated that pursuant to Section 15 "a claimant can be classified under one, and only one, of the four categories of disability. Thus, even though a person maybe medically diagnosed with a permanent partial disability and concurrently experience a temporary exacerbation of his or her medical impairment – for example, after surgery related to the disabling condition – rendering the person completely unable to work in the short term, the statute does not permit a claimant to be classified with both a permanent partial disability and a temporary total disability at the same time."

Accordingly, in the Court's interpretation of Section 15 if a claimant classified with a permanent partial disability experiences an exacerbation resulting in reclassification of a temporary total disability, the earlier permanent partial disability classification is "displaced, until further reclassification."

The Board's interpretation of Section 15 was that following a permanent partial disability classification, a claimant continues to be permanently partially disabled for the purposes of both calculation of the capped number of weeks under Workers' Compensation Law Section 15(3)(w) and the rate of the awards regardless of the reclassification continues at the permanent partial disability classification rate.

The Court concluded that according to the plain language of the statute benefits paid during a period of temporary total disability are payable under a separate paragraph, Section 15(2), and therefore temporary total disability benefits do not count toward the benefit caps for non-schedule awards under Workers' Compensation Law Section 15(3)(w). The Court reversed and remitted the matter to the Workers' Compensation Board for further proceedings not inconsistent with the Court's position.

On February 27, 2020 the Appellate Division, Third Judicial Department decided a series of cases including Matter of Arias v. City of New York ___ N.Y.S3d _____ (decided February 27, 2020) and Matter of Fernandez v. New York University Benefits, ____ N.Y.S.3d ____ (decided February 27, 2020) and Matter of Saputo v. Newsday, LLC, N.Y.S.3d ___ (decided February 27, 2020) in which the Court admonished the Board's total disregard of the Court's prior decision in Matter of Taher v. Yiota Taxi, Inc. 162A.D. 11288 (2018), lv dismissed 32 N.Y.3d 1197 (2019). Specifically the Court noted that the Board's disregard of Matter of Taher was in error and reiterated that "where a claimant who has sustained both schedule and non-schedule permanent injuries in the same work-related accident has returned to work at pre-injury wages and, thus, receives no award based upon his or her non-schedule permanent partial disability classification...he or she is entitled to an SLU award."

In the case of Matter of Arias the case was established for right carpal tunnel syndrome and injuries to her right ankle, right hand, right ring finger, neck and back. Ultimately, the claimant was classified permanently partially disabled based upon impairments to her cervical and lumbar spine and concluded that she had a 40% loss of wage earning capacity which would entitle the claimant to a statutory cap of 275 weeks. However, the claimant was working without reduced earnings. The Board did not award the claimant a schedule loss of use award since the claimant was classified with a loss of wage earning capacity of 40% entitled to 275 weeks. The claimant appealed and the Board affirmed the Judge's decision maintaining its position that the claimant's injuries are subject to a non-schedule classification and therefore the claimant is not entitled to a schedule loss of use award.

The Court agreed with the claimant citing the Court's decision in Matter of Taher.

Additionally, the Court addressed the Board's "assumption" that the Court overlooked the 2018 Workers' Compensation Guidelines for Determining Impairment and the guidelines that preceded it. The Court specifically addresses Section 1.5(4) of the guidelines which the Board relied upon. The Court specifically indicated that Section 1.5(4) of the guidelines is an "ambiguous provision" and does not reflect a "fair and considered judgement" on the circumstances presented in Matter of Arias and decided in Matter of Taher.

The Court specifically rejected the Board's position that the schedule loss of use award should be withheld in favor of the "virtual banking" of the statutory cap. Essentially the Board's position is that the claimant has a benefit of 275 weeks which is being held on reserve or "virtual banking."

The Court continues and concedes, in footnote number 3, that it has not yet had occasion to address this issue, however, the Court identifies a problem with the Board's reasoning in the event that the claimant suffers a death that is unrelated to the established sites of injury. It is our considered opinion that the Court added this as a precaution to the Board.

The Court in Matter of Arias remitted the case to the Workers' Compensation Board to consider the schedule loss of use awards.

In both Matter of Fernandez and Matter of Saputo although the Court noted the applicable law pursuant to Matter of Arias and Matter of Taher the Court further noted that in both of these cases a determination has not been made that there is no award based upon the non-schedule permanent partial disability classification. Both cases were remitted to the Workers' Compensation Board for further proceedings consistent with the Court's decision. The schedule loss of use awards in both cases were rescinded pending the further development of the record in accordance with the Court's Decision and in accordance with Matter of Arias and Matter of Taher.

Essentially, all impairments sustained by a claimant, whether resulting from schedule or non-schedule injuries, must be considered in determining the loss of wage earning capacity attributable to a non-schedule permanent partial disability classification. Once the non-schedule permanent partial disability classification is established if there is no initial award based on the non-schedule permanent partial disability classification the claimant would be entitled to a schedule loss of use award.

Should you have any questions or should you wish to discuss this matter feel free to contact our office at your convenience.

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--- N.Y.S.3d ----, 2020 WL 825510 (N.Y.A.D. 3 Dept.), 2020 N.Y. Slip Op. 01235

*1 In the Matter of the Claim of Rurico Sanchez, Appellant, v. Jacobi Medical Center, Respondent. Workers' Compensation Board, Respondent.

OPINION

Supreme Court, Appellate Division, Third Department, New York
528945
Decided and Entered: February 20, 2020
Calendar Date: January 16, 2020

Before: Garry, P.J., Egan Jr., Lynch, Mulvey and Reynolds Fitzgerald, JJ.

APPEARANCES OF COUNSEL

Grey & Grey, LLP, Farmingdale (Robert E. Grey of counsel), for appellant.
Zachary W. Carter, Corporation Counsel, New York City (Christine Conwell of counsel), for Jacobi Medical Center, respondent.
Letitia James, Attorney General, New York City (Donya Fernandez of counsel), for Workers' Compensation Board, respondent.
Mulvey, J.

Appeal from a decision of the Workers' Compensation Board, filed February 11, 2019, which ruled, among other things, that claimant's periods of temporary total disability following his permanent partial disability classification count towards the durational limit of his permanent partial disability award.

In May 2008, claimant, a housekeeper, was injured in a work-related accident, and his claim for workers' compensation benefits was later established for injuries to the neck, back, right shoulder and

Compensation Law Judge (hereinafter WCLJ) classified claimant with a permanent partial disability and found that he had a loss of wage-earning capacity of 50%, entitling him to wage loss benefits of $211.56 per week not to exceed 300 weeks. In March 2014, claimant underwent a causally-related spinal surgery and, based on that change in his medical condition, filed a request for further action. Thereafter, a WCLJ reopened the case and awarded claimant temporary total disability benefits in the amount of $423.13 per week, retroactive to the date of surgery and continuing (*see generally* Workers' Compensation Law § 15 [2]). Subsequently, and in light of the differing medical opinions as to whether claimant was in fact totally disabled, a WCLJ later reduced claimant's benefit rate from the temporary total disability rate to a "tentative rate" of $211.56 per week. That tentative rate continued until December 2015, at which time claimant underwent a second spinal surgery. Following surgery, claimant again filed a request for further action, and a WCLJ awarded him retroactive temporary total disability benefits at $423.13 per week from the date of the second surgery and continuing until resolution of the differing medical opinions. That rate was later adjusted to tentative rates of $300 per week and then $317.35 per week.

In October 2017, the employer suspended payments to claimant based on the alleged exhaustion of the 300-week durational limit of claimant's permanent partial disability award. Claimant requested a hearing as to whether his payments had been improperly suspended, at which he argued that the period during which he was temporarily totally disabled should not count towards the 300-week cap for his permanent partial disability award and further asserted that he should be reclassified. In a November 2017 notice of decision, a WCLJ directed the employer to continue payments at the tentative rate of $317.35 per week and directed both sides to produce evidence of permanency to determine whether claimant should be reclassified as permanently totally disabled or permanently partially disabled to a more serious degree. The employer administratively appealed, maintaining that it properly suspended payment of claimant's benefits. In an August 2018 decision, a panel of the Workers' Compensation Board affirmed the WCLJ's decision, concluding that periods of temporary total disability should not be counted towards the capped number of

that claimant's two spinal surgeries warranted reconsideration of his classification, directing further development of the record to that end.

The employer then sought discretionary full Board review. The full Board granted the employer's application by, without explanation, merely rescinding the Board panel's August 2018 decision and remitting the matter to the Board panel for further consideration. In a February 2019 decision, the Board panel, expressly disavowing the Board's prior precedent, held that all periods during which a claimant receives awards subsequent to his or her permanent partial disability classification count towards his or her award's durational limit under Workers' Compensation Law § 15 (3) (w), which, here, was exhausted on or about November 8, 2017. The Board panel then modified the November 2017 decision and seven other prior decisions where either temporary total disability awards or "tentative" awards were made to claimant, reducing each of the benefit rates therein to $211.56 per week. Additionally, the Board panel concluded that claimant's request for reclassification was untimely because it was made after his permanent partial disability award had been exhausted. Claimant appeals.

Claimant first contends that the Board erred in holding that, following a permanent partial disability classification, a claimant continues to be permanently partially disabled for purposes of both calculation of the capped number of weeks under Workers' Compensation Law § 15 (3) (w) and the rate of awards -- notwithstanding a WCLJ's reclassification of the claimant's condition to a temporary total disability. Because the issue presented is one of pure statutory interpretation, we need not accord deference to the Board's decision (*see Matter of LaCroix v Syracuse Exec. Air Serv., Inc.*, 8 NY3d 348, 352-353 [2007]). Our analysis begins, as it must, with the text of the statute (*see Matter of Mancini v Office of Children & Family Servs.*, 32 NY3d 521, 525 [2018]).

The Workers' Compensation Law provides compensation for four distinct classes of injury: permanent total disability, temporary total disability, permanent partial disability and temporary partial disability (*see* Workers' Compensation Law § 15 [1]-[3], [5]). In the case of permanent total disability, a claimant is awarded payment of a percentage of wages "during the continuance of such total

Compensation Law § 15 (2) provides that, in the case of temporary total disability, benefits are to be paid to a claimant "during the continuance thereof, except as otherwise provided in this chapter." Workers' Compensation Law § 15 (3), applicable to cases of permanent partial disability, provides for two types of awards: schedule loss of use awards for injuries to certain enumerated body members (*see* Workers' Compensation Law § 15 [3] [a]-[t]) and nonschedule awards for "all other cases of permanent partial disability" (Workers' Compensation Law § 15 [3] [w]). Compensation under Workers' Compensation Law § 15 (3) (a)-(t) is payable as one lump sum (*see* Workers' Compensation Law § 25 [1] [b]; *see also* L 2009, ch 351, § 1), whereas compensation under Workers' Compensation Law § 15 (3) (w) is "payable during the continuance of such permanent partial disability" subject, however, to the durational limits of that paragraph (Workers' Compensation Law § 15 [3] [w]) -- limits set forth by the Legislature during comprehensive reform of the Workers' Compensation Law in 2007 (*see* L 2007, ch 6, § 4). Depending on the date of accident or disablement, the durational limits of Workers' Compensation Law § 15 (3) (w) may also apply to temporary partial disability awards under Workers' Compensation Law § 15 (5) where those awards extend beyond 130 weeks and where a permanent partial disability classification is later made (*see* Workers' Compensation Law § 15 [3] [w]).

Reading the statute as a whole, Workers' Compensation Law § 15 indicates that, at any particular time, a claimant can be classified under one, and only one, of the four categories of disability. Thus, even though a person may be medically diagnosed with a permanent partial disability and concurrently experience a temporary exacerbation of his or her medical impairment -- for example, after surgery related to the disabling condition -- rendering the person completely unable to work in the short term, the statute does not permit a claimant to be classified with both a permanent partial disability and a temporary total disability at the same time. Rather, if a claimant classified with a permanent partial disability experiences a setback or exacerbation that results in a reclassification of a temporary total disability, the earlier permanent partial disability classification is displaced, until further reclassification. Although the statute directs that, except in the case of protracted temporary total disability, a permanent partial

preceding period of temporary total disability (*see* Workers' Compensation Law § 15 [4-a] [entitled "[p]rotracted temporary total disability in connection with permanent partial disability"]; L 1924, ch 500; *see also Matter of Landgrebe v County of Westchester*, 57 NY2d 1, 6 [1982]), the Legislature was silent regarding whether nonschedule awards for permanent partial disability should include preceding or intervening periods of temporary total disability. In our view, this silence in a similar circumstance, despite the Legislature having amended the statute in other ways extensively in 2007 and as recently as 2017 (*see* L 2017, ch 59, part NNN, subpart A, § 1; L 2007, ch 6, § 4), indicates a purposeful legislative choice to not include any periods of temporary total disability in nonschedule awards (*see Matter of Lewandowski v New York State & Local Police & Fire Retirement Sys.*, 69 AD3d 1027, 1029 [2010]; *see also Town of Concord v Duwe*, 4 NY3d 870, 873-874 [2005]; *People v Pinkoski*, 300 AD2d 834, 837 [2002], *lv denied* 99 NY2d 631 [2003]; McKinney's Cons Laws of NY, Book 1, Statutes § 74).

We note that the WCLJs classified claimant as temporarily totally disabled following his two surgeries, which findings were supported by medical proof. Therefore, the Board did not comply with the statute when it counted the weeks during which claimant was classified as temporarily totally disabled against the cap for his nonschedule award for a permanent partial disability. Instead, the duration of his permanent partial disability nonschedule award (the running of the 300 weeks) should have been tolled while claimant was classified with a temporary total disability. Notably, until the decision on appeal, the Board previously held that a claimant's period of temporary total disability did not count against the cap of benefit weeks set forth in Workers' Compensation Law § 15 (3) (w) (*see e.g. Employer: Kraft Foods, Inc.*, 2018 WL 4866440, *2-3, 2018 NY Wrk Comp LEXIS 9781, *5 [WCB No. G016 0350, Sept. 28, 2018] [noting that, "[w]hile [Workers' Compensation Law] § 15 (3) (w) is applicable due to the claimant's classification with a permanent partial disability, the claimant properly received benefits pursuant to [Workers' Compensation Law] § 15 (2) for her temporary total disability following the surgery to [her] neck, and," thus, "the claimant's 300-week cap under [Workers' Compensation Law] § 15 (3) (w) was tolled by the claimant's period of temporary total disability"]; *Employer: Southampton Elementary School*, 2018 WL

6054, Sept. 6, 2018]; *Employer: Heritage Centers*, 2018 WL 2417391, *6, 2018 NY Wrk Comp LEXIS 4538, *16 [WCB No. 8080 5401, May 18, 2018]). Despite the Board's pronouncement regarding its change in position, its new analysis does not comport with the plain language of the statute.

According to that plain language, the durational benefit caps for nonschedule awards under Workers' Compensation Law § 15 (3) (w) apply to "all compensation payable under *this paragraph*" (emphasis added). However, benefits paid during a period of temporary total disability are payable under a separate paragraph, section 15 (2), and we are not persuaded by the Board's position that the "otherwise provided" language of Workers' Compensation Law § 15 (2) contemplates the durational limits of Workers' Compensation Law § 15 (3) (w) inasmuch as the former subdivision existed prior to the 2007 amendment of the latter (*see Matter of Collins v Dukes Plumbing & Sewer Serv., Inc.*, 75 AD3d 697, 699 [2010], *affd* 17 NY3d 906 [2011], 18 NY3d 48 [2011]). Additionally, throughout Workers' Compensation Law § 15 are precise references to paragraphs and subdivisions thereof. Thus, it is much more reasonable to assume that, by using the word "chapter," the Legislature intended to direct attention to other sections of Workers' Compensation Law chapter 67, where there are indeed clear limitations on the payment of temporary total disability benefits (*see e.g.* Workers' Compensation Law § 12). Accordingly, temporary total disability benefits do not count towards the benefit caps for nonschedule awards under Workers' Compensation Law § 15 (3) (w).

Based on this record, we are unable to determine whether claimant has received the proper benefits. Immediately following each of claimant's surgeries, a WCLJ issued a decision classifying him with a temporary total disability and awarding benefits at a rate reflective of a total disability. However, for several later time periods, claimant was awarded benefits at various tentative rates, some of which were equal to the total disability rate, some equal to the nonschedule award rate and others in between those amounts. The Board has continuing jurisdiction to modify its prior decisions (*see* Workers' Compensation Law §§ 22, 123), and doing so does not violate claimant's rights, especially where the prior awards were

or final award would be issued at a later time. We therefore remit for the Board to determine claimant's classification during those periods for which he received tentative awards. For weeks when it is determined that claimant continued to have a temporary total disability, a nontentative rate should be set and the benefits cap on his nonschedule permanent partial disability award should be tolled; for weeks when it is determined that he had returned to his permanent partial disability status, he should receive the rate for his nonschedule award and those weeks should count toward his 300-week benefits cap.

Further, we agree with claimant that the Board's determination with respect to the timeliness of his request for reclassification was in error. The Board's unilateral position that a permanently partially disabled claimant must seek reclassification prior to the exhaustion of his or her permanent partial disability award runs in direct contravention to the plain language of Workers' Compensation Law § 15 (6-a), which provides that, subject to limitations not relevant here, "the [B]oard may, at any time, without regard to the date of accident, upon its own motion, or on application of any party in interest, reclassify a disability upon proof that there has been a change in condition." Accordingly, claimant must be provided an opportunity to seek reclassification. If, after further development of the record, claimant is reclassified, there would at that time be no bar to him receiving, for example, retroactive permanent total disability benefits from the date when he was found to have been totally disabled.

Garry, P.J., Egan Jr., Lynch and Reynolds Fitzgerald, JJ. concur.

ORDERED that the decision is reversed, with costs, and matter remitted to the Workers' Compensation Board for further proceedings not inconsistent with this Court's decision.

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

Decided and Entered: February 27, 2020 529151

In the Matter of the Claim
of FRANJA ARIAS,
Appellant,
v
OPINION AND ORDER
CITY OF NEW YORK,
Respondent.

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: January 16, 2020

Before: Garry, P.J., Egan Jr., Lynch, Mulvey and Reynolds Fitzgerald, JJ.

Grey & Grey, LLP, Farmingdale (Robert E. Grey of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York City (Paul Zaragoza of counsel), for City of New York, respondent.

Garry, P.J.

Appeal from a decision of the Workers' Compensation Board, filed April 5, 2019, which ruled, among other things, that claimant was not simultaneously entitled to an award for a schedule loss of use and a permanent partial disability classification.

In January 2016, claimant was injured when she slipped and fell on ice while working as a school crossing guard, and her ensuing claim for workers' compensation benefits was established for right carpal tunnel syndrome and injuries to her right ankle, right hand, right ring finger, neck and back. In November 2018, a Workers' Compensation Law Judge determined that claimant, who was working without reduced earnings, was entitled to a permanent partial disability classification based on impairments to her cervical and lumbar spine and concluded that she had a 40% loss of wage-earning capacity, entitling her to nonschedule benefits not to exceed 275 weeks. Claimant administratively appealed, arguing that, because she had returned to work at preinjury wages and, thus, was not presently entitled to a nonschedule award based upon any actual loss of wages (see Workers' Compensation Law § 15 [3] [w]), she was entitled to a schedule loss of use (hereinafter SLU) award pursuant to this Court's decision in Matter of Taher v Yiota Taxi, Inc. (162 AD3d 1288 [2018], lv dismissed 32 NY3d 1197 [2019]). The Workers' Compensation Board disagreed, maintaining its position that, because claimant's injuries are subject to a nonschedule classification, they are not also amenable to an SLU award. Claimant appeals.

We agree with claimant that the Board's disregard of Matter of Taher was in error. Although the Board has broad discretion as the finder of fact (see Matter of Tobin v Finger Lakes DDSO, 162 AD3d 1286, 1287 [2018]), resolution of the question presented here, and in Matter of Taher, is a matter of statutory interpretation – namely, whether Workers' Compensation Law § 15 (3) permits a simultaneous SLU award and nonschedule classification for impairments that arise out of the same work-related accident where the claimant has returned to work at preinjury wages.

It is necessary to first address the Board's assumption that we have overlooked the 2018 Workers' Compensation Guidelines for Determining Impairment, or the guidelines that preceded it. We recognize that the Board's guidelines have long provided that "[n]o residual impairments must remain in the systemic area (i.e., head, neck, back, etc.) before the claim is

considered suitable for schedule evaluation of an extremity or extremities involved in the same accident" (Workers' Compensation Guidelines for Determining Impairment § 1.5 [4], at 8 [2018] [hereinafter the 2018 guidelines]; see New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity § 1.5 [4], at 10 [2012]; State of New York Workers' Compensation Board Medical Guidelines, at 4 [June 1996]). The Board relies upon this language for its position that payment of an SLU award is never appropriate where there is also an established injury to a nonschedule site sustained during the same work-related accident. To the extent that any deference to the Board's interpretation of its guidelines might be warranted (see generally Workers' Compensation Law § 15 [3] [x]; 12 NYCRR 325-1.6 [a]; Matter of Kigin v State of N.Y. Workers' Compensation Bd., 109 AD3d 299, 304-305, 312 [2013], affd 24 NY3d 459 [2014]), we find that the Board's interpretation of this ambiguous provision does not reflect a "fair and considered judgment" on the circumstance presented in this case and decided in Matter of Taher (Kisor v Wilkie, ___ US ___, ___, 139 S Ct 2400, 2417 [2019] [internal quotation marks omitted]; see Auer v Robbins, 519 US 452, 462 [1997]).[1] [2]

The Board's position would require injured claimants who have returned to work at preinjury wages – who are perhaps more extensively injured than similarly-situated claimants who have

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[1] Notably, the Attorney General elected not to file a responding brief on behalf of, and in support of the position taken by, the Board in this appeal (see Matter of Johnson v All Town Cent. Transp. Corp., 165 AD3d 1574, 1575 n [2018]).

[2] An SLU award may be inappropriate in the case of a temporary residual impairment to a systemic area, as the Workers' Compensation Law requires that a claimant's partial disability be "permanent in quality" before an award under Workers' Compensation Law § 15 (3) is suitable (Workers' Compensation Law § 15 [3]). The Board's interpretation of section 1.5 (4) of the 2018 guidelines, however, requires affirmatively inserting the word permanent into the guideline, so that it reads "[n]o [permanent] residual impairments." This qualifying word is plainly absent from section 1.5 (4).

sustained only a permanent impairment to a scheduled member – to wait an unspecified period of time to receive any permanent partial disability award until, and only if, they experience actual loss of wages and, thus, become eligible for a nonschedule award. It is instead well established that an SLU award is designed to compensate a claimant for the loss of earning power or capacity presumed to result as a matter of law (see Matter of Taher v Yiota Taxi, Inc., 162 AD3d at 1289; Matter of Gallman v Walt's Tree Serv., 43 AD2d 419, 420 [1974]; Matter of Wilkosz v Symington Gould Corp., 14 AD2d 408, 410 [1961], affd 14 NY2d 739 [1964]). The Board presents this indefinite, and potentially permanent, delay as a "virtual banking" of benefits. It is in fact an attempt to control how prudently a claimant uses or rations his or her lump-sum SLU award – and, thus, a policy choice with no basis in the Workers' Compensation Law. It bears some emphasis that, when a claimant who has sustained a permanent impairment to a member has returned to work at preinjury wages, it is mere speculation that an award will ever be made for nonschedule injuries arising from the same accident. Although the Board may be appropriately concerned about the possibility of double payment or recovery if and when a claimant experiences actual lost wages, this circumstance was provided for within Matter of Taher v Yiota Taxi, Inc. (162 AD3d at 1290 n 2). Additionally, the withholding of an SLU award in favor of the "virtual banking" of nonschedule cap weeks adds unnecessary complexity in the event that a claimant suffers a death that is unrelated to the established sites of injury (see generally Workers' Compensation Law § 15 [3] [u], [w]; [4]).[3] We further note that the Board's

[3] We have not yet had the occasion to address whether, or the extent to which, any remaining portion of a nonschedule award or cap weeks is payable to the beneficiaries identified in Workers' Compensation Law § 15 (4) upon a claimant's death "arising from causes other than the [established] injury" (Workers' Compensation Law § 15 [4]). Although the Board has characterized the "virtual banking" of cap weeks as a "real benefit" that "vests with the claimant upon classification" (Employer: Metropolitan Hospital, 2016 WL 4720221, *3, 2016 NY Wrk Comp LEXIS 16360, *7 [WCB No. G076 1641, Sept. 6, 2016]; see Employer: Cold Spring Hills Center, 2019 WL 3980991, *3, 2019 NY

position strongly incentivizes injured claimants with schedule and nonschedule permanent impairments arising from the same work-related accident who are capable of returning to work at preinjury wages not to do so in order to collect a nonschedule award.

Should the Legislature wish to amend the Workers' Compensation Law to permit the virtual banking of benefits in the manner that the Board desires, it is of course free to do so. Until then, we abide by our prior holding in Matter of Taher. We further conclude that this matter presents the unique circumstance where no initial award was made based on claimant's nonschedule classification; thus, claimant is entitled to an SLU award for the permanent partial impairments to her statutorily-enumerated body members (see Matter of Taher v Yiota Taxi, Inc., 162 AD3d at 1290). Finally, claimant's challenge to the Board's determination regarding her loss of wage-earning capacity, raised for the first time on this appeal, is not preserved for our review (see Matter of Shiner v SUNY at Buffalo, 144 AD3d 1371, 1373 [2016], lv denied 28 NY3d 916 [2017]; Matter of Lattanzio v Consolidated Edison of N.Y., 129 AD3d 1343, 1344 [2015]).

Wrk Comp LEXIS 9414, *7 [WCB No. G124 3859, Aug. 15, 2019]; Employer: The New York Methodist Hospital, 2019 WL 1585790, *4, 2019 NY Wrk Comp LEXIS 3484, *11 [WCB No. 167 6366, Apr. 3, 2019]), a claimant's right to receive a nonschedule award for his or her nonschedule permanent impairments is still conditioned upon a future "wage loss caused by the established injuries" (Employer: Metropolitan Hospital, 2016 WL 4720221, *3, 2016 NY Wrk Comp LEXIS 16360, *7 [WCB No. G076 1641, Sept. 6, 2016]). If a claimant were to die at preinjury wages, such a decedent's beneficiaries could potentially be deprived of the cap weeks that were "virtually banked" because decedent never sustained, and could no longer establish, a causally-related reduction in wages (see Workers' Compensation Law § 15 [4]; Employer: Center for Discovery, 2019 WL 1313956, *1-3, 2019 NY Wrk Comp LEXIS 2705, *3-7 [WCB No. 9070 1546, Mar. 13, 2019]). Such a result would forever deprive a claimant, as well as the beneficiaries identified in Workers' Compensation Law § 15 (4), of any compensation for the claimant's disability.

Egan Jr., Lynch, Mulvey and Reynolds Fitzgerald, JJ., concur.

ORDERED that the decision is modified, without costs, by reversing so much thereof as found that claimant may not receive a schedule loss of use award if she receives a nonschedule permanent partial disability classification but no nonschedule award for those impairments arising out of the same work-related accident; matter remitted to the Workers' Compensation Board for further proceedings not inconsistent with this Court's decision; and, as so modified, affirmed.

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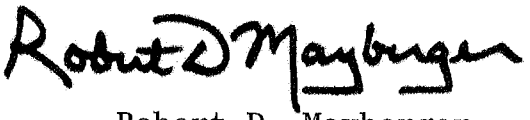

Robert D. Mayberger
Clerk of the Court

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

Decided and Entered: February 27, 2020 528994

In the Matter of the Claim
of CHARLES FERNANDEZ JR.,
Appellant,
v

NEW YORK UNIVERSITY BENEFITS et al.,
Respondents.

WORKERS' COMPENSATION BOARD,
Respondent.

MEMORANDUM AND ORDER

Calendar Date: January 16, 2020

Before: Garry, P.J., Egan Jr., Lynch, Mulvey and Reynolds Fitzgerald, JJ.

Grey & Grey, LLP, Farmingdale (Robert E. Grey of counsel), for appellant.

Weiss, Wexler & Wornow, PC, New York City (J. Evan Perigoe of counsel), for New York University Benefits and another, respondents.

Letitia James, Attorney General, New York City (Steven Segall of counsel), for Workers' Compensation Board, respondent.

Garry, P.J.

Appeal from a decision of the Workers' Compensation Board, filed February 21, 2019, which ruled, among other things, that

claimant was not simultaneously entitled to an award for a schedule loss of use and permanent partial disability classification.

Claimant, a security officer, sustained a work-related injury in August 2012, and his claim for workers' compensation benefits was ultimately established for injuries to his back, neck and shoulders. Claimant was evaluated by his physician and a medical examiner selected by the employer's workers' compensation carrier, who reached varying conclusions regarding the percentages for his schedule loss of use (hereinafter SLU) with respect to both of his arms (shoulders) and the severity rankings for his nonschedule injuries. A Workers' Compensation Law Judge found that claimant, who had not lost any time from work,[1] had a 20% SLU of the left arm and a 40% SLU of the right arm, entitling him to a lump-sum award. The employer and its workers' compensation carrier appealed, arguing that any SLU award was premature because both physicians also gave impairment ratings to the neck and back and no development of the record was conducted as to those nonschedule injuries. The Workers' Compensation Board agreed and rescinded the Workers' Compensation Law Judge's decision, continuing the case for further development of the medical record on the "issue of permanency" – presumably as to claimant's neck and back injuries – and, if appropriate, on the issue of loss of wage-earning capacity. Claimant appeals.[2]

Claimant initially contends that the Board, in this matter and others, has rejected this Court's decision in Matter of Taher v Yiota Taxi, Inc. (162 AD3d 1288 [2018], lv dismissed 32

[1] Claimant has reported that his employment has since been terminated and he has begun collecting Social Security benefits based on his age; the Board asserts that there is some evidence that he may have returned to work for another employer.

[2] Contrary to the contentions of the employer, the carrier and the Board, the Board's decision reached a dispositive threshold legal question and, thus, is appealable (see Matter of Taher v Yiota Taxi, Inc., 162 AD3d 1288, 1288-1289 [2018], lv dismissed 32 NY3d 1197 [2019]).

NY3d 1197 [2019]). For reasons discussed more fully in Matter of Arias v City of New York, ___ AD3d ___ [decided herewith]), we agree with claimant that the Board's disregard of Matter of Taher and continued reliance on its decision in Employer: Metropolitan Hospital (2016 WL 4720221, 2016 NY Wrk Comp LEXIS 16360 [WCB No. G076 1641, Sept. 6, 2016]) was in error. We reiterate that, where a claimant who has sustained both schedule and nonschedule permanent injuries in the same work-related accident has returned to work at preinjury wages and, thus, receives no award based on his or her nonschedule permanent partial disability classification (see Workers' Compensation Law § 15 [3]), he or she is entitled to an SLU award (see Matter of Taher v Yiota Taxi, Inc., 162 AD3d at 1289-1290; Matter of Gallman v Walt's Tree Serv., 43 AD2d 419, 420-421 [1974]).

Here, however, absent a finding of permanency as to the established neck and back injuries (see Matter of Arias v City of New York, slip op 3 n 2; see New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity § 1.5 [4], at 10 [2012]), among other prerequisites, the Board did not err to the extent that it found that claimant is not presently entitled to an SLU award (see Matter of Taher v Yiota Taxi, Inc., 162 AD3d at 1290).

Egan Jr., Lynch, Mulvey and Reynolds Fitzgerald, JJ., concur.

ORDERED that the decision is modified, without costs, by reversing so much thereof as found that claimant may not receive a schedule loss of use award if he receives a nonschedule permanent partial disability classification but no nonschedule award for those impairments arising out of the same work-related accident; matter remitted to the Workers' Compensation Board for further proceedings not inconsistent with this Court's decision; and, as so modified, affirmed.

ENTER:

Robert D. Mayberger
Clerk of the Court

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

Decided and Entered: February 27, 2020 528952

In the Matter of the Claim
of JOHN SAPUTO,
Appellant,
v
MEMORANDUM AND ORDER
NEWSDAY, LLC, et al.,
Respondents.

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: January 16, 2020

Before: Garry, P.J., Egan Jr., Lynch, Mulvey and Reynolds Fitzgerald, JJ.

Grey & Grey, LLP, Farmingdale (Robert E. Grey of counsel), for appellant.

Peter Cusick, State Insurance Fund, Melville (Alisa A. Ammerman of counsel), for Newsday, LLC and another, respondents.

Letitia James, Attorney General, New York City (Steven Segall of counsel), for Workers' Compensation Board, respondent.

Garry, P.J.

Appeal from a decision of the Workers' Compensation Board, filed December 19, 2018, which ruled, among other things, that claimant was not simultaneously entitled to an award for a

schedule loss of use and permanent partial disability classification.

Claimant, a pressman, injured himself during a work-related accident in August 2016, and his claim for workers' compensation benefits was thereafter established for injuries to his neck and shoulders.[1] Claimant sought medical attention from a physician, who diagnosed him with bilateral incomplete rotator cuff tears or ruptures, cervicalgia, spondylosis without cervical myelopathy and cervical disc degeneration, noting straightening of the cervical spine and proscribing claimant physical therapy for both his shoulders and neck. After repeated visits with this physician, claimant sought a permanency opinion for his shoulders from another physician. In August 2017, the second physician concluded that claimant had reached maximum medical improvement with respect to his bilateral shoulder injury and has a 75% schedule loss of use (hereinafter SLU) of the right arm (shoulder) and an 80% SLU of the left arm (shoulder). This second physician did not perform a physical examination of claimant's neck or provide any permanency opinion with respect thereto. In November 2017, Matthew Skolnick, an orthopedic expert, examined claimant upon request of the employer's workers' compensation carrier. Skolnick concluded that claimant has a permanent impairment of the cervical spine at a class 2, severity A rating. Having concluded that claimant has a residual impairment to a systemic area, Skolnick did not provide SLU percentages for claimant's arms. Thereafter, claimant continued to see the second treating physician with complaints of neck pain. In May of 2018, physical therapy was prescribed for claimant's cervical symptoms; in June 2018, the physician noted that this treatment had not been approved. Although continuing pain and cervical limitations were noted, it was also noted that claimant continued with full and unrestricted activities at his work.

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[1] Claimant has several other established claims, including for occupational disease and injuries to other schedule sites not at issue here, spanning from May 2013 to June 2017, some of which have not reached permanency.

After hearings in March and May 2018, a Workers' Compensation Law Judge concluded that there was no permanent neck impairment and thus awarded claimant, who had lost no time from work,[2] a 50% SLU of the right arm and a 55% SLU of the left arm. The employer and its workers' compensation carrier appealed, arguing that the evidence supported a finding that claimant did sustain a nonschedule permanent neck injury and asserting that claimant's treatment was tailored to support the grant of an SLU award. In rebuttal, claimant argued that our decision in Matter of Taher v Yiota Taxi, Inc. (162 AD3d 1288 [2018], lv dismissed 32 NY3d 1197 [2019]) authorized an SLU award for his arms regardless of whether he might also be later found to have a nonschedule permanent partial disability of the neck. The Workers' Compensation Board agreed with the employer and its carrier, rescinding the SLU award as unsuitable in light of the possible residual impairment to claimant's neck and continuing the matter for development of the record as to the severity of claimant's cervical spine impairment, exertional ability, vocational factors and loss of wage-earning capacity. Claimant appeals.

For reasons discussed more fully in Matter of Arias v City of New York, ___ AD3d ___ [decided herewith]), we agree with claimant that the Board's disregard of Matter of Taher and continued reliance on its decision in Employer: Metropolitan Hospital (2016 WL 4720221, 2016 NY Wrk Comp LEXIS 16360 [WCB No. G076 1641, Sept. 6, 2016]) was in error. We reiterate that, where a claimant who has sustained both schedule and nonschedule permanent injuries in the same work-related accident has returned to work at preinjury wages and, thus, receives no award based on his or her nonschedule permanent partial disability classification (see Workers' Compensation Law § 15 [3]), he or she is entitled to an SLU award (see Matter of Taher v Yiota Taxi, Inc., 162 AD3d at 1289-1290; Matter of Gallman v Walt's Tree Serv., 43 AD2d 419, 420-421 [1974]).

However, we reject claimant's challenge to the Board's determination regarding his residual neck impairment.

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[2] Claimant was subsequently laid off from his employment, for reasons unrelated to his physical condition.

Claimant's medical records reveal consistent complaints of neck pain, positive examination findings and recommendations for physical therapy to address his cervical spine, and MRI results show multiple disc herniations of claimant's cervical spine. In view of the foregoing, we find that substantial evidence supports the Board's conclusion that residual impairments of claimant's cervical spine, of a yet unknown severity, remain. Absent a finding of permanency as to claimant's established neck injury, among other prerequisites, the Board did not err to the extent that it found that claimant is not presently entitled to an SLU award (see Matter of Arias v New York City, supra; Matter of Taher v Yiota Taxi, Inc., 162 AD3d at 1290; New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity § 1.5 [4], at 10 [2012]).

Egan Jr., Lynch, Mulvey and Reynolds Fitzgerald, JJ., concur.

ORDERED that the decision is modified, without costs, by reversing so much thereof as found that claimant may not receive a schedule loss of use award if he receives a nonschedule permanent partial disability classification but no nonschedule award for those impairments arising out of the same work-related accident; matter remitted to the Workers' Compensation Board for further proceedings not inconsistent with this Court's decision; and, as so modified, affirmed.

ENTER:

Robert D. Mayberger
Clerk of the Court