To Be Argued By:
Ralph E. Magnetti
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APL-2021-00152

Workers' Compensation Board No. 50714439
Appellate Division, Third Department Docket No. 529624

Court of Appeals

STATE OF NEW YORK

In the Matter of the Claim for Benefits Under
the Workers' Compensation Law by

ERIC WATSON (Dec'd)/KANYE KHALID GREEN (Son),

Claimant-Respondent,

against

DUTCHESS COUNTY BOCES, Employer
WRIGHT RISK MANAGEMENT, Carrier,

Respondents-Appellants,

and

WORKERS' COMPENSATION BOARD,

Respondent.

BRIEF FOR RESPONDENTS-APPELLANTS

CHERRY, EDSON & KELLY, LLP
Attorneys for Respondents-Appellants
150 White Plains Road, Suite 209
Tarrytown, New York 10591
914-332-1800
rmagnetti@cekesq.com

Of Counsel:
Ralph E. Magnetti

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DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. 500.1(f), the Respondent Dutchess County BOCES is a public organization created by the New York State Legislature, and has no parent companies, subsidiaries or affiliates. Wright Risk Management Co., LLC is a subsidiary of Brown & Brown Insurance, Inc., whose affiliates and subsidiaries of affiliates are listed as follows:

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- Texas Security General Ins. Agency
- Texas All Risk
- The Advocate Group
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PRELIMINARY STATEMENT

The subject of this appeal is the Third Department's decision that the claimant, the dependent child of an injured worker who was classified permanently partially disabled pursuant to Section 15(3)(w) of the Workers' Compensation Law before his death on March 12, 2018, is entitled to an additional posthumous award for the remaining cap weeks owed for the decedent's non-schedule permanent partial disability. The Third Department's decision maintains that this conclusion is based on the plain language of WCL Section 15(4), and this Court's prior decisions in *Matter of Sienko v. Bopp & Morgenstern*, 248 N.Y. 40 (1928) and *Matter of Mancini v. Office of Children & Family Services*, 32 N.Y. 3d 521 (2018).

Workers' Compensation Law Section 15(4) provides that an award made to a claimant under subdivision 3 shall in case of death arising from causes other than the injury be payable to a surviving spouse, child under the age of 18, or qualifying dependent. Subdivision 3 of WCL Section 15 refers to permanent partial disability awards, which fall into one of two broad categories. WCL Section 15(3)(a)-(t) are known as 'schedule loss of use' awards, and WCL Section 15(3)(w) refers to 'non-schedule' awards.

WCL Section 15(4) has always been interpreted as giving the right to surviving spouses and dependent children to receive the full amount of a 'schedule award' when the injured employee dies prior to the expiration of the full payment

of the award and from causes other than the work related injuries, but it was always understood that a 'non-schedule award' for a permanent partial disability, i.e., an award for an injury to a bodily member or sense not listed on the schedule contained in WCL Section 15(3)(a)-(t), terminates when the employee dies for reasons unrelated to the injury, and therefore there are no further benefits payable to beneficiaries. A 'non-schedule award' is only payable "during the continuance of such partial disability, 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," (WCL Section 15(3)(w)) whereas 'schedule loss of use awards' are payable for a certain number of weeks, the award "is not allocable to any particular time period" and is independent of any time that the worker might lose from work (*Matter of Cruz v. City of New York Dept. of Children's Services*, 123 A.D. 3d 1390 [2014]).

The Third Department disagreed with the Board's decision that a worker's right to receive a non-schedule award for his or her non-schedule permanent impairments is calculated upon a future wage loss caused by the established injuries, and that upon death an injured worker can no longer establish a causally related reduction in the wages attributable to his or her non-schedule permanent disability. It is respectfully submitted that this decision by the Third Department is a misinterpretation of the legal precedent established by this Court, and the

legislative intent and history that led to the amendments to WCL Section 15(4) in 1920, as well as WCL Section 15(3) in 2007. In reversing the Board's determination that the non-schedule award issue had lapsed when the employee died for reasons unrelated to this injury, the Third Department overlooked the operative text of the provision for non-schedule awards and rendered a decision that cannot be reconciled with this Court's subsequent decisions in *Matter of O'Donnell v. Erie County*, 35 N.Y. 3d 14 (2020) and *Matter of Estate of Youngjohn v. Berry Plastic Corp.*, 36 N.Y. 3d 595 (2021).

If allowed to stand, the Third Department's decision will have great economic consequences, affecting employers and insurance carriers doing business in this state. The Third Department's ruling would significantly increase costs for non-schedule awards, which is contrary to the legislature's intent to reduce costs for employers and carriers, as well as create greater parity among different classes of permanent partial disability recipients, as noted per this Court's decision in *Matter of Mancini*, (*Id*.).

QUESTION PRESENTED

Does Workers' Compensation Law Section 15(4)(c) require that the balance or remaining weeks of decedent's non-schedule permanent partial disability award be paid to the decedent's dependent child after the decedent's death?

JURISDICTIONAL STATEMENT

This Court granted leave to appeal on September 14, 2021. This Court has jurisdiction of the appeal because it presents a preserved question of law, and under CPLR 5602(a)(1)(ii), as this is a direct appeal from the Board's final Order filed April 1, 2021, which was based on the Third Department's decision filed March 5, 2020.

STATUTORY BACKGROUND

Section 15(4) of the WCL addresses those situations in which an employee dies for reasons unrelated to the compensable injury. It states that:

> An award made to a claimant under subdivision 3 shall … be payable to and for the benefit of [the surviving spouse, any minor children or, if none, certain eligible dependents, the Estate, or the person paying the funeral expenses].

Until 1920, the rule in both compensation claims under WCL Section 15 and death claims under WCL Section 16 was that the claim abated upon the death of the claimant. In *Terry v. General Electric*, 232 N.Y. 120 (1921), this Court applied the traditional common law doctrine of abatement, based on WCL Section 33 as it was then codified, and held that any right to compensation died with the claimant. The same reasoning was applied in *Wozneak v. Buffalo Gas Co.*, 175 A.D. 268 (3d Dept., 2016), and *Casmey v. George Parks' Sons Co.*, 229 N.Y. 623 (1920). The year after *Terry* was decided, as part of a substantial recodification of the Workers' Compensation Law, WCL Section 33 was amended to provide that "an award for

disability may be made after the death of the injured employee." This Court, in a decision made after this amendment, acknowledged that *Terry* was overruled by this amendment, and specifically held that "an award was properly made on the claim of disability on file at the time of death without requiring the widow to file a new claim." (*Hughes v. Trustees of St. Patrick's Cathedral*, 245 N.Y. 201 [1927]).

There is nothing to suggest that the amendments were intended to establish an entitlement to a non-schedule permanent partial disability award for a period subsequent to the date of death. In passing the amendments to WCL Sections 15(4) and 33, the legislature limited the language abolishing common law abatement to disability claims. This led to the decision made by this Court in *Matter of Sienko v. Bopp & Morgenstern*, 248 N.Y. 40 (1928). In that case, the decedent was injured on May 29, 1923, and died from unrelated causes on July 28, 1925. The issue that had to be addressed was whether the claim for compensation due at the time of the claimant's death was payable to the surviving spouse, and it was determined that the surviving spouse was entitled to payment of the award that would have been paid to the claimant during his lifetime, covering the period from May 19, 1923 to July 28, 1925. There was no award made for a period subsequent to the claimant's death, nor does the decision indicate that any argument was made for an award for a period subsequent to the date of death. There was a reference to what would occur if there was a claim for a schedule loss of use award that was not

fully paid before the period covered by the schedule loss of use award expired, and this Court stated that such an award would be payable to the surviving spouse or children.

It should be noted that when WCL Section 15(4) was amended in 1920, WCL Section 15(3)(w) did not exist. Subdivision 3 of WCL Section 15, paragraphs (a)-(t) addressed the types of permanent partial disabilities that were subject to schedule loss of use awards, and paragraph (u), under the heading "Other Cases" stated that "in all other cases in this class of disability, the compensation shall be 66 and 2-3rds per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, 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."

It is important to consider the cases that were decided under paragraph (u) during that time to understand its purpose. In *Matter of Jordan v. Decorative Co.*, 230 N.Y. 522 (1921), it was stated "cases such as this where the award is to be measured by the difference between wages and capacity are, of course, not to be confused with those where the act prescribes a fixed and certain limit, irrespective of the tendency of the individual to rise above or fall below it. Workmens' Compensation Law, §15, Subds. 1, 2, 3." The holding emphasized the difference

between a schedule award and non-schedule award and held that the claimant was not entitled to a non-schedule award for a period when the claimant refused work within his physical restrictions without explanation.

In *Matter of Supple v. Erie R.R. Co.*, 180 A.D. 135 (1917), the Third Department had to consider whether a claimant should receive an award for a permanent loss of use of a finger or an award under the "other cases" provision providing compensation based on the difference between his average weekly wage and wage earning capacity thereafter, and concluded that the latter was applicable, subject to the qualification that such compensation cannot exceed that for the loss of a finger. This decision suggested that the "other cases" provision was applicable when it was determined that an injured worker would be unjustly enriched if the schedule loss of use award was made.

The "other cases" provision clearly provided the award was only payable "during the continuance of such partial disability", and in that regard, the provision was similar to WCL Section 15(1) for a permanent total disability, which also provided that an award for permanent total disability was payable "during the continuance of such total disability", and WCL Section 15(2) for a temporary total disability, which indicated that the award was only payable during the continuance of the disability. That is distinguishable from the language contained in WCL

Section 15(3) pertaining to schedule loss of use awards, which provides that the award "shall be paid to the employee for the period named in this subdivision."

The "other cases" provision which now appears in WCL Section 15(3)(w), compensation still provides that such compensation is only "payable during the continuance of such permanent partial disability." Until 2007, this meant that the award could last for the employee's life. This changed in 2007 when, as part of a comprehensive workers' compensation reform bill, the legislature capped the number of weeks that employees are eligible to receive non-schedule benefits (L. 2007, ch. 6, Section 4; See *Matter of Mancini v. Office of Children & Family Servs., Id*. (describing amendment)).

Section 15(3)(w) now provides that any compensation "shall not exceed" the durational cap, which ranges from 225 to 525 weeks depending on the severity of the employee's loss of wage-earning capacity, but unlike a schedule award, a non-schedule award does not guarantee "weekly compensation benefits at a specific rate … over a set period" (*Burns v. Varriale*, 9 N.Y. 3d 207, 217 (2007)). The employee's wage-earning capacity is impaired only insofar as the employee's post-injury earnings are reduced (*See Id.*). There is thus no award for periods in which the disability does not "cause a wage-earning loss," such as when the employee earns as much as he or she did before the injury (*Matter of O'Donnell*, 35 N.Y. 3d 14, 15; *see also* WCL Section 15(5-a) (wage-earning capacity is determined by

"actual earnings")). Given that the employee's wage-earning capacity can fluctuate, the Board may modify the award or suspend it entirely (WCL Sections 15(3)(w) and 22; *see*, *E.G., Matter of Walker v. TNT Redstar Exp.*, 25 A.D. 3d 945, 946 (3d Dept., 2006) (affirming discontinuation of non-schedule benefits)).

Prior to the Third Department's opinion in the matter at hand, neither the Board nor any Court had read WCL Section 15(4) or WCL Section 15(3)(w) (formerly Section 15(3)(u) and (v)) to entitle the named beneficiaries to a non-schedule award for a period subsequent to the date of death upon an employee's death for reasons unrelated to the compensable injury.

STATEMENT OF THE CASE

The decedent, ERIC WATSON, sustained a work-related injury on November 19, 2007. The case was established for an injury to the right leg, and an average weekly wage was set at $1,715.73 (R. 10)[1]. In a Notice of Decision filed March 28, 2012, it was determined that the injury resulted in a permanent partial disability classification, the loss of wage earning capacity was set at 51%, and as a result, it was found that there was an entitlement to wage loss benefits not to exceed 350 weeks (R. 18). At the time of classification, the decedent was working at reduced wages and entitled to continuing reduced earnings payments of $500.00 per week. The payments were made until the decedent's death on March 12, 2018.

[1] Parenthetical references to "R_" refer to pages from the Record on Appeal that was before the Third Department.

The decedent's death certificate indicated that the cause of death was probable cardiac arrhythmia (R. 20).

Proof was submitted that the decedent was survived by his son, KANYE KHALID GREEN, who was born on August 12, 2004. The birth certificate identified the decedent as the child's father (R. 9).

At a hearing held on June 12, 2018, it was argued by the claimant's attorney that the surviving child was entitled to the balance of the decedent's permanent partial disability award, based on the theory that the remaining weeks under the cap were similar to a schedule loss of use award, so the remainder of the cap weeks should be paid to the child (R. 22-24). It was argued on behalf of the self-insured employer that the permanent partial disability award was intended to provide compensation during the continuance of the disability, which ended with the decedent's death (R. 24). The WCLJ agreed with the self-insured employer's position, and the Notice of Decision filed June 18, 2018 found that awards were payable through the March 12, 2018 date of death at the reduced earnings rate of $500.00, with any balance due payable to the dependent child (R. 29).

The claimant's attorney noted an exception to the WCLJ's decision and filed an application for review on July 13, 2018 (R. 31-35). The Memorandum of Board Panel Decision filed January 4, 2019 affirmed the decision made by the WCLJ (R. 4-8). The decision pointed out that an award for loss of wage-earning capacity

under WCL Section 15(3)(w) differed from a schedule loss of use award, noting that the wage earning capacity award was for future loss of wages, which was not a set amount, so entitlement to a loss of earnings award would depend upon whether the injured worker returned to work at or below his said average weekly wage. A claimant who returned to work at earnings at or above the established average weekly wage would not be entitled to an award during the capped weeks after his classification. Since the claimant must have causally related lost time to be entitled to such an award, and a claimant who had died has no earnings to lose, no posthumous award is warranted. Thus, it was determined that no additional award was payable to the decedent's surviving child.

The claimant's attorney filed a Notice of Appeal on January 25, 2019 (R. 1-3). The appeal was perfected with the submission of a Brief and Record on Appeal. A Reply Brief was submitted on behalf of the self-insured employer.

The opinion and Order of the Appellate Division, Third Department reversed the Board Panel's determination and held that the claimant is entitled to an additional posthumous award for the remaining cap weeks owed for decedent's non-schedule permanent partial disability award (See *Matter of Green v. Dutchess County BOCES*, 183 A.D. 3d 23 (3d Dept., 2020), *lv. granted* 37 N.Y. 3d 907, 2021).

In so holding, the Third Department maintained that this conclusion was supported by "the plain and unqualified language of Workers' Compensation Law Section 15(4), and … the recent amendments to the Workers' Compensation Law reflecting the legislature's intent to eliminate disparity between the two different classes of permanent partial disability awards." Regarding the employer's arguments that were not addressed in the decision, it was stated "they are, in light of our decision herein, either academic or without merit."

ARGUMENT

POINT I

A POSTHUMOUS AWARD FOR A LOSS OF EARNINGS FOR A PERIOD SUBSEQUENT TO THE DATE OF DEATH IS NOT SUPPORTED BY THE PLAIN LANGUAGE OF WCL SECTION 15(4).

The first issue that has to be addressed is whether the Workers' Compensation Board and the practitioners who have represented injured workers for the last 100 years have misinterpreted WCL Section 15(4) by failing to realize that the plain language of WCL Section 15(4) should result in awards being made to the surviving spouses, minor children or other qualifying dependents subsequent to an injured workers date of death when the injured worker was classified as having a permanent partial disability under WCL Section 15(3)(w) prior to the 2007 amendments that implemented a durational cap on non-schedule permanent partial disability benefits. Although the Third Department's recent decision

declined to address whether it's holding that Workers' Compensation Law Section 15(4) includes non-schedule permanent partial disability awards in uncapped cases for accidents that occurred prior to March 13, 2007, its decision is premised on its interpretation of the plain language under WCL Section 15(4), which suggests that the Section is applicable to any award made under subdivision 3 of WCL Section 15, including uncapped non-schedule awards with dates of accident prior to March 13, 2007.

It is respectfully submitted that this cannot be so because the language under WCL Section 15(4) cannot be read in isolation. As noted in *ACE Fire Underwriters, Inc. Co. v. The Special Funds Conservation Comm.,* 28 N.Y. 3d 1084, 1086 (2016), provisions of the integrated statutory scheme must be considered as a whole, with each component viewed in relation to the others.

In this case, the Third Department's reasoning interprets WCL Section 15(4) without considering the plain language of WCL Section 15(3)(w) in its entirety. An award under that Section is payable as long as the permanent partial disability continues, which by definition, cannot include a period subsequent to the claimant's death. That limitation does not apply to the schedule loss of use awards under WCL Section 15(3)(a)-(t). Those provisions state the number of weeks payable, without including the qualifying language contained in WCL Section 15(3)(w) (formally WCL Section 15(3)(u) and WCL Section 15(3)(v)). It is well

settled that schedule loss of use 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, 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 (see *Matter of Estate of Youngjohn, Id*.).

Another flaw in the Third Department's reasoning is the perceived unfairness that would result from applying WCL Section 15(4) to SLU awards, but not to non-schedule permanent partial disability awards. This evaluation of what is fair or unfair is misguided. This is demonstrated by the fact that the Third Department's decision would result in non-schedule permanent partial disability awards being paid to the eligible beneficiaries enumerated under WCL Section 15(4), but not to the surviving spouse or dependent children of a decedent who had been classified permanently totally disabled under WCL Section 15(1). There is no rational basis to support the conclusion that beneficiaries of a decedent who was classified with a permanent partial disability are entitled to a posthumous award, but beneficiaries of a decedent who had been classified permanently totally disabled under WCL Section 15(1) are not.

Furthermore, there is nothing intrinsically unfair about the legislature's choice given the broader statutory context. Courts may "not rewrite [a] statute 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 statutory text, non-schedule awards do not survive the employee's death.

Yet another factor to consider is that the Third Department's reasoning would apply to beneficiaries of decedents who had been classified with a permanent partial disability before dying but were not receiving any award at the time of their death because they were working without any loss of earnings or had voluntarily withdrawn from the labor market prior to the date of death. That is not a scenario that was intended by the legislature when the amendments to WCL Section 15(4) and WCL Section 15(3)(w) were enacted.

Finally, when the statutory framework of the law is considered in its entirety, it is clear that 'schedule awards' and 'non-schedule awards' are treated differently. The 2009 amendment to WCL Section 25(1)(b) now permits the payment of a 'schedule award' in one lump sum without commutation to present value (L 2009, ch 351, Section 1), but the amendment does not have a similar provision for a 'non-schedule award'. Also, WCL Section 27(2) requiring carriers to make a payment into the Aggregate Trust Fund after a non-schedule award is made under WCL Section 15(3)(w) is based on the present value of unpaid benefits and WCL Section 27(4) allows for a recalculation and refund when there is a modification or change of an award (for any reason other than the death of a

claimant or remarriage of a spouse). Thus, if a claimant returns to work after a deposit is made, the carrier may request a recalculation and refund. This further illustrates that a 'schedule award' is distinguishable from a 'non-schedule award' in character and purpose and that the plain language of WCL Section 15(4) stating "an award made to a claimant under subdivision 3 shall in case of death arising from causes other than the injury be payable to and for the benefit of the persons following …" was not intended to have posthumous awards made to beneficiaries of decedents who were receiving a non-schedule permanent partial disability award at the time of their death.

POINT II

THE THIRD DEPARTMENT'S DECISION IS NOT SUPPORTED BY THE STATUTE, LEGISLATIVE HISTORY, LEGISLATIVE INTENT OR THIS COURT'S DECISION IN *MATTER OF MANCINI.*

Although the Third Department's reasoning in this case is so far reaching that it could be applied to non-schedule permanent partial disability awards in uncapped non-schedule permanent partial disability awards made for accidents that occurred prior to March 13, 2007, the decision attempted to limit its scope to non-schedule permanent partial disability awards in capped cases that apply to accidents that occurred on or after March 13, 2007. The decision maintains that its conclusion is supported by the legislature's 2007 amendment to WCL Section 15(3)(w) to impose durational restrictions by capping the number of weeks that an

injured worker is eligible to receive benefits for a non-schedule permanent partial disability award, and the statements made by this Court in *Matter of Mancini*, *Id.*

It is respectfully submitted that these assertions by the Third Department are a misinterpretation of the legislative history and intent, as well as this Court's observations in *Matter of Mancini*. It is true that the 2007 amendment was enacted to reduce costs for employers and carriers, as well as create greater parity among different classes of permanent partial disability benefit recipients, but to say that this supports the conclusion that survivors of a decedent are entitled to the remaining cap weeks owed for a decedent's non-schedule permanent partial disability award, in the same manner as a posthumous schedule loss of use award is incorrect, because it ultimately results in increasing costs for employers and carriers, which is contrary to the legislature's intent.

In *Matter of Mancini*, the concept of creating greater parity among schedule loss of use awards and non-schedule permanent partial disability awards was considered in the context of a claimant who suffered a 50% SLU of the left arm and was entitled to additional compensation pursuant to WCL Section 15(3)(v). This Court ruled in favor of the employer and carrier by finding that the durational limits under WCL Section 15(3)(w) setting forth the maximum number of weeks a claimant may receive payment based on a percentage of lost wage earning capacity was applicable to the additional compensation payable under WCL Section

15(3)(v). Thus, the creation of a greater parity among schedule loss of use awards and non-schedule permanent partial disability awards was achieved in a manner that would reduce costs for employers and carriers, not increase costs for employers and carriers, which would be the unintended consequence of the Third Department's decision in the matter at hand.

Two decisions made by this Court after the Third Department's decision also demonstrate that the 2007 amendment to WCL Section 15(3)(w) does not undo the very clear distinction between a 'schedule award' and a 'non-schedule' award. In *Matter of O'Donnell v. Erie County* (*Id*.), the issue to be addressed was whether a claimant classified with a permanent partial disability under WCL 15(3)(w) was entitled to a 'non-schedule award' without establishing a causal link between her disability and reduced earning capacity, and it was held that a 2017 amendment to WCL Section 15(3)(w) which eliminated any post-classification obligation to demonstrate ongoing attachment to the labor market did not change the statutory framework requiring proof of labor market attachment at the time of classification. Thus, a 'non-schedule' award remains distinguishable from a 'schedule award' in that regard.

In *Matter of Estate of Youngjohn v. Berry Plastic Corp.*, (*Id*.), the issue addressed was whether the full value of a 'schedule award' should be paid to the decedent's estate because a 2009 amendment to WCL Section 25(1)(b) allowing an

injured worker to request that a 'schedule award' be paid in one lump sum without commutation to present value superseded the provision set forth in WCL Section 15(4)(d) which limited the portion of the 'schedule award' for the period subsequent to the date of death to reasonable funeral expenses. The conclusion reached was that the 2009 amendment did not nullify the provision in WCL 15(4)(d) that an estate may only recover the amount of the 'schedule award' due before the decedent's death plus reasonable funeral expenses. In its analysis, the decision pointed out that WCL Section 15(1)-(3), (5) provide compensation for four types of injury (permanent total disability, temporary total disability, permanent partial disability and temporary partial disability), and goes on to explain the difference between a 'SLU' award and other types of injury by pointing out that 'SLU' awards are unlike awards for the other types of disability because the duration of 'SLU' awards is "determined by a statutory schedule assigning a fixed number of weeks of compensation for the specific body part that is injured" whereas the other types of disability awards are payable "during the continuance of the disability." The decision also quotes *Matter of Sienko*, 248 N.Y.at 45 stating "for this limited class of injury, permanent partial disability, may be continued for the benefit of a surviving spouse, child or dependent." It is apparent from this language that the Court in *Matter of Sienko* was referring to 'schedule awards' not disability awards that are payable "during the continuance of the disability," and

that it was a mistake to conclude that WCL Section 15(4)(a)-(c) applies to extend benefits for 'non-schedule' awards under WCL Section 15(3)(w) to any period subsequent to the date of death.

The larger context of the 2007 amendments also confirms that the legislature did not intend to provide posthumous non-schedule benefits. The 2007 amendments contained numerous reforms that were "carefully negotiated to provide benefits both to workers, businesses and to the insurance companies through a series of tradeoffs" (*Matter of Raynor v. Landmark Chrysler*, 18 N.Y. 3d 48, 53 (2011)). When the legislature intended the amendments to favor employees or their family members, it did so directly (L. 2007, ch. 6, § 2 (raising the maximum and minimum amount of weekly benefits including for non-schedule awards); *Id*. Section 3 (increasing maximum rate of death benefits payable to deceased employees' family members)). In sharp contrast, the durational caps on non-schedule awards were a "concession to insurance carriers" (*See Matter of Raynor*, 18 N.Y. 3d at 54). They were meant to limit, not expand, the payment of benefits. The Third Department's opinion errs by imputing a contrary purpose to the caps and thus disrupts the legislature's deliberate balance of competing interests embodied in the 2007 amendments.

In summary, if the Third Department's decision in this case is allowed to stand, it undermines the entire framework of the statute, and drastically affects the cost of doing business for employers and insurance carriers in New York State.

CONCLUSION

For the foregoing reasons, this Court should reverse the Third Department's Decision below and confirm the Board's original determination that the balance or remaining weeks of a decedent's non-schedule permanent partial disability award are not payable to the decedent's dependent child subsequent to the decedent's death.

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Respectfully submitted,

CHERRY, EDSON & KELLY, LLP

By: _____
Ralph E. Magnetti, Esq.
Attorneys for Respondents
150 White Plains Road, Ste. 209
Tarrytown, NY 10591
(914) 332-1800

CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 500.13(c) that the foregoing Brief was prepared on a computer.

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