State of New York
Court of Appeals

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NEW YORK STATE COURT OF APPEALS

Background Summaries and Attorney Contacts

March 15 thru March 17, 2022

State of New York
Court of Appeals

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To be argued Tuesday, March 15, 2022 (arguments begin at 2 p.m.)

No. 2 People v Levan Easley

The primary issue here is whether Levan Easley was entitled to a Frye hearing to determine the admissibility of DNA evidence derived by the Office of the Chief Medical Examiner (OCME) by use of its proprietary forensic statistical tool (FST), which it developed to analyze trace samples of crime scene DNA that are too small for standard genetic testing. The FST is a computer program that was used in this case to assess the likelihood that Easley contributed to a mixed sample of DNA found on the trigger of a handgun. Frye hearings are held to determine whether novel scientific evidence is generally accepted as reliable by the relevant scientific community.

Easley was beaten and stabbed during a fight with several other men inside a Queens deli in November 2011. Police found a loaded handgun in the deli, on a shelf near where the fight occurred, and they said surveillance video showed Easley reaching in that area when he was being attacked. He was charged with criminal possession of the weapon. Before the prosecution presented expert testimony about the FST results linking Easley to the gun, he moved for a Frye hearing and sought disclosure of the source code, algorithm and validation studies of the FST.

Supreme Court concluded the FST is not a novel scientific technique and denied both requests. It relied on prior trial court decisions in People v Megnath (27 Misc 3d 405) and People v Garcia (39 Misc 3d 482), which it said "both agree" that the FST is "not even scientific. It's mathematics, and it's a statistical tool..., not some new and exciting DNA test." An OCME witness then testified that the FST analysis showed it was 4.57 million times more likely that Easley contributed to the DNA on the gun than that he did not. Easley was found guilty and sentenced to seven years in prison.

The Appellate Division, Second Department affirmed, saying a Frye hearing is not required when a court "can rely upon previous rulings in other court proceedings as an aid" in deciding admissibility. "At the time of the court's ruling, a court of coordinate jurisdiction had determined that the FST was not a new or novel scientific technique, but 'a computer software program that uses accepted mathematical equations based on Bayes' Theorem to calculate the likelihood ratio of obtaining a recovered mixture of DNA if the suspect is a contributor versus the probability of getting the same mixture if the suspect is not a contributor,'" it said, quoting Garcia. "The court of coordinate jurisdiction noted that the FST had been peer reviewed, accepted in professional journals, presented at numerous scientific conferences, and admitted in several criminal trials in this State." It also upheld the denial of Easley's request for the source code and other FST materials, saying they "were not required to be disclosed pursuant to Brady ... since they were not in the possession or control of the People, but of OCME...."

Easley argues, "The trial court's refusal to hold a Frye hearing before admitting FST-generated DNA evidence, over appellant's objection that FST's developer had never disclosed how the program worked and the People had never proved its general acceptance in the scientific community, was plainly incorrect under this Court's decisions in People v Williams [35 NY3d 24] and People v Foster-Bey [35 NY3d 959], and was not harmless where there was no other testimonial or physical proof of guilt. He also says the denial of his disclosure request for materials underlying FST "violated his constitutional rights to favorable evidence and confrontation, as well as CPL § 240.20's discovery requirements."

For appellant Easley: Jonathan Schoepp-Wong, Manhattan (212) 693-0085 ext 207
For respondent: Queens Assistant District Attorney William H. Branigan (718) 286-6652

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To be argued Tuesday, March 15, 2022 (arguments begin at 2 p.m.)

No. 3 People v John Wakefield

John Wakefield was charged with murdering Brett Wentworth, who was strangled with a guitar amplifier cord in his Schenectady apartment in April 2010. As in Appeal No. 2, People v Levan Easley, DNA from the crime scene was subjected to analysis by a software program that uses statistical modeling to calculate the probability that a defendant contributed to a trace mixture of DNA from more than one person. The program used in this case was the TrueAllele Casework System, which was developed and owned by Cybergenetics, a private company. The TrueAllele analysis determined there was a high degree of probability that Wakefield's DNA was found on the amplifier cord and on the victim's forearm and T-shirt, with the likelihood of a match with Wakefield's DNA on different samples ranging from 56.1 million to 170 quintillion times more probable than a coincidental match to an unrelated person.

Before trial, Wakefield requested the source code for TrueAllele. Cybergenetics refused to disclose it, contending it was a trade secret, and prosecutors responded that the source code was neither discoverable nor within their possession or control. Wakefield then moved to preclude the DNA evidence or for a Frye hearing to determine whether the TrueAllele technology is generally accepted as reliable by the scientific community. He argued that access to the source code was necessary to assess the accuracy of TrueAllele. Supreme Court granted the Frye hearing, but not his demand for the source code, saying "scientists can, and have, validated the reliability of [TrueAllele] even though the source code underlying the process is not available to the public." After the hearing, the court ruled TrueAllele was generally accepted in the scientific community and admitted the DNA evidence at trial. Wakefield was convicted of first-degree murder and robbery and was sentenced to life without parole.

Wakefield argued on appeal that the trial court erred in its Frye ruling because prosecutors could not establish the reliability of TrueAllele when no one outside of Cybergenetics could review the source code; and that the source code, part of an artificial intelligence system that actually conducted the DNA analysis, was in effect an out-of-court declarant that he had the right to cross-examine.

The Appellate Division, Third Department affirmed the conviction, saying the trial court properly admitted the DNA evidence after the Frye hearing. It said "articles evaluating TrueAllele have been published in six separate forensics journals. In addition, at the time of the Frye hearing, TrueAllele had undergone approximately 25 validation studies, some of which appeared in peer-reviewed publications," and it had "been deemed admissible in Virginia, Pennsylvania and California." Rejecting Wakefield's argument that the Frye hearing was a "farce" because he was not allowed to review the source code, it said he waived the claim when "he proceeded with the Frye hearing in the absence of the source code and did not object in doing so." As for his claim that his right to confront witnesses was violated when he was denied access to the source code, it said, "This argument raises legitimate and substantial questions concerning due process as impacted by cutting-edge science. Given the exponential growth of technologies such as artificial intelligence, to embrace the future we must assess, and perhaps reassess, the constitutional requirements of due process that arise where law and modern science collide." However, while it found "the TrueAllele report is testimonial in nature," it said the source code is not a declarant due, in part, to the "human input" required in using the program. "Also key to our analysis is that [Cybergenetics CEO Mark] Perlin, the creator of TrueAllele and the individual who wrote the underlying source code, was present in court and testified.... Given the totality of the circumstances..., we find that Perlin was the declarant in the epistemological, existential and legal sense rather than the sophisticated and highly automated tool powered by electronics and source code that he created." Since Perlin testified, it said, "we find that there was no Confrontation Clause violation ... because [Wakefield] had the opportunity to confront his true accuser."

For appellant Wakefield: Matthew C. Hug, Albany (518) 283-3288
For respondent: Schenectady County Assistant District Attorney Peter H. Willis (518) 388-4364

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To be argued Tuesday, March 15, 2022 (arguments begin at 2 p.m.)

No. 24 Nemeth v Brenntag North America

Florence Nemeth was diagnosed in 2012 with peritoneal mesothelioma, a cancer of the lining of the abdomen. Claiming that her illness was caused by her exposure to asbestos contamination in Desert Flower Talcum Powder, which she used to powder her entire body on a daily basis from 1960 to 1971, she sued Shulton, Inc., the manufacturer of Desert Flower, and Whittaker, Clark & Daniels, Inc. (WCD) a minerals distributor that supplied Shulton with raw talc for its powder. Nemeth died of the cancer in 2016, shortly before the trial began, but she left a videotaped deposition describing her use of Desert Flower. The plaintiff's experts at trial included Dr. Jacqueline Moline, a specialist in environmental medicine and the principal expert on specific causation, who concluded that Nemeth's mesothelioma was caused by her exposure to asbestos in Desert Flower; and geologist Sean Fitzgerald, who found that talc ore from WCD's mines was contaminated with asbestos and tested a vintage sample of Desert Flower in a sealed chamber to simulate Nemith's use of the powder and estimate her level of asbestos exposure.

Shulton settled before trial. The jury found WCD 50% liable for Nemeth's illness and Supreme Court entered judgment of $2.9 million against the company.

The Appellate Division, First Department increased the award to $3.3 million and otherwise affirmed in a 3-1 decision, focusing on the issue of specific causation. It said, "[T]he trial record contains sufficient evidence, consistent with the Court of Appeals' reasoning in Parker v Mobile Oil Corp. (7 NY3d 434 [2006]), to support the jury's verdict and conclusion that Nemeth was exposed to a sufficient quantity of asbestos to cause the disease.... Parker is significant because it recognizes that mathematically precise quantification of exposure to a toxic substance, years after a plaintiff's exposure..., may be impossible and ... alternative means of proof should be available for an injured plaintiff to pursue what may otherwise be a valid claim.... Although Dr. Moline did not precisely quantify the amount of asbestos contaminated talc Nemeth was exposed to when using [Desert Flower], Dr. Moline's conclusion was based upon Nemeth's estimated exposure to such toxin, as derived from Nemeth's own testimony about the timing, frequency and duration of her historical use of [Desert Flower]. Dr. Moline also took into consideration the results of Fitzgerald's testing of an historical sample of [Desert Flower] quantifying the number of asbestos fibers released from [it] in a simulated setting. Thus, the extrapolation of Nemeth's exposure levels is sufficient to produce an estimate, consistent with Parker." It also rejected WCD's claim that remarks of plaintiff's counsel in summation that Nemeth could have been exposed to asbestos through vaginal excursion, as well as by breathing in airborne fibers, misled the jury and deprived it of a fair trial. It said the trial court's direction to plaintiff's counsel to clarify his remarks, "while perhaps not an ideal choice, was a sufficient cure...."

The dissenter said "plaintiff failed to present expert evidence specifying the level of exposure to respirable asbestos that would have been sufficient to cause peritoneal mesothelioma .... Indeed, plaintiff's medical expert on causation admitted that her report did not offer any numerical definition of a 'significant exposure' to asbestos. While this omission, by itself, renders plaintiff's evidence on causation legally insufficient, plaintiff's experts also failed to quantify the level of Mrs. Nemeth's actual exposure to asbestos – that is to say, they offered no estimate of the amount of asbestos she actually would have breathed in while using Desert Flower in a space with the dimensions and air conditions of her bathroom.... [U]nder the governing precedents of the Court of Appeals, plaintiff's evidence falls short of establishing that Mrs. Nemeth 'was exposed to sufficient levels of the toxin to cause the illness (specific causation)' (Parker, 7 NY3d at 448)." He also said WCD is entitled to a new trial due to the trial court's failure to issue a curative instruction correcting the "prejudicial" remarks of plaintiff's counsel in summation.

For appellant Whittaker, Clark & Daniels: Bryce L. Friedman, Manhattan (212) 455-2000
For respondent Nemeth: Seth A. Dymond, Manhattan (212) 681-1575

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To be argued Wednesday, March 16, 2022 (arguments begin at 2 p.m.)

No. 25 Cutaia v Board of Managers of 160/170 Varick Street Condominium

Michael Cutaia, a plumbing mechanic, was injured in March 2012 while working for a subcontractor on a renovation of the offices of Michilli Construction, Inc., on the 11th floor of a condominium building at 160-170 Varick Street in lower Manhattan. Cutaia had been using a 10-foot A-frame ladder to reroute copper pipes above a 12-foot high bathroom ceiling until he came to a spot where he could not reach the work with the ladder in its open position. He closed the ladder, leaned it against a wall, and climbed to an upper rung to continue cutting and rerouting the pipes. Unaware that a pipe was in contact with a 110-volt electrical cable, he grabbed it to pull it into position and received a shock, fell to the floor, and suffered injuries to his spine and shoulders. He brought this suit against Michilli, which was acting as the general contractor, and the owner of the building, Trinity Church, under Labor Law § 240(1), which imposes strict liability on owners and contractors who fail to provide adequate safety devices to protect construction workers against gravity-related risks.

Supreme Court denied his motion for summary judgment, saying, "Typically, courts grant summary judgment where plaintiffs fall from an unsecured ladder.... However, the issue is more complicated when plaintiff's accident involves not only a fall from a ladder, but also an electrical shock which precedes the fall...." Even if the ladder "was inadequate to protect plaintiff against gravity-related dangers..., plaintiff has not shown, or even argued, that his injuries were caused by his fall, rather than the electrical shock he received," the court said.

The Appellate Division, First Department reversed in a 3-2 decision and granted the motion for summary judgment on liability, saying, "The 'safety device' provided to plaintiff was an unsecured and unsupported A-frame ladder that was inadequate to perform the assigned task.... It is undisputed that the ladder was not anchored to the floor or wall. There were no other safety devices provided to plaintiff.... It is well settled that the failure to properly secure a ladder and to ensure that it remain steady and erect is precisely the foreseeable elevation-related risk against which section 240(1) was designed to protect..... The fact that the fall was precipitated by an electric shock does not change this fact.... Plaintiff suffered not only electrical burns but injuries to his spine and shoulders that necessitated multiple surgeries and are clearly attributable to the fall, and not to the shock, presenting questions of fact as to damages, but not liability."

The dissenters said, "[I]t can be concluded from plaintiff's own testimony that he was propelled from where he had been located on the ladder by the force of the electrical charge rather than by the force of gravity, which was not a result of any defect in the ladder.... A claim under section 240(1) still requires proof that an injurious fall from a height, even when induced by an electrical shock, was proximately caused by the inadequacy of the safety devices provided. Here, there was no credible proof that the A-frame ladder was defective or an inadequate device for the plumbing work that plaintiff was performing.... When an electrical shock causes a worker to fall from an A-frame ladder in the absence of evidence that the ladder was defective or that another safety device was required, factual issues pertaining to causation and liability are presented for trial, precluding strict liability favoring the plaintiff."

For appellant Trinity Church & Michilli Constr.: Michael J. Kozoriz, Manhattan (917) 778-6600
For respondent Cutaia: Louis Grandelli, Manhattan (212) 668-8400

State of New York
Court of Appeals

To be argued Wednesday, March 16, 2022 (arguments begin at 2 p.m.)

No. 26 Bonczar v American Multi-Cinema, Inc.

David Bonczar was injured in 2013 while working on the renovation of a movie theater owned by American Multi-Cinema, Inc. (AMC) in the Town of Webster, Monroe County. He had been standing on a six-foot, A-frame ladder to run wiring above the building's drop ceiling and as he began to descend, he later testified, the ladder "shifted and wobbled" and he fell backward to the floor. He brought this personal injury action against AMC. In a deposition, Bonczar said he did not remember whether he checked to see that the ladder was properly positioned or that its hinged spreader arms had locked into place, but he said the ladder was "fully opened" near the middle of the room.

Supreme Court granted Bonczar's motion for partial summery judgment on the issue of liability under Labor Law § 240(1), which requires building owners and contractors at construction sites to provide "ladders ... and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The Appellate Division, Fourth Department reversed in a 3-2 decision, saying Bonczar did not show that section 240(1) was violated and the violation was the proximate cause of his injury. "Plaintiff did not know why the ladder wobbled or shifted, and he acknowledged that he might not have checked the positioning of the ladder or the locking mechanism, despite having been aware of the need to do so, the majority said. We thus conclude that plaintiff failed to meet his initial burden on the motion. '[T]here is a plausible view of the evidence – enough to raise a fact question – that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident'...."

The dissenters said Bonczar met his initial burden "by presenting evidence that the A-frame ladder from which he fell wobbled or shifted and therefore failed to provide him with proper protection," while AMC "submitted no evidence" to raise a triable issue of fact. "The fact that plaintiff could not identify why the ladder shifted does not undermine his entitlement to partial summary judgment because a plaintiff who falls from a ladder that 'malfunction[s] for no apparent reason' is entitled to 'a presumption that the ladder ... was not good enough to afford proper protection'...." Although Bonczar did not recall checking that the spreader arms were locked, "he also testified that the ladder was upright and 'fully open'..., and we conclude that it would be unduly speculative for a jury to infer from plaintiff's testimony that the sole proximate cause of the accident was his alleged failure to check its positioning or its locking mechanism."

After a trial, the jury found AMC had no liability for the accident. Supreme Court denied Bonczar's motions for a directed verdict and to set aside the verdict on liability, finding that "a rational jury could conclude that the Plaintiff's conduct was the sole proximate cause of the accident." The Appellate Division unanimously affirmed without explanation.

Bonczar argues he is entitled to summary judgment and a directed verdict holding AMC liable for his injuries based on his unrebutted testimony that the ladder shifted and wobbled as he climbed down, which caused him to fall, and on the presumption that ladders that "malfunction for no apparent reason" cannot provide the protection required by section 240(1).

For appellant Bonczar: John A. Collins, Buffalo (716) 849-1333
For respondent AMC: Josh H. Kardisch, Manhattan (212) 482-0001

State of New York
Court of Appeals

To be argued Wednesday, March 16, 2022 (arguments begin at 2 p.m.)

No. 27 Healy v EST Downtown, LLC

James Healy was working as a maintenance and repair technician for the property manager of a mixed-use building in Buffalo in 2014, when he was injured while removing a bird's nest from one of the building's rain gutters. He was responding to a "pest control" work order from a commercial tenant, who complained that birds were dropping excrement from a nest lodged in a gutter above the tenant's entryway. Healy used an eight-foot, A-frame stepladder to reach the nest and, when he reached into the gutter to remove it, he said a bird suddenly flew out and startled him, which caused the ladder to shift and him to fall to the concrete surface below. He brought this personal injury action against the building's owner, EST Downtown, LLC.

Supreme Court granted Healy's motion for partial summary judgment on the issue of liability under Labor Law § 240(1), which imposes a nondelegable duty on building owners and contractors to provide safety devices to protect workers engaged in "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." While the statute does not apply to routine cleaning and maintenance, the court found Healy was engaged in a covered activity because he "was dispatched to address the issue of a bird burrowed in a gutter causing excrement falling in the gutter. As opposed to routine gutter cleaning or routine gutter repair occasioned by normal wear and tear, the plaintiff's task to rid the gutter of a foul fowl and to repair the hole and the improperly working gutter was akin ... to troubleshooting an uncommon malfunction."

The Appellate Division, Fourth Department affirmed on a 3-2 vote, ruling that Healy "was engaged in protected, nonroutine cleaning at the time of the accident" under Soto v J. Crew Inc. (21 NY3d 562). It said Healy's "work in removing the bird's nest from one of the building's gutters was not *routine* cleaning. Plaintiff had never before been given such a task during his time working on the premises. Indeed, the reason for removing the nest was, in part, to prevent the further accumulation of bird excrement under the nest. Plaintiff's supervisor characterized the task of removing the nest as nonroutine cleaning. In addition, removing the bird's nest from the gutter, which was located above the tenant's entry door, necessarily involved elevation-related risks that are not generally associated with typical household cleaning...."

The dissenters said Healy's "task involved standing on a stepladder approximately five feet above the ground in order to remove extraneous material in the form of a bird's nest from a gutter ... over the entrance to a first story retail storefront.... Although plaintiff himself may not have personally removed a bird's nest from a gutter before, and although the supervisor characterized 'any type of gutter cleaning' as 'non-routine' for his staff, those facts, while perhaps informative, are nevertheless not determinative.... [T]he clearing of gutters of extraneous material ... in order to keep the storefronts thereunder clean and safe 'is the *type of* job that occurs on a ... relatively frequent and recurring basis as part of the ordinary maintenance and care of commercial premises.... The activity at issue here involved an insignificant elevation risk comparable to those inherent in typical domestic or household cleaning."

For appellant EST: James J. Navagh, Buffalo (716) 855-5710
For respondent Healy: Jonathan M. Gorski, Buffalo (716) 852-1888

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To be argued Thursday, March 17, 2022 (arguments begin at noon)

No. 28 Matter of Mental Hygiene Legal Services v Delaney *(papers sealed)*

Oliviah C.C., a 16-year-old girl with severe developmental disabilities, was taken from her public school in Plattsburgh to the emergency room at Champlain Valley Physicians Hospital in April 2018 after she engaged in aggressive and self-injurious behavior that the school could not manage. The school district determined that she required placement in a residential school, but none was immediately able to accept her. The hospital found Oliviah was not in need of inpatient medical or psychiatric care and sought to discharge her to her family's home, where she had been living with support provided through the Home and Community Based Services (HCBS) Medicaid waiver program of the State Office for People with Developmental Disabilities (OPWDD). However, Oliviah's mother, citing concern for the safety of her other child, refused to accept the home discharge without additional HCBS assistance. OPWDD increased Oliviah's HCBS funding for home support, but no qualified private providers were available. When the mother asked the agency to assign its own employees to assist her, it responded that it did not provide direct services and instead worked through private providers.

Oliviah remained essentially stranded in the emergency room for 35 days while she waited for a residential placement. Fifteen days after she arrived at the hospital, Mental Hygiene Legal Services (MHLS) brought this suit on her behalf to require OPWDD and the Department of Health (DOH) to provide services for which she was eligible as an approved beneficiary of the Medicaid waiver program: enhanced home-support services or a residential placement that would permit her discharge from the hospital. MHLS argued that OPWDD's failure to do so violated the federal Medicaid Act's requirement that participating states provide necessary services "with reasonable promptness" and that it constituted discrimination under the Americans with Disabilities Act (ADA).

After Oliviah received a temporary placement at a residential school in May, Supreme Court dismissed the suit as moot.

The Appellate Division, Third Department invoked the exception to the mootness doctrine and affirmed the dismissal on the merits, saying it lacked "the power to intervene in OPWDD's discretionary determinations." The court said, "In addition to searching for a more appropriate placement, OPWDD increased funding for the child's HCBS services to a level that apparently would have permitted the child to return home if a qualified provider could have been found. The discretion and flexibility embodied in the governing provisions of the Mental Hygiene Law preclude a finding that the child had a 'clear legal right' ... to a more appropriate placement or to any other specific service. OPWDD's actions and policy choices 'involve the exercise of reasoned judgment which could typically produce different acceptable results' and, as such, are beyond the reach of judicial intervention...." It ruled the Medicaid Act's "reasonable promptness" provision did not create a private right of action for individuals to seek relief. Rejecting the discrimination claim, it said "the absence of services resulted from OPWDD's discretionary policy decisions and from a lack of local private providers, which [MHLS] does not allege was caused by discrimination."

For appellant MHLS: Shannon Stockwell, Albany (518) 451-8710
For respondent OPWDD and DOH: Assistant Solicitor General Laura Etlinger (518) 776-2028

State of New York
Court of Appeals

To be argued Thursday, March 17, 2022 (arguments begin at noon)

No. 29 Matter of Johnson v City of New York
No. 30 Matter of Liuni v Gander Mountain

The question raised by these workers' compensation cases is whether a schedule loss of use (SLU) award based on an injury to one part of a qualifying limb or "member" must be offset by the amount of any prior SLU award for injury to a different part of the same limb, or whether a claimant is entitled to the full amount of separate awards for each injury under Workers' Compensation Law § 15(3). The statute provides a compensation schedule for the permanent partial disability of a specified "member" including an arm, leg, hand, foot, eye, thumb, various fingers and toes, and hearing, among others.

New York City employee Thomas Johnson injured both of his knees in a workplace accident in 2006, injured both hips in another accident in 2009, and filed separate claims for workers' compensation benefits. He received a 50% SLU award for his left leg and 52.5% for his right leg based on his hip injuries, and was later found to have an 80% SLU of his left leg and 40% of his right leg based on his knee injuries. He contended the awards should be combined, which would give him a 130% SLU for his left leg and 92.5% for his right leg.

Joseph Liuni, an employee of Gander Mountain, injured his left elbow while lifting a table at work in 2007 and received a 22.5% SLU award for his left arm. After another workplace accident in 2014, he developed a consequential injury to his left shoulder and was found to have a 27.5% SLU of his left arm as a result. A workers' compensation law judge (WCLJ) concluded the 22.5% SLU for his elbow should be combined with the 27.5% SLU for his shoulder because they were "both cumulative" and awarded him a 50% SLU for his left arm.

The Workers' Compensation Board (WCB) ruled in both cases that the latest SLU award for each limb must be reduced by the amount of the prior award, explaining in Liuni that "neither the statute nor the Board's guidelines lists the elbow or the shoulder as body parts lending themselves to separate SLU awards. Rather, impairments to these extremities are encompassed by awards for the loss of use of the arm." The decision reduced Liuni's second SLU award to 5%, giving him a total award of 27.5% SLU for his arm. The Board reduced Johnson's second SLU awards to 30% for his left leg and 0% for his right, giving him total SLU awards of 80% for his left leg and 52.5% for the right leg.

The Appellate Division, Third Department affirmed, saying that allowing "separate SLU awards for a body member's subparts is not authorized by the statute or the guidelines and would amount to a monetary windfall for a claimant that would compensate him or her beyond the degree of impairment actually sustained to the statutorily-enumerated body member...."

Both claimants argue the decisions here conflict with M/O Zimmerman v Akron Falls Park–Erie County (29 NY2d 815 [1971]), which they say permits separate SLU awards for distinct injuries to different parts of the same bodily extremity.

For appellant Johnson: Robert E. Grey, Farmingdale (516)249-1342
For appellant Liuni: Justin S. Teff, Kingston (845) 338-4477
For respondent WCB: Assistant Solicitor General Brian D. Ginsberg (518) 776-2040
For respondent City: Assistant Corporation Counsel Daniel Matza-Brown (212) 356-5042
For respondent Gander Mountain: Glenn D. Chase, Albany (518) 463-1269