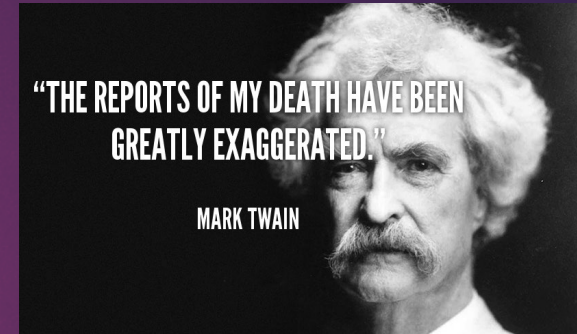


THE REPORTS OF GENDUSO'S DEATH HAVE BEEN GREATLY
EXAGGERATED



(Schedule **LOSS of USE** Calculations in a Post-Johnson/Liuni World)

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OBJECTIVES

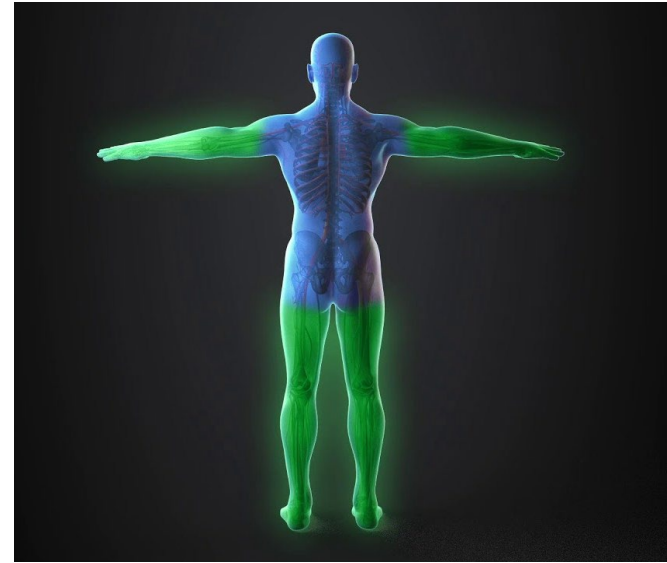
- ▶ 1. Background -Genduso
- ▶ 2. Johnson & Liuni
- ▶ 3. Cases Moving Forward



BACKGROUND

BACKGROUND

- ▶ WCL section 15 (3) · provides compensation for permanent partial disabilities to the extremities



BACKGROUND



- ▶ WCL section 15 (7)
 - allows for compensation benefits to be payable even where there has been a previous disability
 - allows recovery for later injury, specifically the deficits or disability that are attributable to that new injury.
 - If the later SLU was based on an injury to the same limb and the same deficits, the deficits related to the subsequent injury would be subtracted when calculating an overall SLU to avoid a duplicative award.

BACKGROUND

- ▶ Genduso v. NYC Department of Education, 164 AD3d 1509 93rd Dept. 2018)
- ▶ 1997 right ankle and right knee injuries
- ▶ 20% SLU for right leg awarded



BACKGROUND

- ▶ 2019 right knee injury
- ▶ 12.5% SLU for right leg awarded



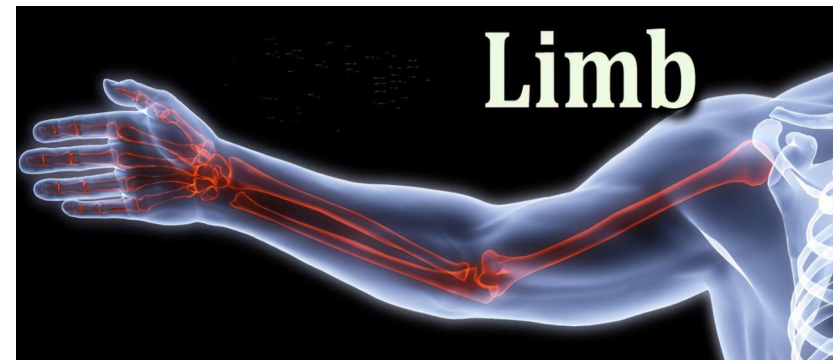
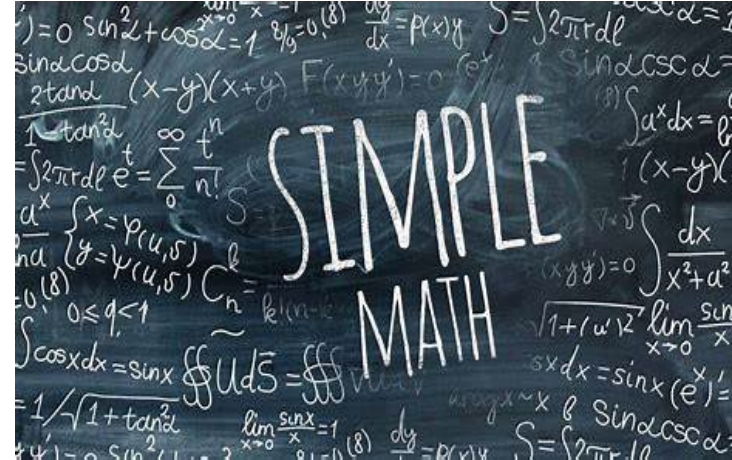
BACKGROUND

- ▶ Overall 40% SLU right leg awarded
- ▶ WCB deducted prior SLU awards of 20% and 12.5% for the right leg
- ▶ Net to claimant was 7.5%



DECISION

- ▶ The SLU award was subject to automatic deduction for any prior SLU award(s)
- ▶ For the same body member could not receive separate SLU awards for the separate joints involving the same limb





JOHNSON AND LIUNI

JOHNSON AND LIUNI

- ▶ GENDUSO CHALLENGED
- ▶ Johnson v. City of N.Y., 180 AD3d 1134 (3rd Dept. 2020)

JOHNSON AND LIUNI

- ▶ bilateral knee injuries in 2/06





JOHNSON AND LIUNI

- ▶ Second accident in 11/09 involving multiple injuries including the hips and right shoulder

JOHNSON AND LIUNI

- ▶ Awarded 50% SLU for left leg (based upon permanent partial disability for left hip)
- ▶ Awarded 52.5% SLU for right leg (based on permanent partial disability for right hip)

JOHNSON AND LIUNI

- ▶ WCLJ awarded 80% SLU for left leg reduced by prior 50% SLU
- ▶ WCLJ also awarded 40% SLU for right leg reduced by prior 40% SLU
- ▶ therefore, claimant awarded 30% SLU for left leg in 0% SLU for right leg
- ▶ Key-overall 130% SLU for left leg and 92% SLU for right leg

JOHNSON AND LIUNI

- ▶ GENDUSO
CHALLENGED
- ▶ Liuni v. Gander
Mountain, 188 AD3d
1403 (3rd dept 2020)
- ▶ 2007 left elbow injury
- ▶ 22.5% SLU for left arm
awarded
- ▶ 2014 left shoulder injury



JOHNSON AND LIUNI



Attending physician said that 2007, 2014 injuries were separate and completely unrelated.



50% SLU left arm from 2014 left shoulder injury awarded



Genduso applies and the 50% SLU from the 2014 injury reduced by the prior 22.5% SLU award from the 2007 date of injury.



On appeal-reliance placed upon Zimmerman v. Akron Falls Park-Eric County, 29 NY2d 815 (1971)

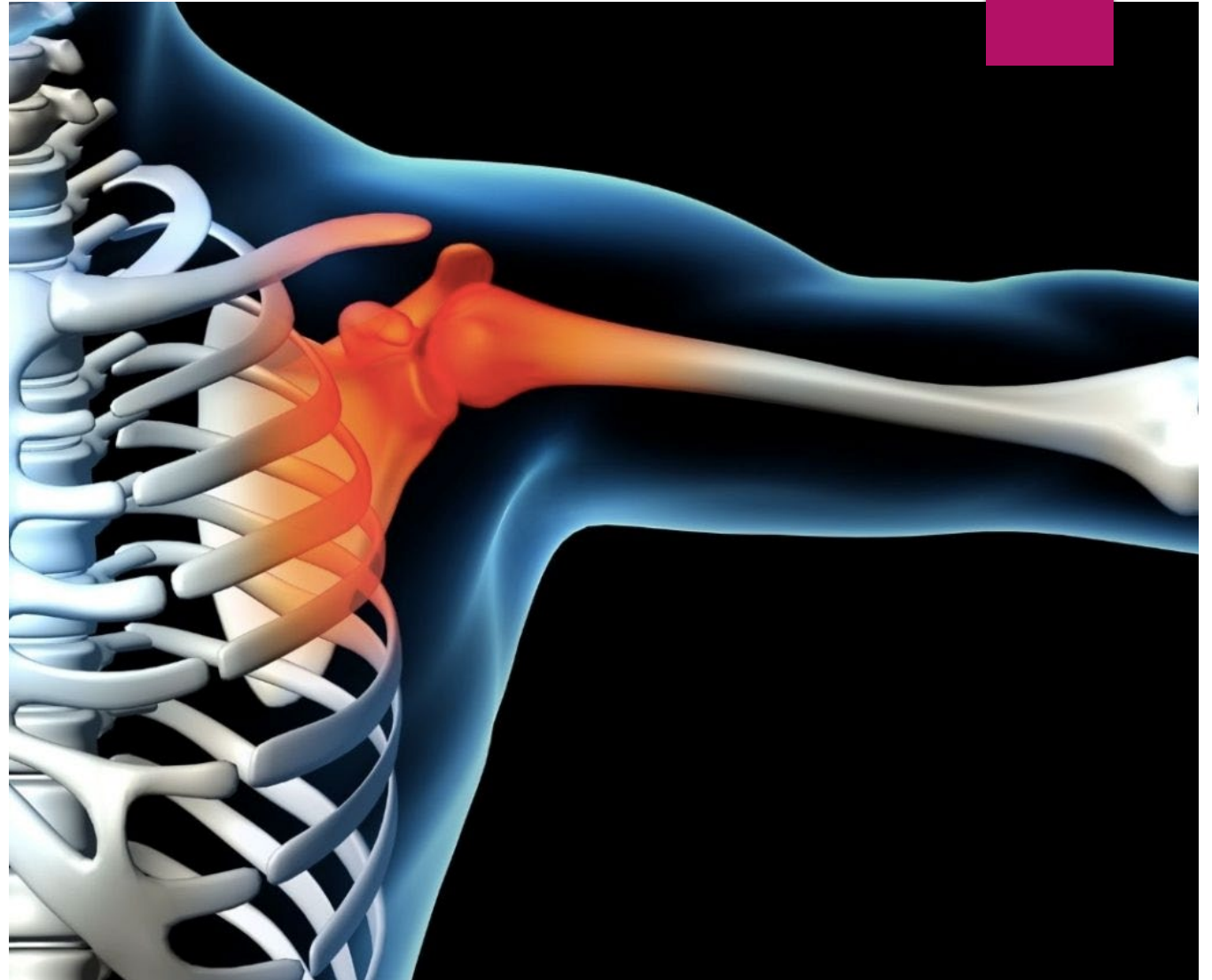
JOHNSON AND LIUNI

- ▶ Work-related partial amputation of the left arm the forearm
- ▶ 80% SLU for left arm awarded
- ▶ Successful use of left arm prosthetic



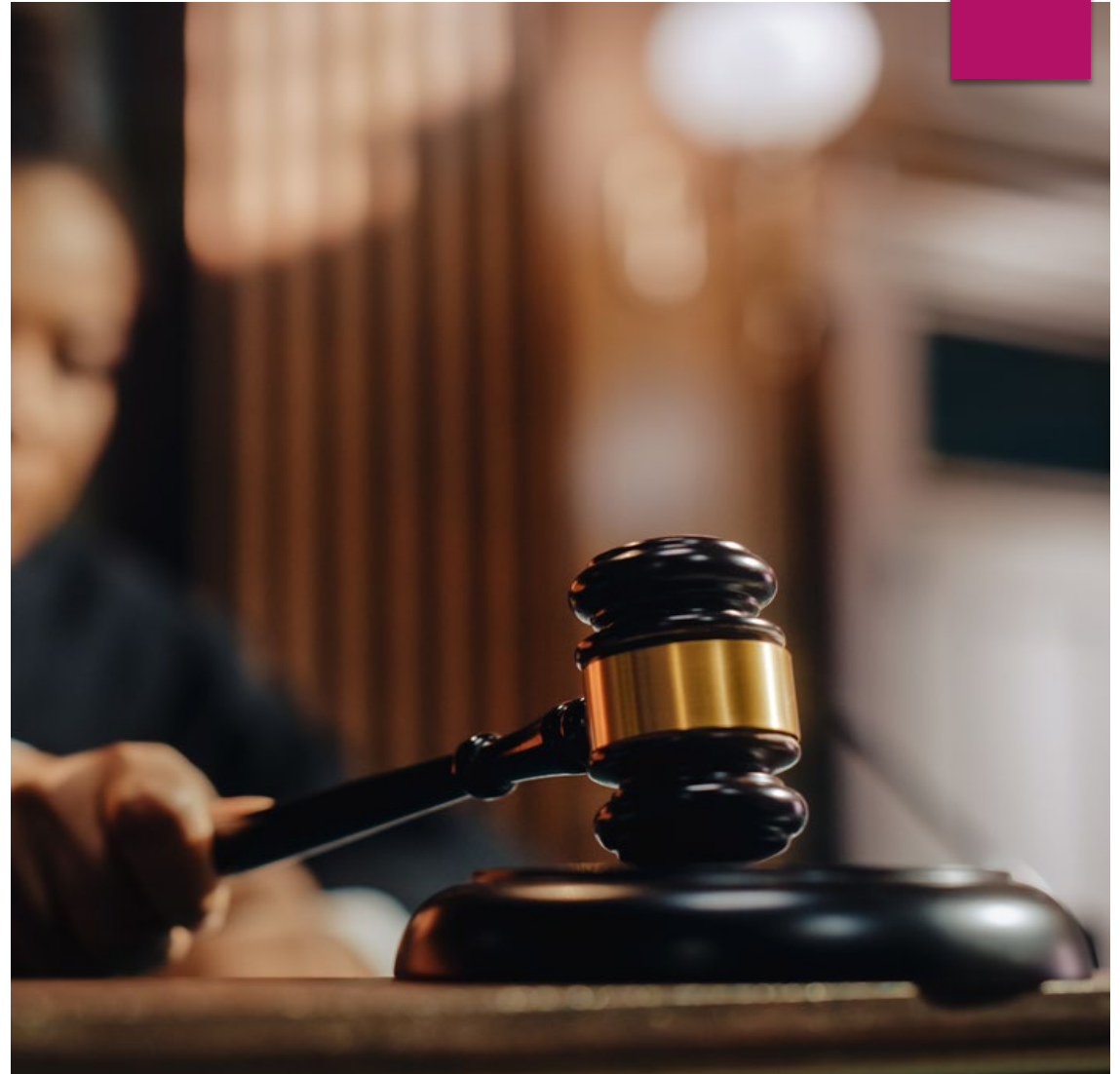
JOHNSON AND LIUNI

- ▶ Many years later left shoulder injury
- ▶ WCB awarded 50% SLU for left arm attributable solely to left shoulder
- ▶ On appeal the Appellate Division deducted the prior SLU for the amputation to the form, 35AD2d 1030 (3rd dept. 1970)



JOHNSON AND LIUNI

- ▶ 50% SLU for left arm awarded
- ▶ An offset not required where it is demonstrated that the subsequent injury to left shoulder was a separate and distinct injury



JOINT DECISIONS

ADDRESSED BY COURT OF APPEALS

Issue: Whether there is an automatic reduction for SLU awards where there has been a prior SLU made for the same extremity

JOHNSON AND LIUNI

- ▶ Separate SLU awards from different injuries to the same body parts can occur.
- ▶ But claimant has the burden to show that the subsequent injury by itself cause an increase in the schedule loss use awards
- ▶ Measured by the question of whether a claimant's earning capacity was reduced solely by the 2nd injury
- ▶ Follows language contained within Section 15(7)
- ▶ WCL Section 15(3)-additional/separate SLU awards for subsequent injuries involving the same body member acceptable if burden of proof is met.

JOHNSON AND LIUNI

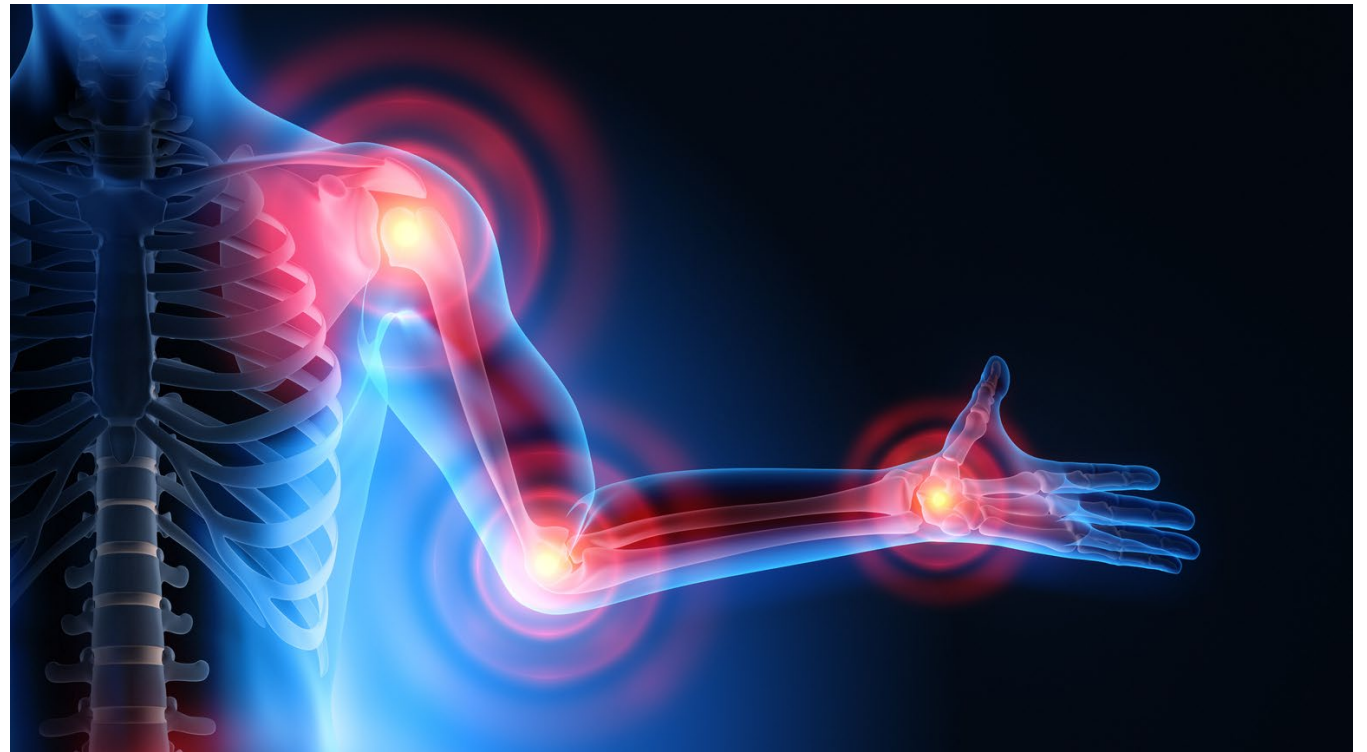
- ▶ Johnson-sufficient proof that the current schedule loss use for the legs were solely attributable to the 2006 knee injuries and therefore the awards should be reduced by the prior SLU awards made for the 2009 bilateral hip injury.
- ▶ Liuni-clear evidence that the later SLU award was solely attributable to the 2014 left shoulder injury and as a result there should be no reduction in the prior schedule loss use based on the 2007 elbow injury



CASES MOVING FORWARD

CASES MOVING FORWARD

- ▶ Kromer v UPS, 206 AD3d 1413 (3rd dept. 2022)
- ▶ Prior left elbow injury with 30% SLU
- ▶ Current injury left shoulder



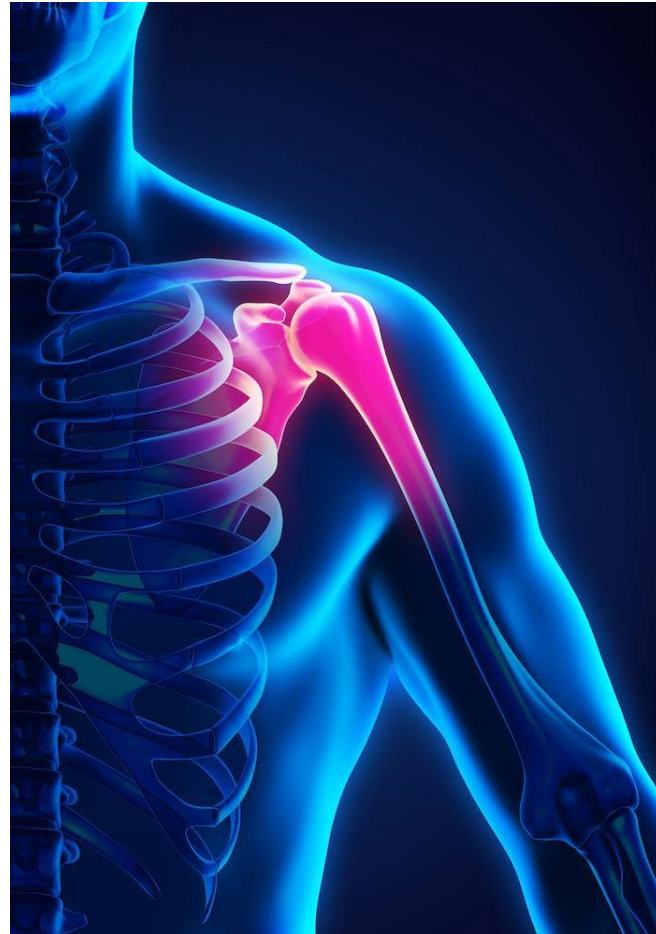


CASES MOVING FORWARD

- ▶ Matter of Abbey Ice Co, Inc., G2754605 (7/5/2023)

CASES MOVING FORWARD

- ▶ Matter of Highland Hospital of Rochester, G2893336 (1/9/2023)
- ▶ Burden of proof not met





CASES MOVING FORWARD

- ▶ Matter of Dynamic Appliance, G2541988 (3/6/2023)
- ▶ Burden of Proof not met.

- ★ **FREE SERVICE CALL** - with recommended repair
- ★ **1 Year Warranty**
- ★ **Locally Trusted Appliance Repair**



CASES MOVING FORWARD

MATTER OF TOWN OF OYSTER BAY, G2441788 (9/20/23)

Injuries 6/08 and 7/18 and burden of proof not met





CASES MOVING FORWARD

- ▶ *MATTER OF NYC CHILDREN'S CENTER, G267 7720 (5/10/2023)*
- ▶ Injuries in 1/12, 4/19, 4/21
- ▶ Burden of proof not met because there is no increase in functional loss from new injury.

CASES MOVING FORWARD

- ▶ Matter of Department of Transportation, G25464 (11/21/2023)
- ▶ Injuries in 2008, 2012, 2015, 2019
- ▶ Burden of proof not met



CASES MOVING FORWARD

- ▶ MATTER OF TABLE ROCK FARM INC., G1303398 (11/15/2023)
- ▶ Left hip in 9/04
- ▶ Left knee in 12/16
- ▶ Burden of proof not met



CASES MOVING FORWARD

- ▶ Matter of New York Downtown Hospital, G1000555 (9/19/2023)
- ▶ Right ankle 9/01
- ▶ Right ankle 6/13
- ▶ Burden of proof not met-overlapping impairment

