

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

Decided and Entered: May 30, 2024

CV-23-1298

In the Matter of the Claim of MICHAEL
GAROFALO,

Appellant,

v

MEMORANDUM AND ORDER

VERIZON NEW YORK, INC., et al.,
Respondents.

WORKERS' COMPENSATION
BOARD,
Respondent.

Calendar Date: April 29, 2024

Before: Garry, P.J., Egan Jr., Clark, Lynch and Mackey, JJ.

Aaron Zimmerman, Syracuse, for appellant.

Sullivan Keenan & Oliver, LLP, Albany (*Michael J. Keenan* of counsel), for
Verizon New York, Inc. and another, respondents.

Clark, J.

Appeal from a decision of the Workers' Compensation Board, filed May 12, 2023, which, among other things, ruled that claimant was entitled to an award of workers' compensation benefits based upon a 35% schedule loss of use of his left hand.

In January 2020, claimant, a lineman for the employer, sustained traumatic work-related injuries when a reel of fiberoptic cable fell off the back of a truck and crushed his

left hand, resulting in fractures of the left pinky finger and metacarpal fractures of the left hand. Shortly thereafter, claimant underwent open reduction and internal fixation surgery, and the postoperative diagnosis was comminuted segmental open fractures of the left pinky finger with a crush injury and tendon disruption. An ensuing workers' compensation claim was established for a work-related injury involving the left hand, and claimant's average weekly wage was established. Following a May 2021 permanency evaluation, Brian J. Harley, claimant's treating physician, opined that claimant had reached maximum medical improvement and had sustained an 85% schedule loss of use (SLU) of the left pinky finger, which he converted to a 35% SLU of the left hand based upon "the significant reduction in grip strength" that he approximated to be "about [a] 40% loss." In August 2021, Thomas R. Haher, a consultant obtained by the employer and its workers' compensation carrier, conducted an independent medical examination of claimant and opined that claimant had sustained an 85% SLU of the left pinky finger, which amounted to a 35% SLU of the left hand, due to the additional deficits for "strength and sensation." In a subsequent unsolicited September 15, 2021 addendum, Haher revised his SLU opinion, concluding that, based upon the correct application of the New York Workers' Compensation Guidelines for Determining Impairment (2018) (hereinafter the 2018 Guidelines), claimant had sustained a 100% SLU of the left pinky finger, which corresponded to a 50% SLU of the left hand "due to decreased grip and sensory deficit[s]."¹ Following a hearing, a Workers' Compensation Law Judge (hereinafter WCLJ) found that "a[n] SLU limited to the [pinky] finger would not adequately represent [claimant's] overall loss"; rather the WCLJ found claimant to have a 35% SLU of the left hand based on Haher's initial opinion and Harley's opinion, both of which account for claimant's near total loss of use of his left pinky finger and the related loss of use of the hand.² Upon administrative appeal, the Board, among other things, adopted the findings and decision of the WCLJ as its own, upholding an award of a 35% SLU of the left hand. Claimant appeals.

Claimant's principal argument on appeal is that the Board erred in crediting Harley's SLU opinion because, among other reasons, Harley improperly based such opinion upon the 2012 New York State Guidelines for Determining Impairment and Loss

¹ Haher adhered to the conclusion set forth in his addendum in subsequent medical reports dated September 23, 2021 and November 17, 2021.

² The WCLJ also found that Haher's revised SLU opinion was premised upon an improper addition of "deficits where a specific special consideration does not list a schedule value."

of Wage Earning Capacity (hereinafter the 2012 Guidelines), rather than upon the 2018 Guidelines. We agree. It is settled that "SLU awards are made to compensate for the loss of earning power or capacity that is presumed to result, as a matter of law, from permanent impairments to statutorily-enumerated body members" (*Matter of Kromer v UPS Supply Chain Solutions*, 206 AD3d 1413, 1414 [3d Dept 2022] [internal quotation marks and citations omitted]; see Workers' Compensation Law § 15 [3] [a]-[v]; *Matter of Fuller v NYC Tr. Auth.*, 202 AD3d 1189, 1190 [3d Dept 2022], *lv denied* 39 NY3d 903 [2022]). "Whether a claimant is entitled to an SLU award and, if so, the resulting percentage are factual questions for the Board to resolve and, thus, the Board's determination will be upheld provided that it is supported by substantial evidence" (*Matter of Semrau v Coca-Cola Refreshments USA Inc.*, 189 AD3d 1873, 1874 [3d Dept 2020] [internal quotation marks and citations omitted]; see *Matter of Harmon v Office of Children & Family Servs.*, 206 AD3d 1214, 1215 [3d Dept 2022]). "The Board is vested with the discretion to resolve conflicting medical opinions" (*Matter of Garland v New York City Dept. of Corr.*, 204 AD3d 1198, 1199 [3d Dept 2022] [internal quotation marks, brackets and citations omitted]; accord *Matter of Ayars v Navillus Tile Co.*, 219 AD3d 1614, 1615 [3d Dept 2023]). "Where the first medical evaluation of SLU occurs on or after January 1, 2018, the question of SLU will be evaluated under the 2018 . . . Guidelines" (*Matter of Fiato v New York State Dept. of Transp.*, 195 AD3d 1251, 1253 [3d Dept 2021], *lv denied* 37 NY3d 917 [2022] [internal quotation marks and citation omitted]; see Workers' Compensation Law § 15 [3] [x]; *Matter of Semrau v Coca-Cola Refreshments USA Inc.*, 189 AD3d at 1875 n 2).

The record reflects that Harley first examined claimant for permanency and to determine an SLU percentage on May 5, 2021 and that he assessed the permanency of claimant's injury and arrived at a 35% SLU using the 2012 Guidelines. Inasmuch as Harley's permanency examination of claimant was "the first medical evaluation of SLU" and occurred after January 1, 2018, Harley improperly relied upon and applied the 2012 Guidelines in rendering his SLU opinion. As such, the Board's reliance upon Harley's medical report and testimony was erroneous; its decision is therefore not supported by substantial evidence and must be reversed (see *Matter of Fiato v New York State Dept. of Transp.*, 195 AD3d at 1253-1254; see also Workers' Compensation Board, Subject No. 046-1011, 2018 Permanent Impairment Guidelines for Schedule Loss of Use Evaluations [Dec. 28, 2017]; *Matter of Semrau v Coca-Cola Refreshments USA Inc.*, 189 AD3d at 1875 n 2). Upon remittal, the Board should, after accurately reviewing the existing medical evidence before it, determine anew the appropriate SLU percentage. The Board may also permit the parties to submit additional evidence on the issues presented herein (see Workers' Compensation Law § 123; *Matter of Ayars v Navillus Tile Co.*, 219 AD3d

at 1617). To the extent that claimant's remaining contentions are not rendered academic in light of our decision, they have been considered and found to be without merit.

Garry, P.J., Egan Jr., Lynch and Mackey, JJ., concur.

ORDERED that the decision is reversed, without costs, and matter remitted to the Workers' Compensation Board for further proceedings not inconsistent with this Court's decision.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court