

To be Argued By:
Stephen A. Segar, Esq.
Estimated Time for Argument
15 Minutes

STATE OF NEW YORK

COURT OF APPEALS

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

Appellant,

v.

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

Respondents.

APL – 2019-00231

BRIEF

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QUESTION PRESENTED

Do the 2009 amendments to Workers' Compensation Law §§15(3)(u) and 25(1)(b) together with WCL §33 render the subject schedule awards wholly accrued and fully payable to appellant in one lump sum?

JURISDICTIONAL STATEMENT and STATEMENT OF THE CASE

Decedent Norman Youngjohn suffered compensable work-related injuries to his right shoulder and left elbow on December 30, 2014 during the course of his employment with Berry Plastics Corporation (A.33 – A.36).

Decedent died on March 4, 2017 of causes unrelated to his compensable injuries. At the time of death, decedent was not married, had no dependents and no children under the age of eighteen (A.9 – A.10).

Prior to his death, decedent's treating orthopedic specialists offered their respective opinions regarding causally related permanency. John Gorczyca, M.D., per his report dated September 8, 2016 found decedent at maximum medical improvement and opined a 50% schedule loss of use to the right arm (A.14 – A.16). Ronald Gonzalez, D.O., per his report dated August 24, 2016, also found decedent at maximum medical improvement and opined a 70% schedule loss of use to the left arm (A.17 – A.21).

Respondent-employer's medical consultant, per his examination of decedent on October 14, 2016, opined decedent had attained maximum medical improvement and found him to have a 40% schedule loss of use to both arms (A.22 – A.32).

At hearing before the Workers' Compensation Board on August 16, 2017, memorialized per Notice of Decision dated August 22, 2017, the Workers' Compensation Law Judge awarded appellant schedule loss of use awards of 55% to the left arm, 45% to the right arm and 23.8 weeks of protracted healing payable at \$614.51 per week - a total award of \$206,352.46 less payments already made. The Workers' Compensation Law Judge also directed payment of the awards, less payments already made, in one lump sum per the request of the appellant and pursuant to Workers' Compensation Law (hereinafter referred to as "WCL") §§15(3)(u) and 25(1)(b) (A.12 – A.13).

Respondent-employer appealed said decision to the Workers' Compensation Board contending that WCL §15(4)(d) foreclosed payment on the schedule awards for those periods of weeks after the time of death. The Workers' Compensation Board, per Memorandum of Board Panel Decision dated and filed on November 30, 2017, modified the decision of the Workers' Compensation Law Judge rescinding the schedule awards and limiting the award to funeral expenses (A.8 – A.11).

Appellant appealed to the Appellate Division, Third Department, seeking reversal of the Workers' Compensation Board's decision and a determination that the entirety of the schedule awards be paid in one lump sum. The Appellate Division, per its Memorandum and Order decided and entered on February 21,

2019, modified the decision of the Workers' Compensation Board. The Court held that in addition to funeral expenses, appellant was entitled to only that portion of the schedule awards that had accrued, in weeks, from the time of accident to the time of decedent's death (A.3 – A.7).

Appellant sought leave to appeal to the Court of Appeals pursuant to CPLR §5602(a)(1)(i) by motion to the Appellate Division filed with the Court and served upon the respondents on March 25, 2019. The Appellate Division, per Decision and Order on Motion dated and entered on May 17, 2019, denied appellant's motion (A.2).

Appellant sought leave to appeal to the Court of Appeals pursuant to CPLR §5602(a)(1)(i) by motion filed with the Court on or about June 13, 2019. The Court granted appellant leave to appeal per Order decided and entered on November 21, 2019 (A.1).

The Court has jurisdiction over this appeal pursuant to CPLR §5602(a)(1)(i) as the Appellate Division's Memorandum and Order finally determined all substantive matters relevant to decedent's workers' compensation claim pursuant to CPLR §5602(a)(1)(i). Although the Appellate Division remitted the claim to the Workers' Compensation Board, said remittal was merely for ministerial recalculation of the subject schedule awards from the date of accident to the date of decedent's death. The remittal did nothing to effect, modify, alter or amend the

Appellate Division's Memorandum and Order or the finality of it in any substantive manner.

POINT

The 2009 amendments to WCL §§15(3)(u) and 25(1)(b) together with WCL §33 render the subject schedule awards wholly accrued and fully payable to appellant in one lump sum.

Compensation for loss of use of a body part due to a permanent partial disability pursuant to WCL §15(3)(a-t) is known as a “schedule loss of use” award. The right to receive a schedule loss of use award after the death of an injured employee is well established assuming there is sufficient medical evidence at the time of death to support it. *Matter of Kondylis v. Alatis Interiors Co., Ltd.*, 116 A.D.3d 1184 (3rd Dept. 2014). In *Kondylis* and all other cases involving the propriety of a posthumous schedule award, the Courts have relied on the sufficiency of medical opinion tendered after the date of death based on treatment rendered prior thereto. *Riley v. Syracuse University*, 56 A.D.2d 163 (3rd Dept. 1977); *Healey v. Carroll*, 282 A.D. 969 (3rd Dept. 1953); *Matter of Wakefield v. Schlaier's Sons Iron Works*, 18 A.D.2d 1121 (3rd Dept. 1963); *Matter of Smith v. General Elec. Co.*, 24 A.D.2d 814 (3rd Dept. 1965).

The facts in the instant case are unique as decedent was examined for permanency by his treating physicians as well as the respondent-employer's

medical consultant well prior to the time of his death. Additionally, there was universal agreement among the medical experts that at the time of their respective examinations, decedent had reached maximum medical improvement and evidenced schedule losses of use to both arms based on criteria set forth in the Workers' Compensation Guidelines for Determining Impairment, First Edition, November 22, 2017, effective January 1, 2018 (12 NYCRR §325-1.6).

In *Matter of LaCroix v. Syracuse Exec. Air Serv., Inc.*, 8 N.Y.3d 348 (2007), the Court was called upon to determine whether a schedule loss of use is payable as a lump sum or must be made over time. The Court, in citing prior precedent, including *Matter of Lynch v. Board of Educ. of City of N.Y.*, 1 A.D.2d 362, *aff'd*, 3 N.Y.2d 871 (1957), explained that a schedule loss of use award compensates for loss of earning power and liability for same arises on the date of accident. *Id.* at 353, 356. Payment is not allocable to any particular period or periods of disability and is not analogous to the payment of weekly compensation for temporary benefits as the weekly rate and the number of weeks specified in a schedule award are simply the measure by which such an award is determined. *Id.* at 353.

The Court held that because the aforementioned conceptual framework of a schedule award did not address the method of payment (lump sum v. periodic payments), it would not override longstanding statutory payment mechanisms requiring periodic payments of compensation.

In holding that schedule awards were not reducible to a lump sum payment except as provided in WCL §15(5), the Court also cited other provisions of the Workers' Compensation Law, including WCL §§15(4)(d), as clear indication that schedule awards contemplated periodic payments over time. *Id.* at 355. WCL §15(4)(d) provides for discontinuation of a schedule award upon the death of a claimant with no heirs, except for reasonable funeral expenses, assuming the claimant dies from causes unrelated to the compensable injury. As explained by the Court, the language of §15(4)(d) clearly presumes that schedule awards are paid periodically and death interrupts the right of the decedent's estate to receive any such future periodic benefits owed on the schedule. *Ibid.* 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. *Ibid.* The Court was careful to point out that "...any departure from the method of periodic payment of schedule loss of use awards specified in the Workers' Compensation Law must come from the Legislature." *Id.* at 357.

In 2009 and in response to *LaCroix*, the Legislature amended WCL §§15(3)(u) and 25(1)(b) by providing option for the immediate accrual and full payment of schedule awards in one lump sum. L. 2009, ch 351, §§1,2.

The Appellate Division below, *Matter of the Claim of Estate of Norman Youngjohn v. Berry Plastics Corporation*, 169 A.D.3d 1237 (2019), found the

2009 amendments had no application to the facts and circumstances in this case, relying instead on *Healey v. Carroll*, 282 A.D. 969 (3rd Dept. 1953). In *Healey*, claimant-decedent fell and injured her right arm. She died from unrelated causes the following year. The Workers' Compensation Board awarded a posthumous schedule award of 55% to the right arm. Claimant-decedent left no surviving husband, children or dependents. Question arose whether the estate was entitled to receive the schedule award pursuant to WCL §33 or was limited to funeral expenses under WCL §15(4)(d).

WCL §33 provides in pertinent part:

...In the case of the death of an injured employee to whom there was due at the time of his or her death any compensation under the provisions of this chapter, the amount of such compensation shall be payable to the surviving spouse, if there be one, or, if none, to the surviving child or children of the deceased under the age of eighteen years, and if there be no surviving spouse or children, then to the dependents of such deceased employee or to any of them as the board may direct, and if there be no surviving spouse, children or dependents of such deceased employee, then to his estate. An award for disability may be made after the death of the injured employee.

WCL §15(4)(d) provides in pertinent part:

4. An award made to a claimant under subdivision three shall in case of death arising from causes other than the injury be payable to and for the benefit of the persons following:

d. If there be no surviving spouse and no surviving child or children of the deceased under the age of eighteen years, then to such dependent or dependents as defined in section sixteen of this chapter, as directed by the board; and if there be no such dependents, then to the estate of such deceased in an amount not exceeding reasonable funeral expenses as provided in subdivision one of section sixteen of this chapter... An award for disability may be made after the death of the injured employee.

Healey affirmed the decision of the Workers' Compensation Board by correctly interpreting the tension between WCL §§33 and 15(4)(d) to the extent that a schedule award made after the death of an injured employee from unrelated causes becomes due at the time of death. The Court was clear in pointing out that the entire schedule is not cut off, only the "unaccrued" portion that is payable after the date of death. The Court explicitly stated that the unaccrued part of a schedule award which becomes due after death was no longer payable pursuant to the provisions of §15(4)(d) and was otherwise absorbed and limited by funeral expenses. The "accrued" part of the schedule award, i.e., the weeks from the date of accident to the time of death, came due at the time of death pursuant to WCL §33, was the property of the decedent without regard to when the award was made and would require strong and certain legislative or constitutional language to take it away from decedent's estate. The Court concluded that the schedule award was

properly computed in weeks up to the time of claimant's death with the appropriate addition of funeral expenses.

As aforementioned, the Appellate Division below explicitly relied on its longstanding rule articulated in *Healey* that the accrued portion of the schedule award came due at the time of death while the unaccrued portion was absorbed and limited by funeral expenses. *Id.* at 1239. The Appellate Division refused to recognize that the 2009 amendments to WCL §§25(1)(b) and 15(3)(u) had any application or impact upon WCL §15(4)(d). 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 statutory dependents.

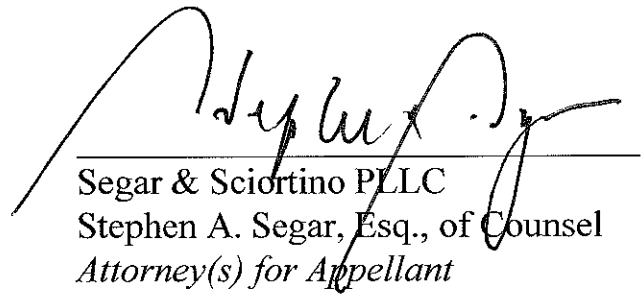
However, because the Workers' Compensation Law now allows for full payment of a schedule award in one lump sum, whereby the entirety of the award immediately accrues, the conceptual distinction between accrued and unaccrued portions of an award has been entirely eroded. In its stead stands a statutory framework which converts and merges any unaccrued portions into an indivisible, accrued whole – entirely and immediately payable in full when due. Because the accrued portion of a posthumous schedule award is deemed due at the time of death as set forth above, it stands to reason that a fully accrued posthumous

schedule award is also due at the time of death. Accordingly, the subject schedule awards are payable to appellant in one lump sum, minus payments previously made, as of the time of decedent's death.

CONCLUSION

Appellant pleads that the Court modify the Order and Memorandum of the Appellate Division by directing payment to the appellant in one lump sum of the entirety of the subject schedule awards, minus payments previously made. Appellant further pleads that the Court remit the case to the Workers' Compensation Board for recalculation of said schedule awards consistent with the Court's direction.

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**NEW YORK STATE COURT OF APPEALS
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