APL 2021-152

To Be Argued By:
DUSTIN J. BROCKNER
Time Requested:
10 MINUTES

Court of Appeals of the State of New York

In the Matter of the Claim for Benefits under the Workers' Compensation Law Made By:

KANYE KHALID GREEN,

Claimant-Respondent,

-against-

DUTCHESS COUNTY BOCES, Employer,
WRIGHT RISK MANAGEMENT, Carrier,

Respondents-Appellants,

-and-

NEW YORK STATE WORKERS' COMPENSATION BOARD,

Respondent-Appellant.

BRIEF FOR APPELLANT NEW YORK STATE WORKERS' COMPENSATION BOARD

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PRELIMINARY STATEMENT

At issue in this appeal is a novel and unsupported interpretation of the Workers' Compensation Law ("WCL") relating to compensation for certain types of permanent partial disability. The Workers' Compensation Board ("Board") has long held that a "non-schedule award"—an award for a permanent partial disability not provided for by schedule—terminates when the employee dies for reasons unrelated to the injury, and therefore no further benefits are payable to the employee's beneficiaries. The Appellate Division, Third Department, rejected that position here and adopted the beneficiary's claim to posthumous benefits. It held that, because non-schedule awards are no longer potentially payable for the injured employee's entire life, but are now capped (since a 2007 amendment) at a maximum number of weeks of potential benefits, it follows that if the employee dies before benefits for that maximum number of weeks have accrued, benefits for the remaining weeks are owed to the beneficiaries.

The Court should reverse. In ruling as it did, the Third Department ignored the effect of WCL § 15(3)(w), which specifies the duration of non-schedule awards, on the operation of WCL § 15(4), which provides that

awards for permanent partial disabilities may be payable after an employee's death to certain beneficiaries.[1] Section 15(3)(w) specifies that non-schedule awards—unlike schedule awards, which provide a fixed number of weeks of benefits—are due only (i) "during the continuance of such permanent partial disability" and (ii) for the periods in which the injury reduces the employee's "wage-earning capacity." Because neither condition can be met upon an employee's death, the non-schedule award—unlike a schedule award—terminates at that point, and no further benefits are payable. The Third Department's contrary ruling improperly ignored the rule that courts must construe statutes as a whole and may not second-guess the Legislature's choices or rewrite its laws.

The Third Department also misconstrued the 2007 amendment that imposed durational caps on non-schedule awards. Nothing in the statutory text suggests that the Legislature intended to guarantee that employees or their beneficiaries would receive the maximum amount of potential weekly benefits set by the caps. And treating the caps as a guarantee would defeat the Legislature's purpose when it imposed those

[1] For the Court's convenience, we have reproduced these two provisions in full in an addendum to this brief.

caps as part of a comprehensive workers' compensation reform bill. While certain provisions of that bill increased benefits for employees or their beneficiaries, the caps were designed to reduce the cost of non-schedule awards, which previously were potentially payable for life. Yet the Third Department's interpretation, if permitted to stand, will increase the costs of many non-schedule awards and, in so doing, disrupt the careful balance of competing interests that the Legislature struck in 2007.

QUESTION PRESENTED

A non-schedule award for a permanent partial disability is only payable (i) during "the continuance of such permanent partial disability," and (ii) for the periods in which the disability reduces the employee's "wage-earning capacity." WCL § 15(3)(w). The question presented is:

> Whether a non-schedule award terminates—and thus no further benefits are payable—when an employee dies for reasons unrelated to the compensable injury and thus neither of these conditions is met.

STATEMENT OF THE CASE

A. Statutory Background

The WCL provides wage-related compensation to employees for four classifications of injuries: (i) permanent total disabilities, (ii) temporary total disabilities, (iii) permanent partial disabilities, and (iv) temporary partial disabilities. WCL § 15(1), (2), (3), (5); *see Matter of LaCroix v. Syracuse Exec. Air Serv., Inc.*, 8 N.Y.3d 348, 353 (2007).

An employee who suffers a permanent partial disability may qualify for either a "schedule award" (also known as a "schedule loss of use award") or a "non-schedule award," depending on the injury. A schedule award, so named because it is set forth in a schedule contained in WCL §§ 15(3)(a)-(t), compensates an employee for the loss of use of a bodily member or sense listed in the schedule, such as an arm, hand, foot, or vision. The award equals two-thirds of the employee's average weekly wages (subject to maximum and minimum compensation rates) multiplied by a fixed number of weeks set forth in the statutory schedule for the disabled bodily member or sense. WCL §§ 15(3)(a)-(t), 15(6). Because such awards provide a fixed number of weeks of benefits, they are "easily ascertainable," *Burns v. Varriale*, 9 N.Y.3d 207, 216 (2007),

and their use simplifies the process for administering benefits for certain workplace injuries, such as those that were common in factories and other industrial settings at the start of the 20th century, when the schedule was created, *see* L. 1913, ch. 816, art. 2, § 15(3).

An award for a compensable permanent partial disability that is not a schedule award is a called a "non-schedule award" and is governed by WCL § 15(3)(w). A non-schedule award equals two-thirds of the difference between the employee's average weekly wages and "wage-earning capacity" after the injury (subject to maximum and minimum compensation rates). WCL §§ 15(3)(w), 15(6). That amount is not multiplied by any fixed number of weeks.

Unlike a schedule award, then, a non-schedule award does not entitle an employee to weekly compensation benefits at a specific rate over a set period. *Burns*, 9 N.Y.3d at 217. The employee's wage-earning capacity is impaired only insofar as the employee's post-injury earnings are reduced.[2] *See id*. There is thus no award for periods in which the

[2] Although "unlike a non-schedule award, a schedule loss award does not depend upon the claimant being out of work," Martin Minkowitz, Practice Commentaries, McKinney's Cons. Laws of N.Y., WCL § 15, a schedule award does not necessarily provide an employee with more benefits than would have been received had the award been calculated

disability does not "cause[] a wage-earning loss," such as when the employee earns as much as the employee did before the injury. *Matter of O'Donnell v. Erie County*, 35 N.Y.3d 14, 19 (2020); *see also* WCL § 15(5-a) (providing that wage-earning capacity is determined by "actual earnings"). Given that the extent to which the injury reduces an employee's wages can fluctuate, the Board may reduce a non-schedule award or suspend it entirely. WCL §§ 15(3)(w), 22 & 123; *see also Burns*, 9 N.Y.3d at 217 (noting that the amount of non-schedule benefits "may change from one period to the next").

Further, WCL § 15(3)(w) specifies that compensation for a non-schedule award—unlike for a schedule award—is "payable during the continuance of such permanent partial disability." Until 2007, an employee's weekly benefits for a non-schedule award could continue as long as the employee's earning capacity remained impaired, and thus potentially for the employee's lifetime. *Matter of Mancini v. Office of Children & Family Servs.*, 32 N.Y.3d 521, 529 (2018). This changed in 2007 when, as part of a comprehensive workers' compensation reform

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as a non-schedule award—that is, computed based on loss of wage-earning capacity.

bill, the Legislature capped the number of weeks that an employee could potentially receive non-schedule benefits. *See* L. 2007, ch. 6, § 4 (*codified at* WCL § 15(3)(w)); *see also Matter of Raynor v. Landmark Chrysler*, 18 N.Y.3d 48, 54 (2011) (describing amendment). While certain provisions of the 2007 bill directly increased benefits for employees or their beneficiaries, the durational caps on schedule-awards were "a concession to insurance carriers." *Matter of Raynor*, 18 N.Y.3d at 54. They were meant "to reduce costs for employers and [insurance] carriers." *Matter of Mancini*, 32 N.Y.3d at 530. Thus, § 15(3)(w) now provides that any compensation "shall not exceed" a maximum number of weeks of potential benefits, which ranges from 225 to 525 weeks depending on the severity of the employee's "loss of wage-earning capacity."

WCL § 15(4) addresses the situation in which an employee dies for reasons unrelated to the compensable injury before benefits for the maximum number of weeks have accrued.[3] It states that:

[3] WCL § 16, which is not implicated here, governs the payment of "death benefits" when the compensable injury causes the employee's death. *See Matter of Estate of Youngjohn v. Berry Plastics Corp.*, 36 N.Y.3d 595, 601 n.2 (2021).

> an award made to a claimant under subdivision three [i.e., the subdivision that governs schedule and non-schedule awards] shall in the case of death arising from causes other than the injury be payable to and for the benefit of the persons following . . . .

The provision proceeds to name the potential beneficiaries: the surviving spouse, any minor child, and, if there is no spouse or minor child, qualifying dependents, the estate, or the person paying the funeral expenses. WCL §§ 15(4)(a)-(d). If an employee dies before a *schedule* award has fully accrued, the provision entitles the named beneficiaries to the unaccrued portion—that is, the weekly benefits that had not yet become due to the employee during the employee's life.[4] *See Matter of Sienko v. Bopp & Morgenstern*, 248 N.Y. 40, 43 (1928). Any payment to the estate or the person paying funeral expenses for the award's unaccrued portion is limited to reasonable funeral expenses. WCL§ 15(4)(d); *Matter of Estate of Youngjohn v. Berry Plastics Corp.*

[4] Section 15(4) only governs the portion of the award that had not accrued during the employee's life. Section 33 of the WCL, which applies to any type of compensation under the WCL, governs the portion of an award that had accrued during the employee's life but had not yet been paid at the time of death; it entitles qualifying survivors or the estate to receive the entire portion of the award that had accrued but remained outstanding at the time of death. *See* WCL § 33; *see also Youngjohn*, 36 N.Y.3d at 600-01.

("*Youngjohn*"), 36 N.Y.3d 595, 608 (2021). Neither the Board nor any court has ever read WCL § 15(4) to entitle the beneficiaries named in that section to the remaining weeks of potential benefits on the now capped *non-schedule* award, however. After all, the provision that provides for non-schedule benefits has always specified that such benefits are payable only "during the continuance of such partial disability," *see, e.g.*, L. 1913, ch. 816, art. 2, § 15(3)—a condition that the 2007 amendment left untouched.

B. Proceedings Below

In late 2007, Eric Watson—the decedent—injured his right leg in in a work-related accident. (Record on Appeal ["R.] 4.) In March 2012, he received a non-schedule award not to exceed 350 weeks of benefits. (R. 18.) And because the decedent's wages were impaired by his injury, he accrued weekly benefits at a rate of $500 per week. (R. 4, 18.) In March 2018, after accruing 311.2 weeks of benefits, he died for reasons unrelated to his injury. (R. 5, 29.)

The decedent's minor son—claimant Kayne Khalid Green—sought the remaining 38.8 weeks of potential benefits. (R. 22-23.) The Workers' Compensation Law Judge rejected that request (R. 29), and the Board

affirmed (R. 4-7). The Board explained that the non-schedule award terminated upon the decedent's death—and no further benefits were payable—because the decedent's disability did not thereafter cause a reduction in his wage-earning capacity. As the Board emphasized, upon an employee's death, "there are no future earnings to lose and no posthumous award is warranted." (R. 5-6.) Claimant was therefore entitled only to the 311.2 weeks of benefits that had accrued during the decedent's life, to the extent that those benefits had not yet been paid to the decedent during his life.

On claimant's direct appeal of the Board's determination, *see* WCL § 23, the Third Department reversed. It held that claimant was entitled to the non-schedule award's 38.8 "remaining cap weeks." (R. 53, 61.) The court noted that although WCL § 15(4) has "for nearly 100 years" been interpreted to entitle the named beneficiaries to the portion of a *schedule* award that had not yet accrued at the time of death, the court had never squarely addressed whether the statute provides the same entitlement for a *non-schedule* award. (R. 57.) The court held that there was no basis to distinguish between the two awards. It reasoned that, by its terms,

WCL § 15(4) applies to "'an award made to a claimant[5] under'" WCL § 15(3) and thus does not exempt non-schedule awards from its scope. (R. 58 [quoting WCL § 15(4)].)

The court also relied on the fact that, in 2007, the Legislature imposed "durational restrictions" on non-schedule awards "by capping the number of weeks that an injured worker is eligible to receive benefits." (R. 59 [citing L. 2007, ch. 6, § 4].) Citing this Court's opinion in *Mancini*, the court noted that the durational restrictions reduced the "disparity" between non-schedule and schedule awards in that both "'are now generally payable *at most* for a specified number of weeks.'" (R. 60-61 [emphasis added] [quoting *Matter of Mancini*, 32 N.Y.3d at 529-30].) The court concluded that, in consideration of "the Legislature's intent to eliminate disparity" between the two awards reflected in the 2007 amendment, the durational limits on non-schedule benefits should be read as guaranteeing for the employee's beneficiaries any benefits that had not accrued during the employee's life. (R. 61.)

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[5] The term "claimant" as used in WCL § 15 refers to the injured employee.

On remittal, the Board determined that, given the Third Department's decision, it was "constrained to find that claimant is entitled to an award in the amount of 38.8 weeks of compensation at the rate of $500 per week"—the weekly rate of benefits that the decedent accrued while alive. (Supplemental Record on Appeal ["S.R."] 1-4.) Thus, the Board concluded, claimant was entitled to a total award of $19,400 payable in a single lump sum. (S.R. 4.)

The Board, as well as the employer and its insurance carrier, moved for leave to appeal from the Board's determination, which brought up for review the Third Department's prior order. *See* C.P.L.R. 5602(a)(1)(ii). This Court granted both motions. (R. 52.)

ARGUMENT

A NON-SCHEDULE AWARD TERMINATES WHEN THE INJURED EMPLOYEE DIES FOR REASONS UNRELATED TO THE INJURY

As the statutory text and legislative history demonstrate, non-schedule awards terminate when the employee dies for reasons unrelated to the compensable injury and, thus, there are no further benefits that are payable under that award. The Board therefore correctly adhered to

its longstanding position that WCL § 15(4) does not entitle claimant to non-schedule benefits that did not accrue during the decedent's life.

A. The Statutory Text and Legislative History Establish that No Further Non-Schedule Benefits Are Payable After an Employee Dies for Reasons Unrelated to the Injury.

The WCL, like any other statute, "must be construed as a whole," and "its various sections must be considered together and with reference to each other." *Youngjohn*, 36 N.Y.3d at 603 (internal quotation marks omitted); *accord, e.g.*, *Matter of Mancini*, 32 N.Y.3d at 525. As part of this analysis, courts should "harmonize[]" the statute's "interlocking provisions." *Youngjohn*, 36 N.Y.3d at 603-04 (internal quotation marks omitted).

The Third Department contravened this basic rule of statutory interpretation. Although the court was correct to note that WCL § 15(4) refers to an "award made to the claimant under" WCL § 15(3)—a provision that governs both schedule and non-schedule awards—the court disregarded the limits that WCL § 15(3)(w) imposes on the duration of non-schedule awards in particular. That provision makes clear that a non-schedule award terminates upon the death of the injured employee

because—unlike a schedule award—it is contingent upon two ongoing conditions, neither of which can be satisfied at that point.

First, compensation for a non-schedule award is only "payable during the continuance of such permanent partial disability." WCL § 15(3)(w). This clause "addresses the period after [the disability] classification," *Matter of O'Donnell*, 35 N.Y.3d at 19, and provides that once the disability ends, compensation is no longer payable. Because the injured employee's disability here ended when he died, so too did the carrier's obligation to pay further benefits, and the award terminated. Yet the Third Department failed even to mention this textual constraint, let alone explain how its interpretation comports with it.

Second, compensation is only payable while the disability impairs the employee's "wage-earning capacity." WCL § 15(3)(w); *see also Matter of Mancini*, 32 N.Y.3d at 529 (recognizing this condition). Wage-earning capacity is not impaired—and thus weekly benefits do not accrue—for periods in which the disability does not reduce the employee's earnings. *See Burns*, 9 N.Y.3d at 216; *Matter of O'Donnell*, 35 N.Y.3d at 19 (non-schedule award requires "a causal link between the claimant's disability and reduced earning capacity"). Employees have an "ongoing obligation"

to show how much they actually earn, *Burns*, 9 N.Y.3d at 216, and the Board has the corresponding authority to stop payments if wage-earning capacity is no longer impaired, WCL §§ 15(3)(w), 22 & 123. Wage-earning capacity is necessarily no longer impaired by the injury when the employee dies for reasons unrelated to that injury. No further benefits can thus accrue at that time.[6]

The history of WCL § 15(4)'s enactment confirms that the statute was not designed to extend the duration of non-schedule awards. The provision that became WCL § 15(4) was added in 1920 in response to then-recent cases holding that, when an employee died for reasons unrelated to the compensable injury, the unaccrued portion of a *schedule* award abated and was not payable to the employee's beneficiaries. *See* L. 1920, ch. 534; *Matter of Bartling v. Gen. Elec. Co.*, 231 A.D. 369, 370 (3d Dep't 1931) (citing, e.g., *Matter of Wozneak v. Buffalo Gas Co.*, 175 A.D. 268 [3d Dep't 1916].) As the judges who dissented from one of those cases observed, schedule awards should not abate upon death because, in creating the statutory schedule, the Legislature "fixed a price" for each

[6] As noted *supra* 7 n.3, when an employee dies for reasons related to the injury, the award of any future benefits is governed by WCL § 16, which provides for "death benefits."

disabled bodily member listed in the schedule, and thereby provided a fixed obligation that does not depend upon the employee's continued life. *Matter of Wozneak*, 175 A.D. at 275 (Kellogg, J., dissenting). Agreeing with that dissenting view, the Legislature enacted WCL § 15(4) to make clear that "the unaccrued part of a schedule award that would have become due after the death" becomes payable to the beneficiaries named therein. *Matter of Healey v. Carroll*, 282 A.D. 969, 970 (3d Dep't 1953).

Consistent with this purpose, neither this Court, the Board, or the Third Department—until its decision here—had suggested that WCL § 15(4) requires the payment of *non-schedule* benefits that had not accrued during the employee's life. Indeed, the Third Department had repeatedly specified that WCL § 15(4) applies to the permanent partial disability award that guarantees a fixed amount of benefits: "a (schedule) 'award made to a claimant.'" *Matter of Garner v. Shulte Co.*, 23 A.D.2d 127, 129 (3d Dep't 1965); *see, e.g.*, *Matter of Healey*, 282 A.D. at 969; *Matter of Snyder v. Wickwire Spencer Steel Co.*, 277 A.D. 233, 234 (3d Dep't 1950); *Matter of Botta v. Tosti Constr. Co., Inc.*, 253 A.D. 556, 558 (3d Dep't), *aff'd*, 270 N.Y. 586 (1938); *Matter of Manning v. Stroh & Wilson*, 247 A.D. 233, 234 (3d Dep't 1936); *Matter of Bartling*, 231 A.D.

at 370; *see also Matter of Bogold v. Bogold Bros.*, 218 A.D. 676, 678 (3d Dep't 1926) (Hinman, J., concurring); *see also, e.g.*, *Matter of LaCroix*, 8 N.Y.3d at 353 (describing WCL § 15(4)'s impact on schedule awards). This is true even though the purportedly operative text cited by the Third Department here—i.e., WCL § 15(4)'s reference to an "award made to a claimant under" the subdivision that governs schedule and non-schedule awards—has remained unchanged since 1920. *See* L. 1920, ch. 534; L. 1922, ch. 615.

Legislative materials generated since the initial enactment of WCL § 15(4) suggest that the Legislature has long understood that the provision is only relevant to schedule awards. For instance, when, in 1947, the deceased employee's estate was added to WCL § 15(4)'s list of beneficiaries who may qualify for payment of posthumous benefits, the legislative annual specified that the amendment shall apply to "a *schedule* award in case of death arising from causes other than injury . . . where there are no dependents." L. 1947, ch. 746, 1947 Legis. Ann. at 220 (emphasis added). A 1954 amendment, which added the person paying funeral expenses to the list of beneficiaries, was likewise understood to apply "only in cases where there is at the date of death an unpaid balance

of a *schedule* award." Letter to Governor's Counsel from the Chair of the Workers' Compensation Board, Bill Jacket, L. 1954, ch. 687 (emphasis added).

B. The Third Department Erred in Construing the Durational Limits on Non-Schedule Benefits As Creating an Entitlement to Such Benefits for the Injured Employee's Beneficiary.

In reaching a contrary conclusion, the Third Department relied on the fact that, in 2007, the Legislature imposed "durational restrictions" on non-schedule awards "by capping the number of weeks that an injured worker is eligible to receive benefits" for a non-schedule award. (R. 59.) In the court's view, adopting the Board's longstanding position that no further non-schedule benefits accrue after the employee's death would "unfairly deprive[] an injured worker's surviving spouse and/or child of the remaining cap weeks." (R. 59.) This reasoning is flawed.

To begin, nothing in the statutory text that imposed the durational caps *guarantees* that employees and their beneficiaries will receive the maximum amount of weekly benefits set by the caps. The provision merely provides that any compensation "shall not exceed" that maximum amount. WCL § 15(3)(w). Indeed, the Legislature understood that the

caps merely imposed a limit on the number of weeks that an employee "*may* receive" benefits. Assembly Introducer's Mem., Bill Jacket, L. 2007, ch. 6 at 21 (emphasis added).

Had the Legislature intended to guarantee non-schedule benefits for a fixed number of weeks of benefits, it knew how to say so. For a schedule award, the Legislature expressly provided that such an award "shall be paid to the employee for the period named in" the statutory schedule. WCL §§ 15(3)(a)-(t). This language promises benefits for a fixed number of weeks, "independent of the time an employee actually loses from work." *Matter of LaCroix*, 8 N.Y.3d at 356 (internal quotation marks omitted). Thus, the unaccrued portion of a schedule award at the time of death becomes "payable to and for the benefit of" the named beneficiaries. WCL § 15(4). The absence of similar language in the provision for non-schedule awards provides strong evidence that the Legislature did not intend the durational caps on non-schedule award to guarantee that employees and their beneficiaries would receive the maximum benefits allowed by those caps. As this Court has explained, "the failure of the legislature to include a term in a statute is a significant indication that

its exclusion was intended." *Commonwealth of the N. Mariana Is. v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 60, (2013).

Further, treating the durational caps as a guarantee of a fixed amount of benefits would increase the costs of non-schedule awards and, in so doing, disrupt the Legislature's deliberate balance of competing interests when it imposed those caps as part of its 2007 comprehensive workers' compensation reform bill. The 2007 bill contained numerous amendments that were "carefully negotiated to provide benefits both to workers, businesses and to the insurance companies through a series of trade-offs." *Matter of Raynor*, 18 N.Y.3d at 53. When the Legislature intended for the bill to increase weekly benefits for employees or their beneficiaries, it did so directly. The bill, among other things, raised the maximum and minimum amount of benefits, including for non-schedule awards, L. 2007, ch. 6, § 2, and increased the maximum amount of death benefits payable to deceased employees' family members, *id.* § 3; *see also id.* § 5 (providing mechanism for additional benefits for employees who have been awarded non-schedule benefits).

In sharp contrast, the durational caps were intended as a "concession to insurance carriers," *Matter of Raynor*, 18 N.Y.3d at 54,

meant "to reduce costs for employers and carriers." *Matter of Mancini*, 32 N.Y.3d at 530. The Governor and the Legislature touted the caps as a reform that will help bring about "hundreds of millions of dollars of additional savings." Governor's Program Bill Mem. No. 9, 2007 N.Y. Legis. Ann. at 6; Assembly Introducer's Mem., Bill Jacket, L. 2007, ch. 6 at 30-31.

The Third Department's interpretation disserves that cost-saving intent. By holding that beneficiaries are entitled to all "remaining cap weeks" (R. 61), the Third Department's newly minted rule—which reverses the Board's longstanding position—could significantly increase the costs of non-schedule awards. The unaccrued portion of the non-schedule award at the time of death can total as many as 525 weeks of potential benefits. WCL § 15(3)(w). Thus, the Third Department's reading could increase the costs of many awards by tens or even hundreds of thousands of dollars.[7] Indeed, since the Third Department issued its

[7] *See, e.g.*, *New York City Transit*, 2018 WL 1748462 (Work. Comp. Bd. Mar. 5, 2018) (denying posthumous request for over $262,000 for 367 weeks of unaccrued non-schedule benefits); *Dykes Lumber Co.*, 2019 WL 2071902 (Work. Comp. Bd. May 3, 2019) (same for over $182,000 for 321.7 weeks of benefits); *Center for Discovery*, 2019 WL 1313956 (Work. Comp. Bd. Mar. 13, 2019) (same for over $75,000 for 253.6 weeks of benefits).

decision in March 2020, the Board has already received over 40 applications for administrative review that, like this case, involve a posthumous request for non-schedule benefits that had not accrued before the employee's death for reasons unrelated to the injury.

This Court's recent decision in *Youngjohn* further undercuts the Third Department's reliance on the durational caps. In that case, this Court rejected a claimant's novel interpretation of WCL § 15(4) that was premised on an amendment to a *different* WCL provision. More specifically, *Youngjohn* addressed what effect, if any, the 2009 amendments to WCL §§ 15(3) and 25(1) had on WCL § 15(4)(d)—the provision that provides that the unaccrued portion of an award payable to the employee's estate is limited to "reasonable funeral expenses." *Id.* at 591-92. The amendments provide that schedule awards are payable in a lump sum, rather than on a bi-weekly basis, "upon the request of the injured employee." WCL §§ 15(3)(u), 25(1)(b) (as amended by L. 2009, ch. 351, §§ 1, 2). Although there was no evidence that the decedent employee in *Youngjohn* requested a lump-sum payment, his estate argued that the 2009 amendments "implicitly" provided it "a new entitlement" to the entire schedule award because, according to the estate, the entire

schedule award became due to the deceased employee at or prior to his death. *Youngjohn*, 36 N.Y.3d at 604.

This Court rejected the estate's novel interpretation, emphasizing that WCL § 15(4) itself was "left untouched by the 2009 amendments." *Id.* It further explained that no legislative intent to alter WCL § 15(4)'s operation could be discerned from "the statutory language enacted in 2009[] or the legislative history of the 2009 amendments." *Id.* at 605.

The same reasoning applies to the Third Department's interpretation here. The Third Department effectively construed the 2007 amendment—which added the durational caps to WCL § 15(3)(w)—as "implicitly" providing an employee's beneficiaries a "new entitlement" under WCL § 15(4) to any weekly benefits that had not accrued during the employee's life. *Youngjohn*, 36 N.Y.3d at 604. But this novel interpretation fails. As in *Youngjohn*, WCL § 15(4) itself was "left untouched" by the amendment at issue, as were the conditions for receiving non-schedule benefits set forth in WCL § 15(3)(w). And neither the amendment's text nor its history evinces an intent to create such an entitlement. *Id.* at 604-05. Rather, as demonstrated, the Third

Department's reading of the durational-cap provision would undermine its cost-saving purpose.

The Third Department also misapprehended this Court's opinion in *Matter of Mancini*. (R. 59-60.) There, this Court observed that the durational caps were designed not just to "curtail costs" but also to create "greater parity" among "permanent partial disability benefit recipients"—that is, the injured employees. 32 N.Y.3d at 530-31. But there is no reason to think that the Legislature intended this parity to extend beyond the benefits payable to employees during their lifetimes, much less to extend those benefits in such a way as to increase the costs of non-schedule awards.

Lastly, to the extent the Third Department rejected the Board's position because it would result in what that court perceived to be an unfair outcome (R. 59), the court contravened the principle that statutes may not be rewritten "to achieve more 'fairness' than the Legislature chose to enact." *Matter of Bello v. Roswell Park Cancer Inst.*, 5 N.Y.3d 170, 173 (2005). As made clear by the WCL's text, the Legislature has decided that non-schedule benefits do not survive the employee's death. Any contention concerning the fairness of that decision is "better directed

to the legislature for its consideration and resolution." *Youngjohn*, 169 N.E.3d at 608.

CONCLUSION

The decision of the Third Department should be reversed and the Board's determination, dated January 1, 2019, which denied claimant's request for posthumous non-schedule benefits, should be reinstated.

Dated: Albany, New York
January 13, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the body of the foregoing Brief for Appellant New York State Workers' Compensation Board contains 4,870 words and thus complies with the word limit set by 22 N.Y.C.R.R. § 500.13(c)(1).

January 13, 2022

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ADDENDUM

Workers' Compensation Law § 15(3)(w)

w. Other cases. In all other cases of permanent partial disability, the compensation shall be sixty-six and two-thirds percent of the difference between the injured employee's average weekly wages and his or her wage-earning capacity thereafter in the same employment or otherwise. Compensation under this paragraph shall be payable during the continuance of such permanent partial disability, without the necessity for the claimant who is entitled to benefits at the time of classification to demonstrate ongoing attachment to the labor market, but subject to reconsideration of the degree of such impairment by the board on its own motion or upon application of any party in interest however, all compensation payable under this paragraph shall not exceed (i) five hundred twenty-five weeks in cases in which the loss of wage-earning capacity is greater than ninety-five percent; (ii) five hundred weeks in cases in which the loss of wage-earning capacity is greater than ninety percent but not more than ninety-five percent; (iii) four hundred seventy-five weeks in cases in which the loss of wage-earning capacity is greater than eighty-five percent but not more than ninety percent; (iv) four hundred fifty weeks in cases in which the loss of wage-earning capacity is greater than eighty percent but not more than eighty-five percent; (v) four hundred twenty-five weeks in cases in which the loss of wage-earning capacity is greater than seventy-five percent but not more than eighty percent; (vi) four hundred weeks in cases in which the loss of wage-earning capacity is greater than seventy percent but not more than seventy-five percent; (vii) three hundred seventy-five weeks in cases in which the loss of wage-earning capacity is greater than sixty percent but not more than seventy percent; (viii) three hundred fifty weeks in cases in which the loss of wage-earning capacity is greater than fifty percent but not more than sixty percent; (ix) three hundred weeks in cases in which the loss of wage-earning capacity is greater than forty percent but not more than fifty percent; (x) two hundred seventy-five weeks in cases in which the loss of wage-earning capacity is greater than thirty percent but not more than forty percent; (xi) two hundred fifty weeks in cases in which the loss of wage-earning capacity is greater than fifteen percent but not more than thirty percent; and (xii) two hundred twenty-five weeks in cases in which the loss of wage-earning capacity is fifteen

percent or less. For a claimant with a date of accident or disablement after the effective date of the chapter of the laws of two thousand seventeen that amended this subdivision, where the carrier or employer has provided compensation pursuant to subdivision five of this section beyond one hundred thirty weeks from the date of accident or disablement, all subsequent weeks in which compensation was paid shall be considered to be benefit weeks for purposes of this section, with the carrier or employer receiving credit for all such subsequent weeks against the amount of maximum benefit weeks when permanent partial disability under this section is determined. In the event of payment for intermittent temporary partial disability paid after one hundred thirty weeks from the date of accident or disablement, such time shall be reduced to a number of weeks, for which the carrier will receive a credit against the maximum benefit weeks. For a claimant with a date of accident or disablement after the effective date of the chapter of the laws of two thousand seventeen that amended this subdivision, when permanency is at issue, and a claimant has submitted medical evidence that he or she is not at maximum medical improvement, and the carrier has produced or has had a reasonable opportunity to produce an independent medical examination concerning maximum medical improvement, and the board has determined that the claimant is not yet at maximum medical improvement, the carrier shall not receive a credit for benefit weeks prior to a finding that the claimant has reached maximum medical improvement, at which time the carrier shall receive credit for any weeks of temporary disability paid to claimant after such finding against the maximum benefit weeks awarded under this subdivision. For those claimants classified as permanently partially disabled who no longer receive indemnity payments because they have surpassed their number of maximum benefit weeks, the following provisions will apply:

(1) There will be a presumption that medical services shall continue notwithstanding the completion of the time period for compensation set forth in this section and the burden of going forward and the burden of proof will lie with the carrier, self-insured employer or state insurance fund in any application before the board to discontinue or suspend such services. Medical services will continue during the pendency of any such application and any appeals thereto.

(2) The board is directed to promulgate regulations that establish an independent review and appeal by an outside agent or entity of the board's choosing of any administrative law judge's determination to discontinue or suspend medical services before a final determination of the board.

Workers' Compensation Law § 15(4)

4. Effect of award. 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:

a. If there be a surviving spouse and no child of the deceased under the age of eighteen years, to such spouse.

b. If there be a surviving spouse and surviving child or children of the deceased under the age of eighteen years, one-half shall be payable to the surviving spouse and the other half to the surviving child or children.

The board may in its discretion require the appointment of a guardian for the purpose of receiving the compensation of the minor child. In the absence of such a requirement by the board the appointment for such a purpose shall not be necessary.

c. If there be a surviving child or children of the deceased under the age of eighteen years, but no surviving spouse then to such child or children.

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, or, if there be no estate, to the person or persons paying the funeral expenses 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.