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COURT OF APPEALS

STATE OF NEW YORK

IN THE MATTER OF STEVEN MANCINI,

Appellant,

-against-

NO. 135

OFFICE OF CHILDREN & FAMILY SERVICES,
THE STATE INSURANCE FUND

Respondents,

NEW YORK STATE WORKERS' COMPENSATION
BOARD,

Respondent.

20 Eagle Street
Albany, New York
November 13, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 135, the
2 Matter of Mancini v. The Office of Children & Family
3 Services.

4 Good afternoon, counsel.

5 MS. KARIC: Good afternoon, Your Honor. May it
6 please the court, my name is Amina Karic. I'm here on
7 behalf of the appellant, Mr. Mancini. I would like to
8 reserve two minutes for rebuttal.

9 CHIEF JUDGE DIFIORE: You may.

10 MS. KARIC: Thank you.

11 This court has followed the Constitutional truism
12 that judicial will should consider legislative command.
13 When 15(3)(v) was enacted in 1970, the legislative command
14 was to create a section that would protect and address a
15 certain class of injured workers. This class of injured
16 workers was not com - - -

17 JUDGE RIVERA: We're just looking at the plain
18 language. So if - - - if one paragraph says the additional
19 compensation we set up here is determined in accordance
20 with this other paragraph, don't we just read the other
21 paragraph and follow what it says?

22 MS. KARIC: And when - - - when this statute was
23 enacted, Your Honor, in 1970, this reference was in place.
24 This Section 15(3) was never amended throughout the years.
25 To this day, it stays the same. And when - - -



1 JUDGE STEIN: But isn't the legislature presumed
2 to know what - - - exactly what was there in - - - in (v)
3 when it - - - it amended (w).

4 MS. KARIC: And that's exactly my point, Your
5 Honor. It was. And at the time that it was enacted, the
6 statutory caps were not present in (v) - - - in (w) - - -

7 JUDGE FEINMAN: So how - - - how do you get
8 around - - -

9 MS. KARIC: - - - excuse me.

10 JUDGE FEINMAN: - - - that referential language?

11 MS. KARIC: I'm sorry, Your Honor?

12 JUDGE FEINMAN: How do you get around the referen
13 - - - referential language that says look at (w) in order
14 to effect the purpose of (v) to address this particular
15 subsection of injured people?

16 MS. KARIC: In - - - in three ways, Your Honor.
17 First, we look at the legislative intent in 1970 when it
18 made that reference to (w). The legisla - - -

19 JUDGE RIVERA: But why do we do that if the
20 language is clear? Are you - - - are you suggesting
21 there's some ambiguity in this language that says go look
22 at this other paragraph to understand what the additional
23 compensation is under this paragraph? Why are we doing
24 that?

25 MS. KARIC: Why are we looking at the legislative

1 intent in 1970?

2 JUDGE RIVERA: The - - - isn't the language clear
3 on its face?

4 MS. KARIC: It is, Your Honor. And it was clear
5 the - - - the intent is clear - - - the whole of statute
6 15(3)(v) is clear on its face, and it has a durational
7 limitation. The very plain - - -

8 JUDGE STEIN: Well, but is that a durational
9 limitation? I mean, the limitation in (w) has to do with
10 number of weeks, right? And the - - - the - - - what
11 you're calling a durational limitation in (v) has - - - it
12 doesn't - - - it doesn't have anything to do with how many
13 weeks or how long, because if - - - if you're injured when
14 you're twenty versus if you're injured when you're fifty-
15 nine, the duration is going to be very different.

16 So why isn't that Social Security cap just sort
17 of an end cap? And why can't that work with the - - - with
18 the - - - the week caps in - - - in (w)?

19 MS. KARIC: Yes, Your Honor. If we were to look
20 at the thirty-seven-year-plus history of the application of
21 Section 15(3)(w) to Section 15(3)(v), it was never applied
22 to consider any durational limitations of 15(3)(w) or any
23 other parameters of 15(3)(w) except for the - - -

24 JUDGE GARCIA: But there was - - - was there a
25 durational limit in (w) before they added this?



1 MS. KARIC: No, there was not, Your Honor.

2 JUDGE GARCIA: So how could they consider a
3 durational limit in (w) before they amended it? After they
4 amended it, they did, right?

5 MS. KARIC: Exactly. And it was not - - - so it
6 was not - - - it was not another limiting factor that was
7 contemplated by the legislature in 1970. This - - -

8 JUDGE GARCIA: But again, going back to - - - you
9 presume the legislature knew about (v)'s cross-reference
10 when they amended (w), the intent was to import that
11 durational limitation into (v)?

12 MS. KARIC: Well, Your Honor, my position is that
13 the legislature not only knew as to (v)'s reference to (w),
14 but also knew as to the thirty-seven-year history of the
15 applicability of that reference.

16 JUDGE GARCIA: But they were changing that. They
17 were changing the reference. So whatever (v) referred to
18 now is different. But they knew (v) made the cross-
19 reference. You're just reading kind of the amendment out,
20 I think.

21 MS. KARIC: Well, to that, Your Honor, the - - -
22 if the legislature's intent in 2007 was to apply these
23 broad statutory limitations that it implemented in 15(3)(w)
24 - - - and I think it's important for this court to
25 understand - - -



1 JUDGE STEIN: Well, I think there is some
2 legislative history that indicates that it - - - part of
3 the intent was to create some parity between schedule - - -
4 partial - - - permanent - - - permanent partial
5 disabilities and non-schedule PPDs.

6 MS. KARIC: Exactly.

7 JUDGE STEIN: So what you're - - - the way you're
8 reading it is doing just the opposite. It's working the
9 disparity back in.

10 MS. KARIC: No, Your Honor. 15(3)(v) is meant to
11 address a very small class of injured workers. It very - -
12 - barely ever comes up. It's meant - - - it has different
13 - - - the road an injured worker that seeks benefits under
14 15(3)(v) and the road that an injured worker that seeks
15 benefits under 15(3)(w) are very different.

16 In order to even be eligible for 15(3)(v)
17 benefits, an injured worker must have sustained a fifty-
18 percent or greater loss of use of their body member. To
19 that, they have to prove to the court that upon their
20 participation in a Board-approved rehabilitation program,
21 that the only sole cause as to their loss of earning power
22 is that impairment as to their body member.

23 They are not afforded the same considerations
24 that an injured worker who receives benefits pursuant to
25 15(3)(w) is. And those additional considerations are - - -



1 JUDGE GARCIA: I may - - - I may very well be
2 misunderstanding how it works, but my understanding was
3 that (w), those are the only benefits they get, whereas (v)
4 you get a scheduled award and then you get the (v) (sic)
5 benefits in addition to that. Is that accurate?

6 MS. KARIC: That is accurate, Your Honor.

7 JUDGE GARCIA: So why would you get no durational
8 limits in what is an additional benefit to a scheduled
9 award, whereas in (w), which is your only award, you have
10 those limitations?

11 MS. KARIC: Because, Your Honor, this is - - -
12 the additional limitations - - - or the additional benefits
13 are meant to aid or to supplement the loss of use that very
14 small subset of injured workers have. That schedule loss
15 of use determinations, which really is - - - if Your Honor
16 looks, and I'm sure the court has - - - in our appendix - -
17 - sets out a number of weeks that are the maximum number of
18 weeks that an individual can receive. So - - -

19 JUDGE WILSON: Am I - - - am I misunderstanding
20 that the (v) benefits come after the termination of the
21 schedule a, b, and c, d benefits? You don't - - - you're
22 not getting two sets at the same time; you're getting the
23 ones in (w) first and then you're getting a (v) benefit?

24 MS. KARIC: That's correct, Your Honor. You'd
25 get the schedule loss of use benefit - - -



1 JUDGE WILSON: There's no point where you're
2 getting both at the same time?

3 MS. KARIC: That's correct, Your Honor. And so
4 after the expenditure of that - - - of that schedule loss
5 of use, the claimant has very strict requirements that they
6 have to prove that they're even eligible for the (v)
7 benefits.

8 A claimant that is eli - - - eligible for
9 15(3)(w) benefits can take into consideration their age,
10 can take into consideration their education, can take into
11 consideration their training or lack thereof. And a - - -
12 a true and accurate reading of 15(3)(w), none of those are
13 taken into consideration. The only thing that - - -

14 JUDGE STEIN: I have a question that sort of
15 relates to this, and I don't think it was directly
16 addressed by either party - - - and maybe - - - but there -
17 - - there also is a safety net that was created in 2007 in
18 - - - in Section 35 of the Workers' Compensation Law for -
19 - - for extreme hardship. And - - - and do we know if that
20 applies to (v) claimants as well as (w) claimants?

21 MS. KARIC: That - - - I believe that that - - -
22 that may apply to both, Your Honor, but that's - - - that's
23 a section of the law that we don't see come up very often,
24 as is Section 15(3)(v).

25 And to - - - to that point - - -



1 JUDGE RIVERA: So you may - - - you may consider
2 it harsh, which I think is really what - - - what you're
3 arguing, this - - - this cap, but it is the legislative
4 choice - - - so we're back to the plain language. But even
5 if we were to look at the legislative history, as Judge
6 Stein has already pointed out, but much of those amendments
7 are to keep down costs. So again, even though it's a harsh
8 result, it appears to be what the legislature intended?

9 MS. KARIC: I - - - I don't agree with that, Your
10 Honor. The legislature could not have at - - - intended
11 that after their 2007 amendment to Section 15(3)(w) the
12 Board was going to go back and change and contradictly
13 (sic) apply 15(3)(w) to 15(3)(v).

14 And to do so, and as they have done so, would be
15 contrary to very eligibility of 15(3)(v) benefits.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MS. KARIC: Thank you.

18 CHIEF JUDGE DIFIORE: Counsel?

19 MR. OBERTUBBESING: Good afternoon. I am Edward
20 Obertubbesing, attorney with the New York State Insurance
21 Fund, on behalf of the State Fund and its - - - the State
22 agency, Office of Children & Family Services.

23 The respondents ask this court to find that the
24 additional compensation benefits provided for under section
25 15(3)(v) of the Workers' Comp Law are subject to the



1 durational limits that are set forth in 15(3)(w). The
2 language of 15(3)(v) specifically notes, as already has
3 been observed, that the additional compensation awarded
4 under that subdivision shall be determined in accordance
5 with paragraph (w) of Section 15(3).

6 15(3)(w) is where the durational limits or the
7 caps exist in the law.

8 JUDGE FEINMAN: So - - - so you wouldn't read the
9 prior language that's still there, because they never
10 rescinded it, about - - - you know, until you retire, you
11 don't - - - you don't read that as a durational limit?

12 MR. OBERTUBBESING: No. And I think that's been
13 addressed. It doesn't create an entitlement to benefits.
14 It doesn't say the claimant shall be entitled or that these
15 benefits shall continue. The statutory language says that
16 the benefits shall cease when the claimant reaches old age
17 Social Security age, which the courts have interpreted as
18 age sixty-two.

19 In Matter of Ramroop, this court had an
20 opportunity to look at the statutory language of 15(3)(v)
21 and indicated in that decision that the court would not put
22 its imprimatur on a compensation award in contravention of
23 the statutory mandate.

24 In Matter of LaCroix, this court noted that the
25 Board can't contravene the plain language of the statutory



1 provisions of the Workers' Comp Law.

2 JUDGE WILSON: Let me ask you why I can't read
3 the statute exactly the opposite way that you're reading
4 it? It - - - in the following way. Section (w) says, "all
5 compensation payable under this paragraph shall not
6 exceed," and then it has a list of - - - of items.

7 Paragraph (v) says, "additional compensation" - -
8 - "additional compensation shall be paid under (v)
9 notwithstanding any other provision of the subdivision."

10 It then goes on to say that the additional
11 compensation shall be determined as paragraph (w) provides.
12 But why can't I read this that there are two different
13 streams of compensation, one that is provided under (v),
14 one that is provided under (w); and all that the limitation
15 language that you're relying on in (w) says is that the
16 compensation payable under this paragraph - - - (w) - - -
17 won't exceed the limits?

18 MR. OBERTUBBESING: Well, the cross-reference has
19 been mentioned previously. 15(3)(v) specifically says that
20 the additional compensation set forth in 15(3)(v) shall be
21 determined in accordance with paragraph (w).

22 JUDGE WILSON: Compensation determined - - -
23 that's how the compensation in (v) is determined. But that
24 doesn't mean it's payable under (w).

25 MR. OBERTUBBESING: Well, I - - - except that



1 15(3) (w) provides for the calculation of both the amount
2 and the duration. The language is already there and has
3 been there.

4 In - - - in all cases of permanent or partial
5 disability - - - this is from paragraph (w) - - -

6 JUDGE WILSON: But perhaps - - - but except that
7 perhaps the compensa - - - the durational requirement is
8 limited by the language I read you: "all compensation
9 payable under this paragraph." That is, can I read that
10 clause to restrict the durational requirement to paragraph
11 (w)?

12 MR. OBERTUBBESING: Well, I - - - I - - - I think
13 we get back to that next sentence that says such additional
14 compensation "shall". "Shall" is a - - - is a mandatory
15 word. It shall be determined in accordance with paragraph
16 (w), which contains, now, since 2007, durational limits.

17 JUDGE RIVERA: But what does compensation refer
18 to?

19 MR. OBERTUBBESING: Well, I - - - compensation
20 refers to two things: the amount of benefits and how long
21 you'll get them for. And the schedule loss of use, that's
22 a dollar amount times a number of weeks.

23 15(3) (w) also says it's a dollar amount, sixty-
24 six-and-two-thirds of the difference between the average
25 weekly wage and the loss of wage earning capacity or wage



1 earning capacity thereafter. And it refers to a duration.
2 It's payable during the continuance of the permanent
3 partial disability.

4 That's where the language ended until 2007 when
5 they added the - - - the durational limits. So now the
6 caps apply.

7 The legislative history was 15(3)(v) was pretty
8 clear. The intention of the statutory change in 1970 was
9 to put a certain subset of schedule loss of use recipients
10 on par with claimants who are receiving permanent partial
11 disability benefits. "On par" means equal or comparable.

12 To accept the argument advanced here by the
13 claimant would treat this claimant dramatically better than
14 a similarly situated permanently partially disabled
15 claimant. He was found to have a thirty-seven-and-a-half
16 percent loss of wage earning capacity. That equals 275
17 weeks.

18 The claimant's argument to cont - - - continue
19 these benefits through age sixty-two would result in this
20 claimant receiving 804 weeks, more than ten years in excess
21 of what a similarly situated, permanently partially
22 disabled claimant would receive. That's hardly on par.

23 Respondents would ask this court to affirm the
24 Appellate Division decision and to find that the benefits
25 payable under Section 15(3)(v) are subject to the



1 durational limits of 15(3)(w). Thank you.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 Counsel?

4 Hold your - - -

5 MS. KARIC: I'm sorry. Go ahead.

6 CHIEF JUDGE DIFIORE: Anxious.

7 MR. WOODS: Good afternoon. May it please the
8 court. Patrick Woods representing the Workers'
9 Compensation Board.

10 I think I'll start by addressing Judge Stein's
11 question with respect to the safety net and Workers'
12 Compensation Law 35(3). The answer is that has - - - that
13 question has never reached the Board about whether at the
14 end of a (v) award you could then seek an award - - - seek
15 to have your classification changed.

16 But I do think it's im - - - since you've raised
17 it, I do think it's important to recognize what the
18 legislature did in that provision. First, it showed that
19 if it wants to put in language that changes something in
20 terms of continuing benefits in a way that's different from
21 every other benefit of permanent partial disability, they
22 knew how to do it. And two, the way that it chose to do it
23 was not by giving lifetime benefits for a permanent partial
24 disability award.

25 What happens under 35(3) is that at the end of



1 your (w) award, and potentially your (v) award, you would -
2 - - if you can demonstrate extreme hardship, you can
3 petition to be reclassified. You are classified out of
4 being permanently partially disabled and into being
5 permanently totally disabled. And I think that accords
6 with the legislative intent that is in - - - throughout the
7 2007 amendments.

8 Two themes, and one big one that this court
9 recognized in Raynor, was cost savings to the insurance
10 companies. And that was the trade-off for a number of
11 other benefits.

12 JUDGE WILSON: How many cases like Mr. Mancini's
13 are there?

14 MR. WOODS: A very small number a year - - - a
15 year, Judge. I don't have the precise number, but it's
16 like single digits.

17 JUDGE WILSON: Roughly - - - single digits.

18 MR. WOODS: It's - - - it's not a very large
19 number of cases, which is part of the reason why the issue
20 didn't get here before and why there - - - we don't know
21 whether a (v) award could then lead to a 35(3) award.
22 Although interesting to - - - interestingly enough, to
23 follow up on Judge Wilson's observation, the language in
24 35(3) about "payable under" is the same language that
25 exists in (w). So this court's decision here might affect



1 that.

2 Obviously the Board doesn't have a position on
3 that, because that hasn't come in front of it yet.

4 But to - - - to point out that it dovetails with
5 the legislative history and legislative intent, is that
6 there's two statements of intent in the legislative history
7 here. There's the one in 2007, which talked expressly
8 about creating parity between those who receive schedule
9 awards and those who receive non-schedule awards; and
10 resolved that question by doing away with lifetime benefits
11 for those who received the non-schedule awards. And the
12 earlier 1970, which also talked about parity, but addressed
13 it in a different way.

14 The legislature is free to choose how it wants to
15 address those things.

16 JUDGE FAHEY: Let me ask just one question. The
17 application of (w) durational limits, does that render any
18 part of (v) meaningless?

19 MR. WOODS: No, it doesn't, Judge. You can read
20 them entirely in harmony.

21 JUDGE FAHEY: You say there's no parts that are
22 rendered - - - rendered meaningless as a result of the
23 amendment?

24 MR. WOODS: No. And in fact, I would encourage -
25 - - if you - - - encourage - - - if you look at the



1 language of (v), and as this court interpreted it in
2 Ramroop, the participation in rehabilitation program
3 requirement and - - - with the identical language,
4 presumably the age cap, these are requirements for
5 continued payment.

6 You can read the statute very harmoniously by
7 saying such additional compensation is determined in (w).
8 At that sentence, you go look at (w) and you see amount - -
9 - you - - - amount of money for number of - - - not to
10 exceed a certain number of weeks.

11 Then you come back and for the durational
12 requirement - - - for the age cap it says: "and shall
13 cease on the date." In other words, the payments that you
14 would get under (w) that are set duration and amount, then
15 cease if you hit that age.

16 There's no part that's rendered out - - - that's
17 read out; because you certainly will have and could have
18 individuals who would receive the full num - - - amount of
19 benefits and those who had hit the age cap. They're read -
20 - - they can - - - can and should be read together.

21 JUDGE WILSON: So let me ask a variant on what I
22 asked previously. If you think of these, again, as two
23 separate streams of payment - - - you may not agree with
24 that, but just hypothetically think of them that way as
25 separately set out - - - is there a way to read the



1 durational requirements in (w) to be applied separately to
2 the two streams, that is, you first get your initial set of
3 awards, that can't run past the durational cap, then if
4 you're eligible you --for the (v) award, you get the (v)
5 award, and that starts at clock zero, but is again, subject
6 to the caps in (w)? Is there a way to - - -

7 MR. WOODS: I - - - I'm - - -

8 JUDGE WILSON: - - - read the statute that way?

9 MR. WOODS: - - - I'm not sure I'm following
10 that, Judge, because the initial award in order to qualify
11 for (v) is not under (w).

12 JUDGE WILSON: Right.

13 MR. WOODS: It's - - -

14 JUDGE WILSON: Right. It's a separate payment.
15 So first I get my (w) award, that runs, it's capped as in
16 the statute. I could then receive a (v) award, but that's
17 capped also as the statute. You just start running the
18 clock over again?

19 MR. WOODS: No, I think that's where I'm
20 disagreeing, Judge. The - - - in order to get a (v) award,
21 you have to have an award under 15 - - - under 15(3) (a)
22 through (d).

23 JUDGE WILSON: Yes.

24 MR. WOODS: So you - - - you're not going to have
25 a situation where you have a (w) award that then you've run



1 out the clock on, and then you get a (v) award.

2 JUDGE WILSON: And how about an a, b, or c, d - -
3 - or d award that's subject to the caps in (w)? Could you
4 get that first for, let's say, your 300 weeks, and then
5 subject to the same cap, get the (v) award?

6 MR. WOODS: a, b, c, and d awards aren't subject
7 to the caps in (w). They're a set number of weeks to - - -
8 set - - - set out in the statute. Those two provisions are
9 two different ways that the legislature decided to deal
10 with different kinds of injuries. They don't - - - they
11 don't cross-pollinate, so to speak.

12 If I could just make one very brief - - -

13 CHIEF JUDGE DIFIORE: Yes, of course, sir.

14 MR. WOODS: - - - point with regard to harshness.
15 To the extent that we want to read this as harsh, I think
16 that's not a good way to look at it. The defendant - - -
17 sorry, the petitioner here is still receiving 275
18 additional weeks of benefits in addition to the schedule
19 loss of use award, and doing better than a similarly
20 situated (w) person.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. WOODS: Thank you, Your Honors.

23 CHIEF JUDGE DIFIORE: Ms. Karic?

24 MS. KARIC: Yes, Your Honor. Just to follow up
25 to - - - to what my colleague here indicated that the



1 petitioner here would be doing better than a similarly
2 situated individual who's receiving benefits pursuant to
3 15(w), I wholeheartedly disagree.

4 The appellant here had to take a very different
5 road in order to even be eligible for these benefits. The
6 appellant here did not have the potential benefit of having
7 his age, his education, his other medical co-morbidities to
8 be taken into account when addressing his loss of wage
9 earning capacity. The only thing that the appellant could
10 rely on is that his loss of use of his body member was the
11 sole reason for his wage impairment.

12 And in - - - in following up with the definition
13 of compensation, Your Honor, Workers' Compensation Law
14 Section 2 defines compensation as the money allowance
15 payable to an employer - - - employee or his dependents as
16 provided for in this chapter, and includes funeral benefits
17 provided therein. There - - -

18 JUDGE STEIN: But doesn't the money allowance
19 also take into consideration how long you get that money
20 allowance? In other words, the total of the money
21 allowance depends on how many weeks you get it, right?

22 MS. KARIC: Your - - - Your Honor, I would
23 disagree. And again, I would look to the thirty-seven-year
24 - - - in this particular instance and in reading these two
25 very distinct and separate parts of the statute meant to



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address very distinct and separate injured workers - - - I would read that differently.

I would also note that the - - - the reference in Section 15(3)(v) to ref - - - to 15(3)(w) does not come at the end. It comes in the middle. It comes - - - it indicates that such additional compensation shall be determined in accordance with paragraph (w) of this sub - - - of this subdivision, and then it goes on to say within 15(3)(w) itself, and shall cease on the date the disabled employee receives or is entitled to receive old age insurance benefits.

Therefore, the plain reading of this section of the statute indicates that the durational limitation contained therein is the proper durational limitation that - - - that should be implemented. Thank you.

CHIEF JUDGE DIFIORE: Thank you, counsel.
(Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of In the Matter of Steven Mancini v. Office of Children & Family Services, the State Insurance Fund, and New York State Workers' Compensation Board, No. 135 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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