

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

Decided and Entered: May 16, 2024

CV-23-0067

In the Matter of the Claim of
RAYMOND R. GARROW,
Appellant,

v

LOWE'S HOME CENTERS INC. et al.,
Respondents.

MEMORANDUM AND ORDER

WORKERS' COMPENSATION
BOARD,
Respondent.

Calendar Date: April 24, 2024

Before: Egan Jr., J.P., Aarons, Lynch, Reynolds Fitzgerald and Powers, JJ.

Law Firm of Alex Dell, PLLC, Albany (Sarah M. Bennett of counsel), for appellant.

Goldberg Segalla, Rochester (Bradford J. Reid of counsel), for Lowe's Home Centers Inc. and another, respondents.

Egan Jr., J.P.

Appeal from a decision of the Workers' Compensation Board, filed December 12, 2022, which ruled, among other things, that claimant was entitled to a 33 $\frac{1}{3}$ % schedule loss of use award for his left arm.

Claimant, a delivery driver for the employer, sustained an injury to his left arm in June 2004 while moving a refrigerator and initially was diagnosed with left shoulder strain and a partially ruptured bicep tendon. The employer was apprised of the injury, and claimant did not seek further medical treatment until 2014, at which point an MRI study revealed a full-thickness tear in claimant's left bicep. Claimant underwent surgery in June 2014 and returned to work, and his claim subsequently was established for a work-related injury to his left shoulder. Claimant continued to experience problems and, in September 2015, the parties stipulated that claimant had sustained a 45% schedule loss of use (hereinafter SLU) of his left arm.

Approximately five years later, claimant underwent additional testing, and a second surgery was performed in September 2020. Claimant's consultant, Kevin Scott, performed an SLU examination in August 2021 and initially concluded that claimant had sustained a 33 $\frac{1}{3}$ % SLU of his left arm/shoulder. Scott subsequently filed an addendum to his report, and his deposition and a hearing ensued, during the course of which Scott opined that claimant had sustained injuries to his left arm/shoulder beyond the initial bicep tendon rupture – specifically, a partial tear of claimant's rotator cuff – and that claimant was entitled to an SLU award greater than the percentage allocated under special consideration 6 of the Workers' Compensation Guidelines for Determining Impairment (hereinafter the 2018 guidelines) (*see* Workers' Compensation Guidelines for Determining Impairment § 5.5, special consideration 6 at 32 [2018]). The employer and its workers' compensation carrier (hereinafter collectively referred to as the carrier) disagreed, contending that claimant's award was limited to the 33 $\frac{1}{3}$ % SLU of his left arm as outlined in special consideration 6. A Workers' Compensation Law Judge found that, consistent with the application of special consideration 6, claimant was entitled to a 33 $\frac{1}{3}$ % SLU of his left arm. Upon claimant's administrative appeal, the Workers' Compensation Board affirmed, prompting this appeal by claimant.¹

The crux of claimant's appeal centers upon the applicability of this Court's prior decision in *Matter of Blue v New York State Off. of Children & Family Servs.* (206 AD3d 1126 [3d Dept 2022]). In *Blue*, the claimant, who had been diagnosed with a causally-related medial meniscus tear and significant chondromalacia patella of the right knee, sought an SLU award for his right leg (*see id.* at 1126). Although the claimant's physician opined that the claimant's severe range of motion deficits warranted a 50% SLU award, he acknowledged that application of a special consideration pertaining to a diagnosis of

¹ Claimant apparently did not appeal from the denial of his subsequent application for reconsideration and/or full Board review.

chondromalacia patella under the 2018 guidelines (*see* 2018 Workers' Compensation Guidelines for Determining Impairment § 7.5, special consideration 4 at 43 [2018]) capped the SLU award at 10% – notwithstanding the claimant's separate meniscus injury (*see Matter of Blue v New York State Off. of Children & Family Servs.*, 206 AD3d at 1126-1127). The Board agreed and limited the claimant's SLU award to 10%, "disregarding any loss of use attributable to [the] claimant's meniscal tear" (*id.* at 1127).

Upon the claimant's appeal, this Court modified the Board's decision, finding that although the special consideration at issue "may arguably be said to rationally limit an SLU award when it is based upon *only* a finding of chondromalacia patella," the Board's interpretation of the applicable instructions and special consideration as set forth in the 2018 guidelines could not stand (*id.* at 1130 [emphasis added]). Specifically, this Court noted the obvious disparity created by the Board's analysis, under which claimants with only meniscus tears could receive SLU awards in excess of 10%, while claimants with the same or greater range of motion deficits would have their SLU awards capped at 10% simply "because they happen to have an additional diagnosis of chondromalacia patella" (*id.*). Accordingly, the matter was remitted to the Board for "a proper assessment of the evidence," i.e., whether the claimant was entitled to an SLU value for the impairment resulting from diagnoses other than chondromalacia patella (*id.* at 1132).

Here, the carrier argued and the Board found that *Blue* "dealt solely with an injured worker's knee" and had no applicability to claimant's injured shoulder. We disagree. The preliminary instructions for calculating the loss of use of a knee or shoulder are substantially the same,² the language governing the application of the respective special considerations is identical³ and the inequity and/or disparity identified by this Court in *Blue*, i.e., that "the claimants suffering from greater injury . . . are the ones receiving lesser compensation" (*id.* at 1131) is equally evident here. Simply put, our holding in *Blue* that the application of a special consideration does not preclude an SLU

² "To determine the overall [SLU] of the [relevant body part], first assess whether any special considerations apply" (Workers' Compensation Guidelines for Determining Impairment §§ 5.4, 7.4 at 30, 42 [2018]).

³ "The following are special considerations that have enumerated [SLU] values. Other deficits may be added when specified or when no schedule value is provided. However, the maximum [SLU] value cannot exceed the value of ankylosis" (Workers' Compensation Guidelines for Determining Impairment § 5.5, special consideration 6 at 32; § 7.5, special consideration 4 at 43 [2018]).

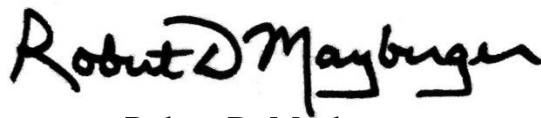
value for an impairment of the knee resulting from diagnoses *other than* chondromalacia patella (*see* Workers' Compensation Guidelines for Determining Impairment § 7.5, special consideration 4 at 43 [2018]) applies with equal force where a claimant alleges a shoulder impairment due to *both* a condition encompassed by a special consideration *and* a diagnosis that is not governed by the special consideration at issue, i.e., a torn rotator cuff. Thus, contrary to the Board's conclusion, our holding in *Blue* is not limited solely to knee impairments.

Alternatively, the carrier argues that claimant's medical proof is insufficient to establish that he suffered from additional deficits attributable to his torn rotator cuff and, therefore, the Board properly limited the SLU award to the 33⅓% outlined in special consideration 6 for claimant's ruptured bicep (*see* Workers' Compensation Guidelines for Determining Impairment § 5.5, special consideration 6 at 32 [2018]). Although the Board is vested with the authority to determine the SLU percentage to be assigned to a specific impairment and, to that end, "is free to accept or reject portions of a medical expert's opinion" (*Matter of Zuhlke v Lake George Cent. Sch. Dist.*, 220 AD3d 1028, 1029 [3d Dept 2023] [internal quotation marks and citations omitted]), the Workers' Compensation Law Judge's and the Board's respective decisions do not reflect any consideration of the medical proof adduced. Contrary to the carrier's assertion, the Board did not base its SLU award upon the alleged insufficiency of claimant's medical proof but, rather, upon its belief that any deviation from the SLU percentage outlined in special consideration 6 was unwarranted because *Blue* simply did not apply to shoulder injuries. In light of this Court's limited review powers in administrative matters, we are unable to discern what decision the Board would have reached had it reviewed the medical evidence in support of claimant's assertion that his separate diagnosis of a rotator cuff tear warranted an increase in his SLU award, and this matter "must be remitted to the Board so that a proper assessment of the evidence may occur" (*Matter of Blue v New York State Off. of Children & Family Servs.*, 206 AD3d at 1132; *see Matter of Ayars v Navillus Tile Co.*, 219 AD3d 1614, 1617 [3d Dept 2023]).

Aarons, Lynch, Reynolds Fitzgerald and Powers, JJ., concur.

ORDERED that the decision is modified, on the law, without costs, by reversing so much thereof as found that Workers' Compensation Guidelines for Determining Impairment chapter 5, special consideration 6 precludes a schedule loss of use value for impairment of the shoulder resulting from a diagnosis other than a rupture of the bicep; matter remitted to the Board for further proceedings not inconsistent with this Court's decision; and, as so modified, affirmed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, flowing style with a large initial "R" and a distinct "D" in the middle.

Robert D. Mayberger
Clerk of the Court