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

Decided and Entered: November 19, 2026 CV-25-0974

In the Matter of the Claim of
CARLOS EUSEBIO-BRITO,
Appellant,
v

NEW YORK BLACK CAR OPERATORS,
Respondent.

WORKERS' COMPENSATION BOARD,
Respondent.

MEMORANDUM AND ORDER

Calendar Date: October 21, 2026

Before: Aarons, J.P., Pritzker, Reynolds Fitzgerald, Ceresia and Mackey, JJ.

Ugalde & Rzonca, LLP, Rego Park (*John F. Clennan*, Ronkonkoma, of counsel), for appellant.

Weiss, Wexler & Wornow, PC, New York City (*J. Evan Perigoe* of counsel), for New York Black Car Operators, respondent.

Reynolds Fitzgerald, J.

Appeals (1) from a decision of the Workers' Compensation Board, filed May 23, 2025, which, among other things, precluded claimant's evidence of schedule loss of use, and (2) from a decision of said Board, filed August 26, 2025, which denied claimant's application for reconsideration and/or full Board review.

In 2022, claimant, an "Uber driver," filed a claim for workers' compensation benefits alleging that he sustained work-related injuries in March 2022 as a result of a motor vehicle accident. The claim was established for injuries to the lower back area, neck and right shoulder. In March 2024, Robert Hecht, an orthopedic surgeon who had examined claimant on January 26, 2024, February 9, 2024 and February 29, 2024, filed a C-4.3 form (Doctor's Report of MMI/Permanent Partial Impairment) and opined therein that claimant's injury to his right shoulder had reached maximum medical improvement and was permanent,[1] and that claimant had sustained a 15% schedule loss of use (hereinafter SLU) of the right arm (shoulder). In June 2024, Richard Semble, an orthopedic surgeon, performed an independent medical examination (hereinafter IME) of claimant and found no impairment of the cervical or lumbar spine and a 0% SLU of the right arm (shoulder). Following depositions of Hecht and Semble, a Workers' Compensation Law Judge (hereinafter WCLJ) found in an amended reserved decision that Hecht acted as an independent medical examiner and that his permanency report constituted an IME and, therefore, precluded that report because it did not comply with Workers' Compensation Law § 137. After reviewing the history of the claim and medical records, the WCLJ also credited Semble's findings relative to permanent impairment. Upon administrative appeal, the Workers' Compensation Board affirmed, adopting the findings and decision of the WCLJ. Claimant appeals from that decision, as well as one denying his later application for reconsideration and/or full Board review.[2]

We affirm. Claimant's assertion that the Board erred by considering Hecht to be an independent medical examiner is without merit. An "[a]ttending physician or other attending practitioner" is defined as the "provider[ ] or practitioner[ ] who ha[s] primary responsibility for treating the claimant for the injury or illness for which such claimant is being examined" (12 NYCRR 300.2 [b] [1]; *accord Matter of Harris v Department of Envtl. Protection*, 217 AD3d 1034, 1035 [3d Dept 2023]; *Matter of Estanluards v American Museum of Natural History*, 53 AD3d 991, 992 [3d Dept 2008]). A physician may be considered to be an independent medical examiner if they examine a claimant

[1] Hecht indicated no permanent impairment of the cervical and lumbar spine.

[2] Inasmuch as claimant's brief makes only a passing reference to the denial of his application for reconsideration and/or full Board review, without substantive arguments, his challenge to the Board's August 2025 decision denying that application is deemed abandoned (*see Matter of Giesselmann v Rotterdam Steel, LLC*, 233 AD3d 1243, 1246 [3d Dept 2024]; *Matter of Deliso v New York City Tr. Auth.*, 225 AD3d 1010, 1013 [3d Dept 2024]).

only for the purpose of evaluating or providing an opinion with respect to, among other things, claimant's degree of disability, maximum medical improvement, permanency and/or SLU (*see* 12 NYCRR 300.2 [b] [4], [5]; *Matter of Esposito v Tutor Perini Corp.*, 158 AD3d 912, 913 [3d Dept 2018], *lv denied* 31 NY3d 906 [2018]; *Matter of Estanluards v American Museum of Natural History*, 53 AD3d at 992).

A review of the record reveals that, at the time of Hecht's final examination of claimant, he did not provide substantive treatment for claimant's injuries, and Hecht's examination and permanency report were for the purpose of, and limited to, making a determination regarding whether claimant's injuries had reached maximum medical improvement and claimant's SLU (*see* 12 NYCRR 300.2 [b] [4]; *Matter of Belmonte v Snashall*, 2 NY3d 560, 563 n 1 [2004]). To the extent that claimant argues that Hecht was his attending physician, and not an independent medical examiner, because Hecht provided treatment to him during the first two examinations on January 26, 2024 and February 9, 2024, we disagree. The only plan of care or treatment that Hecht provided following these examinations was "physical therapy and proper care" after the first examination and "proper care" after the second examination. Although Hecht recommended physical therapy in January 2024, there was no reference to physical therapy or any ongoing physical therapy in his February 9, 2024 medical narrative, no referral for physical therapy, no baseline measurements taken, no prognosis provided, and the recommendations for "physical therapy" and "proper care" were abandoned after the third examination on February 29, 2024 at which time Hecht evaluated claimant for maximum medical improvement and permanency. Accordingly, substantial evidence supports the Board's determination that Hecht's February 29 examination constituted an IME and that Hecht acted as an independent medical examiner on behalf of claimant (*see* Workers' Compensation Law § 137 [9]; 12 NYCRR 300.2 [b] [4], [5]; *Matter of Harris v Department of Envtl. Protection*, 217 AD3d at 1035-1036; *Matter of Esposito v Tutor Perini Corp.*, 158 AD3d at 913; *Matter of Estanluards v American Museum of Natural History*, 53 AD3d at 992). Inasmuch as there has been no demonstration of compliance, substantial or otherwise, with the applicable statutory and regulatory requirements governing IME reports, which claimant does not dispute, the Board properly precluded Hecht's permanency report (*see* Workers' Compensation Law § 137 [1]; 12 NYCRR 300.2 [b] [4]; [d]; *Matter of Harris v Department of Envtl. Protection*, 217 AD3d at 1036; *Matter of Perez v SN Gold Corp.*, 155 AD3d 1298, 1299-1300 [3d Dept 2017]; *Matter of Estanluards v American Museum of Natural History*, 53 AD3d at 992).

Finally, we reject claimant's argument that the Board should have found Semble's IME report and opinion on SLU incredible. Although Semble's IME report does not

indicate that he used a goniometer to measure range of motion (*see Matter of Vujeva v Dairy Conveyor Corp.*, 237 AD3d 1433, 1436 [3d Dept 2025]; *Matter of James v Premier Home Health Care*, 232 AD3d 1017, 1019 [3d Dept 2024]),[3] his testimony, which the Board was entitled to credit, reflects that he did in fact use a hand-held goniometer. Inasmuch as the Board was free to credit and accept Semble's testimony in this respect and his opinion on permanency and findings relative to SLU (*see Matter of Cho v New York City Tr. Auth.*, 242 AD3d 1279, 1281 [3d Dept 2025]), and because claimant's only contrary evidence was properly precluded, the medical evidence failed to support an SLU award.

Aarons, J.P., Pritzker, Ceresia and Mackey, JJ., concur.

ORDERED that the decisions are affirmed, without costs.

ENTER:



Robert D. Mayberger
Clerk of the Court

[3] The impairment guidelines state that "medical providers should generally utilize a goniometer" to measure range of motion (New York Workers' Compensation Guidelines for Determining Impairment § 1.3 at 7 [2018]).