

directive that payments be made "periodically" precludes a policy of lump-sum payment of schedule loss of use awards.

In November 2002, claimant Marie LaCroix, a Delta baggage handler employed by Syracuse Executive Air Service, slipped and fell on an iced-over ramp while attempting to load a last-minute bag. As a result, she fractured her left wrist and tore her left rotator cuff, and later filed a claim for compensation with the Workers' Compensation Board. In a February 2003 determination, the Board found the injury to be work related, and claimant's average weekly wage to be \$415.83. While her claim was pending, she was awarded permanent partial disability payments for 72 weeks and three days, and temporary total disability payments for 24 weeks at \$277.22 per week, amounting to \$26,724.01.

On October 1, 2004, the Workers' Compensation Board held a hearing on Ms. LaCroix's claim for a schedule award for permanent partial disability. The parties stipulated to a 75% loss of use of claimant's left arm. Claimant's lawyer requested that "the entire schedule be paid, less, of course, prior payments, all at once rather than spreading it all out in the future as old decisions used to do." In an October 8, 2004 decision, the Board determined that Ms. LaCroix's 75% schedule loss of use entitled her to 234 weeks of benefits at \$277.22, or \$64,869.48, less payments already made, and directed the

employer's insurance carrier "to pay schedule loss of use award in a lump sum."

Upon review, a panel of the Board affirmed the lump-sum payment. It found that, although Workers' Compensation Law § 25 (1) (b) specified bi-weekly payments, it also provided that "the board may determine that any payments may be made monthly or at any other period, as it may deem advisable." Citing Miller v Syracuse Cent. School Dist. (1 AD3d 691 [3d Dept 2003]), the panel explained that "[w]hen an award is based on a finding of permanent disability, the benefit is intended to recompense a claimant for the loss of all of his or her earning capacity on a permanent basis -- i.e., without respect to any particular time frame" (Mem. of Board Panel Dec. of Dec. 28, 2004 [internal citation omitted]). The panel acknowledged that the assignment of a number of weeks to a specific injury was used to calculate the amount of the compensation award, but pointed out that this number did not otherwise correspond to payment for loss of use, as "even if no time is lost, [the schedule loss of use] is payable in full." Thus, it held that "the Board may direct payments of a schedule loss of use presently, in full, without regard to a set period of calendar weeks," and that a lump sum award did not require compliance with the commutation procedures of Workers' Compensation Law § 25 (5) (b) as "there are no allocated future payments that could be subject to a commutation."

The Appellate Division unanimously affirmed. It determined that the contentions of claimant's employer were "based upon two erroneous assumptions -- namely, that a schedule award is allocable to a particular period of disability and, hence, constitutes compensation in lieu of wages, which must, in turn, be paid periodically, and, further, that the foregoing statutory provisions expressly require a schedule award to be paid out over a particular period of time." Dismissing the employer's arguments as to the Board's past practice, the Appellate Division concluded that "regardless of whether the Board previously may have treated a schedule award as one to be paid out over time, we are satisfied that the case law, as it subsequently has evolved, coupled with the general powers granted to the Board" supported its decision to make such payments payable in one lump sum. We now reverse.

Analysis

Where the interpretation of a statute or its application involves "knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom," we regularly defer to the agency responsible for its administration, unless that determination is irrational or unreasonable (Kurcsics v Merchants Mutual Ins., 49 NY2d 451, 459 [1980]). The issue before us here, however, is primarily one of statutory interpretation for the courts. Indeed, the Board itself notes that its shift in policy

rested on the Third Department's opinion in Miller, signaling "little basis to rely on any special competence or expertise of the administrative agency" (id. at 459).

Contrary to the Appellate Division, we conclude that the Board's interpretation contravenes the plain language of Workers' Compensation Law § 25.

Enacted in 1913 as the Workmen's Compensation Law, the statute provides compensation for four different types of injury: permanent total disability, temporary total disability, permanent partial disability and temporary partial disability (Workers' Compensation Law § 15 [1], [2], [3], [5]). In the case of permanent total disability, an employee is awarded payment of a percentage of wages during the continuance of the disability; the same is true for temporary total disability and temporary partial disability (see Workers' Compensation Law § 15 [1], [2], [5]). Permanent partial disability, however, is called a schedule loss of use award because the statute assigns -- as by a "schedule" -- a fixed number of lost weeks' compensation according to the bodily member injured (see Workers' Compensation Law § 15 [3]).

While the general purpose of permanent and temporary disability awards pursuant to sections 15 (1), (2) and (5) is to "compensat[e] for disability to work made on the basis of average weekly wages," a schedule loss of use award is to "compensate for loss of earning power" (Marhoffer v Marhoffer, 220 NY 543, 546-547 [1917]). Nevertheless, all compensation awards are intended

to provide a "limited and certain, not full but uncertain" remedy regardless of the fault of the employer (see id. at 547), and to "continue the wage income as nearly uniform as the provisions of law would permit" after the employee's injury (Lauritzen v Terry & Tench Co., 193 AD 809, 810 [3d Dept 1920]).

Section 25 directs the method of payment of such compensation. Prior to 1921, section 25 (1) (a) provided that compensation be paid "periodically, in accordance with the method of payment of the wages of the employee at the time of his injury or death" (see L 1913, ch 816, Annotated Cons Laws of 1918). In 1921, the Legislature amended this section to require that it be paid "periodically and promptly in like manner as wages" and on accrual that it be paid "directly to the person entitled thereto, without waiting for an award" (see L 1921, ch 540 [emphasis added]). The additional language was intended to expedite the award process. Whereas injured workers previously were not entitled to any payment of an award prior to a hearing, regardless of the employee's undisputed right to compensation, following the amendment most injured workers were receiving compensation within three weeks of injury (see Joint Comm on Labor and Industry, Report to the Legislature, Bill Jacket, L 1922, ch 615, at 5).

Section 25 (1) (b) provides that "[t]he first payment of compensation shall become due on the fourteenth day of disability on which date or within four days thereafter all

compensation then due shall be paid, and the compensation payable bi-weekly thereafter; but the board may determine that any payments may be made monthly or at any other period, as it may deem advisable" (emphasis added). Section 25 (5) (b) further permits the Board, "whenever it shall so deem advisable," to "commute such periodical payments to one or more lump sum payments to the injured employee . . . provided the same shall be in the interests of justice" (Workers' Compensation Law § 25). The purpose of this section was not to "destroy the general scheme of the statute establishing periodical payments, [r]ather, it was . . . to provide for particular and exceptional instances" where such a deviation would be desirable (Annotation to Workmen's Compensation Law § 25, L 1913, ch 816, Annotated Cons Laws of 1918). Periodic payments commuted pursuant to this section must, however, be reduced to present value (see Workers' Compensation Law §§ 25 [5] [b], 27 [2]).

Reading these provisions harmoniously, we conclude that section 25 provides for payment of compensation at the time the injured worker would normally receive his or her wages and continued bi-weekly payments, unless the Board determines that payments should be made at different intervals, but it does not contemplate a policy of payment as one lump sum. "Period" plainly means a division or portion of time. "Periodic payment" means "one of a series of payments made over time instead of a one-time payment for the full amount" (Black's Law Dictionary

1165 [8th ed 2004]). Section 25 explicitly requires periodic payment of compensation, even if such compensation is payable at a period other than bi-weekly or as wages customarily accrue (see Workers' Compensation Law § 25 [1] [a], [b]), and we cannot read "at any other period" in Workers' Compensation Law § 25 (1) (b) to include a one-time payment. Although other provisions of the Workers' Compensation Law grant the Board considerable discretion in determining "the time for the payment of compensation" (see Workers' Compensation Law § 142), section 142 is limited by section 25 (1), which explicitly requires periodic payment.

As the statute limits commutation of such periodic payments to individual situations in which the Board determines that the interests of justice so require -- and then only upon an actuarial reduction -- the Board was without authority to direct the full-value lump-sum payment ordered here. Neither the general purpose of Workers' Compensation Law in ensuring uniform continuation of an injured worker's income flow, nor the specific purpose of the Legislature in amending section 25 to prevent delay in commencement of payments, establishes an intent to permit payment of schedule loss of use awards to fall outside of the statute's direct prescription.

Other provisions of the Workers' Compensation Law, while ancillary to the issue presented here, support our reading of the statute. Section 15 (3) (u), for example, provides that two or more schedule loss of use awards for permanent partial

disabilities "shall run consecutively;" section 15 (3) (v) states that an employee may be eligible for additional compensation for impairment of wage earning capacity "after the termination" of a permanent partial disability schedule award for a 50% or more loss of an arm, leg, hand or foot. Subsection four provides for discontinuation of a schedule loss of use award upon the death of a claimant with no heirs (with the exception of reasonable funeral expenses) if claimant dies from causes unrelated to the compensable injury (Workers' Compensation Law § 15 [4] [d]). The plain language of these provisions contemplates payment of an award over a period of time. Although literal application is possible, these provisions would be substantially compromised in meaning and effect -- payments to run consecutively would simply be made back to back, options available after termination of an award would immediately accrue, and cancellation of benefits upon death would have even more limited application -- were we to read section 25 as the Board did.¹

Nor are we compelled to interpret section 25 differently based on a sequence of cases that delineate the conceptual distinction between schedule loss of use and other compensation awards. In fact, we do not agree with claimant that

¹ These provisions apply equally to commutation of a periodic payment to a lump-sum pursuant to section 25 (5). Lump-sum payments, however, would be the exception rather than the rule, and such considerations would presumably factor into an interests of justice analysis.

the case law is at odds with our statutory analysis. In Matter of Lynch v Bd. of Educ. of the City of New York (1 AD2d 362, affd 3 NY2d 871 [1957]), the court considered whether section 25 permitted an employer to be reimbursed by its carrier for the full amount of weekly wages paid following injuries that caused claimant's total disability. It found that the statute permitted reimbursement from the nonschedule award for up to the statutorily prescribed weekly compensation rate, but no more. In distinguishing Matter of Ott v Greenwood Cemetery (262 NY 532 [1933]), in which we held that a schedule loss of use award would permit such full reimbursement, the Lynch court noted that

"[i]n the case of a schedule award, the weekly rate and the number of weeks specified in the schedule are simply the measure by which the total amount of the award is to be determined. The payment is not analogous to the payment of weekly compensation for temporary disability. Liability for the schedule award comes into existence on the date of the accident. The payment of the schedule award is not allocable to any particular period of disability"

(Matter of Lynch, 1 AD2d at 365). Whereas the nonschedule award was limited to the specified weekly rate, the schedule award, untethered to a period of weekly compensation, was not so limited.

We considered a similar question in Landgrebe v County of Westchester (57 NY2d 1 [1982]). Asked to determine whether an employer who had paid full wages to an employee during a period of temporary disability was entitled to full reimbursement out of a later schedule award

for a different (though consequential) injury, we held that the employer was entitled only to the amount of the maximum weekly total disability rate. As the award of weekly compensation for the previous nonschedule injury was not comparable to the schedule loss of use award for the subsequent injury, and each injury constituted a "distinct physical occurrence and impairment" (id. at 11), reimbursement for the former could not be made from the latter. We explained that -- as opposed to a section 15 award for any other type of disability -- a schedule award was "independent of the time an employee actually loses from work" even though computation of such award required multiplication of the applicable weekly rate by "a statutorily prescribed number of weeks" (id. at 6).

More recently, in Miller, the court considered whether a schedule loss of use award overlapped with a temporary total disability award to violate the statutory maximum. Relying in part on Lynch and Landgrebe, the Appellate Division determined that no violation had occurred, as the losses each award was intended to reimburse were distinct -- one to compensate for earning capacity, the other for temporary loss of wages during a specific period of time -- and the schedule loss of use was not allocable to any particular time frame (Miller, 1 AD3d at 693).

The Board bases its decision on Miller. Assuming that Miller is correct, we do not agree that Miller or its predecessors dictate that result.² The conceptual framework for a schedule award as unallocable to a particular period of lost wages is separate and distinct from the award's method of payment. Neither Lynch, nor Landgrebe, nor Miller addresses the method of payment of a schedule loss of use award, much less overrides a statutory payment mechanism that has been in place for close to a century.

We recognize that arguments have long been made on both sides of the issue. Some have said that lump-sum payments fail to account for recipients who spend their awards up front and then turn to state resources for support, putting the community "right back where it would have been had there been no compensation system at all" (see Larson's Workers' Compensation Law, § 80.05[5], at 80-28 [2006]). Others have reasoned that, as a schedule loss equates to a fixed award calculable upon injury, the state should not delay full payment over a period of years, effectively preventing a claimant from choosing how to invest

² We distinguish Matter of Field Delivery Serv. v Roberts 66 NY2d 516 [1985]), in which we noted that an agency must provide an explanation for its departure from agency precedent adequate for a reviewing court to ascertain whether it has done so for valid reasons. Here, the Board provided no reasons of its own for its change in policy. Field, in any event, is inapposite, as this case concerns not a policy or precedent within the agency's purview but the interpretation of a statute.

these funds (see Gellhorn & Lauer, Administration of the New York Compensation Law, Part II, 37 NYU L Rev 204, 229 [1962]). One thing is clear: any departure from the method of periodic payment of schedule loss of use awards specified in the Workers' Compensation Law must come from the Legislature.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the case remitted to the Appellate Division, with directions to remand to the Workers' Compensation Board for further proceedings in accordance with this opinion.

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Order reversed, with costs, and case remitted to the Appellate Division, Third Department, with directions to remand to the Workers' Compensation Board for further proceedings in accordance with the opinion herein. Opinion by Chief Judge Kaye. Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided March 29, 2007