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 WORKERS' COMPENSATION BOARD,

Respondent-Appellant.

REPLY BRIEF FOR APPELLANT NEW YORK STATE WORKERS' COMPENSATION BOARD

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PRELIMINARY STATEMENT[1]

This appeal involves a beneficiary's claim for posthumous workers' compensation benefits. Rejecting the longstanding rule 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, the Third Department held that the employee's beneficiary here was entitled to receive benefits for the weeks remaining of the maximum number of weeks at which such benefits are now capped.

We previously demonstrated that the Third Department failed to construe the Workers' Compensation Law as a whole when it 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 beneficiaries. The Third Department compounded that error by misconstruing the 2007 amendment to the WCL, which imposed durational caps on non-schedule awards both to save costs and to eliminate one way in which non-schedule awards differ from schedule

[1] The abbreviations used in respondent-appellant New York State Workers' Compensation Board's opening brief are continued herein.

awards. The imposition of the caps did not, however, guarantee that employees or their beneficiaries would receive the maximum number of potential weekly benefits set by the caps.

Claimant nonetheless argues (Br. at 4-8) that because WCL § 15(4) refers generally to awards made under WCL § 15(3)—the provision that governs schedule and non-schedule awards—it must apply to both types of awards equally, notwithstanding the specific constraints that WCL § 15(3)(w) imposes on non-schedule awards. Claimant further argues (Br. at 9) that his reading is necessary to avoid rendering superfluous WCL § 33, which applies to benefits that have accrued during an employee's life but remained unpaid at the time of death. And claimant insists (Br. at 10-15) that, because the 2007 amendment that imposed the caps eliminated one difference between non-schedule and schedule awards, the amendment should be read to eliminate other differences between the two kinds of awards. These arguments are misguided.

ARGUMENT

POINT I

WCL § 15(4) MUST BE HARMONIZED WITH THE CONSTRAINTS THAT WCL § 15(3) IMPOSES ON NON-SCHEDULE AWARDS

As the Court recently reiterated, a statute must be construed as a whole, with its interlocking provisions read together. *Matter of Estate of Youngjohn v. Berry Plastics Corp.* ("*Youngjohn*"), 36 N.Y.3d 595, 604 (2021). Claimant nonetheless asks the Court to read WCL § 15(4), without accounting for the constraints that WCL § 15(3) imposes on non-schedule awards in particular.

Unlike non-schedule awards, schedule awards provide a set rate of weekly benefits for a fixed number of weeks according to the schedule set forth in WCL §§ 15(3)(a) through (t). *See Youngjohn*, 36 N.Y.3d at 599. They are intended to "compensate for loss of earning power" even when there is no loss of actual wages and thus are "independent of the time an employee actually loses from work." *Id.* at 599-600, 602 (internal quotation marks omitted); *see also, e.g.*, *Matter of Johnson v. City of New York*, __ N.Y.3d __, 2022 WL 1177637, at *2 (Apr. 21, 2022). Indeed, since 2009, the statute has expressly authorized the lump-sum payment of a

schedule award upon the request of the injured employee. *See* L. 2009, ch. 351, §§ 1, 2 (*codified at WCL* §§ 15(3)(u), 25(1)(b)). For an employee who has not requested such lump-sum payment, section 15(4) ensures that if that employee dies before accruing all guaranteed benefits, the remaining benefits become "payable to" the qualifying beneficiaries.

Non-schedule awards, by contrast, are not guaranteed or fixed, and employees are not entitled to a lump-sum payment upon request. The benefits are payable only (i) during the "continuance of" the disability and (ii) when the injury actually impairs the employee's "wage-earning capacity." WCL § 15(3)(w). That injury cannot continue, nor can it impair the employee's capacity to earn wages once the employee dies for reasons unrelated to the injury. Thus, a non-schedule award terminates at that point and no further benefits remain "payable to" the qualifying beneficiaries.

These constraints on non-schedule awards explain why neither the Board nor any court—until the Third Department here—had read WCL § 15(4) to apply to non-schedule awards, notwithstanding the fact that the purportedly operative language cited by claimant has been in effect for a century. *See* L. 1920, chs. 533, 534; L. 1922, ch. 615. The caselaw

addressing WCL § 15(4) likewise confirms that this provision was understood to affect schedule awards only. (*See* Board Opening Br. at 16-17.)

There is thus no merit to claimant's assertion (Br. at 6) that, had the Legislature wanted WCL § 15(4) to affect schedule awards only, it would have drafted that provision to refer to the specific paragraphs of WCL § 15(3) that govern schedule awards. "[T]here was simply no need for the Legislature to add language" to that effect given the existing limits imposed on non-schedule awards by "paragraph w's compensation regime." *Matter of Mancini v. Office of Children & Family Servs.* ("*Mancini*"), 32 N.Y.3d 521, 530 (2018).

POINT II

THE BOARD'S LONGSTANDING INTERPRETATION DOES NOT RENDER WCL § 33 SUPERFLUOUS

The Board's longstanding interpretation of WCL § 15(4) does not render WCL § 33 superfluous. The two provisions simply cover two distinct aspects of an award. Section 15(4), which affects schedule awards only, concerns the portion of the award that had *not* accrued during the employee's life. It provides that the unaccrued portion, which had been

guaranteed to the employee, becomes payable to the qualifying beneficiaries. Section 33, which affects *all* kinds of awards, "deals with a different matter altogether." *Matter of Sienko v. Bopp & Morgenstern*, 248 N.Y. 40, 45 (1928). It concerns the portion of the award that *had* accrued during the employee's life but remained unpaid at the time of death. It provides that this accrued portion is payable to the qualifying beneficiaries. WCL § 33; *see Youngjohn*, 36 N.Y.3d at 600. There is nothing superfluous about construing sections 15(4) and 33 to cover, respectively, the unaccrued portion of schedule awards and the accrued, yet unpaid, portions of all awards. Indeed, this is how the Third Department had long construed these two provisions, until its decision here. *See Matter of Healey v. Carroll*, 282 A.D. 969, 969 (3d Dep't 1953).

POINT III

THE DURATIONAL CAPS ON NON-SCHEDULE BENEFITS DO NOT GUARANTEE PAYMENT OF BENEFITS FOR THE MAXIMUM NUMBER OF CAPPED WEEKS

Like the Third Department, claimant misconstrues both the caps that the Legislature imposed on non-schedule benefits in 2007 and this Court's discussion of the caps in *Mancini*.

The provision that added the caps states that "compensation payable under [WCL § 15(3)(w)] shall not exceed" a certain number of weeks of benefits. L. 2007, ch. 6, § 4 (*codified at* WCL § 15(3)(w)). Had the Legislature wanted to promise benefits for a fixed number of weeks, it could have said—as it did for schedule awards—that such compensation "shall be paid" for that number of weeks. WCL §§ 15(3)(a)-(t).

Claimant nonetheless argues (Br. at 10-12) that because *Mancini* observed that the caps created "greater parity" between schedule and non-schedule awards, 32 N.Y. 3d at 530, the Third Department was correct to similarly create "greater parity" between those awards by treating the caps not just as a ceiling on non-schedule benefits but rather as guarantee of the maximum amount set for such benefits. *Mancini* does not sweep so broadly. Nothing in the Court's reasoning suggests that the caps were meant to eliminate *all* differences between schedule and non-schedule awards. Rather, the caps were meant to eliminate just one difference: They ensured that neither type of award provided "potentially open-ended benefits." *Id.*

Claimant's attempt to extend *Mancini*'s reasoning is especially unwarranted given that such an extension would disserve another

purpose of the caps: "to reduce costs for employers and carriers." *Id.* at 530. As we have explained (Opening Br. at 21-22), claimant's interpretation would increase the costs of many such awards. Amicus New York State Insurance Fund represents that it would have to increase reserves for over 6,500 non-schedule awards to account for the potential added liability. (*See* NYSIF Amicus Br. at 20-21.)

Claimant also overlooks the myriad ways that the statutory scheme continues to treat schedule and non-schedule awards differently. As noted, the Legislature in 2009 *increased* the disparity between the two awards by making schedule awards payable in one lump sum upon the employee's request. *See* L. 2009, ch. 351, §§ 1, 2. Further, the duration of schedule benefits is often less than the maximum duration of non-schedule benefits, and the manner of computing those durations is different. A schedule award can range from less than 15 weeks to 312 weeks of fixed benefits, depending on the degree of loss or loss of use of the specific body part or member. *See* WCL §§ 15(3)(a)-(t). A non-schedule award, in contrast, can range from 225 to 525 weeks of potential benefits, depending on the employee's loss of wage-earning capacity. *Id.* § 15(3)(w).

The Board's longstanding interpretation here is another example of how schedule and non-schedule awards continue to differ.

Claimant's other arguments lack merit. He asserts, incorrectly, that his reading is supported by the Board's observation in an administrative decision that "cap weeks" "vest[]" with the employee at the time the employee is classified as having a permanent partial disability. (Cl. Br. at 8; *see Metropolitan Hospital*, 2016 WL 4720221, at *3 [N.Y. Work. Comp. Bd. Sept. 6, 2016].) But the right that vests is a contingent one. It is the right to collect benefits "should [the employee] experience wage loss caused by the established injuries." *Metropolitan Hospital*, 2016 WL 4720221, at *3. Because an injury does not cause any wage loss after an employee's death for reasons unrelated to that injury, no further benefits accrue, and the award terminates.

Equally meritless is claimant's reliance on a 2017 amendment to WCL § 15(3)(w). (Cl. Br. at 12-14.) That amendment provides that employees who are entitled to receive non-schedule awards at the time they are classified as having a permanent partial disability do not have to show "ongoing attachment to the labor market." L. 2017, ch. 59, § 1, part NNN, § 1, subpart A, § 1 (*codified at* WCL § 15(3)(w)). An employee

is attached to the labor market, even if the employee has not been able to obtain work, as long as the employee remains willing to work consistent with the employee's limitations. *See Matter of O'Donnell v. Erie County*, 35 N.Y.3d 14, 20 (2020). As a result of the amendment, to continue receiving non-schedule benefits, partially disabled employees who are not working at the time of classification no longer have an affirmative duty to prove that they remain attached to the labor market on an ongoing basis. *Id.*[2]

The 2017 amendment, however, does not guarantee either a fixed number of weekly non-schedule benefits, or even a fixed rate of such benefits—a point that claimant does not dispute. (*See* Cl. Br. at 13.) Even today, no benefits are due to employees for those periods in which their injuries do not cause losses in wages and, thus, do not impair wage-earning capacity. *See* WCL § 15(3)(w); *see also, e.g.*, *New Caps LLC*, 2022 WL 972154, at *2 (N.Y. Work. Comp. Bd. Mar. 28, 2022) (no non-schedule benefits due for period in which employee did not have a "loss of wages

[2] The amendment did not change the longstanding rule that employees generally must show that they are attached to the labor market at the same at they are classified as having a non-schedule permanent partial disability. *See Matter of O'Donnell*, 35 N.Y. at 20.

causally related to her established disability"); *Reliable Plumbing Supply*, 2022 WL 412292, at *4 (N.Y. Work. Comp. Bd. Feb. 8, 2022) (similar). Accordingly, the 2017 amendment—like the imposition of the statutory cap—does not mean that non-schedule benefits continue to accrue when the employee dies for reasons unrelated to the injury.

Finally, the Third Department's decision, if permitted to stand, could embroil the Board and courts in resolving disputes for which the WCL provides no guidance. Because non-schedule awards are based on an employee's actual impairment of wage-earning capacity, weekly payments for those awards can fluctuate or be suspended entirely. In a case where those payments have fluctuated or been suspended entirely, and an employee dies for reasons unrelated to injury with unaccrued capped weeks remaining, the Board, or courts, would have to determine how payments for those capped weeks would be calculated. The fact that the WCL does not provide any guidance on how to resolve that issue provides further evidence that the Legislature did not intend for non-schedule benefits to accrue posthumously.

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
April 26, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the body of the foregoing Brief for Appellant Workers' Compensation Board contains 2,145 words and thus complies with the word limit set by 22 N.Y.C.R.R. § 500.13(c)(1).

April 26, 2022

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