

To be argued by:  
LOUIS M. DAUERER  
(Time requested: 10 minutes)

APL No. APL-2021-00152  
Appellate Division Case No. 529624  
Workers' Compensation Claim No. 50714439

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# Court of Appeals

*of the*

# State of New York

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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,

*Respondent-Appellant,*

WRIGHT RISK MANAGEMENT,

*Carrier-Appellant,*

– and –

WORKERS' COMPENSATION BOARD,

*Respondent-Appellant.*

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## BRIEF FOR CLAIMANT-RESPONDENT

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April 1, 2022

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## QUESTION PRESENTED

Whether WCL §15(4) requires that the balance of the remaining weeks of decedent's non-schedule permanent partial disability award be paid to his dependent child after his death by causes unrelated to the injury?

## STATEMENT

This is a response to an appeal by the Appellants, Dutchess County BOCES (employer), Wright Risk Management (carrier) and Workers' Compensation Board ("Board"), from the Appellate Division, 3<sup>rd</sup> Department's decision dated March 5, 2020, which reversed the Board's determination and held that Kanye Khalid Green, a dependent child, was entitled, based upon WCL §15(4), to receive the remaining cap weeks owed for his father, Eric Watson's, non-schedule permanent partial disability award after Mr. Watson passed away due to causes unrelated to his injury. *Matter of Green v. Dutchess County BOCES*, 183 AD3d 23 (3<sup>rd</sup> Dept. 2020), *lv. granted* 37 NY3d 907 (2021) (R. 53).

## STATEMENT OF FACTS

Mr. Watson injured his right leg at work on June 24, 2008. Among the three jobs at which he was working at the time of injury, his average weekly wage was set at \$1,715.73 (R.13). On March 23, 2012, the Workers' Compensation Board

classified Mr. Watson with a non-schedule permanent partial disability pursuant to WCL §15(3)(w), with a loss of wage earning capacity of 51% entitling him to wage loss benefits not to exceed 350 weeks. (R. 18).

Mr. Watson never returned to work for Dutchess County BOCES, however subsequent to his classification Mr. Watson continued to work light duty for other employers and was awarded benefits at a \$500 weekly reduced earnings rate, (R. 29) which he received until his death.

Mr. Watson passed away on March 12, 2018 due to causes unrelated to his injury (R. 20). Among others, Mr. Watson was survived by his then 13 year-old dependent son, Kanye Khalid Green. (R. 4). At that time there remained 38.8 weeks of the 350 weeks awarded at the March 23, 2012 hearing.

At the June 12, 2018 hearing, we requested that the WCLJ direct payment of the remaining weeks of the non-schedule permanent partial disability award to Mr. Watson's son pursuant to WCL §15(4)(c). (R. 22-23). The WCLJ denied the request. (R. 25) We filed an application for review to the board, (R. 31) and the Workers' Compensation Board Panel affirmed the WLJ's determination. (R.4).

We appealed the Board Panel's determination to the Appellate Division, Third Department. On March 5, 2020, the Appellate Division, Third Department held that Kanye Khalid Green was entitled to receive the remainder of the non-schedule PPD award pursuant to §15(4)(c). (Appendices A007 and A001 of the

appellants' motions). *Matter of Green v. Dutchess County BOCES*, 183 AD3d 23 (2020), *lv. granted* 37 NY3d 907 (2021). The court remitted the matter to the Workers' Compensation Board for further proceedings not inconsistent with this decision.

Thereafter, on April 1, 2021, the Workers' Compensation Board issued a Memorandum of Board Panel Decision (EBRB-1) wherein they directed the carrier to issue payment to Eric Watson's son, Kanye Khalid Green, in accordance with the March 25, 2020 Memorandum and Order of the Appellate Division. In this decision, the Board wrote that,

pursuant to the March 5, 2020, Memorandum and Order of the Appellate Division, Third Department, and the February 18, 2021, opinion of the Court of Appeals which dismissed the Board's motion for leave to appeal, finding that the decision of the Appellate Division, Third Department was nonfinal, the Board is constrained to find that the claimant is entitled to an award in the amount of 38.8 weeks of compensation at the rate of \$500.00 per week. (SR. 3).

The carrier issued payment to Mr. Green on April 19, 2021.

Motions for leave to appeal to the Court of Appeal filed by the carrier (on April 14, 2021) and the Workers' Compensation Board (on April 27, 2021) were granted on September 14, 2021. *Matter of Green v. Dutchess County BOCES*, 183 AD3d 23 (3<sup>rd</sup> Dept., 2020), *lv. granted* 37 NY3d 907 (2021).

## SUMMARY OF THE ARGUMENT

We contend the Appellate Division, Third Department, correctly held that Eric Watson's son, Kanye Khalid Green, was entitled to the remaining posthumous non-schedule PPD benefits awarded to his father. WCL §15(4) provides that,

[a]n 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 persons . . . (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. (emphasis added)

WCL §15(3) provides for both schedule loss [§15(3) (a-s)] and non-schedule loss [WCL §15(3)(w)] awards. Interpreting WCL §15(4) to apply to non-schedule permanent partial disabilities is most consistent with the plain language of that section in conjunction with stated legislative intent underpinning the 2007 amendments to the WCL (L. 2007 ch. 6) to reduce unfairness and create greater parity among different classes of permanent partial disability benefit recipients by reducing disparities between schedule and non-schedule permanent partial disability awards. *See Matter of Mancini v. Office of Children & Family Servs.*, 32 NY3d 520, 530-531 (2018)



## ARGUMENT

### POINT I

#### **A POSTHUMOUS AWARDING OF THE REMAINING NON-SCHEDULE PERMANENT PARTIAL DISABILITY BENEFITS TO AN INJURED WORKER'S SURVIVING SON IS CONSISTENT WITH THE STATUTORY LANGUAGE AND PURPOSE AND INTENT OF THE WORKERS' COMPENSATION LAW.**

The Workers' Compensation Law should be construed fairly and liberally in favor of the employee, *Matter of Heitz v. Ruppert*, 218 NY 148, 154 (1916) consistent with the beneficial and remedial character of the statute, *Matter of Wolfe v. Sibley, Lindsay & Curr Co.*, 36 NY2d 505, 508 (1975).

Workers Compensation Law §15 creates four classes of benefits: permanent total §15(1), temporary total §15(2), temporary partial §15(5) and permanent partial §15(3). WCL §15(3) creates two sub-classes of permanent partial disabilities: schedule loss §15(3)(a)-(u) and non-schedule loss §15(3)(w). As noted, Mr. Watson was found to have a non-schedule loss with a 51% loss of wage earning capacity pursuant to §15(3)(w) thereby entitling him to a maximum of 350 weeks of benefits. (R. 18)

WCL §15(4)(c) provides that,

“[a]n 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 . . . (c) [i]f 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 . . . .” (emphasis added).

The starting point of statutory interpretation begins with the statutory text giving effect to the plain meaning of the language used. *Matter of Mancini v. Office of Children and Family Services*, 32 NY3d 521, 525 (2018) (citing *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 (1998)). WCL §15(4) makes no differentiation between schedule and non-schedule benefits in its reference to subdivision three. Had the legislature sought to limit its application to schedule loss claims, it would have added the language “sections (a) – (u)” after “subdivision three”, but it did not. “Where a statute describes the particular situations in which it is to apply and no qualifying exception is added, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded.” *Matter of Alonzo M. v. NYC Dept. of Probation*, 72 NY2d 662, 665 (1988); *Matter of Raynor v. Landmark Chrysler*, 18 NY3d 48, 56 (2011). The legislature did not except non-schedule permanent partial disability awards from WCL §15(4), thereby mandating an inference that it did not intend to exclude them from this provision. Therefore, the Third Department correctly concluded that WCL §15(4) does apply to both types of permanent partial benefits awarded under §15(3).

Turning to the appellants’ assertion that the Third Department’s decision is inconsistent with the plain language of the statute based upon WCL §15(3)(w) that

an award “shall be payable during the continuance of such permanent partial disability. . .”, the amending of §15(3)(w) on March 13, 2007, (L. 2007 ch. 6, § 4), to cap the duration of benefits rendered this language hollow for anyone injured after that date, since non-schedule permanent partial awards are no longer payable during the full continuance of the disability regardless of the severity. While Mr. Watson did pass away before receiving his full non-schedule permanent partial disability award, countless other injured workers in New York have outlived their non-schedule permanent partial disability benefit, even though their disability continued beyond their receipt of lost wage benefits. Neither the amendments to WCL §15(3)(w) (L. 2007, ch. 6) nor the legislative history (Bill Jacket, L. 2007 ch. 6) make reference to what a worker with a non-schedule permanent partial disability with a loss of wage earning capacity of less than seventy-five percent whose benefits have expired is to do to replace their ongoing lost wages.<sup>1</sup>

Permanent partial non-schedule awards are no longer a lifetime benefit but are only payable for the durational limits imposed by the 2007 reforms, and as noted by the Appellate Division,

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<sup>1</sup> WCL §35(3) provides injured workers with a greater than 75% Loss of Wage Earning Capacity an opportunity to apply for an extreme hardship redetermination to be reclassified to permanent total disability or total industrial disability due to factors reflecting extreme hardship. There have been three cases reported by the Workers’ Compensation Board wherein the injured workers were found eligible for additional benefits under this provision. *Matter cf Finger Lakes DDSO*, 2021 WL 1036779; *Matter cf Nassau Community Hosp.*, 2021 WL 2184671; *Matter cf United Cerebral Palsy Assoc.*, 2021 WL 4937479.

[T]he Board has characterized an injured worker's cap weeks as a "real benefit" that "vests with the [worker] upon classification" (*Employer: Matter of Metropolitan Hospital*, 2016 WL 4720221 at \*3; see *Employer: Cold Spring Hills Center*, 2019 WL 3980991, \*3, 2019 NY Wrk Comp LEXIS 9414, \*7 [WCB No. G124 3859, Aug. 15, 2019]; *Employer The New York Methodist Hospital*, 2019 WL 1585790, \*4, 2019 NY Wrk Comp LEXIS 3484, \*11 [WCB No. 167 6366, Apr. 3, 2019]).

*Matter of Green*, @ 29 n 3. As the award vests with classification, Mr. Watson's death is not the basis for his son's claim nor does it create any right to compensation, rather it is the reason for a change in beneficiary. *Matter of Sienko v. Bopp & Morgenstern*, 248 NY 40, 44 (1928). Mr. Watson's entitlement to his non-schedule permanent partial disability benefits vested as of March 23, 2012 (R. 18), and as found by the Third Department, Kanye Khalid Green became the beneficiary of this award upon his father's death.

Had the legislature intended to allow surviving dependents to receive only the remaining non-schedule permanent partial disability benefits that had accrued but not been paid prior to the injured worker's death, they did not have to compose WCL §15(4), as WCL §33 already provides for a widow or dependents of an injured worker who dies from unrelated causes to receive the amount of an accrued award that was not paid to the employee during their lifetime. *Matter of Sienko*, 248 NY at 45 (award of temporary total that accrued prior to death); *Matter of Estate of Youngjohn v. Berry Plastics Corp.*, 36 NY3d 595, 600 (2021) (SLU awarded to estate up to date of death). The incorporation of all benefits awarded

under §15(3) into the plain language of §15(4) evidences an intent by the legislature to provide additional protection for dependents beyond that contained in §33. Moreover, the argument posited by appellants that §15(4) only applies to schedule loss benefits and that widows and orphans of those who receive non-schedule awards are limited to those benefits that accrued during the injured worker's lifetime renders the language in §33 redundant.

Examination of the plain language in §15(4) that it applies to awards made under subdivision 3 without any limitation or qualification supports the Third Department's conclusion that the remaining non-schedule permanent partial disability benefits should be paid to deceased injured workers' surviving dependents.

## POINT II

### **THE APPELLATE DIVISION’S DECISION IS CONSISTENT WITH THE LEGISLATIVE INTENT TO BRING PARITY BETWEEN SCHEDULE AND NON-SCHEDULE LOSS AWARDS.**

In *Matter of Mancini v. Office of Children and Family Services*, 32 NY3d 521 (2018), this Court noted that before the legislature amended WCL §15(3)(w) in 2007 non-schedule benefits under paragraph (w) potentially lasted for life. *Id.* At 529. The Court added that the 2007 amendments to WCL§15(3)(w), which capped the number of weeks that a person is eligible to receive benefits for a non-schedule permanent partial disability, made non-schedule benefits “comparable to most schedule awards, in that both types of primary award are now generally payable at most for a specified number of weeks based upon the “schedule” or durational provisions set forth in the pertinent subsections of the statute”, noting that this was done to remedy an unfairness from “the fact that one group had previously been eligible for potentially open-ended benefits.” *Id.* at 529-30.

The Court considered the legislative history of the 2007 amendment to WCL §15(3)(w), which added the durational component to non-schedule permanent partial disability awards, and noted that it was “intended to create greater parity among the different classes of permanent partial disability benefit recipients.” *Id.* at 530. (*citing* Governor’s Program Bill Mem No. 9, Bill Jacket, L 2007 ch 6, at 16-

17; Assembly Introducer's Mem in Support, Bill Jacket, L 2007, ch 6 at 30). As a result, both schedule loss and non-schedule permanent partial disability awards are now limited in duration notwithstanding the permanent impact each will have on the injured workers' earning power.

It is well settled that schedule loss awards made pursuant to WCL §15(3)(a)-(t) are payable to the listed beneficiaries in §15(4) when the injured worker dies from reasons unrelated to the injury. *Matter of Sienko v. Bopp & Morgenstern*, 248 NY 40, 43 (1928); *Matter of Youngjohn v. Berry Plastics Corp.* 36 NY3d 595, 601 (2021). These schedule loss awards compensate for loss of earning power. *Matter of LaCroix v. Syracuse Exec. Air Serv., Inc.*, 8 NY3d 348, 353 (2007) citing *Matter of Marhoffer v. Marhoffer*, 220 NY 543, 547 (1917). However, the statute only "provides for limited and certain, not full but uncertain, compensation for the results of an injury." *Marhoffer*, at 547.

Since creating parity between the two types of permanent partial disability awards was the legislative goal, then WCL §15(4) should apply to both types of permanent partial disability awards found under §15(3). This interpretation would be most consistent with the Court's reasoning in *Mancini* that the durational limits which are tied to the injured worker's loss of wage earning capacity found in WCL §15(3)(w), like schedule awards, are simply a method of calculating the award. *Id.*@ 530-531. The Third Department's interpretation in the instant case to compel

payment of the remaining non-schedule awards to a decedent's dependents serves to accomplish the goal of creating parity between non-schedule and schedule awards, whereas the appellant's interpretation would thwart it.

Before the 2007 (L. 2007, ch. 6) and 2017 (L. 2017, ch. 59) legislative changes to the WCL §15(3)(w), non-schedule permanent partial disability awards were not easily calculated. *Matter of Burns v. Varriale*, 9 NY3d 207 (2007). The variables associated with non-capped non-schedule permanent partial disability awards were not easily predicted. *Id.* @ 217. Variables including labor market attachment, how much the injured worker would earn, and the uncertain duration of benefits rendered the value of future compensation speculative. *Id.* In 2007 the legislature amended WCL §15(3)(w) to limit the duration an injured worker would receive their non-schedule permanent partial disability benefits ranging between 225 to 525 weeks depending upon the injured worker's loss of wage earning capacity as determined by the Board. (L. 2007, ch. 6 §4). No longer would permanently partially disabled workers receive benefits for life regardless of the severity of the impairment. In 2017, the legislature amended WCL §15(3)(w) to provide "[c]ompensation . . . 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." (L.



2017, ch 59, §1, part NNN, §1, subpart A, §1). (emphasis added to highlight new language).

As a result of these two fundamental changes to WCL §15(3)(w), the calculation of non-schedule permanent partial disability benefits is no longer speculative, as there is now a predetermined maximum period of benefits the injured worker may receive without the need for the worker to demonstrate an attachment to the labor market, thereby addressing the concerns raised by the Court in *Burns*, at 217. In *Burns*, the Court noted that calculation the present value of benefits in death claims WCL §16 (present value of future death benefits can be calculated using actuarial tables that take into account the dependent spouse's life expectancy and probability of remarriage), and cases involving permanent total disability §15(1) (no expectation that he or she will rejoin the workforce) were easily calculated and therefore not speculative. *Burns*, at 215. The value of capped non-schedule permanent partial disability benefits is now as easy to calculate as schedule loss, permanent total or death benefits based upon these statutory changes. In light of this, the 2017 along with the 2007 statutory amendments to §15(3)(w) have advanced the legislative intent to bring parity between scheduled and non-schedule awards. *See Mancini*, at 530.

Appellants argue that the Third Department's decision disserves the cost saving intent of the 2007 amendments which capped the PPD benefits. (L. 2007,

ch. 6 §4). According to them, the Governor and 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 savings has resulted in far more than that. In New York insurance companies’ workers’ compensation profits topped \$1 Billion in 2017 and \$1.6 Billion in 2018. Parrott and Martin, *Time for a Real Look at How the New York State Workers’ Compensation System Treats Injured Workers*, THE NEW SCHOOL CENTER FOR NEW YORK CITY AFFAIRS, Feb. 2020 at 6.

[https://publicseminar.org/wp-content/uploads/2020/02/Real\\_Look\\_2020.pdf](https://publicseminar.org/wp-content/uploads/2020/02/Real_Look_2020.pdf)

The savings resulted from the reduction of non-schedule permanent partial disability benefits from lifetime to a period of four to ten years. Appellants allege that because the Board has received over forty requests for posthumous non-schedule benefits that it could increase the costs of many awards by tens or even hundreds of thousands of dollars. This amount pales in comparison to the industry’s reported profits.

Understanding that it is difficult to prove a negative, there nonetheless remains a lack of evidence that the legislature intended to limit WCL§15(4)’s application to solely schedule loss awards under §15(3)(a)-(u). The plain language of §15(4) in referencing an award “under subdivision three” demonstrates a

legislative intention to include all awards under subdivision three. To hold otherwise runs counter to the stated legislative intent outlined by the Court in *Mancini* to create parity between the two classes of permanent partial disabilities.

### CONCLUSION

Adopting the appellants' interpretation of WCL §15(4) to limit the application of an award "under subdivision three" to schedule loss awards under §15(3)(a)-(u) runs contrary to the unambiguous language. Additionally, denying payment of the posthumous award to Mr. Kanye Khalid Green, would run counter to legislative purpose to reduce unfairness and create parity between the different classes of permanent partial disability by reducing the differences between them as noted by this Court in *Mancini*. Based upon the foregoing, this Court should affirm the Third Department's decision below.

Dated: Poughkeepsie, New York  
April 1, 2022

Respectfully submitted,

BY: 

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## CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR §500.13(c), I certify the following:

That the brief was prepared on a computer using the proportional font - Times New Roman type face with a 14 point font size in a double spaced format. The total word count of the document is 3380.

April 1, 2022

Respectfully submitted,  
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STATE OF NEW YORK )  
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ss.:

**AFFIDAVIT OF SERVICE  
BY OVERNIGHT FEDERAL  
EXPRESS DELIVERY**

I, **Jeremy Slyck**, of Rochester, New York, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

**On** April 1, 2022

deponent served the within: **BRIEF FOR DEFENDANT CLAIMANT-RESPONDENT**

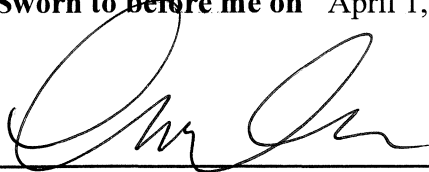
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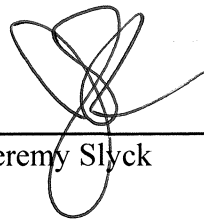
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the address(es) designated by said attorney(s) for that purpose by depositing **three (3)** true copy of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

**Sworn to before me on** April 1, 2022



Andrea P. Chamberlain  
Notary Public, State of New York  
No. 01CH6346502  
Qualified in Monroe County  
Commission Expires August 15, 2024



Jeremy Slyck