

STATE OF NEW YORK  
COURT OF APPEALS

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In the Matter of the Claim of  
ESTATE OF NORMAN YOUNGJOHN,

Appellant,

v.

BERRY PLASTICS CORPORATION and  
THE WORKERS' COMPENSATION BOARD,

Respondents.

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**NOTICE OF MOTION  
FOR LEAVE TO  
APPEAL**

WCB Case No.:  
G093 5493

Motion No.: \_\_\_\_\_

**MOTION BY:**

Appellant, *The Estate of Norman Youngjohn*

**DATE, TIME AND  
PLACE OF MOTION:**

**Monday, July 1, 2019**  
New York State Court of Appeals  
20 Eagle Street  
Albany, New York 12207

**OBJECT OF MOTION:**

An Order granting leave to appeal pursuant to  
CPLR §5602(a)(1)(i).


**SUPPORTING PAPERS:**

Affirmation of Stephen A. Segar, Esq. dated  
June 13, 2019 with Exhibits together with  
Appellant's Brief, Respondent-Employer's  
Brief and the Record on Appeal from the  
underlying appeal to the Appellate Division,  
Third Department.

**ANSWERING PAPERS:**

To be served no later than seven (7) days  
prior to the return date as required by CPLR  
§2214(b).

Dated: June 13, 2019



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Segar & Sciortino PLLC  
Stephen A. Segar, Esq., of Counsel  
*Attorney(s) for Appellant*  
Office and Post Office Address:  
400 Meridian Centre, Suite 320  
Rochester, New York 14618  
Telephone No.: (585) 475-1100

TO: Goldberg & Segalla LLP  
Cory A. DeCresenza, Esq., of Counsel  
*Attorneys for Respondent*  
Berry Plastics Corporation  
Office and P.O. Address:  
5786 Widewaters Parkway  
Syracuse, New York 13214  
Telephone No.: (315) 413-5400

Office of Attorney General  
Steven Segall, Assistant Attorney General  
*Attorneys for Respondent*  
The Workers' Compensation Board  
Office and P.O. Address:  
Department of Law, Labor Bureau  
28 Liberty Street, 15<sup>th</sup> Floor  
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**STATE OF NEW YORK  
COURT OF APPEALS**

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**In the Matter of the Claim of  
ESTATE OF NORMAN YOUNGJOHN,**

Appellant,

v.

**BERRY PLASTICS CORPORATION and  
THE WORKERS' COMPENSATION BOARD,**

Respondents.

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**SUPPORTING  
AFFIRMATION**

WCB Case No.:  
G093 5493

Motion No.: \_\_\_\_\_

Stephen A. Segar affirms as true under penalty of perjury:

1. Affirmant is duly admitted to practice before the Courts of New York State.
2. Affirmant is a member of the law firm of Segar & Sciortino PLLC, 400 Meridian Centre, Suite 320, Rochester, New York 14618.
3. Affirmant represents the interests of the Estate of Norman Youngjohn with regard to injuries decedent Norman Youngjohn sustained in a work-related accident which occurred on December 30, 2014 while he was engaged in the scope of his employment with respondent-employer, Berry Plastics Corporation.

4. Affirmant is fully familiar with the facts and proceedings herein and submits the instant affirmation in support of appellant's motion for leave to appeal pursuant to CPLR §5602(a)(1)(i).

Statement of Procedural History

5. References hereinafter made to the Record on Appeal to the Appellate Division, Third Department are followed by "R." and the page number(s) so referenced.

6. At hearing before the Workers' Compensation Board (hereinafter referred to as "WCB") on May 13, 2015, memorialized in a Notice of Decision dated and filed on May 20, 2015, decedent's claim was established for an injury to his right shoulder with an average weekly wage of \$921.77 (R.19 – R.21).

7. At a subsequent hearing before the WCB on June 8, 2015, memorialized in a Notice of Decision dated and filed on June 11, 2015, the claim was amended to include decedent's left elbow (R.22 – R.24).

8. Decedent received temporary workers' compensation benefits from the date of his work-related accident until the time of his unfortunate and sudden death on March 4, 2017.

9. Decedent's death was unrelated to any of the underlying injuries of this claim.

10. At the time of his death, decedent was not married, he had no children under the age of eighteen (18) or any other dependents.

11. Prior to his death, decedent's treating orthopedic surgeons offered opinions regarding permanency, i.e., a 50% schedule loss of use (hereinafter referred to as "SLU") to his right arm (R.54 – R.65) and a 70% SLU to his left arm (R.48 – R.53).

12. The respondent-employer's medical consultant, per his examination of decedent on October 14, 2016, found a 40% SLU to decedent's right arm as well as a 40% SLU to his left arm (R.58 – R.68).

13. Decedent's adult daughter, Bridget Cooke, was appointed Administrator of his Estate by the Ontario County Surrogate's Court on June 7, 2017 as memorialized in Letters of Administration CTA With Limitations (R.120).

14. At hearing before the WCB on August 16, 2017, memorialized in a Notice of Decision dated August 22, 2017, the Workers' Compensation Law Judge (hereinafter referred to as "WCLJ") awarded posthumous schedule awards of 55% to decedent's left arm, 45% to his right arm, with 23.8 weeks of protracted healing period – a total of 335.8 weeks payable at \$614.51 per week equaling \$206,352.46 less temporary payments previously made. The WCLJ directed payment of the awards to decedent's estate in one lump sum (R.131 – R.133).

15. Respondent-employer appealed said decision to the WCB on September 20, 2017 (R.156 – R.165). Appellant filed a Rebuttal thereto on October 20, 2017 (R.168 – R.176).

16. The WCB, per a Memorandum of Board Panel Decision dated and filed on November 30, 2017, held the WCLJ erred in directing the carrier pay the balance of decedent's schedule awards to his estate and limited payment of same to funeral expenses pursuant to WCL §15(4)(d) (R.5 – R.9).

17. Appellant appealed the WCB's decision to the Appellate Division, Third Department, seeking reversal and specifically a determination that the entirety of said schedule awards be made payable to the appellant in one lump sum.

18. The Appellate Division, per its Memorandum and Order decided and entered on February 21, 2019, annexed hereto as *Exhibit "A"*, modified the decision of the WCB holding that in addition to funeral expenses, appellant was entitled to that portion of the schedule awards that had accrued in weeks up to the time of the decedent's death.

19. Notice of Entry of said Memorandum and Order was served upon the undersigned on February 26, 2019 (*Exhibit "B"*).

20. Appellant filed a motion to the Appellate Division on March 25, 2019 seeking leave to appeal to the Court of Appeals pursuant to CPLR §5602(a)(1)(i).

Respondents were served with appellant's motion papers on March 25, 2019. Proof of service is annexed hereto as *Exhibit "C"*.

21. The Appellate Division, per Decision and Order on Motion dated and entered on May 17, 2019, annexed hereto as *Exhibit "D"*, denied appellant's motion for leave to appeal.

#### Statement of Jurisdiction and Timeliness

22. Appellant makes the instant motion within thirty (30) days from the date of entry of said Decision and Order on Motion.

23. Affirmant states that the Court of Appeals has jurisdiction over this matter as the Appellate Division's Memorandum and Order (*Exhibit "A"*) finally determined the instant workers' compensation claim as required pursuant to CPLR §5602(a)(1)(i).

#### Legal Question/Issues Presented

24. The issue in this case is novel and centers on whether the meaning, effect and application of WCL §15(4)(d) has been eroded to such extent that it does not preclude appellant from receiving the entirety of the subject schedule awards in one lump sum.

25. The Appellate Division's holding in the instant case, *Matter of the Claim of Estate of Norman Youngjohn v. Berry Plastics Corporation*, 169 A.D.3d 1237 (2019), effectively tolled the appellant's right to be paid the entirety of the

subject schedule awards by differentiating between the “accrued” portion of the awards (the number of weeks from the time of injury to the date of death) from the “unaccrued” portion of the awards (the balance of the awards due in weeks after the date of death). The Appellate Division relied on its “longstanding rule” articulated some 65 years ago in *Matter of Healey v. Carroll*, 282 App. Div. 970 (1953); *Youngjohn* at 1239.

26. The Appellate Division did not recognize that the 2009 amendments to Workers’ Compensation Law §§25(1)(b) and 15(3)(u), L 2009, ch 351, §§1,2, had any application or impact upon WCL §15(4)(d), relying instead on *Healey*. It is the Appellate Division’s position that the Legislature, in granting the option of a lump sum payment for schedule awards, did not intend for a decedent’s estate to collect any part of a schedule award that had not accrued prior to death where there were no survivors or dependents. *Youngjohn* at 1239-1240.

27. The appellant submits that said amendments, together with the Court’s prior analysis of WCL §15(4)(d) in *LeCroix v. Syracuse Exec. Air Serv., Inc.*, 8 N.Y.3d 348 (2007), have entirely eroded the application of WCL §15(4)(d) so to adequately support the instant motion.

28. In *LeCroix*, the Court was called upon to decide whether the Workers’ Compensation Law allowed for the payment of a schedule award in one lump sum. The Court carefully examined relevant statutes, relevant case law as well as the



historical framework of schedule awards, including their definition and purpose and their distinction from other awards of compensation. The Court held that the statutory payment mechanism for schedule awards set forth in WCL §25 had been in place for almost a century and clearly provided that schedule awards were to be paid periodically and over time, not in one lump sum. *LeCroix* at 357.

29. The Court supported its holding in *LeCroix* by directly interpreting the meaning, effect and application of WCL §15(4)(d) as it related to payment of schedule awards in lump sum. The Court reasoned that a plain reading §15(4)(d) clearly contemplates that a schedule award is paid over a period of time. The Court stated that the meaning, effect and application of WCL §15(4)(d) would be “substantially compromised” and of “limited application” were schedule awards paid in one lump sum. *LeCroix* at 355.

30. Now that schedule awards are payable in one lump sum, thereby vitiating, among other things, the distinction between accrued and unaccrued portions of schedule awards, appellant submits that the provisions of WCL §15(4)(d), by the Court’s own reasoning in *LeCroix*, are substantially compromised and limited in meaning, effect and application. Accordingly, and based on the aforementioned facts and circumstances, the Court should re-examine what, if any, meaning, effect and application WCL §15(4)(d) now bears to schedule awards.

31. The issue presented for review was preserved in as much as the entirety of the Record on Appeal, Appellant's Brief, Respondent-Employer's Brief and the Appellate Division's Memorandum and Order focus exclusively on the meaning, effect and application of WCL §15(4)(d) in light of the Legislature's recent sanction that schedule awards are payable in lump sum.

Order/Judgments Appealed From

32. Appellant seeks leave to appeal to the Court from the Memorandum and Order of the Appellate Division, Third Department, dated and entered February 21, 2019 (*Exhibit "A"*). Appellant's Brief, Respondent-Employer's Brief and the Record on Appeal are submitted herewith separately in support of appellant's motion.

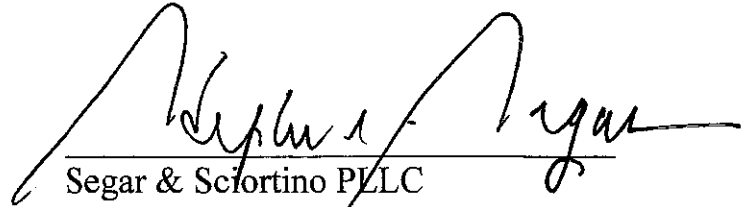
33. The Appellate Division's Decision and Order on Motion dated May 17, 2019 denying appellant's leave to appeal to the Court of Appeals is annexed hereto as *Exhibit "D"*.

34. The WCB's Memorandum of Board Panel Decision dated and filed on November 30, 2017 is found at pages 14-16 in the Record on Appeal.

WHEREFORE and based on the facts and circumstances set forth above, affirmant respectfully pleads for an order granting leave to appeal to the Court from the Memorandum and Order of the Appellate Division dated and entered February

21, 2019 pursuant to CPLR §5602(a)(1)(i) and for such other and further relief as the Court deems just and proper.

Dated: June 13, 2019

A handwritten signature in black ink, appearing to read "Stephen A. Segar", written over a horizontal line.

Segar & Sciortino PLLC  
Stephen A. Segar, Esq., of Counsel  
*Attorney(s) for Appellant*  
Office and P.O. Address:  
400 Meridian Centre, Suite 320  
Rochester, New York 14618  
Telephone No.: (585) 475-1100

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

Decided and Entered: February 21, 2019

527110

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In the Matter of the Claim of  
ESTATE OF NORMAN  
YOUNGJOHN,

Appellant,

v

BERRY PLASTICS CORPORATION  
et al.,

MEMORANDUM AND ORDER

Respondents.

WORKERS' COMPENSATION BOARD,  
Respondent.

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Calendar Date: January 11, 2019

Before: Lynch, J.P., Clark, Mulvey, Devine and Aarons, JJ.

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Segar & Sciortino PLLC, Rochester (Stephen A. Segar of  
counsel), for appellant.

Goldberg Segalla LLP, Buffalo (Cory A. DeCresenza of  
counsel), for Berry Plastics Corporation and another,  
respondents.

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Clark, J.

Appeal from a decision of the Workers' Compensation Board,  
filed November 30, 2017, which, among other things, limited the  
amount of decedent's schedule loss of use award payable to  
claimant to funeral expenses not to exceed \$10,500.

Norman Youngjohn (hereinafter decedent) was injured in a work-related accident on December 30, 2014, and his claim for workers' compensation benefits was established for an injury to his right shoulder. In June 2015, the claim was amended to include an injury to his left elbow. In 2016, decedent's treating physicians raised the issue of permanency and schedule loss of use (hereinafter SLU) of both arms, and an independent medical examination was conducted on behalf of the employer's workers' compensation carrier. All of the medical experts agreed that decedent had reached maximum medical improvement, although they disagreed as to the SLU percentages. On March 4, 2017, prior to the resolution of this issue, decedent passed away as a result of reasons unrelated to his workplace injuries. At the time of decedent's death, he had no surviving spouse, children under 18 years of age or dependents. Following decedent's death, the parties stipulated to a 55% SLU of the left arm and a 45% SLU of the right arm. A Workers' Compensation Law Judge (hereinafter WCLJ), among other things, incorporated the percentages stipulated to in a decision and, based on the SLU percentages, found that decedent was entitled to 312 weeks of benefits, along with "an additional 23.8 weeks of benefit[s] due to [a] healing period which took longer than normally expected." The WCLJ ordered that the total SLU awards, less payments already made, be paid to claimant, decedent's estate. Upon review, the Workers' Compensation Board modified the WCLJ's decision, finding that Workers' Compensation Law § 15 (d) (4) limits the amount of the SLU award that may be paid to claimant to reasonable funeral expenses. Claimant appeals.

"SLU awards are made to compensate for the loss of earning power or capacity that is presumed to result, as a matter of law, from permanent impairments to statutorily-enumerated body members" (Matter of Taher v Yiota Taxi, Inc., 162 AD3d 1288, 1289 [2018]; see Workers' Compensation Law § 15 [3] [a-v]; Matter of Marhoffer v Marhoffer, 220 NY 543, 547 [1917]; Matter of Walczyk v Lewis Tree Serv., Inc., 134 AD3d 1364, 1365 [2015], lv denied 28 NY3d 902 [2016]). "Unlike an award of weekly compensation for a disability, which is based upon the actual period during which an employee is disabled from earning full wages, liability for [an SLU] award arises as of the date of the

accident, and the weekly rate and number of weeks specified in the schedule are merely the measure by which the total amount of the award is calculated; while the decisions often list the [SLU] award as covering certain dates, the [SLU] award is not allocable to any particular period of disability" (Matter of Newbill v Town of Hempstead, 147 AD3d 1191, 1192 [2017] [internal quotation marks and citations omitted]; see Matter of Cruz v City of N.Y. Dept. of Children's Servs., 123 AD3d 1390, 1391 [2014], lv denied 26 NY3d 905 [2015]).

Workers' Compensation Law § 33 generally provides that where "an injured employee to whom there was due at the time of his or her death any compensation under the provisions of [the Workers' Compensation Law]" dies without leaving a surviving spouse, child under 18 years of age or dependent, the amount of such compensation is payable to his or her estate. However, with respect to SLU awards under the same circumstances, Workers' Compensation Law § 15 (4) (d) provides that the SLU award be paid to the deceased's estate "in an amount not exceeding reasonable funeral expenses." In Matter of Healey v Carroll (282 App Div 969 [1953]), we considered these two statutes together in a situation where, as here, a deceased worker received a posthumous SLU award after dying from reasons unrelated to her injuries without leaving a surviving spouse, child under 18 years old or dependent. We concluded that Workers' Compensation Law § 15 (4) (d) restricted payment of only the unaccrued portion of the SLU award "that would have become due after the death of [the decedent]" and that the "accrued part of the award, . . . due when death occurred, was the property of the decedent without regard for when the award was made" (Matter of Healey v Carroll, 282 App Div at 970). Accordingly, we affirmed the Board's determination to direct payment of the accrued portion of the SLU award – that is, the number of weeks between the date of the accident and the date of death, multiplied by the weekly rate of the award – to the deceased worker's estate, along with reasonable funeral expenses (id.).

In 2009, in response to a Court of Appeals decision holding that the lump-sum payment of an SLU award was

statutorily prohibited (Matter of LaCroix v Syracuse Exec. Air Serv., Inc., 8 NY3d 348, 353-357 [2007]), the Legislature amended the Workers' Compensation Law to authorize the full payment of SLU awards in one lump sum at the request of the injured employee (see Workers' Compensation Law §§ 15 [3] [u]; 25 [1] [b], as amended by L 2009, ch 351, §§ 1, 2).<sup>1</sup> Claimant argues that, as a result of the amendments allowing for the option of lump-sum payments, the entirety of decedent's SLU award accrued at the time of his accident and is, therefore, payable to it. We disagree.

Initially, because the issue raised "is one of pure statutory reading and analysis, we 'need not accord any deference to the [Board's] determination, and [are] free to ascertain the proper interpretation from the statutory language and legislative intent'" (Matter of Soriano v Elia, 155 AD3d 1496, 1497-1498 [2017], lv denied 31 NY3d 913 [2018], quoting Matter of Belmonte v Snashall, 2 NY3d 560, 566 [2004]). In our view, the 2009 statutory amendments did not alter the longstanding rule that, where an injured employee dies without leaving a surviving spouse, child under 18 years old or dependent, only that portion of the employee's SLU award that had accrued at the time of the death is payable to the estate, along with reasonable funeral expenses (see Matter of Healey v Carroll, 282 App Div at 970).<sup>2</sup> Nor did, as claimant contends, the amendments alter the rate at which an SLU award accrues to an injured employee who is posthumously awarded SLU benefits. Absent clear statutory language or an indication of statutory intent, we cannot conclude that, in granting the option of a lump-sum payment, the Legislature intended for the employee's estate to collect any portion of the posthumous SLU award that had not accrued prior to death. Accordingly, claimant was not entitled to the entirety of decedent's SLU award. However,

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<sup>1</sup> Lump-sum SLU award payments are payable without commutation to present value (see Workers' Compensation Law § 25 [1] [b]).

<sup>2</sup> To the extent that our decision in Matter of Kilday v 35 E. 75th St. Corp. (32 AD2d 597 [1969]) is in conflict with this longstanding rule, that decision should no longer be followed.

under Matter of Healey v Carroll (*supra*), claimant was entitled to payment of that portion of the SLU award that had accrued up to the time of decedent's death. We therefore modify the Board's determination accordingly and remit the matter for a recalculation of the amount of the SLU award owed to claimant.

Lynch, J.P., Mulvey, Devine and Aarons, JJ., concur.

ORDERED that the decision is modified, without costs, by reversing so much thereof as limited the schedule loss of use award payable to claimant to reasonable funeral expenses; matter remitted to the Workers' Compensation Board for further proceedings not inconsistent with this Court's decision; and, as so modified, affirmed.

ENTER:



Robert D. Mayberger  
Clerk of the Court





February 26, 2019

Office of the Secretary  
NYS Workers Compensation Board  
328 State Street  
Schenectady, NY 12305

**RE: NORMAN R YOUNGJOHN (Dec'd) v. MACEDON**  
Claim No. 1A844943121206  
WCB Case No. G0935493  
Date of Accident: 12/30/2014  
Our File No. 13902.0060

Notice of Entry

Dear Sirs/Madams:

Please take notice that attached hereto is a true and correct copy of the Decision and Order on Motion dated February 21, 2019 and entered in the State of New York Supreme Court, Appellate Division, Third Judicial Department. Thank you for your attention to this matter.

Respectfully Submitted,

Cory A. DeCresenza

CAD/

Encl. (Memorandum and Order; Affidavit of Service)

Cc: NYS Office of Attorney General  
28 Liberty St., Labor Bureau  
15<sup>th</sup> Floor  
New York, New York 10005

Segar & Sciortino  
Attorneys At Law  
400 Meridian Centre, Suite 320  
Rochester, NY 14618

We've gone paperless

Please send mail to our scanning center at: PO Box 1057, Buffalo, NY 14201

Office Location: 5786 Widewaters Parkway, Syracuse, NY 13214-1840  
315.413.5400 | Fax: 315.413.5401 | [www.GoldbergSegalla.com](http://www.GoldbergSegalla.com)

Norman Youngjohn (hereinafter decedent) was injured in a work-related accident on December 30, 2014, and his claim for workers' compensation benefits was established for an injury to his right shoulder. In June 2015, the claim was amended to include an injury to his left elbow. In 2016, decedent's treating physicians raised the issue of permanency and schedule loss of use (hereinafter SLU) of both arms, and an independent medical examination was conducted on behalf of the employer's workers' compensation carrier. All of the medical experts agreed that decedent had reached maximum medical improvement, although they disagreed as to the SLU percentages. On March 4, 2017, prior to the resolution of this issue, decedent passed away as a result of reasons unrelated to his workplace injuries. At the time of decedent's death, he had no surviving spouse, children under 18 years of age or dependents. Following decedent's death, the parties stipulated to a 55% SLU of the left arm and a 45% SLU of the right arm. A Workers' Compensation Law Judge (hereinafter WCLJ), among other things, incorporated the percentages stipulated to in a decision and, based on the SLU percentages, found that decedent was entitled to 312 weeks of benefits, along with "an additional 23.8 weeks of benefit[s] due to [a] healing period which took longer than normally expected." The WCLJ ordered that the total SLU awards, less payments already made, be paid to claimant, decedent's estate. Upon review, the Workers' Compensation Board modified the WCLJ's decision, finding that Workers' Compensation Law § 15 (d) (4) limits the amount of the SLU award that may be paid to claimant to reasonable funeral expenses. Claimant appeals.

"SLU awards are made to compensate for the loss of earning power or capacity that is presumed to result, as a matter of law, from permanent impairments to statutorily-enumerated body members" (Matter of Taher v Yiota Taxi, Inc., 162 AD3d 1288, 1289 [2018]; see Workers' Compensation Law § 15 [3] [a-v]; Matter of Marhoffer v Marhoffer, 220 NY 543, 547 [1917]; Matter of Walczyk v Lewis Tree Serv., Inc., 134 AD3d 1364, 1365 [2015], lv denied 28 NY3d 902 [2016]). "Unlike an award of weekly compensation for a disability, which is based upon the actual period during which an employee is disabled from earning full wages, liability for [an SLU] award arises as of the date of the

accident, and the weekly rate and number of weeks specified in the schedule are merely the measure by which the total amount of the award is calculated; while the decisions often list the [SLU] award as covering certain dates, the [SLU] award is not allocable to any particular period of disability" (Matter of Newbill v Town of Hempstead, 147 AD3d 1191, 1192 [2017] [internal quotation marks and citations omitted]; see Matter of Cruz v City of N.Y. Dept. of Children's Servs., 123 AD3d 1390, 1391 [2014], lv denied 26 NY3d 905 [2015]).

Workers' Compensation Law § 33 generally provides that where "an injured employee to whom there was due at the time of his or her death any compensation under the provisions of [the Workers' Compensation Law]" dies without leaving a surviving spouse, child under 18 years of age or dependent, the amount of such compensation is payable to his or her estate. However, with respect to SLU awards under the same circumstances, Workers' Compensation Law § 15 (4) (d) provides that the SLU award be paid to the deceased's estate "in an amount not exceeding reasonable funeral expenses." In Matter of Healey v Carroll (282 App Div 969 [1953]), we considered these two statutes together in a situation where, as here, a deceased worker received a posthumous SLU award after dying from reasons unrelated to her injuries without leaving a surviving spouse, child under 18 years old or dependent. We concluded that Workers' Compensation Law § 15 (4) (d) restricted payment of only the unaccrued portion of the SLU award "that would have become due after the death of [the decedent]" and that the "accrued part of the award, . . . due when death occurred, was the property of the decedent without regard for when the award was made" (Matter of Healey v Carroll, 282 App Div at 970). Accordingly, we affirmed the Board's determination to direct payment of the accrued portion of the SLU award – that is, the number of weeks between the date of the accident and the date of death, multiplied by the weekly rate of the award – to the deceased worker's estate, along with reasonable funeral expenses (id.).

In 2009, in response to a Court of Appeals decision holding that the lump-sum payment of an SLU award was

statutorily prohibited (Matter of LaCroix v Syracuse Exec. Air Serv., Inc., 8 NY3d 348, 353-357 [2007]), the Legislature amended the Workers' Compensation Law to authorize the full payment of SLU awards in one lump sum at the request of the injured employee (see Workers' Compensation Law §§ 15 [3] [u]; 25 [1] [b], as amended by L 2009, ch 351, §§ 1, 2).<sup>1</sup> Claimant argues that, as a result of the amendments allowing for the option of lump-sum payments, the entirety of decedent's SLU award accrued at the time of his accident and is, therefore, payable to it. We disagree.

Initially, because the issue raised "is one of pure statutory reading and analysis, we 'need not accord any deference to the [Board's] determination, and [are] free to ascertain the proper interpretation from the statutory language and legislative intent'" (Matter of Soriano v Elia, 155 AD3d 1496, 1497-1498 [2017], lv denied 31 NY3d 913 [2018], quoting Matter of Belmonte v Snashall, 2 NY3d 560, 566 [2004]). In our view, the 2009 statutory amendments did not alter the longstanding rule that, where an injured employee dies without leaving a surviving spouse, child under 18 years old or dependent, only that portion of the employee's SLU award that had accrued at the time of the death is payable to the estate, along with reasonable funeral expenses (see Matter of Healey v Carroll, 282 App Div at 970).<sup>2</sup> Nor did, as claimant contends; the amendments alter the rate at which an SLU award accrues to an injured employee who is posthumously awarded SLU benefits. Absent clear statutory language or an indication of statutory intent, we cannot conclude that, in granting the option of a lump-sum payment, the Legislature intended for the employee's estate to collect any portion of the posthumous SLU award that had not accrued prior to death. Accordingly, claimant was not entitled to the entirety of decedent's SLU award. However,

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<sup>1</sup> Lump-sum SLU award payments are payable without commutation to present value (see Workers' Compensation Law § 25 [1] [b]).

<sup>2</sup> To the extent that our decision in Matter of Kilday v 35 E. 75th St. Corp. (32 AD2d 597 [1969]) is in conflict with this longstanding rule, that decision should no longer be followed.

AFFIDAVIT OF SERVICE

Kara DuPlessis, being duly sworn deposes and says, that deponent is not a party to this action, is over 18 years of age and resides in Fulton, New York. That on the 26th day of February, 2019, deponent served a copy of the within Notice of Entry upon:

NYS Office of Attorney General  
28 Liberty St., 15th Fl.  
Labor Bureau  
New York, New York 10005

Segar & Sciortino  
Attorneys at Law  
400 Meridian Centre, Suite 320  
Rochester, NY 14618

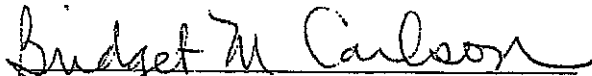
Office of the Secretary  
NYS Workers Compensation Board  
328 State Street  
Schenectady, NY 12305

by depositing the enclosed in a stamped envelope in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.



Kara DuPlessis

Sworn to before me this  
26<sup>th</sup> day of February, 2019



NOTARY PUBLIC

BRIDGET M. CARLSON  
Notary Public, State of New York  
Qualified in Onon. Co. No. 4815660  
My Commission Expires Oct. 31, 20 22

STATE OF NEW YORK SUPREME COURT  
APPELLATE DIVISION THIRD DEPARTMENT

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**In the Matter of the Claim of  
ESTATE OF NORMAN YOUNGJOHN,**

Appellant,

**AFFIDAVIT OF SERVICE  
BY MAIL**

v.

WCB Case No: G093 5493

**BERRY PLASTICS CORPORATION and  
THE WORKERS' COMPENSATION BOARD,**

Case No.: 527110

Respondents.

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STATE OF NEW YORK)  
COUNTY OF MONROE )ss:

Virginia Jonas, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and whose business address is 400 Meridian Centre, Suite 320, Rochester, New York 14618.

That on the 25<sup>th</sup> day of March, 2019, deponent served a notice of motion, supporting affirmation and memorandum of law requesting leave to appeal to the Court of Appeals by depositing a true copy of same in a prepaid envelope in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the addressees indicated below at the last known address of each:

**GOLDBERG SEGALLA LLP**  
Cory A. DeCresenza, Esq., of Counsel  
*Attorneys for Respondent,*  
Berry Plastics Corporation  
5786 Widewaters Parkway  
Syracuse, New York 13214

**OFFICE OF ATTORNEY GENERAL**  
Steven Segall, Assistant Attorney General  
*Attorneys for Respondent,*  
The Workers' Compensation Board  
Department of Law, Labor Bureau  
28 Liberty Street  
New York, New York 10005

*Virginia Jonas.*  
VIRGINIA JONAS

Sworn to before me on this  
25<sup>th</sup> day of March, 2019

*Stephen A. Segar*  
NOTARY PUBLIC

**STEPHEN A. SEGAR**  
Notary Public, State of New York  
No. 02SE488787  
Qualified in Monros County  
Commission Expires Feb 17, 2023

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

Decided and Entered: May 17, 2019

527110

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In the Matter of the Claim of ESTATE OF  
NORMAN YOUNGJOHN,  
Appellant,

v

DECISION AND ORDER  
ON MOTION

BERRY PLASTICS CORPORATION  
et al.,

Respondents.

WORKERS' COMPENSATION BOARD,  
Respondent.

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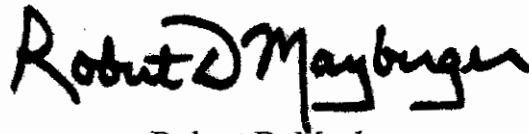
Motion for permission to appeal to the Court of Appeals.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

Lynch, J.P., Clark, Mulvey, Devine and Aarons, JJ., concur.

ENTER:



Robert D. Mayberger  
Clerk of the Court



STATE OF NEW YORK  
COURT OF APPEALS

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**In the Matter of the Claim of  
ESTATE OF NORMAN YOUNGJOHN,**

Appellant,

**AFFIDAVIT OF SERVICE  
BY MAIL**

v.

WCB Case No: G093 5493

**BERRY PLASTICS CORPORATION and  
THE WORKERS' COMPENSATION BOARD,**

Respondents.

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STATE OF NEW YORK)  
COUNTY OF MONROE )ss:

Virginia Jonas, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and whose business address is 400 Meridian Centre, Suite 320, Rochester, New York 14618.

That on the 13<sup>th</sup> day of June, 2019, deponent served appellant's notice of motion and supporting affirmation requesting leave to appeal to the Court of Appeals by depositing two true copies of same in a prepaid envelope in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the addressees indicated below at the last known address of each:

GOLDBERG SEGALLA LLP  
Cory A. DeCresenza, Esq., of Counsel  
*Attorneys for Respondent,*  
Berry Plastics Corporation  
5786 Widewaters Parkway  
Syracuse, New York 13214

OFFICE OF ATTORNEY GENERAL  
Steven Segall, Assistant Attorney General  
*Attorneys for Respondent,*  
The Workers' Compensation Board  
Department of Law, Labor Bureau  
28 Liberty Street  
New York, New York 10005

*Virginia Jonas.*  
VIRGINIA JONAS

Sworn to before me on this  
13<sup>th</sup> day of June, 2019

*[Handwritten Signature]*  
NOTARY PUBLIC

**STEPHEN A. SEGAR**  
Notary Public, State of New York  
No. 02SE4886787  
Qualified in Monroe County  
Commission Expires Feb 17, 2023