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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF THE CLAIM OF ESTATE OF
NORMAN YOUNGJOHN,

Appellant,

-against-

No. 12

BERRY PLASTICS CORPORATION, et al.,

Respondents.

20 Eagle Street
Albany, New York
February 9, 2021

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

Appearances:

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Sharona Shapiro
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal is appeal
2 number 12.

3 Welcome back, counsel.

4 MR. SEGAR: Chief Judge, this is Stephen Segar.
5 Can the court hear me?

6 CHIEF JUDGE DIFIORE: Yes, I can hear - - - we
7 can all hear you, sir.

8 MR. SEGAR: It doesn't appear, Your Honor, that
9 the video portion of my computer is working.

10 CHIEF JUDGE DIFIORE: Is working or is not
11 working?

12 MR. SEGAR: It is not.

13 CHIEF JUDGE DIFIORE: Okay. Well, as long as
14 you're comfortable, the court is comfortable with you
15 proceeding through use of audio only, and you may begin,
16 sir.

17 MR. SEGAR: Well, Your Honor, I've been told I
18 have a face made for radio, so perhaps it's more
19 appropriate anyway. But may it please the court. My name
20 is Stephen Segar. I represent the appellant here, and I
21 would like to first point out that the facts here are
22 unique to a posthumous - - -

23 CHIEF JUDGE DIFIORE: Mr. Segar, excuse me for
24 interrupting. I'd like to ask you if you would like to
25 reserve some rebuttal time, sir.



1 MR. SEGAR: No, ma'am.

2 CHIEF JUDGE DIFIORE: Okay. Please proceed.

3 MR. SEGAR: The facts here are unique to a
4 posthumous schedule loss of use award, assuming that's how
5 it's best characterized. And it's unique in the - - - in
6 the sense that claimant's permanency - - - impairment - - -
7 permanent impairment to both arms were found some six
8 months prior to the time of his death by both the
9 employer's medical consultant and by his treating
10 physicians. Therefore, an argument, and I believe a strong
11 argument could be made that these schedule awards were not
12 posthumous but became due in fact before the time of death.

13 However, using Healey v. Carroll and the
14 Appellate Division's decision below, it's clear that these
15 posthumous schedules became due or were due at the time of
16 death. I think the only issue, obviously, here is the
17 dichotomy or the paradigm used by the Appellate Division to
18 - - - in citing Healey, that there is an accrued portion of
19 a schedule loss of use versus an unaccrued portion.

20 JUDGE STEIN: Well - - - this is Judge Stein.
21 Can you see us?

22 MR. SEGAR: I can, yes.

23 JUDGE STEIN: All right. Good to know. What - -
24 - what is difficult for me to understand is that,
25 regardless of how we say or when we say these benefits



1 accrued, two issues that I'd like you to - - - to address.
2 One is, is that wouldn't your interpretation render
3 Workers' Compensation Law 15(4)(d) completely eviscerated,
4 and if so, where - - - where do you see support for a
5 legislative intent to do that?

6 And the other thing is that Healey was existing
7 at the time for many, many, many years at the time of the
8 2009 amendments, and the legislature made no reference to
9 changing the rule or impact of 15(4)(d). So isn't that
10 something that really needs to be addressed to the
11 legislature?

12 MR. SEGAR: I don't think so, Your Honor. I - -
13 - I don't believe that my argument here is a call for the
14 evisceration of 14(d). It's simply a broadening of the
15 application of Section 33 and a narrowing or a restriction
16 of the application of 14(d). 15(4)(d) would still apply to
17 nonschedule permanent partial disability payments under the
18 same circumstances.

19 JUDGE STEIN: That may be, but the statute itself
20 doesn't limit it to nonschedule awards. It includes
21 schedule awards. And it - - - it just seems to me that it
22 - - - it is consistent with the legislative intent to - - -
23 in - - - in both enacting the lump sum payments and before
24 that, to say that, look, when there's no dependents that -
25 - - that once - - - once the - - - the injured worker has



1 died, you're - - - you're limited to - - - to these funeral
2 expenses other than what - - - what payments were due to
3 you when - - - when you - - - before you died.

4 MR. SEGAR: Understood, Judge Stein, but not only
5 does 15(4)(d) still apply to the nonscheduled scenario, but
6 it does apply and does find some application, however
7 narrow, to a scheduled loss of use that is - - - that it
8 claim - - - that is paid to a claimant or awarded to a
9 claimant during his or her lifetime where that claimant
10 opts to be paid in periodic payments.

11 We're just simply asking that a - - - that the -
12 - - that this situation, that is, whether it's a posthumous
13 schedule loss of use award that, again, according to
14 Healey, according to the Appellate Division below, becomes
15 due at or before the time of death. Now, if it becomes
16 due, that invokes Section 33 of the Workers' Comp. Law
17 which makes the - - - which takes 15(4)(d) out of the
18 equation and out of the application and brings Section 33
19 in so that the schedule loss of use may be made payable to
20 the estate. Once that occurs, it's our contention that the
21 amendments, the 2009 amendments, the 15(3)(u) and 25(1)(b),
22 allow the estate the additional authority to claim that
23 award that's due in one lump sum.

24 JUDGE RIVERA: Counsel, if I can just ask, if we
25 adopt your interpretation of these various provisions,



1 would that encourage an injured employee who has received
2 an SLU award to request a lump sum payment in the hope that
3 they're going to get that payment, all of it, before they
4 die?

5 MR. SEGAR: Well, I think that's the practicality
6 of it, Your Honor. I mean, I think there's certain
7 financial incentives to request a - - - that a schedule
8 loss of use of work be paid in lump sum because of present
9 value considerations but also because of the issue of - - -
10 of legacy, of course. I mean, I think that goes without
11 saying, yes.

12 JUDGE RIVERA: So what - - - in your view, what
13 legis - - - I'm sorry.

14 CHIEF JUDGE DIFIORE: Counsel, the stated purpose
15 behind the 2009 amendment - - - let me read this - - - is
16 "to allow the injured workers to invest their awards
17 upfront and better prepare for the financial and emotional
18 effects of their diminished earning capacity". So how
19 would the payment of the entire award to the estate further
20 the purposes that were explained to undergird the
21 amendments?

22 MR. SEGAR: Well, I think, Your Honor - - - I
23 think that a - - - a situation that must incorporate the -
24 - - the definition of what a schedule loss of use of work
25 really is. If it's - - - it is clearly distinguishable



1 from a nonschedule permanent partial disability in that
2 there are no continuing payments, per se, unless the
3 claimant opts for it. And as this court had said in
4 LaCroix and also in Mancini and many of the Appellate
5 Division cases below, the schedule loss of use is not
6 allocable to a particular period of time. It's not
7 dependent upon any lost time from his or her job, and the
8 purpose is to - - - is to compensate for loss of earning
9 power.

10 I know that respondent here asserts that a
11 schedule loss is for future loss of earning capacity, and I
12 don't believe that's what the recent case law, post-
13 amendment, actually defines a schedule loss of use award.

14 So to the extent that a schedule loss of use
15 award is a unified whole, I think our position here that it
16 accrues, or becomes due is maybe the more appropriate
17 phrase, at the time of death, if not beforehand, is - - -
18 is key.

19 And I might also add, Judge, that because the
20 basis of the foundation here in this case for the
21 claimant's schedule loss of use awards were made, in an
22 undisputed fashion, six months before he died, it does seem
23 somewhat unfair, given the remedial legislation that the
24 Workers' Compensation Law embodies, to deny him, or his
25 estate in this matter, of that award that he should have



1 otherwise had but for some unfortuitous - - - except for
2 his unfortuitous death that occurred, again, some six
3 months, you know, after these findings were made.

4 JUDGE WILSON: Counsel, this strikes me, although
5 I don't know anything about the practicalities of Workers'
6 Comp. Law or practice, as a very unusual situation. Is
7 that right? That you'd have a schedule loss of use where
8 the award is posthumous and the cause of death is not
9 related to the injury; does this happen much?

10 MR. SEGAR: No, not in my thirty-four years of
11 practice, Your Honor. It's a very - - -

12 JUDGE WILSON: The reason I ask that is the
13 following. I wonder what your view is on whether Healey is
14 consistent with 15(4)(d). And the reason I've put those
15 two together is, is this the sort of issue that ever would
16 have come to the legislature's notice?

17 MR. SEGAR: I think precisely my point, Your
18 Honor, although I probably didn't do a particularly good
19 job of articulating that, is that because there is this
20 companion or alter ego of 15(4)(d) in the form of Section
21 33, I don't think there's a need, necessarily, to - - - for
22 the legislature to step in and amend 15(4)(d) or other
23 provision of the Workers' Comp. Law in order to accommodate
24 what we're asking the court to do here.

25 If the award was due at or before the time of



1 death, 33 serves its function. And again, the amendments
2 should offer no impediment to that payment of the schedule
3 loss of use award being paid, upon request, in one lump
4 sum.

5 JUDGE FAHEY: Can I ask, Judge?

6 One of the things I wondered when I went back and
7 read Healey, which has, in essence, created a compromise,
8 in a way, to read both of these statutes together, what's
9 your position on this? Can these statutes be read
10 together? Does the legislature have this right to do this,
11 and - - - or does the court have the right to create this
12 compromise with Healey, or is that purely a legislative
13 matter? Have you given any thought to that?

14 MR. SEGAR: Well, I think Healey was - - - was
15 more easily decided, Judge Fahey, prior to the 2009
16 amendments. I think it was - - -

17 JUDGE FAHEY: Let me stop you there. The
18 question that comes to mind, if the 2009 amendments
19 eliminated 15(4)(d), then why didn't they say that?

20 MR. SEGAR: Well, again, to my point, I think it
21 was to Judge Stein, 15(4)(d) did not eliminate entirely - -
22 - did not - - -

23 JUDGE STEIN: But it didn't relate to a
24 particular class of people, so I think just that Judge
25 Fahey's question is still pertinent. If they intended to



1 eliminate it for a significant class of people that fell
2 under that - - - that provision, then why - - - why
3 shouldn't they do that?

4 MR. SEGAR: Well, again, my position is because
5 there is a legislative enactment that already - - - already
6 takes care of that, already applies - - - defines
7 application to the - - -

8 JUDGE FAHEY: Well, the question is, it's a
9 general v. specific; 33 is a general. Is this a carve-out
10 under Section 33?

11 MR. SEGAR: No, in all due respect, Judge Fahey,
12 that's the respondent's point of view that it is general
13 versus specific. I don't - - - I don't - - - appellant
14 doesn't contend that here, that - - -

15 JUDGE FAHEY: All right. Let me ask you just in
16 a slightly different area. The word "accrual" itself, does
17 33 set the accrual on the date of liability or the date of
18 award?

19 MR. SEGAR: Well - - -

20 JUDGE FAHEY: In other words, the date the
21 accident happened or the date the award came down; what's
22 the accrual date?

23 MR. SEGAR: Well, I don't think it's either,
24 frankly.

25 JUDGE FAHEY: Okay.



1 MR. SEGAR: I think it is - - -

2 JUDGE FAHEY: When is it?

3 MR. SEGAR: Section 33, and under the Appellate
4 Division below, the accrual would be - - - well, there are
5 two - - - two - - - there's accrual and when the award is
6 due. The accrual date would be the date of the accident,
7 running from that point up until the date of death.

8 JUDGE FAHEY: All right. Let me stop you. For -
9 - - for most - - - I know of no other area of the law where
10 the accrual date doesn't mean that's the date that damages
11 begin to count from, that's the date you measure from.
12 Now, you may get your award six years later or whatever,
13 but when we count them, we're counting them from the date
14 of accrual, the date the damages occur.

15 And so that's - - - the purpose of that, of
16 course, is to measure liability - - - it's not measuring
17 liability, it's measuring the amount of damages once you
18 determine liability. I know of no other area of the law
19 that - - - that moves that date except for here. And
20 that's why I asked if they were in conflict. Does that
21 make sense to you? Do you understand my question?

22 MR. SEGAR: I believe I do, and I'll do my best
23 to try to - - -

24 JUDGE FAHEY: Thank you.

25 MR. SEGAR: - - - respond to it. I believe case



1 law is - - - is replete that liability for a schedule loss
2 of use arises on the date of the accident. But - - -

3 JUDGE FAHEY: No, I'm asking you a larger
4 question. I'm asking you not just in workman's comp. Is
5 there any other area of law where the damages don't begin
6 to run from the date that the damages occurred, the date of
7 accrual. In an automobile accident, in a wrongful death
8 case, in any other area, in a contract action, the date
9 that the breach occurred, right? Whatever it is.

10 MR. SEGAR: Well, I think it is somewhat unique
11 in that - - - in that regard, Judge Fahey. I do - - -

12 JUDGE FAHEY: I do too. Here's the problem I
13 have, and this - - - this is what I struggle with. I do
14 think that this does seem unfair or - - - but I have a hard
15 time reconciling, and I don't really like it, but I - - -
16 I'm wondering why doesn't the legislature have the right to
17 do this since the whole workman's comp system, it seems,
18 was established in lieu of the common law to balance the
19 interests of employers and employees. So I guess I - - -
20 we would - - - it seems we would have to say that the
21 legislature did not have this right to carve out this area
22 in order for you to be successful.

23 MR. SEGAR: Judge, and again, I'm not sure if I
24 necessarily disagree with that, but what I would like to
25 say is - - - and perhaps I'm redundant, and I apologize if



1 I am, but Section 33 talks - - - uses the word when an
2 individual dies that any compensation may be taken by the -
3 - - by the spouse or statutory survivors, or if there be
4 none, then by the estate. Compensation that was due at the
5 time of death.

6 Now, Healey and the Appellate Division below say
7 that the schedule loss of use award, posthumously awarded,
8 was due at the time of death. If we accept that, if the
9 court accepts that then it's a - - - then my position is
10 the legislature need not amend 15(4)(d) to allow the
11 amendment of 15(3)(u) and 25(1)(b) to apply because the
12 right of the estate to take that award is due and otherwise
13 payable, per 33, at the time of death.

14 JUDGE FAHEY: I see. Thank you.

15 MR. SEGAR: And I think that - - -

16 JUDGE FAHEY: Thank you.

17 CHIEF JUDGE DIFIORE: Counsel?

18 MR. SEGAR: Are there any other questions of the
19 court?

20 CHIEF JUDGE DIFIORE: No, sir. Thank you very
21 much.

22 Mr. DeCresenza? Unmute yourself, sir.

23 MR. DECRESENZA: Sorry about that. Good
24 afternoon, Your Honors. Cory DeCresenza on behalf of the
25 respondent, and may it please the court.



1 We are here today on, agreed, a very unusual set
2 of facts. The claimant was found to be at maximum medical
3 improvement, per both doctors, and before the schedule loss
4 of use was implemented at the Board level, unfortunately,
5 passed away. It is a - - - I agree with Mr. Segar that
6 this does not happen very often before the Board and it - -
7 - it triggers a very specific set of statutory amend - - -
8 enactments.

9 Our position is that the 2009 changes to allow
10 claim - - - living claimants to collect lump sum schedule
11 loss of use awards has not impacted the Healey analysis on
12 15(4) (d) and Section 33.

13 JUDGE RIVERA: Well, counsel, if I can ask you,
14 does his interpretation, or yours, encourage, as I asked
15 before, an injured employee who has an SLU award, to demand
16 a lump sum payment so that they don't lose all the money?

17 MR. DECRESENZA: Yeah, I think, practically,
18 before the court, there's very few instances where a
19 claimant tends to, you know, elect to receive a schedule
20 loss of use award by periodic payments instead of a - - - a
21 lump sum. So I - - - I can't see arguments in this case
22 having a very broad impact on implementation of schedule
23 loss of use awards in general, at the workers' comp level.

24 JUDGE RIVERA: I'm sorry, because you're saying
25 usually people want the lump sum? Is that what you're



1 saying?

2 MR. DECRESENZA: Yes, Your Honor.

3 So - - - and again, I guess our point is just
4 that essentially LaCroix did not impact 15(4)(d). Again,
5 as several judges have pointed out, if the legislature - -
6 - legislature had meant to do so, it certainly could have.
7 It could have removed that section or amended it in any
8 way, but it did not.

9 JUDGE STEIN: Counsel, how do you respond to the
10 argument that it's arbitrary that if - - - if a worker had
11 selected the lump sum payment the day before the worker
12 died then the estate would get everything, and if the
13 worker selected only periodic payments, then they're
14 limited in what they can get. How do you respond to that
15 argument?

16 MR. DECRESENZA: I guess I'd need to know a
17 little bit more about the timing. It may seem arbitrary on
18 its face. I guess the counter argument is that one of the
19 purposes of schedule loss of use awards, as we previously
20 mentioned, was to compensate a worker for a future loss of
21 wage earning capacity or diminution of earnings. Here the
22 claimant has unfortunately passed, so there - - - there is
23 not going to be a future loss of earnings. So to the
24 extent that - - - this may be why 15(4)(d) was put in to,
25 essentially, ameliorate the negative effect of a claimant's



1 estate getting nothing. They are getting the - - -

2 JUDGE RIVERA: But counsel, if I can interrupt
3 you, I think Judge Stein's question is a little bit
4 different from that. I don't think anyone's disputing the
5 statute, as you've described it. I - - - I think her point
6 is that anomaly - - - I might change the hypothetical
7 slightly - - - of someone who gets the check, because they
8 ask for the lump sum, cashes it, and the next day they die.
9 So they've gotten all of it, and if they didn't spend it,
10 it's going to the estate, versus the person who wants the
11 lump sum, requested it, but the check has not yet arrived,
12 and so they just didn't have an opportunity to cash it.
13 Where's the fairness there? What - - - what - - - let me
14 put it a different way. What's the legislative purpose
15 that is served by the law working in that way?

16 JUDGE FEINMAN: In other words, what's the
17 rationale for the death gamble?

18 MR. DECRESENZA: To be honest with you - - -

19 JUDGE RIVERA: Well, it's not - - - it's not even
20 a gamble. In my example, they both want the lump sum.

21 JUDGE FEINMAN: Yeah.

22 JUDGE RIVERA: The problem is they're waiting for
23 the check, which they have no control over. The award - -
24 - the termination may take some period of time, I mean,
25 cutting check, however it's paid. You get my point. As I



1 say, what is the legislative purpose that's served by that
2 being the result? Because I understand that's the result
3 of your interpretation. I could be wrong.

4 JUDGE STEIN: Yeah, I - - - yeah, if you would
5 clarify that, because my understanding was if - - - if the
6 election by the worker had been made but the check hadn't
7 been received, that would not be a different result. But
8 maybe I've misunderstood your position.

9 MR. DECRESENZA: I think I might be confused
10 based on the timing. Essentially, the election is made
11 usually, in practice of the Workers' Comp. Board, at the
12 time that the stipulation is entered before the Board. So
13 I mean, typically the claimant's alive, they elect to take
14 a lump sum award, and as a result, if claimant passed the
15 next day, the decision's already entered at the Workers'
16 Compensation Board level. At that point I would agree, the
17 - - - the award would be due to the estate if the
18 decision's already been entered.

19 This is just, unfortunately, a factually
20 dissimilar circumstance which is limited to 15(4)(d). I
21 don't disagree that it may seem, on its face, arbitrary
22 when argued, as Mr. Segar's taking the position, but that
23 is the statutory framework.

24 JUDGE RIVERA: So I'm sorry, I've misunderstood
25 this record. I'm confused. You're saying that the



1 decedent here did not request the lump sum before passing?

2 MR. DECRESENZA: I believe that it - - - the lump
3 - - - I believe he passed before the decision was entered,
4 and so I don't believe that actual implement - - -
5 implementation of the decision requesting a lump sum had
6 actually been made.

7 JUDGE RIVERA: Okay. So that was my
8 misunderstanding. Okay. So then my hypothetical - - -
9 there is no such situation as my hypothetical because the
10 person would have to have had the award and then say I want
11 that as a lump sum as opposed to when there's still an open
12 decision about the amount of the award?

13 MR. DECRESENZA: I guess practically the way it
14 works, in a general case, claimant's doctor says, you know,
15 one schedule loss of use, IME says another. And then the
16 parties either, you know, come to an agreement that this is
17 the schedule loss of use or the judge makes a decision and
18 then it's reduced to - - - that's reduced to writing,
19 decision, dated 1/1/21.

20 And typically before the decision is entered, you
21 know, a claimant will request that either at the hearing or
22 a memorandum of law that this award be paid in - - - you
23 know, in a lump sum per 15(3)(u). And so that's usually
24 when it's entered.

25 So one of the disagreements I have with Mr. Segar



1 is he - - - you know, he continually maintains that, you
2 know, this award is accrued before the passing and is
3 payable before that. My position is that it's not. He
4 passed before the decision entering the schedule loss of
5 use was made.

6 If this had been a Section 32 settlement before
7 the Workers' Compensation Board, you know, I believe the
8 carrier would have been free to essentially withdraw from
9 that. It was not yet a - - -

10 JUDGE RIVERA: So then - - - I'm sorry, I'm just
11 still trying to get past this issue about the record. So
12 are you saying that the estate administrator is the one who
13 said we want a lump sum? The decedent, while he was alive,
14 never said I want a lump sum payment?

15 MR. DECRESENZA: I do not believe that that was
16 stated in open court before, but without going through
17 every single document, I - - -

18 JUDGE WILSON: So Chief, if I might ask a
19 question.

20 Counsel, what is your understanding of the first
21 moment that there was due, at any time, any compensation on
22 this record.

23 MR. DECRESENZA: Sure. Lost time compensation,
24 often a term of art just for lost wages at the Workers'
25 Comp. Board. So claimant sustained an injury and was out



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of work, so at the moment he began losing time, that would be the - - - when compensation became due.

CHIEF JUDGE DIFIORE: Anything further, counsel?

MR. DECRESENZA: No, I'm fine resting on our brief. And we, again, maintain that the proper remedy here would be legislative rather than judicial. Thank you.

CHIEF JUDGE DIFIORE: Thank you. Thank you to both counsel.

(Court is adjourned)



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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of Matter of the Claim of Estate of Norman Youngjohn v. Berry Plastics Corporation, et al., No. 12 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

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