

2022 WL 1530812 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: OTEGO-UNADILLA CENTRAL SCHOOL

Case No. G182 5877

Carrier ID No. 0024W21170 W873889

May 9, 2022

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Date of Accident 6/5/2018

The Full Board, at its meeting on April 19, 2022, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed November 29, 2021.

ISSUE

The issue presented for Mandatory Full Board Review is whether the record supports the award of a 50% schedule loss of use (SLU) of claimant's left leg without apportionment to a prior non-work related injury.

The Workers' Compensation Law Judge (WCLJ) awarded claimant a 50% SLU of the left leg and found “insufficient medical evidence to support apportionment of liability to a prior condition.”

The Board Panel majority affirmed the WCLJ decision.

The dissenting Board Panel member would apportion 50% liability for the SLU to claimant's prior left knee condition.

The self-insured employer (SIE) filed an application for Mandatory Full Board Review on December 10, 2021, arguing that claimant should be found to have no more than a 42.5% SLU of the left leg and that the schedule award should be apportioned 50% to claimant's prior non-work related injury.

The claimant filed a rebuttal on December 17, 2021, arguing that apportionment is inapplicable because her prior injury would not have resulted in an SLU if the injury had been work-related pursuant to the Board's 2018 Guidelines, and the medical evidence in the record supports an award of a 50% SLU of the left leg with no apportionment.

Upon review, the Full Board votes to adopt the following findings and conclusions.

FACTS

On June 5, 2018, claimant, a teacher, was injured when she fell while roller skating during a field trip. This claim is established for an injury to claimant's left knee and the average weekly wage has been set at \$1, 451.96.

Claimant's treating orthopedist, Dr. Meeks, recommended that claimant undergo a left [total knee replacement](#). The SIE argued that liability for claimant's medical and indemnity benefits should be apportioned to a prior left [knee injury](#), and the record was developed on the question of apportionment.

Dr. Meeks was deposed on July 1, 2019, and testified that he began treating claimant on February 13, 2019. Claimant had previously sustained a [lateral meniscus tear](#) in 2011 (sic) and undergone an [arthroscopic partial lateral meniscectomy](#). When asked to describe his diagnosis of the claimant, Dr. Meeks responded:

She has advanced arthritic changes of her left knee, lateral joint collapse. I would consider this to be end stage [degenerative arthritis](#), as she would not respond to arthroscopic treatment, but is a candidate for a [total knee replacement](#).

*2 (Deposition, Dr. Meeks, 7/1/19, p. 8). Dr. Meeks explained that a [total knee replacement](#) was appropriate because claimant “has lateral joint line collapse and [osteophyte](#) formation” (p. 9), she had not responded to conservative treatment, and was developing a progressive valgus angulation of the knee. Dr. Meeks believed that claimant's June 5, 2018, accident led to the need for her to undergo a [total knee replacement](#) at an earlier age than she would have otherwise. On cross-examination, Dr. Meeks testified that claimant's June 5, 2018, injury exacerbated her pre-existing arthritic changes and that 50% of claimant's current symptoms were due to her prior injury and 50% to her June 5, 2018, accident. Dr. Meeks also found that the need for [total knee replacement](#) surgery was also due 50% to her prior injury and 50% to the June 5, 2018, accident.

By a reserved decision filed August 22, 2019, the WCLJ denied the SIE's request that liability for this claim be apportioned to claimant's prior injury, finding that “her present need for treatment, including the TKR, was precipitated by the fall in June 2018.” However, the WCLJ found that “[a] pportionment may be revisited once claimant reaches maximum medical improvement and permanency is addressed.”

On October 24, 2019, Dr. Meeks performed a left [total knee replacement](#) with correction of valgus angulation. Dr. Meeks subsequently filed a C-4.3 (Doctor's Report of MMI/Permanent Impairment) based on a November 2, 2020, examination. Dr. Meeks indicated that he had discussed with claimant the possibility of performing a revision of her [total knee replacement](#) to regain stability in the knee. However, claimant did not wish to undergo further surgery and therefore Dr. Meeks found that she had reached maximum medical improvement. Dr. Meeks opined that claimant had a 50% SLU of the left leg. In an attached narrative, Dr. Meeks stated that he had found a “35% scheduled loss of use after [total knee replacement](#) adding 15% scheduled loss of use due to varus valgus laxity in the semiflexed position.” Dr. Meeks stated:

On physical examination she has about 5 degrees of hyperextension and 135 degrees of flexion. At full extension he (sic) has minimal opening to valgus stress, no opening to varus stress but at 30 degrees of flexion she has about 15 degrees of combined varus and valgus opening. With the knee flexed she is once again stable and there is no rotational deformity. No increased translation anterior and posterior.

Claimant was examined by the SIE's orthopedic consultant, Dr. Haheer, on December 16, 2020. In his report, Dr. Haheer stated:

Examination of the left knee revealed tenderness to palpation. There was mild (1+) effusion. There was no atrophy of the quadriceps. [McMurray's test](#) was negative. [Lachman's test](#) was negative. Anterior drawer sign was negative. Posterior drawer sign was negative. Patello-femoral [crepitus](#) was not present. Valgus & [Varus stress test](#) was stable.

*3 Dr. Hafer reported that claimant's left knee had flexion to 100 degrees and extension to three degrees and concluded that “[t]here is a 50% SLU to the left knee (due to decreased range of motion and surgery).”

At a hearing on February 11, 2021, the WCLJ set a deadline of April 11, 2021, for the parties to depose Dr. Meeks and Dr. Hafer, and indicated that he would direct claimant's counsel to submit all of the records of claimant's prior left knee treatment with Dr. Wittstein. Those directions are reflected in a decision dated February 17, 2021.

The record contains several reports dating from 2010 to 2014 concerning the treatment of claimant's knees. Claimant began treating with Dr. Elting on November 17, 2010, for pain and swelling in her left knee. In a December 10, 2010, report, Dr. Elting indicated that an MRI of claimant's knee showed a [meniscus tear](#) and other [cartilage injuries](#), and that he was referring claimant to Dr. Wittstein. On December 27, 2010, Dr. Wittstein performed “[I]eft [knee arthroscopy](#) with [chondroplasty](#) of the lateral femoral condyle with [microfracture](#) of the full thickness lesion, partial lateral [meniscectomy](#), [chondroplasty](#) of the patella and lateral tibial plateau.”

In a March 22, 2011, report, Dr. Wittstein found that claimant had full extension of her left knee, but flexion was “limited somewhat by the swelling in the knee about 110 degrees.” Dr. Wittstein found that claimant had “early degenerative changes in the lateral compartment...with valgus alignment about the left knee,” and that based on those findings, “it may be reasonable for her to at some point consider realignment-type procedure.” However, according to Dr. Wittstein, claimant was not interested in undergoing the procedure.

In a May 19, 2011, report, Dr. Wittstein again indicated that claimant was not interested in undergoing surgery to repair her valgus alignment. According to Dr. Wittstein, claimant had only slight [effusion in her knee](#), much less than during her previous examinations; no joint line tenderness; and good patellar mobility and range of motion. Dr. Wittstein indicated that claimant would only return as needed.

In a July 16, 2013, report, Dr. Wittstein indicated that claimant was being treated for a right [knee injury](#). According to Dr. Wittstein, claimant was an “active runner known to me status post left [knee arthroscopy](#) and [microfracture](#) done a couple of years ago. She reports that the left knee is doing very well, not having any swelling.” In addition to findings concerning claimant's injured right knee, Dr. Wittstein also noted that she had examined claimant's “[u]naffected left knee” and found no medial or lateral joint line tenderness, no peripatellar tenderness, no patellar apprehension, no retropatellar [crepitus](#), full range of motion, no effusion, no instability, and full strength. Dr. Wittstein noted that x-rays showed “some degenerative disease at the medial and lateral compartment as well as patellofemoral compartment of the left knee.” Dr. Wittstein also noted that claimant was “[d]oing well status post left knee [microfracture](#), x-ray evidence of early [degenerative joint disease](#) in the left knee”.

*4 In reports of treatment of claimant's right knee dated November 7, 2013, and December 3, 2013, Dr. Wittstein again noted that examination of claimant's left knee was unremarkable, with no tenderness or effusion, and full range of motion.

Dr. Meeks was again deposed on May 10, 2021, and testified that he performed an SLU evaluation of the claimant's left knee on November 2, 2020, and found that she had “[a] 35 percent schedule loss of use due to the [total knee replacement](#) and loss of tissue and bone, and then 15 percent schedule loss of use due to the instability that I detected on physical exam, but total of a 50 percent schedule loss of use” (Deposition, Dr. Meeks, 5/10/21, p. 8).

On cross-examination, Dr. Meeks testified that based on the Board's 2012 Impairment Guidelines, a partial excision of the meniscus, without any loss of range of motion, would equal a seven-and-a-half percent SLU of the leg. When asked whether, “if there are records that document that [claimant] did have a partial excision of the meniscus, you would agree that that would be appropriate, a 7 and a half percent loss of use,” Dr. Meeks responded, “Yes” (p. 13). Dr. Meeks explained that he added 15% to the SLU of claimant's leg due to medial and lateral laxity of the collateral ligaments. Dr. Meeks would apportion the SLU of claimant's leg 50% to her prior injury and 50% to the June 5, 2018, accident.

On re-direct examination, Dr. Meeks testified that under the Board's 2018 Impairment Guidelines, a [meniscectomy](#) alone, with no loss of range of motion, would not result in a schedule award.

Claimant waived the opportunity to depose Dr. Haher.

In a reserved decision filed July 23, 2021, the WCLJ awarded claimant a 50% SLU of the left leg and declined to apportion any part of the SLU to claimant's prior injury.

The SIE requested administrative review, arguing that claimant should be found to have no more than a 42.5% SLU of the left leg and that the SLU should be apportioned 50% to claimant's prior non-work related injury.

In rebuttal, claimant argued that the WCLJ decision should be affirmed.

MAJORITY OPINION

The Board Panel majority affirmed the WCLJ decision. The Board Panel majority stated:

Upon review of the record, the Board Panel majority finds that the claimant has a 50.00% schedule loss of use of the left leg with no apportionment to a prior injury. The claimant had surgery to the left knee from a prior injury performed by Dr. Wittstein in 2010 and in her 2013 reports, Dr. Wittstein indicated that the claimant's left knee had no signs of instability, strength was 5/5 in extension and she had full range of motion. Dr. Haher found a 50% schedule loss of use based on decreased range of motion and surgery. Dr. Meeks was aware of the claimant's prior injury and subsequent surgery, but his opinion of a 50% schedule loss of use is supported by the surgery and range of motion finding, and he indicated that the claimant would not have required a [total knee replacement](#) so soon but for the accident of record. As such, there is insufficient medical evidence to support apportionment of liability to a prior condition.

LEGAL ANALYSIS

Schedule Loss of Use

*5 The 2018 Guidelines provide that when a claimant undergoes a [total knee replacement](#), an SLU of 35% should be awarded if the outcome of the surgery is good, with additional loss of use added, not to exceed a total of 80%, based on deficits in range of motion, positional defects, atrophy, and other chronic complications (2018 Guidelines, p. 44). Here, both Dr. Meeks and Dr. Haher found that claimant had a 50% SLU of the left leg following her [total knee replacement](#). Dr. Meeks noted instability in claimant's knee and Dr. Haher documented range of motion deficits. The SIE proposes a mechanistic application of the 2018 Guidelines which it contends supports a finding that claimant has no more than a 42.5% SLU of the left leg. However, while the Board's Guidelines "provide useful criteria to be used in assessing a claimant's degree of disability, the ultimate determination rests with the Board and must be upheld if it is supported by substantial evidence" (Matter of [Soluri v Superformula Products, Inc.](#), 96 AD3d 1292 [2012]; see also Matter of [Semrau v Coca-Cola Refreshments USA Inc.](#), 189 AD3d 1873 [2020]).

Therefore, based on the opinions of Dr. Meeks and Dr. Haher, the Full Board finds that the record supports a finding that claimant has a 50% SLU of the left leg.

Apportionment

This case involves the narrow situation in which the relevant inquiry is whether a prior non-work related injury would have resulted in a schedule loss of use (SLU) award had that prior injury occurred in a work environment. An SLU award represents compensation for an impairment of future wage-earning capacity and is based upon a medical determination that there has been a loss of use, function, or range of motion of the body part in question (see [WCL § 15](#); see also e.g. Matter of [Landgrebe v County](#)

of *Westchester*, 57 NY2d 1 [1982]; *Matter of Pedro v Liberty Lines Express*, 246 AD2d 945 [1998]). When a preponderance of the evidence establishes that the claimant had a prior, non-work related injury that, had it been work-related, would have resulted in an SLU award, the Board can find that the prior injury caused “a disability in the compensation sense sufficient to warrant a finding of apportionment” (*Matter of Scally v Ravena Coeymans Selkirk Cent. School Dist.*, 31 AD3d 836 [2006] [[citations omitted]]).

The 2012 Guidelines provide:

Medial or lateral meniscus excision, for one or both, equals 7 1/2-10% loss of use of the leg. With joint defects and **muscle atrophy** average award is 15 - 20%. Partial excision of the meniscus without defects equals 7 1/2% loss of use of the leg. Excision of the meniscus should be documented by operative report or pathological report.

(2012 Guidelines, Special Consideration 9 [Knee], p. 28). However, that special consideration was not included in the revised 2018 Guidelines, and the current Guidelines do not provide for an SLU based solely on meniscus excision surgery, absent deficits in range of motion.

*6 The SIE contends the record supports a finding that claimant's prior injury would have resulted in an SLU award had the injury been work-related based on the 2012 Guidelines, which were in effect when the prior injury occurred. The SIE does not, however, make a compelling argument for applying the 2012 Guidelines. The 2012 Guidelines were updated and replaced by the 2018 Guidelines, which were designed “to be ‘...reflective of advances in modern medicine that enhance healing and result in better outcomes.’ [WCL § 15(3)(x)]” (2018 Guidelines, Forward, p. 2).

Insofar as the 2018 Guidelines are “reflective of advances in modern medicine” and are applicable to determine the SLU resulting from claimant's work-related injury, which occurred on June 5, 2018, the 2018 Guidelines should also be used to determine whether claimant's prior injury would have resulted in an SLU award had it been work-related.

In reports dated July 16, 2013, November 7, 2013, and December 3, 2013, Dr. Wittstein noted that examination of claimant's left knee was unremarkable, with no tenderness or effusion, and full range of motion following her December 2010 partial lateral **meniscectomy**. Because there is no evidence that claimant's prior injury resulted in a loss of range of motion or other deficit in her knee, the record does not support a finding that claimant's prior injury would have resulted in an SLU under the 2018 Guidelines. Therefore, the Full Board finds that the record supports a finding that apportionment of the SLU is not warranted.

Moreover, even if the question of whether claimant's prior injury would have resulted in an SLU was determined under the 2012 Guidelines, there is still insufficient evidence that the prior injury would have resulted in an SLU. When asked whether, “if there are records that document that [claimant] did have a partial excision of the meniscus, you would agree that that would be appropriate, a 7 and a half percent loss of use,” Dr. Meeks responded, “Yes.” However, it does not appear that Dr. Meeks ever reviewed the report of claimant's December 2010 knee surgery, or any of the medical records of Dr. Wittstein, and this response to a hypothetical posed on cross-examination, without benefit of review of those records, is insufficient evidence that claimant's prior injury would have resulted in an SLU (see *Matter of Hughes v Mid Hudson Psychiatric Center*, 197 AD3d 1376 [2021]).

Finally, there is no authority to support the alternative relief requested by the SIE of reduction of the SLU by 7.5%, which it asserts is the award claimant would have received had her prior injury been work-related.

CONCLUSION

ACCORDINGLY, the WCLJ reserved decision filed July 23, 2021, is AFFIRMED. No further action is planned by the Board at this time.

Clarissa Rodriguez

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