

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
THIRD DEPARTMENT

Matter of Fiato v. New York State Dept. of Transp.

2021 NY Slip Op 03882 (App. Div. 2021) · No. 529921 · Decided June 17, 2021

SUMMARY

The Appellate Division, Third Department, affirmed Workers’ Compensation Board decisions awarding Daniel Fiato a 15% schedule loss of use of his left leg following knee replacement surgery. The court held that the 2018 Workers’ Compensation Guidelines applied because the first evaluation of the additional schedule loss occurred after January 1, 2018, and that the prior 20% award was properly deducted from the current 35% impairment determination.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Third Department
WRITING FOR THE COURT	Garry, P.J.; Egan Jr., J.; Lynch, J.; Colangelo, J.
JURISDICTION	New York
DECIDED	June 17, 2021
DOCKET	529921
DISPOSITION	affirmed
PROCEDURAL POSTURE	Claimant appealed Workers' Compensation Board decisions determining that the 2018 Guidelines governed calculation of his schedule loss of use, awarding him a 15% schedule loss of use of his left leg after crediting a prior 20% award, denying reconsideration or full Board review, and affirming that the Workers' Compensation Law Judge lacked jurisdiction to review the Board's decision.
STANDARD OF REVIEW	Whether substantial evidence supports the Workers' Compensation Board's determination; the Board's interpretation and application of the Workers' Compensation Law and its impairment guidelines were upheld where consistent with the legislative mandate and the Board's administrative authority.
PRECEDENTIAL VALUE	published

PARTIES

Daniel Fiato v. New York State Department of Transportation,
Workers' Compensation Board

TOPICS

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QUESTIONS PRESENTED

1. Whether the claimant's schedule loss of use following his 2017 total knee replacement surgery had to be evaluated under the 2012 Guidelines or the 2018 Guidelines.
2. Whether substantial evidence supported the Board's finding of a 35% schedule loss of use under the 2018 Guidelines.
3. Whether the Board properly deducted the claimant's prior 20% schedule loss of use award for the same left leg.
4. Whether the claimant's appeals from the Board's denial of reconsideration or full Board review and its determination that the Workers' Compensation Law Judge lacked jurisdiction were abandoned.

HOLDINGS

1. The 2018 Guidelines governed because the first medical evaluation of the claimant's current schedule loss of use occurred after January 1, 2018, the effective date of the 2018 Guidelines.
2. Substantial evidence supported the Board's finding that the claimant sustained a 35% schedule loss of use of the left leg.
3. The Board properly deducted the prior 20% schedule loss of use award from the current 35% award because both awards concerned impairment of the same left leg.
4. The appeals from the September 2019 and August 2020 decisions were deemed abandoned because the claimant failed to raise arguments challenging those decisions.

KEY QUOTATIONS

"For SLU claims that have at least one examination conducted before January 1, 2018, the Board will consider the issue of SLU to have been joined under the auspices of the Guidelines in effect at the time, and as such the Board will determine the claimant's degree of permanent disability using the 2012 Guidelines. Where the first medical evaluation of SLU occurs on or after January 1, 2018, the question of SLU will be evaluated under the 2018 SLU Guidelines." (*2)

"SLU awards are not given for particular injuries, but they are made to compensate an injured worker for his or her loss of earning power or capacity that is presumed to result, as a matter of law, from the residual

*permanent physical and functional impairments to statutorily-enumerated body members”” (*2)*

FACTUAL BACKGROUND

In 2011, Fiato sustained a work-related meniscus tear in his left knee and was awarded a 20% schedule loss of use of the left leg in 2012. He underwent total left-knee replacement surgery in 2017. In 2018, both his surgeon and an employer-retained medical examiner opined, using the 2018 Guidelines, that the knee replacement resulted in a 35% schedule loss of use of the left leg. The Board applied the 2018 Guidelines and deducted the prior 20% award for the same body member, resulting in a 15% additional award.

PROCEDURAL HISTORY

Fiato sustained a work-related left-knee injury in 2011 and received a 20% schedule loss of use award under the 2012 Guidelines. After total knee replacement surgery in 2017, the Workers' Compensation Law Judge directed the parties to submit medical evidence under the 2012 Guidelines. The Workers' Compensation Board reversed, applied the 2018 Guidelines, credited medical opinions finding a 35% schedule loss of use, deducted the prior 20% award, and awarded 15%. The Board denied reconsideration and affirmed that the Workers' Compensation Law Judge lacked jurisdiction to review its decision; the Appellate Division affirmed all three decisions.

DISPOSITION

affirmed

CASES CITED

- Matter of Covington v New York City Dept. of Corr., 187 AD3d 1285, 1285-1286 (2020)
- Matter of Semrau v Coca-Cola Refreshments USA Inc., 189 AD3d 1873, 1874-1875 n 2 (2020)
- Matter of Knapp v Bette & Cring LLC, 166 AD3d 1428, 1430 (2018)
- Matter of Maunder v B & B Lbr. Co., 166 AD3d 1261, 1261 (2018)
- Matter of Maloney v Wende Corr. Facility, 157 AD3d 1155, 1156 (2018)
- Matter of Blair v SUNY Syracuse Hosp., 184 AD3d 941, 943 (2020)
- Matter of Genduso v New York City Dept. of Educ., 164 AD3d 1509, 1510 (2018)
- Matter of Turner v Graphic Paper Inc., 151 AD3d 1127, 1128 n (2017)

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