

2022 WL 3135055 (N.Y.Work.Comp.Bd.)

Workers' Compensation Board

State of New York

EMPLOYER: DEPARTMENT OF CORRECTION

Case No. G123 7129

Carrier ID No. W0721483319 W846505

July 27, 2022

*1 Police, Fire, Sanitation and Corrections CNY

Attn: Maria Ziccardi

350 Jay Street, 9th Fl

Brooklyn, NY 11201

Date of Accident 12/4/2014

The Full Board, at its meeting held on July 19, 2022, considered the above captioned case for Mandatory Full Board Review of the Board Panel Memorandum of Decision filed March 31, 2022.

ISSUE

The issue presented for Mandatory Full Board Review is the schedule loss of use (SLU) of the claimant's right arm.

The Workers' Compensation Law Judge (WCLJ) found that the claimant has an overall 35.50% SLU of the right arm, thereby entitling him to an 18.00% SLU of the right arm in this claim after deducting the 17.50% SLU of the right arm previously awarded in an associated claim.

The Board Panel majority found that claimant has an overall SLU of the right arm of 28.00%, entitling him to a 10.50% SLU of the right arm after deducting the prior 17.50% SLU.

The dissenting Board Panel member would affirm the WCLJ decision.

The claimant filed an application for Mandatory Full Board Review on April 14, 2022, arguing that the Board Panel majority should not have reduced the SLU of the right arm found by the WCLJ. The claimant concedes that the Board Panel majority correctly found that he has an overall 25.00% SLU of the arm based on his shoulder injury and does not dispute that it was appropriate to reduce his overall SLU by the 17.5% SLU of the right arm previously awarded. However, the claimant contends that the record supports the WCLJ's finding that he has a 10.50% SLU of the arm based on his right elbow injury, and an overall 35.50% SLU of the right arm, resulting in an 18.00% SLU of the right arm payable in this claim

The self-insured employer (SIE) did not file a timely rebuttal.

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

FACTS

The present claim is established for December 4, 2014, injuries to the right shoulder, right elbow, right wrist, and right hand that were sustained while the claimant was working as a corrections officer for the SIE.

The claimant also has an associated case (WCB Case No. G0437154) that is established for April 11, 2011, injuries to the back, right elbow, and right shoulder that were sustained while the claimant was working for the SIE. In 2013, the claimant was awarded a 17.50% SLU of the right arm in WCB Case No. G0437154 based on permanent impairments of his right shoulder and elbow.

On May 28, 2015, Rella & Associates P.C. (Rella) filed a Form OC-400 (Notice of Retainer and Appearance) indicating that it was representing the claimant in the instant matter.

On February 26, 2019, the Board received a Form OC-400 from Aronova and Associates, LLC (Aronova) advising that Aronova was substituting for Rella in representing the claimant.

Shortly thereafter, Rella filed a Form OC-400.1 (Application for a Fee by Claimant's Attorney or Licensed Representative) requesting a fee of \$5,000.00 for a total of 30.05 hours of work performed on the claimant's behalf, noting that it had received a prior fee of \$250.00.

*2 On November 26, 2019, the claimant was examined by Dr. Kaplan who filed a Form C-4.3 (Doctor's Report of MMI/Permanent Impairment). Dr. Kaplan noted that the claimant has multiple prior injuries, including injuries to the left and right shoulders, and the left elbow. Dr. Kaplan noted that the claimant's right [shoulder MRI](#) revealed a SLAP tear and partial [rotator cuff tear](#), and his right [elbow MRI](#) revealed a partial medial collateral [ligament tear](#) and lateral collateral [ligament tear](#). In the narrative attached to the Form C-4.3, Dr. Kaplan opined that the claimant has an overall 25.00% SLU of the right shoulder (arm) based on flexion of 130/180 degrees, abduction of 125 degrees, internal and external rotation of 70/80 degrees, and extension of 45/60 degrees. Dr. Kaplan also found a 12.50% SLU of the right elbow (arm), attributing 7.50% for motion deficits (flexion of 140/150 degrees, supination of 80/90 degrees, with full extension and full pronation), and 5.00% for persistent [epicondylitis](#) using Chapter 4.5 of the 2018 Impairment Guidelines (Guidelines). Lastly, Dr. Kaplan found a 20.00% SLU of the right wrist (hand) based on range of motion deficits (extension of 60/70 degrees, palmar flexion of 70/80 degrees, and ulnar deviation of 25/30 degrees, with normal radial deviation).

In WCLJ decisions filed on April 3, 2020, and September 15, 2020, the SIE was directed to produce medical evidence of permanency.

In a WCLJ decision filed on December 28, 2020, the WCLJ found that the SIE had waived its opportunity to produce an independent medical examination report. The WCLJ directed the parties to depose Dr. Kaplan and submit his deposition transcript within 45 days. The WCLJ also directed that Rella remain on notice for a fee.

Two attempts were subsequently made to depose Dr. Kaplan (February 25, 2021, and March 15, 2021). Pursuant to the March 15, 2021, Statement on the Record, the SIE's representative advised that the SIE was waiving the doctor's cross-examination.

Aronova submitted a Form OC-400.1 on June 3, 2021, in which it requested a fee of \$21,000.00 based on a total of 21 hours of work performed on the claimant's behalf.

On June 15, 2021, the WCLJ filed a reserved decision in which he indicated that Dr. Kaplan's permanency opinion was the only permanency opinion in the file, but that Dr. Kaplan had made certain errors in his calculations. Specifically, the WCLJ noted that the claimant's prior right arm SLU in WCB Case No. G0437154 had been 17.50%, rather than 15.00% as indicated by the doctor. The WCLJ also found that, based on Dr. Kaplan's range of motion findings, the claimant's right elbow SLU under the Guidelines is 10.50% of the arm, rather than the doctor's finding of 12.50%, and that the claimant's right wrist/hand SLU under the Guidelines is 16.25% of the hand, rather than the doctor's finding of 20.00%. The WCLJ found that the claimant has an overall 35.50% SLU of the right arm based on findings of a 25.00% SLU for the right shoulder and a 10.50% SLU for the right elbow. The claimant was thereby awarded an 18.00% SLU of the right arm (after deducting the prior 17.50% SLU of the

right arm), and a 16.25% SLU of the right hand, with no protracted healing period, entitling the claimant to 95.81 weeks of benefits at \$808.65 per week, less payments already made. The WCLJ also directed the SIE to take credit for wages paid to the claimant in the amount of \$2, 264.22; granted attorneys' fees of \$9, 000.00 to Rella and \$500.00 to Aronova; and discharged and removed Aronova from notice.

*3 The claimant and the SIE thereafter filed applications for administrative review of the WCLJ reserved decision, and the SIE filed a reimbursement request for a credit in the amount of \$5, 240.82 for wages paid to the claimant.

Aronova submitted an application for administrative review on behalf of the claimant asserting that the WCLJ reserved decision should be modified to reflect that Aronova is awarded a \$9, 000.00 attorney fee and to place Aronova back on notice, since it continues to represent the claimant.

The SIE maintained in its application for administrative review that the WCLJ reserved decision should be modified to reflect that there are no SLU nor increases in SLU, and to find, presumably in the alternative, that it is entitled to a credit of \$5, 240.82. The SIE indicated in Item 14 of the Form RB-89 (Application for Board Review) that it was not relying on any new or additional evidence in its application.

In rebuttal, claimant argued that the SLU findings should be affirmed, as they are supported by Dr. Kaplan's credible opinion and the Guidelines. Claimant also asserted that the WCLJ's determination as to the SIE's credit should be affirmed, since it was based on the documentation in the Board file at the time of the decision. Claimant argued that the new reimbursement request submitted by the SIE after the filing of the reserved decision should not be considered because the SIE failed to indicate in its Form RB-89 that it was relying on new evidence. Claimant also requested that the reserved decision be modified to reflect the proper allocation of the attorney fees, as argued in his application for administrative review.

LEGAL ANALYSIS

Chapter 4 of the Guidelines addresses permanent impairment of the elbow. Section 4.4 states that “[t]o determine the overall schedule loss of use of the elbow, first assess whether any special considerations apply. If not, overall loss of use of the elbow is calculated by combining any noted deficits in extension and flexion. When evaluating based on range of motion, the maximum loss of use for the elbow cannot exceed [ankylosis](#).” Special Considerations for the elbow are enumerated in Section 4.5. As is relevant here, Special Consideration #3 states that “[m]edial and [lateral epicondylitis](#) are usually given a schedule, but if it becomes chronic, severe and disabling, consider classification.”

Here, Dr. Kaplan found that the claimant has a 12.50% SLU of the right elbow, attributing 7.50% for motion deficits (flexion of 140/150 degrees, supination of 80/90 degrees, with full extension and full pronation), and 5.00% for persistent [epicondylitis](#). However, Special Consideration #3 does not provide for a schedule loss value to be assessed solely on the presence of persistent [epicondylitis](#), and therefore the SLU based on claimant's elbow injury should be determined based solely on deficits in extension and flexion.

Table 4.4 sets forth SLU values based on deficits in extension and flexion of the elbow and indicates that flexion to only 125 degrees equates to a 7.50% SLU. Dr. Kaplan found that claimant had flexion to 140/150 degrees and full extension. Thus, claimant's minimal loss of flexion of the elbow equates to a 3.00% SLU pursuant to the Guidelines.

*4 As to the SIE's request for a credit in the amount of \$5, 240.82, the SIE is relying on evidence that was submitted after the WCLJ reserved decision of June 15, 2021, was filed. The SIE failed to include the required affidavit or any rationale for why such evidence should be considered. Based on these facts, we will not consider this request for additional reimbursement which we find to be untimely.

Lastly, as Aronova is the claimant's current counsel, they are placed back on notice. With regard to the attorneys' fees awarded, the WCLJ reserved decision is devoid of any rationale as to the findings. While Aronova contends that the WCLJ unintentionally awarded the bulk of the attorney fees to Rella when he intended to award same to Aronova, it is impossible to determine if this is accurate based on review of the decision.

Therefore, the Full Board finds, upon review of the record and based upon a preponderance of the evidence, that the claimant has an overall 28.00% SLU of the right arm, which amounts to an increase of 10.50% in this file; a 16.25% SLU of the right hand; the SIE is entitled to a credit in the amount of \$2, 264.22; Aronova is placed back on notice and the attorneys' fees are rescinded without prejudice.

CONCLUSION

ACCORDINGLY, the WCLJ reserved decision filed on June 15, 2021, is MODIFIED to reflect an increase in SLU to the right arm of 10.50% in this case and to place Aronova back on notice. The attorneys' fees are rescinded without prejudice and the matter is restored to the hearing calendar for further consideration of the attorney fee issue, with both firms to be present and the WCLJ to provide a rationale for his findings on this issue. The case is continued.

Chair - Clarissa Rodriguez

2022 WL 3135055 (N.Y.Work.Comp.Bd.)

End of Document

© 2022 Thomson Reuters. No claim to original U.S. Government Works.