1 COURT OF APPEALS

2 STATE OF NEW YORK

3 --

MATTER OF JOHNSON,

4 Appellant,

5 -against-

6 NO. 29

CITY OF NEW YORK,

7 Respondent.

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MATTER OF LIUNI,

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Appellant,

11 NO. 30

-against-

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GANDER MOUNTAIN,

13

Respondent.

14 --

20 Eagle Street
Albany, New York

15 March 17, 2022

16 Before:

17 CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA

18 ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON

19 ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

20 ASSOCIATE JUDGE SHIRLEY TROUTMAN

21

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24 Cheryl Odom
Official Court Transcriber

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1 CHIEF JUDGE DIFIORE: Number 29 and 30, Matter of
2 Johnson v. the City of New York and Matter of Liuni v.
3 Gander Mountain.
4 Counsel?
5 MR. GREY: Good afternoon, Your Honor. Robert
6 Grey, Grey & Grey, on behalf of appellant Thomas Johnson in
7 Johnson v. the City. I - - - I'd respectfully request one
8 minute for rebuttal.
9 CHIEF JUDGE DIFIORE: You may have one minute,
10 sir.
11 MR. GREY: Thank you, Your Honor. May it please
12 the court, respondents Workers' Compensation Board and City
13 of New York have conceded in their briefs that the
14 Appellate Division's decision in matter of Genduso was
15 erroneous as a matter of law and that there is no basis
16 upon which a previous award for schedule loss of use to one
17 part of a member should automatically be deducted from a
18 later schedule loss of use award for a different part of
19 the member.
20 So with that in mind, there is no question that
21 the decisions, both in my case, Johnson, and in matter of
22 Liuni, must be reversed and that there must be a remand.
23 The only remaining question is what standard the Appellate
24 Division and the Workers' Compensation Board should employ
25 upon that remand.

1 Our position regarding that issue is that the
2 appropriate standard is precisely the standard as contained
3 in Workers' Compensation Law, Section 15(7), and in this
4 court's previous decision in matter of Zimmerman, which is
5 that the injured worker should be compensated for the
6 injuries caused by an accident, in an amount no less than
7 the compensation the statute provides for that accident and
8 without conjunction - - - and not in conjunction with any
9 previous disability.
10 That standard would require the Workers'
11 Compensation Board to assess the deficits that are causally
12 related to any individual accident and to make an
13 appropriate award for schedule loss of use based on the
14 deficits causally related to that accident.
15 For decades, the Workers' Compensation Board has
16 promulgated guidelines to do precisely that. It has
17 guidelines to assess the schedule loss of use of a limb
18 based on knee deficits or knee def - - - or hip deficits or
19 elbow deficits or shoulder deficits and - - - and many
20 other commonplace work injuries.
21 In this case, the administrative law judge and
22 the Workers' Compensation Board accepted the opinion of the
23 treating physician that Mr. Johnson's left-knee injury,
24 standing alone, would have resulted in an eighty percent
25 schedule loss of use of his left leg, and the injury to Mr.

1 Johnson's right knee, evaluated alone, would have resulted
2 in a schedule loss of use of forty percent of his right
3 leg.
4 However, the Board then deducted what the
5 administrative law judge found were "separate and distinct
6 injuries" from his previous accident involving his hips,
7 based solely on the Appellate Division's decision in
8 Genduso, which the Board has not - - - has now acknowledged
9 is incorrect as a matter of law, and the City, in their
10 reply brief to the amicus AFL-CIO brief, has also
11 acknowledged is erroneous as a matter of law.
12 JUDGE CANNATARO: Counsel, the WCLJ did offer the
13 - - - Mr. Johnson's physician the opportunity to opine as
14 to the proportion of loss, as between the - - - the two
15 injuries to, I believe, it was the left leg; did he not?
16 MR. GREY: What happened, Your Honor, is that - -
17 - that Johnson's doctor submitted a schedule loss involving
18 the knees only. The Board directed the City to respond to
19 the report regarding the knees only. The City then
20 objected to that, and there was a hearing.
21 At the hearing, there was a dispute about - - -
22 in view of the fact that the man had previously gotten a
23 fifty percent schedule loss award for his left hip, if the
24 eighty percent report were considered with a - - - he could
25 get, quote unquote, 130 percent of a leg. So that issue

1 was briefed. And on the basis of this court's decision in
2 Zimmerman, the judge issued a decision saying that because
3 the new injuries were separate and distinct, the case could
4 be - - - could proceed and be evaluated on the injuries
5 related to this accident alone.
6 JUDGE CANNATARO: So this raises the question - -
7 -
8 MR. GREY: And the City didn't appeal that.
9 JUDGE CANNATARO: This raises the question that
10 knees, hips are not actually listed as members in - - - in
11 the relevant sections. So how do we get there? How do - -
12 - how do we aggregate knees and hips, and - - - and aside
13 from legs, which is the named body member?
14 MR. GREY: Right. Well, Your Honor, I'm certain
15 that in 1914 and '15, the legislature, when it enacted the
16 statute at that time, understood that someone could injure
17 a part of a leg and not the entirety of the leg. And as a
18 result, it provided, in the statute, compensation for parts
19 of members, and it also provided compensation for
20 proportional loss of a member.
21 So essentially, what the respondents' position is
22 is that the loss - - - well, I'll state my position. My
23 position is that the schedule in the statute is simply the
24 means of calculation of the award related to the injury.
25 So if in this accident, the man has a fifty

1 percent or an eighty percent or a forty percent loss of use
2 of his leg, the statute provides that you're going to take
3 forty percent of 300 and - - - 288 weeks for a leg. You're
4 going to multiply that by his benefit rate, and that's the
5 method of calculation of the award.
6 There is nothing in the Workers' Compensation Law
7 that is a - - - a lifetime cap on anything. The - - - the
8 statute - - - and 15(3), in fact, leads with, in case of.
9 It doesn't say, in all cases of. It doesn't say, no matter
10 how - - - how many injuries the man ever has, this is his
11 lifetime cap. Everything in the statute is case-based.
12 If the worker has a new injury, he has a new date
13 of accident. The notice provision runs anew. The statute
14 of limitations run anew. The periods of temporary and
15 permanent disability are calculated anew. He has a - - -
16 JUDGE TROUTMAN: Does the plaintiff - - -
17 MR. GREY: - - - new average weekly wage.
18 JUDGE TROUTMAN: Does the plaintiff then have to
19 establish that that new injury caused greater disability
20 that was not compensated for?
21 MR. GREY: Absolutely, Your Honor. The - - -
22 there - - - there's no argument here that - - - that any
23 injured worker should receive duplicate comper - - -
24 compensation. So if in injury number 1, the deficit is a
25 ninety degree loss of flexion in the knee, and following

1 injury number 2, the loss of flexion in the knee is exactly
2 the same, then there's no additional award.
3 But if in injury number 1, the - - - the - - -
4 the worker has one deficit, and injury number 2, they have
5 an entirely different deficit, the - - - the statute
6 provides that compensation should be provided for injury
7 number 2, without regard to the previous disability.
8 JUDGE CANNATARO: And if the sum of the deficits
9 should exceed the - - - the - - - the award that would be
10 given for a total loss of use, that's just how it goes?
11 MR. GREY: In no individual case can the worker
12 receive more than one hundred percent of a limb. That - -
13 - that's clear.
14 JUDGE WILSON: By individual case, you mean an
15 accident?
16 MR. GREY: In one accident, right.
17 JUDGE WILSON: Yeah.
18 MR. GREY: I mean, that's fundamentally what - -
19 - what the dispute here comes down to. And what it's
20 really - - -
21 JUDGE CANNATARO: And what about the aggregate?
22 MR. GREY: It's really the only point of dispute
23 between us and, I know, the City and, I believe, the
24 Workers' Compensation Board is whether the schedule in the
25 law is a per-case limit or a lifetime limit.

1 The complication of making it a lifetime limit
2 is, to take Zimmerman as an example, you know, the man had
3 a below-elbow amputation. He was assessed as having an
4 eighty percent loss of use of his arm. Any subsequent
5 employer now reaps a windfall. They've - - - they're
6 required by law to purchase a workers' compensation policy
7 to cover benefits for their employee. But their liability
8 for - - - for that employee is limited to another twenty
9 percent of the arm.
10 If he had had a previous - - - if - - - if the
11 previous injury had been evaluated at a hundred percent of
12 the arm, and Zimmerman had a subsequent accident and had an
13 amputation at the shoulder, under the respondents'
14 approach, he would get nothing.
15 JUDGE WILSON: Can I ask you about Mr. - - - over
16 here; sorry - - - about Mr. Johnson's - - -
17 MR. GREY: I'm sorry, Your Honor.
18 JUDGE WILSON: - - - his left leg, just for a
19 minute?
20 MR. GREY: Right.
21 JUDGE WILSON: The way I read the record, Dr.
22 Long opined that he had a forty percent scheduled loss of
23 use in the left knee. With me so far?
24 MR. GREY: It - - - it's the right, but yes, Your
25 Honor.

1 JUDGE WILSON: Oh, sorry. It's the - - -

2 MR. GREY: I - - - I had trouble remembering them

3 also.

4 JUDGE WILSON: Okay. It's the right?

5 MR. GREY: On the right, he was assessed as

6 having forty percent for the knee. And the Board deducted

7 from that a previous fifty-two and a half percent - - -

8 JUDGE WILSON: And did he get - - -

9 MR. GREY: - - - for his hip - - -

10 JUDGE WILSON: And did he get - - - sorry.

11 MR. GREY: - - - and gave him zero.

12 JUDGE WILSON: Did he get the forty percent

13 because of the total knee replacement?

14 MR. GREY: Correct.

15 JUDGE WILSON: And the IME also awarded forty

16 percent because of the total knee replacement?

17 MR. GREY: The - - - the IME gave him forty

18 percent on the left and twenty-seven and a half percent on

19 the right. The treating doctor gave him eighty percent on

20 the left and forty percent on the right. The Board gave

21 him nothing for the right, notwithstanding the fact that

22 everyone agreed that there was a causally related

23 disability to the - - -

24 JUDGE WILSON: Well, that's where - - - that's

25 ultimately where I was going is that even the City's IME

1 would give him something?
2 MR. GREY: Yes, Your Honor. That's - - - that -
3 - - that's - - - that's why everyone agrees that Genduso
4 was wrongly decided. You know, everyone agrees that there
5 was a causally related deficit in - - - to both knees,
6 related to this accident, and that the man should be
7 compensated for the causally related deficit to his knees
8 for both accidents. There - - - you know, everyone agrees
9 that he should not have got - - - I think, that he should
10 not have gotten zero for his right leg.
11 The sum total of the dispute is whether he was
12 entitled to an independent evaluation of his left knee
13 without regard to the prior, as opposed to you have to look
14 at them both, and under no circumstances can they exceed
15 one hundred, which the cases refute.
16 I believe my time's up, Your Honors.
17 CHIEF JUDGE DIFIORE: Yes, sir, it is. Thank
18 you.
19 Counsel?
20 MR. TEFF: Thank you, Your Honors. My name is
21 Justin Teff. I represent Joseph Liuni in the matter of
22 Liuni v. Gander Mountain.
23 I am going to start by saying I agree with
24 everything that Mr. Grey has - - -
25 CHIEF JUDGE DIFIORE: Excuse me.

1 MR. TEFF: - - - said in terms of - - -

2 CHIEF JUDGE DIFIORE: Counsel, are you requesting

3 any rebuttal time?

4 MR. TEFF: Oh, no. I'm sorry, Your Honor.

5 CHIEF JUDGE DIFIORE: Okay. Thank you.

6 MR. TEFF: No rebuttal time.

7 I agree with everything that Mr. Grey said in

8 terms of what remains for the court, in terms of

9 determination, at this point. But I did want to add,

10 because the one point that seems to have not been conceded

11 by the employer in my case and a point raised by the court

12 here today, as well as, quite honestly, every board and

13 counsel for employer and carrier that I've discussed this

14 with, as stated by the court, how do you get past the fact

15 that the statute plainly uses the word "arm" and plainly

16 uses the word "leg"?

17 Having thought quite a bit, have an answer I am

18 completely comfortable proffering to the court. Your

19 Honors, we respectfully submit that although the phrase

20 "plain language" is one that is thrown around quite a bit

21 by lawyers in various contexts, the true and penultimate

22 goal of statutory interpretation is not slavish,

23 textualistic adherence to the plain language of the

24 statute. Rather, plain language is made with a series - -

25 - or first - - - pardon me - - - in a series of successive

1 tools, which we utilize to try to ascertain, if it is not
2 perfectly clear, the true intent of the legislature that
3 passed the act.
4 In fact, while it is a bit down on the list,
5 there is actually a canon that says that if slavish
6 adherence to the text yields a result which is seemingly
7 absurd within the context, then that approach is to be
8 reconsidered.
9 Admittedly, Your Honors, I was not a member of
10 the state legislature in the second decade of the 20th
11 century. But I do know that this was a body that passed
12 one of the first in our nation of these progressive
13 workers' compensation acts, only to see it quickly struck
14 down on Constitutional grounds.
15 That same body, more or less, I imagine, then
16 undertook the utterly momentous task of securing passage of
17 a state Constitutional amendment that would permit
18 enactment of the humanitarian act they so desired. That
19 same body then re-passed this worker-oriented law, which,
20 by the way, was not of general applicability at the time
21 but was specifically limited to a list of the known most
22 hazardous employments in that era.
23 Now, in order for the employer's argument to hold
24 water, as it were, what needed to happen, in the midst of
25 all this, in the session chambers just a few blocks from

1 here, is that this very same body of legislators that
2 undertook this momentous task thought, wait a minute.
3 Here's an idea. After all we just did, what if we word
4 this very carefully to ensure that all of these workers
5 will only be permitted to suffer one major injury to each
6 joint in their arm or their leg, for instance, the shoulder
7 or knee, and will never again be permitted, for the rest of
8 their working lives, to be compensated for any permanent
9 loss to any different joint in the same extremity, such as
10 the elbow or hip. Yes, there it is. Let's finally get
11 this passed. Let's get it over to the governor.
12 Your Honors, I find it highly doubtful that this
13 seemingly absurd result would represent the true intentions
14 of the lawmakers that struggled so diligently to promulgate
15 this revolutionary humanitarian act. As well, I find it
16 highly doubtful that this honorable court got it wrong when
17 it was presented with this very issue fifty-one years ago,
18 in matter of Zimmerman, and decided that, indeed, an
19 injured worker in New York may be compensated for different
20 injuries to different joints in the same extremity.
21 And Your Honors, I find it highly doubtful, as it
22 seems to have been conceded by most in the courtroom, that
23 all of the rest of us have been getting this wrong for a
24 hundred years, until somehow, four years ago, the holy
25 grail of workers' compensation was unearthed.

1 For these reasons, Your Honor, as well as those
2 set forth in our brief, we respectfully ask this court to
3 reverse the order of the Appellate Division and remand this
4 matter to the Board with a very specific instruction that
5 there is utterly no black-letter prohibition against an
6 injured worker being separately and distinctly compensated
7 for permanent injuries to different joints in the same
8 extremity and that indeed this is a determination that is a
9 matter of substantial evidence.
10 JUDGE CANNATARO: Counsel, just as a point of
11 order with respect to Zimmerman, that involved what was,
12 even then, two separate members, did it not? It was a hand
13 which was listed and a different part of the arm, which is
14 included as - - - as a different member.
15 MR. TEFF: I'm sorry, Your Honor. Would you
16 repeat - - -
17 JUDGE CANNATARO: The - - - the injuries that
18 were added together in Zimmerman - - -
19 MR. TEFF: Yeah.
20 JUDGE CANNATARO: - - - they - - - they involved
21 two different specified body members, did they not?
22 MR. TEFF: And in what refer - - - frame of
23 reference are you asking? My case or Zimmerman?
24 JUDGE CANNATARO: Well, you've made reference to
25 Zimmerman and - - - and how - - -

1 MR. TEFF: Okay. I believe Zimmerman was two
2 different parts of the arm, the elbow and the shoulder, if
3 I'm not reading it incorrectly, Your Honor. The hand is
4 separately enumerated.
5 JUDGE CANNATARO: And you don't think that
6 Zimmerman's injury was to a hand and a forearm? You think
7 it was an elbow and a shoulder? Is that - - -
8 MR. TEFF: I believe it was shoulder and then
9 forearm, elbow, from the way I read it. But again, forgive
10 me if I'm misinterpreting that, Your Honor.
11 JUDGE CANNATARO: Well, I - - - I may be
12 misreading as well. But it - - - it seems as if the
13 analysis would be different if you're talking about two
14 differently enumerated members.
15 MR. TEFF: We don't believe that it is, Your
16 Honor, because we, again, cannot believe that after going
17 through all that they did, the legislature intended each of
18 these dangerously employed injured workers to be able to
19 suffer only one injury to each of the major limbs and their
20 extremity throughout all of their working lives - - - or
21 pardon me, each of the joints. Hip or knee, elbow or
22 shoulder, that seems incongruous, again, with the
23 background that we believe is set forth. That said - - -
24 JUDGE RIVERA: Well, Counsel, if I can interrupt
25 you. I'm on the screen.

1 MR. TEFF: Oh, sorry, Your Honor.
2 JUDGE RIVERA: Sorry about that. Well, in your
3 case, I understand the point you're making, but I'm not
4 sure how relevant it ends up being, at the end of the day,
5 because didn't the expert that was credited say that the
6 injuries to the different parts of the member were wholly
7 unrelated - - -
8 MR. TEFF: In our - - -
9 JUDGE RIVERA: - - - or there was no overlap?
10 Isn't that sort - - - isn't that the difference,
11 potentially, between your case and Mr. Johnson's case?
12 MR. TEFF: It can be viewed as a difference,
13 certainly, Your Honor. We would - - -
14 JUDGE RIVERA: Well, it may be a dispositive
15 difference. I mean, that - - - that's the position the - -
16 - the Board is taking or at least potentially could be a
17 view of your case.
18 MR. TEFF: I - - - I'm going to maintain that as
19 a matter of law, Genduso was the controlling factor here,
20 and seemingly, therefore, we should start with removing
21 that. And then if records need further development, they
22 can be further developed. But to have a blanket black-
23 letter rule that no injured worker in New York may ever
24 have a separate permanent injury to the elbow or the
25 shoulder just does not make any sense.

1 CHIEF JUDGE DIFIORE: Thank you, Counsel.
2 Counsel?
3 MR. GINSBERG: May it please the court, the Board
4 asked this court to do two - - -
5 CHIEF JUDGE DIFIORE: Counsel, please put your
6 appearance on the record.
7 MR. GINSBERG: Oh. Brian Ginsberg for the Board,
8 Your Honor.
9 CHIEF JUDGE DIFIORE: Thank you.
10 MR. GINSBERG: May it please the court, the Board
11 asks the court to do two things in these appeals. Number
12 one, the court should hold, which I think is now common
13 ground among everyone here, that a second schedule award
14 for an injury to a different part of the same enumerated
15 member is limited to any additional loss of use of the
16 member as a whole.
17 Second, the court should further hold that the
18 calculation of whether and to what extent the injury to
19 that different part of the member causes additional loss of
20 use of the member of a - - - as a whole is a case-by-case
21 determination based on the totality of credible medical
22 evidence introduced in that case, not susceptible to a
23 categorical rule. If the court - - -
24 JUDGE GARCIA: So if we adopt that rule, what
25 would we do in these two cases?

1 MR. GINSBERG: Well, if you were to adopt those
2 two baseline rules, we think there's still enough, based
3 upon the peculiar facts of Johnson, to affirm the Third
4 Department's decision in Johnson.
5 As Your Honor's colleagues were interrogating
6 with my opposing counsel, there seems to be an independent
7 failure of proof, just as an evidentiary matter, when the
8 doctor was prompted to give evidence of any other injury to
9 the leg that was greater than the forty or eighty percent
10 he had isolated for the knee. He didn't come up with any,
11 so the forty or eighty percent was stuck.
12 JUDGE WILSON: That's - - - that's Dr. Long. But
13 what about Dr. Parisien?
14 MR. GINSBERG: Oh, the other doctor gave more,
15 gave - - - gave a different picture of things. But Dr.
16 Long was - - - was the doctor who was credited.
17 JUDGE WILSON: No, I understand. But the - - -
18 but the independent medical examiner, you know - - - let me
19 ask it this way. Is the - - - is the report - - - and I
20 think he was also deposed - - - deposition from Dr.
21 Parisien, would that have been sufficient to - - - under
22 your formulation of the rule, evidentiarily sufficient to
23 support the award - - - the schedule loss of use award that
24 that doctor came up with?
25 MR. GINSBERG: Yeah. I - - - I - - - I think

1 that might have. My limited point is that there is
2 substantial evidence in the record to sustain the
3 credibility findings that the Workers' Compensation Law
4 judge and the Board actually made. So again, we're asking
5 for a new legal rule, no question about that. But no one -
6 - - at least, we are not asking the court to undo the
7 factual findings of the Workers' Compensation Law judge and
8 the Board, to the extent those findings are based on
9 substantial evidence, which is the case in Johnson.
10 I think we all agree that in Liuni, there would
11 have to be a vacate and remit to the Board to be properly
12 instructed to apply these case-by-case rules that I just
13 set forth, as opposed to the categorical rule of Genduso.
14 And we don't have any strong objection to a vac - - - a
15 similar vacate and remit in the Johnson matter either.
16 Really, the Board's interest is, at the end of the day,
17 this court should set forth - - - should make clear those
18 two rules that I opened with.
19 JUDGE WILSON: Yeah, I'm - - - I'm getting
20 something a little - - - or trying to get at something a
21 little different, which is not what the result in that case
22 ought to be. But under your formulation of the rule, which
23 turns on the - - - the sufficiency - - - and the reason
24 you're rejecting Long is because you think that's
25 insufficient, under the rule you're - - - you're

1 promulgating or proposing, to satisfy his evidentiary
2 burden.
3 If, instead - - - what I'm trying to get at is
4 if, instead, his doctor had - - - had testified and
5 provided the report in the form that Dr. Parisien's, would
6 that have met the evidentiary standard you're seeking for?
7 MR. GINSBERG: I think it would have met the
8 evidentiary standard. I also think, though, that that
9 would run into an additional legal hurdle, which is - - -
10 which has been referenced a little bit today, which is the
11 one hundred percent limit. Johnson, namely, would need
12 legal authority to recover compensation for greater than a
13 hundred percent of the loss of use of the given member.
14 And there's no authority for that in the Workers'
15 Compensation Law.
16 For - - - as a common-sense matter, you can only
17 lose one hundred percent of something. You can't lose any
18 more than that. You can't lose something twice. So one
19 would think that Johnson would need to find an
20 exceptionally clear statement in the Workers' Compensation
21 Law, in the case law, in some authority for that
22 counterintuitive, contrary rule. And there is none.
23 What Johnson relies on to exceed the one hundred
24 percent limit are decisions from this court, from the
25 Appellate Division, Third Department, and from the Board

1 that are all follow-ons, Your Honor, to the Zimmerman case.
2 And all of those cases, like Zimmerman, involve awards for
3 the loss of use of multiple, separately scheduled members,
4 such as - - - indeed, it's the case in Zimmerman. This is
5 most clearly stated in the Appellate Division decision in
6 that case. There, the hand and the arm.
7 The hand is, anatomically, of course, a component
8 part of the arm. But they are both statutorily separately
9 scheduled. So even in Zimmerman and the cases that follow
10 Zimmerman from the Third Department, from the Board, et
11 cetera, no court nor the Board has ever authorized - - - to
12 - - - to my knowledge, has ever authorized recovery of
13 greater than one hundred percent compensation for any
14 single, separately scheduled member.
15 And you know, I - - - I'm not sure exactly what
16 the employer in Gander Mountain is going to get up here and
17 say. But they seem to advocate a categorical - - - in
18 their briefs, anyway, a categorical rule in their favor
19 that injury to a different part of a member never
20 constitutes an independent loss of use of the member as a
21 whole and always justifies an offset, basically the Genduso
22 rule.
23 We don't find any support for the Genduso rule in
24 the - - - in - - - in the decisional law or in the - - -
25 the Workers' Compensation Law. The - - - the Gander

1 Mountain employer, for that point - - - and - - - and
2 Genduso points to 15(7). But that just says that
3 compensation for an additional loss of use of the member is
4 limited to that actually caused by the specific injury in
5 any given case. Medical evidence could come in, as it did,
6 at least potentially, in the Liuni case, showing that those
7 injuries are separate and independent.
8 And for the reasons that I think Your Honors have
9 been exploring with my colleague on the other side, the
10 categorical rule in Johnson is similarly unsupported. And
11 I'll just close with one statutory point on that before I
12 sit down. My friend on the other side, representing Mr.
13 Johnson, referred to - - - I think he was intending to
14 refer to Workers' Compensation Law 15(3)(u), which
15 authorizes an aggregate schedule award for the loss of use
16 of "more than one member or parts of more than one member
17 set forth in paragraphs a through t."
18 And he was invoking that provision in an attempt
19 to show that this authorizes sort of a blinkered part-by-
20 part analysis, as opposed to a loss of use of the member as
21 a whole analysis. The text itself refutes that because
22 that modifier, "set forth in paragraphs a through t", that
23 applies not only to the word "member"; it applies to the
24 word "part" also. And it therefore means that the only
25 parts of members that can qualify for enumer - - - for

1 separately enumerated awards are those that are themselves
2 separately scheduled.
3 So we're really back to where we started - - -
4 and I'll close with this - - - that there are no
5 categorical rules in this analysis. It's a case-by-case
6 analysis to determine whether a different - - - whether a
7 successive injury to a different part of the same member
8 fully translates into an additional loss of use of that
9 member as a whole, partially translates into an additional
10 loss of use of that member as a whole, or doesn't translate
11 at all. The Board should be permitted, going forward, to
12 make that determination on a case-by-case basis, based upon
13 the evidence presented. Thank you, Your Honors.
14 CHIEF JUDGE DIFIORE: Thank you, Counsel.
15 Counsel?
16 MR. MATZA-BROWN: May it please the court, Daniel
17 Matza-Brown for the City of New York as the employer-
18 respondent in the Johnson matter.
19 This appeal is fundamentally about administrative
20 law judges' fact-finding authority. And in particular, the
21 key question here is whether the administrative judge had
22 the authority to require Mr. Johnson to bear his burden of
23 proof, by which I mean to require Mr. Johnson to show the
24 amount of loss of use of his legs that had not been
25 previously compensated in the prior award.

1 Now, I want to focus on Mr. Johnson's left leg
2 because I think that if we walk through the evidence there
3 and if we walk through what the administrative judge did
4 with respect to the left leg, it becomes clear why
5 affirmance and not remand is warranted here.
6 For the first award, Mr. Johnson presented
7 evidence of impairment to his hip that translated to a
8 fifty percent permanent loss of use of his leg. And I want
9 to emphasize "permanent" here. My colleague, speaking for
10 Mr. Johnson, I think, never once used the word "permanent."
11 But these are awards for permanent losses of use.
12 For the second award, Mr. Johnson then submitted
13 a written opinion of his doctor, saying that he had a knee
14 - - - a knee impairment yielding a eighty percent loss of
15 use. The administrative judge essentially asked counsel,
16 are you saying that your - - - your client's entitled to
17 130 percent, to which counsel said, yes.
18 And I think the administrative judge then,
19 probably, scratched her head a bit and said, all right, if
20 you're - - - if you're going to come to me and say, my
21 client has a hundred percent loss of use or maybe even more
22 than a hundred percent loss of use, cumulative total,
23 you're going to need to prove up your case.
24 And so at page 139 of the record, the
25 administrative judge said, I want the doctors to testify as

1 to the loss of use for all sites, for all the impairments
2 to the leg, so that the - - - so that they could prove up
3 the cumulative loss of use, which would then permit the
4 administrative judge to determine what percent loss of use
5 of the legs had not been previously awarded and previously
6 covered in the first award.
7 Mr. Johnson's doctor declined to address that
8 issue in his testimony. And - - - and in fact, he
9 testified, at page 186 of the record, that he was not even
10 asked to do so. Right? We can understand why,
11 strategically, the claimant's attorney may not want to have
12 asked the doctor this, because a doctor will not get up
13 under oath and say, oh, I believe the cumulative loss of
14 use is 120 percent, right? It's - - - as my colleague
15 said, it's a factual impossibility, right?
16 So the claimant's attorney hoped to get the 130
17 percent. But it is completely rational and completely
18 within the administrative judge's fact-finding authority to
19 ask the medical experts here to assess the cumulative loss
20 of use of the member.
21 When no additional evidence was put in, the
22 highest number the administrative judge had was eighty
23 percent loss of use for the left leg.
24 JUDGE TROUTMAN: So Johnson is a failure of
25 proof?

1 MR. MATZA-BROWN: Johnson is a failure of proof.
2 That's exactly - - - exactly correct, Your Honor. And what
3 the administrative judge did finds ample support, strong
4 support, in both the statutory text and the statutory
5 intent.
6 JUDGE WILSON: So let me ask you, then, about Dr.
7 Parisien's opinion that Mr. Johnson suffered a forty
8 percent causally related schedule loss of use of the left
9 leg. Is that cumulative or noncumulative?
10 MR. MATZA-BROWN: I'm sorry. Forty percent of
11 the left leg, Your Honor, or - - - or - - - or the right
12 leg?
13 JUDGE WILSON: Forty percent of the left is what
14 I'm reading from his report at page 119 of the record.
15 MR. MATZA-BROWN: Bear with me, Your Honor. Page
16 119, you say. All right. Well, that's - - - that's the -
17 - - that - - - that is the - - - the City's doctor - - -
18 JUDGE WILSON: Right.
19 MR. MATZA-BROWN: - - - whose - - - whose opinion
20 was not credited by the - - - by the - - - by the ALJ. But
21 to turn to your question from before, which, I think, is
22 what you're getting at, is - - - is this - - - is this
23 notion where if both doctors found some impairment - - -
24 JUDGE WILSON: No, no, I'm asking some - - - I'm
25 sorry. I'm asking something different, which is - - -

1 MR. MATZA-BROWN: Okay.
2 JUDGE WILSON: - - - you want the doctor to opine
3 on the cumulative loss, right? That's - - - that's the
4 relevant evidence, as far as you're concerned, the
5 cumulative loss to the leg?
6 MR. MATZA-BROWN: It is. And the reason for
7 that, Your Honor, is you cannot - - -
8 JUDGE WILSON: I just - - -
9 MR. MATZA-BROWN: - - - is you can't look at each
10 impairment in isolation and - - - and assume that they're -
11 - -
12 JUDGE WILSON: Right.
13 MR. MATZA-BROWN: - - - summative.
14 JUDGE WILSON: I'm not - - - I don't want the
15 reason. I just want to know if that's right so I can move
16 to my next question.
17 MR. MATZA-BROWN: Yes.
18 JUDGE WILSON: Okay. So your doctor says, forty
19 percent, causally related to schedule loss of use of the
20 left leg. Does that meet the cumulative requirement you're
21 trying to impose on the plaintiff, the - - - the claimant,
22 or not, or is this just irrelevant?
23 MR. MATZA-BROWN: Well, Your Honor, I think that
24 the claimant does bear the burden. But I think that here,
25 these numbers, if they're cumulative, do not warrant - - -

1 JUDGE WILSON: Answer my question.

2 MR. MATZA-BROWN: - - - an additional award

3 because they've already been compensated for in the first

4 award.

5 JUDGE WILSON: Answer my question. Is the forty

6 percent cumulative or not cumulative? This is your doctor.

7 MR. MATZA-BROWN: It's not clear - - - it's not

8 clear from this report, which is why the administrative

9 judge specifically instructed to receive additional

10 evidence at the juncture in the proceedings.

11 JUDGE WILSON: So your doctor put in evidence

12 that you don't know whether is cumulative or not

13 cumulative?

14 MR. MATZA-BROWN: Your Honor, so the - - -

15 JUDGE WILSON: It says, causally related.

16 MR. MATZA-BROWN: So - - - so this - - - this is

17 how I look at it, Your Honor. There is - - - there's - - -

18 there are the guidelines, which are very, very helpful for

19 consistent awards for single impairments, right?

20 JUDGE WILSON: Um-hum.

21 MR. MATZA-BROWN: The guidelines have single-

22 impairment rubrics that allow for consistent awards. But

23 the guidelines also say, at page 48 of the 2012 guidelines

24 that govern in Johnson, that we're not going to put forth

25 mathematical formulas because it's too hard; they're not

1 purely summative, right?

2 And we know that, right? We - - - if you added a

3 cup of water to a cup of sugar, you don't get two cups of

4 sugar water. And you can have similarly symbiotic or

5 related injuries to different joints, right? So if, for

6 instance, your hip does not move at all, you cannot walk,

7 right?

8 JUDGE WILSON: I get all that.

9 MR. MATZA-BROWN: And additional - - -

10 JUDGE WILSON: I'm really just try - - - what

11 does causally related mean?

12 MR. MATZA-BROWN: Well, Your Honor, I think that

13 that's where we all get really tripped up because it's

14 somewhat conclusory to say related or not, right? We know,

15 in this - - - in this case, that Mr. Johnson's own doctor

16 said that these injuries are related. And so the question

17 is, right, how much are they related; how much - - -

18 JUDGE WILSON: But I'm asking you about - - -

19 MR. MATZA-BROWN: - - - are they not related?

20 JUDGE WILSON: - - - your own doctor, right? I

21 mean, presumably, you have some idea of what your doctor

22 was saying. I - - - I don't - - - I guess - - -

23 MR. MATZA-BROWN: Well, so this opinion that - -

24 - that you're referencing here on page 119 - - -

25 JUDGE WILSON: Yeah.

1 MR. MATZA-BROWN: - - - is he's saying, if I
2 examine the knee on its own and I look at the guidelines,
3 then - - - then that knee impairment would result in this
4 percentage loss of use and without regard for any other
5 injuries and - - - and - - - and how they sum or how they
6 do not sum.
7 JUDGE WILSON: Okay. So right. So he's not
8 actually providing evidence that would meet the evidentiary
9 standard you would like to have us adopt?
10 MR. MATZA-BROWN: No. But what I think was
11 rational on this record, Your Honor, is that after these
12 written reports were put in, the administrative judge
13 looked and said, you know, you're asking me for 130
14 percent. That doesn't make sense to me. So I think that
15 the best way, in this case, would be to get a cumulative
16 estimate.
17 And - - - and at that point, it was fully within
18 his authority as the adjudicative administrative judge to -
19 - - to - - - to find facts in that manner. And that's why
20 affirmance is warranted here. And - - - and - - - and the
21 - - -
22 JUDGE RIVERA: Okay. Counsel, can I just - - -
23 I'm on the screen.
24 MR. MATZA-BROWN: Oh, yes.
25 JUDGE RIVERA: So I just want to understand this

1 point about this record 119. I think what you're saying is
2 that the statement from the doctor is, if I looked at - - -
3 at this injury to the knee, I would say it's a forty
4 percent loss to a leg that has no other injury, a leg
5 without any other problems. Is that - - -
6 MR. MATZA-BROWN: That's exactly - - -
7 JUDGE RIVERA: - - - what you're saying the
8 statement is?
9 MR. MATZA-BROWN: Yes, exactly, Your Honor.
10 JUDGE RIVERA: Okay. And so but - - - but your -
11 - - and your position is that - - - and I believe this is,
12 obviously, the Board's position here, that the point of the
13 statute is you are going to be interested, as the Board and
14 as the ALJ, in figuring out what's the impact on the entire
15 member, right, in terms of the impact at the time of the
16 injury.
17 That is to say, if you've already got a member
18 that has some reduced use, you're looking at, well, how
19 much more reduced use is there, based on this subsequent
20 injury. Am I - - - am I getting - - - am I understanding
21 you, and that's why the statement on 119 didn't - - - as
22 I'm understanding your point, didn't answer the - - - the A
23 - - - the workers' comp ALJ's concern?
24 MR. MATZA-BROWN: Yes. With just the slight
25 point that because these are permanent losses of use, it's

1 not at the time of the injury, but it's at the time of full
2 medical rehabilitation.
3 JUDGE RIVERA: Yes. I'm sorry. Yes.
4 MR. MATZA-BROWN: Yes. But - - - but otherwise,
5 yes.
6 JUDGE RIVERA: Yes.
7 MR. MATZA-BROWN: I'm exactly on - - -
8 JUDGE RIVERA: Correct.
9 MR. MATZA-BROWN: - - - board with what you've
10 just articulated, Your Honor. Yes, I think that that's
11 correct. And - - - and what the administrative judge did
12 here finds strong support in the statutory text because if
13 you look at subsection 7, it clearly forbids double
14 recoveries, as everyone here agrees. And if you look at
15 the statutory schedule, what we have is we have the
16 legislature carefully selecting specific members and very
17 carefully selecting specific recovery amounts for permanent
18 loss of use of that member.
19 We have 244 weeks, 288, 312. With - - - with
20 immense precision, the legislature decided on these per-
21 member limits. And if you look at subsection s, which says
22 that you get less than that amount for partial permanent
23 disability, and then if you look at the other sections,
24 such as subsection 8 and subsection v, those allow for
25 additional recovery beyond the schedule. So my colleague's

1 concerns about the - - - these being lifetime limits for
2 forever is not borne out by the statute.
3 But what these are is for cases like these, they
4 are per-member limits for permanent loss of use of that
5 member. Zimmerman does not hold otherwise. Zimmerman
6 simply affirms the Board's broad discretion to issue
7 appropriate awards based on the schedule.
8 And as Judge Cannataro noted, it involves two
9 different members. If you look at the Third Department
10 decision, the dissent, because this - - - this court said
11 to the Third Department, no, you cannot limit the Board the
12 way you're doing it, the Third Department decision makes
13 clear that it's the loss of use of the hand that was
14 compensated in 1924 - - -
15 JUDGE RIVERA: Counsel, in - - - in - - - in this
16 case - - - and do we have to actually resolve this dispute
17 over whether or not there can be an award that exceeds a
18 hundred percent? Do we have to resolve that here?
19 MR. MATZA-BROWN: No, Your Honor, we don't. But
20 I think that what - - - what the - - - what the claimants
21 and the appellants are arguing Zimmerman does is it
22 requires the Board to give awards exceeding this - - - the
23 per-member limit. And I think it's clear that Zimmerman
24 does not require that. And the statute certainly does not
25 require that. And so it was within the administrative

1 judge's authority and discretion here to say - - -
2 JUDGE RIVERA: I guess what I'm saying is if - -
3 - if - - - if we agree with the different rule, perhaps
4 your rule, perhaps the Board's rule or - - - do we have to
5 resolve the question of the cap?
6 MR. MATZA-BROWN: No, Your Honor. I - - - I
7 think that you don't have to resolve the question of the
8 cap - - -
9 JUDGE RIVERA: We can leave that for another day,
10 right? It's not implicated here, necessarily.
11 MR. MATZA-BROWN: That - - - that's right, Your
12 Honor. The evidence - - - all the claimant put in was an
13 eighty percent number for the - - - for the left leg. He
14 had the opportunity to explain - - - to - - - to - - - to
15 prove up additional cumulative loss of use from both
16 impairments and failed to do so. So on this basis, there's
17 certainly substantial evidence supporting the award.
18 CHIEF JUDGE DIFIORE: Thank you, Counsel.
19 MR. MATZA-BROWN: Thank you.
20 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?
21 Oh, excuse me. I'm sorry. Mr. Chase?
22 MR. FOX: Good afternoon. I'm Jeff Fox. I'm
23 replacing Mr. Chase today, but good afternoon. And may it
24 please the court, I'm sorry to end by taking a little
25 different position than everyone else today, but I

1 disagree, respectfully, with my colleagues with regard to
2 the Genduso decision and - - - and that - - - whether it
3 was proper or not.
4 This court first spoke on the issue of the
5 relationship or the interrelationship between larger
6 members and their component parts in the matter of Flicker
7 v. Mac Sign Company in 1930. And in that decision, there's
8 very specific language saying that in the absence of
9 exceptional conditions, compensation for the loss of a
10 large member must be accepted as compensation for the loss
11 of its component parts.
12 In other words, as part of the calculation that
13 was - - - that's been referred to a few times, 312 weeks
14 for an arm is taking into account all the component parts
15 that are involved in an arm. So that's why the court, in
16 Genduso, said that there's only four different types of
17 larger members for which the statute allows for schedule
18 loss of use findings. That would be the foot, the arm, the
19 leg, and the hand.
20 The leg and the - - - the leg and the arm come
21 into play the most with regard to this issue. But Flicker
22 did indicate exceptional circumstances. And that's - - -
23 our position is that Zimmerman was, in fact, an exceptional
24 circumstance. The - - - the unfortunate situation in that
25 case was an amputation six - - - six inches below the

1 elbow. The court seems to indicate that it - - - under the
2 guidelines, it would have been amenable to a schedule loss
3 of use of a hundred percent of the hand. It seems like
4 they sort of prorated it into, what, eighty percent of the
5 arm.
6 And then several years later, the individual was
7 working with that amputated limb and suffered a separate
8 and distinct injury to what was remaining of his arm. We
9 would certainly admit that it would be a draconian result
10 to not allow him to have some compensation for the
11 permanency associated with the remaining part of his arm.
12 But that's completely different than what we have before
13 you today, which is different component parts of larger
14 members and whether they could be separately awarded
15 schedule loss of use awards.
16 There's nothing in the statute awarding a
17 schedule for a shoulder or an elbow, only the arm. Mr.
18 Liuni received a schedule loss of use of the left arm from
19 his 2007 injury of twenty to twenty-five percent. That was
20 utilized - - - a 312-week figure was utilized to calculate
21 the award, which ended up being 70.2 weeks. Schedule loss
22 of use awards are not attached to actual lost time, so
23 that's a measurement of their anticipated future loss of
24 wage-earning capacity from the loss of the arm.
25 Subsequently, he sustained the injury in 2014,

1 for which he had the schedule loss of use of the left arm
2 from the shoulder condition, which was a 27.5 percent. So
3 it's our position that the five percent increase is
4 appropriate, and we'd ask that all decisions be affirmed.
5 Thank you.
6 CHIEF JUDGE DIFIORE: Thank you, Counsel.
7 Now, Counsel, your rebuttal.
8 MR. GREY: Thank you, Your Honor.
9 I - - - I'd like to clear up what I think is a
10 fundamental misunderstanding about the - - - the - - - the
11 record here. This case was litigated on the basis of the
12 Court of Appeals decision in Zimmerman. The City's
13 position during the litigation was that we needed to
14 produce a report with an overall loss of use of the leg,
15 apportioned between the two injuries.
16 The decision that the City points to at - - - at
17 page 139 of the record, if you read the entirety of the
18 decision and the brief that was submitted before that,
19 found that the man did not need to do that. The judge
20 found that the claim for the disability to the knees was
21 separate and distinct from the previous disability to the
22 hips.
23 And the reason that the judge made that decision
24 was because of the City's argument that the fif - - - the
25 previous fifty percent for the hips in com - - - for the

1 left hip, in combination with the eighty percent to the
2 left knee, would have resulted in more than 130 percent.
3 The direction for testimony to consider all sites
4 was on the question of whether the medical proof would then
5 establish that the knee deficits were independent of the
6 hip deficits, which is what Dr. Long testified to quite
7 clearly. He testified it was a challenging situation; he
8 did the best he could. But ultimately, he stated, I
9 believe, at page 184 that the pre-existing hip schedule
10 losses did not affect his opinion regarding the knees.
11 And then the judge went on to find that had the
12 man had no problem with his hips prior, he would have had
13 eighty percent to the left leg for his left knee and forty
14 percent to the right leg for his right knee.
15 The only reason that the judge did not make those
16 awards was because between the time of her first decision,
17 when she found that the knees should be considered
18 independently of the hips, and the time of her second
19 decision, when she made the award, the Appellate Division
20 decided Genduso. So the case was litigated based on the
21 state of the law prior to Genduso, which is that a new
22 injury received a new evaluation and that the award should
23 not be affected by the previous disability, which is what
24 the statute says.
25 And just briefly, Your Honor, to answer your

1 question regarding the facts of Zimmerman, the facts of
2 Zimmerman are that the man had an amputation six inches
3 below the elbow. If you look at the current Workers' Comp.
4 Board guidelines, an amputation six inches below the elbow
5 is considered eighty percent of an arm because the forearm
6 is an arm, not a hand.
7 Had the award been for one hundred percent of a
8 hand, then the award would have been seventy-eight percent,
9 not eighty percent, because a hand is 244 weeks, and 244
10 over 312 is 78. So the fact that the award was eighty
11 percent, in my experience as three decades in this field,
12 indicates that the prior award was an arm award, not a hand
13 award. And thus Zimmerman, as here, was two unrelated
14 deficits, as the court found, involving the same member.
15 Lastly, what I'll say is if the court adopts the
16 respondents' position that a worker is limited for their
17 lifetime to a hundred percent of a member, not only would
18 that contradict the statute, it would result in exactly the
19 thing that happened with Mr. Johnson for his right knee,
20 which is in the face of a concession by the employer's
21 consultant that there was a causally related disability.
22 And Dr. Parisien examined only the knees, so his opinion
23 was solely related to the knees, just as Dr. Long provided
24 an opinion solely related to the knees.
25 Then you will have injured workers who wind up

1 with zero compensation, which is what happened to Mr.
2 Johnson with regard to his right knee. You know, by
3 contrast, you have, in the history of the law in the last
4 fifty years, five cases that address the issue of whether
5 you can get more than a hundred percent.
6 So I would respectfully suggest to the court that
7 the evil to be avoided here is not overcompensation but
8 under-compensation. Thank you.
9 CHIEF JUDGE DIFIORE: Thank you, Counsel.
10 (Court is adjourned)
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1 C E R T I F I C A T I O N

2

3 I, Cheryl Odom, certify that the foregoing

4 transcript of proceedings in the Court of Appeals of

5 Johnson v. City of New York, No. 29, and Liuni v. Gander

6 Mountain, No. 30 were prepared using the required

7 transcription equipment and is a true and accurate record

8 of the proceedings.

9

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11 Signature: ___________________

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20 Date: March 26, 2022

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