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COURT OF APPEALS
STATE OF NEW YORK

SCHULZE,

Respondent,

-against-

NO. 32

CITY OF NEWBURGH FD,

Appellant.

92 Court Street
Binghamton, New York
March 11, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

LARS P. MEAD, ESQ.
COUGHLIN & GERHART, LLP
Attorney for Appellant
99 Corporate Drive
Binghamton, NY 13904

DUSTIN J. BROCKNER, ASG
OFFICE OF THE ATTORNEY GENERAL
Attorney for Respondent
The Capitol
Albany, NY 12224

RICHARD T. CAHILL, JR., ESQ.
PASTERNAK TILKER ZIEGLER WALSH STANTON & ROMANO, LLP
Attorney for Respondent
117 Executive Drive, Suite 200
New Windsor, NY 12553

Christian C. Amis
Official Court Transcriber



1 CHIEF JUDGE WILSON: Last case on this morning's
2 calendar is Schulze v. City of Newburgh Fire Department.

3 MR. MEAD: Good morning. I'd like to reserve
4 five minutes.

5 CHIEF JUDGE WILSON: Yep.

6 MR. MEAD: May it please the court? I am Lars
7 Mead of the law firm, Coughlin & Gerhart, on behalf of the
8 Appellant, City of Newburgh Fire Department.

9 Before I get to the merits of this case, first
10 let me say that we fully recognize the sacrifice that
11 firefighters and other first responders, such as the
12 claimant herein, have made for the safety of the public of
13 the State of New York.

14 We here in Binghamton just recently experienced a
15 terrible - - - a tragic loss that reminds us all of the
16 debt we owe to our first responders. The arguments that
17 I'm going to make this morning are not meant in any way to
18 denigrate the service of the claimant herein or any other
19 first responder.

20 However, this case involves a duplicate provision
21 of benefits that's not permitted under the law.

22 JUDGE RIVERA: So fair enough that the
23 legislature wants to provide benefits but not duplicate
24 them. Fair enough. Is there anything that could have been
25 done by your client to avoid this current situation?

1 MR. MEAD: I don't think so. I know that the - -
2 - the Attorney General's Office maintains that we could
3 have filed an application to start the workers'
4 compensation benefits at some earlier stage, and perhaps
5 that's true. But even if we had done that, under the
6 circumstances of this case, where the employer commences
7 payment of the General Municipal Law 207-a(2) supplement
8 upon the retirement, there would still be a delay before
9 the Workers' Compensation Board makes a retroactive
10 decision. And it was that retroactive decision, and the
11 Board's corresponding determination that those retroactive
12 benefits were not subject to employer reimbursement, that
13 created this duplicate payment.

14 CHIEF JUDGE WILSON: Tell me why that would have
15 had to be retroactive. He obtained a workers' compensation
16 judgment, for lack of a better word, that would have
17 entitled him to, I think it was up to 375 weeks of
18 compensation.

19 MR. MEAD: Right. Yeah. So - - - but that - - -

20 CHIEF JUDGE WILSON: And then they were awarded
21 in tranches.

22 MR. MEAD: What happens when the claimant is
23 under General Municipal Law 207-a(1) benefit - - - this is
24 the pre-retirement benefit - - - they are being paid their
25 full salary. Everybody, including the Board, agree that in

1 that circumstance the employer is entitled to reimbursement
2 of workers' compensation awards. So when a hearing is held
3 in the pre-retirement stage where the employee is receiving
4 their full salary, the Workers' Compensation Board does not
5 direct continuing workers' compensation benefits in the
6 future. All of the benefits that they award are
7 retroactive in nature and reimbursable to the employer.
8 This way, if the status changes at any point along the road
9 in the future, there isn't already a benefit that's been
10 paid to the employer.

11 JUDGE HALLIGAN: And why is it only retroactive
12 in nature?

13 MR. MEAD: Because for practical purposes - - -
14 as I understand it anyway, from doing these workers'
15 compensation hearings - - - the Board knows the person, the
16 employee, the claimant is already on payroll and already
17 getting their full salary benefits, so there's no benefit
18 to making the award at that point going forward.

19 JUDGE HALLIGAN: Pursuant to what provisions
20 specifically is the employee on full payroll?

21 MR. MEAD: General Municipal Law 207-a(1), the
22 pre-retirement benefit, where they've been injured due to
23 an injury incurred in the performance of duty, and they're
24 out of work.

25 JUDGE TROUTMAN: The entitlement is salary and



1 wages? Is that what's being paid?

2 MR. MEAD: So in the - - - and I was in the pre-
3 retirement stage. If you want me to move to the post-
4 retirement stage, I could do that.

5 JUDGE TROUTMAN: Yeah.

6 JUDGE CANNATARO: Before you leave pre-
7 retirement, I just - - - so are you saying that in the pre-
8 retirement context, workers' comp will not make a
9 prospective award if they know that the person is receiving
10 salary from the municipality under (1)a or a(1)?

11 MR. MEAD: That's - - - that is correct. They do
12 not make continuing payment directives in that
13 circumstance.

14 CHIEF JUDGE WILSON: Continuing payment
15 directives to you.

16 MR. MEAD: Continuing payment directives to
17 anyone, either to the claimant or the employer in a
18 prospective going forward.

19 JUDGE CANNATARO: Even if it's been determined
20 that that person has sustained some sort of disability?

21 MR. MEAD: Correct. Because the parties all
22 represent to the law judge, this person is currently still
23 on payroll. So therefore, there are retroactive awards.
24 Those retroactive awards are paid back to the employer to
25 avoid the duplication of benefits. But there's no need to

1 continue future workers' compensation benefits from the
2 date of the hearing going forward at that point, because
3 the claimant's already receiving their full salary.

4 CHIEF JUDGE WILSON: I guess the question is, at
5 the moment he was entitled to receive the POD benefits,
6 right - - - or started receiving them - - - why couldn't
7 you go to the Board, notify him of that, and then
8 prospectively - - - however long a gap there is - - -
9 prospectively deduct those payments yourself from the
10 payments you were making.

11 MR. MEAD: Well, we don't know exactly what the
12 claimant's going to be entitled to until the workers' comp
13 Board rules on it, for one thing.

14 CHIEF JUDGE WILSON: Okay. So - - -

15 MR. MEAD: Claimant's counsel is going to request
16 an attorney fee to be deducted from it for another. The -
17 - - also, the calculation of the a(2) benefit is not so
18 straightforward. So the person gets the performance of
19 duty disability retirement. The a(2) benefit is not really
20 known to the municipality until the retirement system does
21 the pension calculation.

22 JUDGE TROUTMAN: Okay. So with respect to 207
23 a(2), salary or wages?

24 MR. MEAD: So our position is that it is either
25 salary or wages, but it's one of those. It's not some kind

1 of pension benefit.

2 JUDGE TROUTMAN: And why is it, when there's
3 supplemental, and the status of the employee has now
4 changed?

5 MR. MEAD: So what I would say is that - - - and
6 most importantly for our analysis here, is that these
7 benefits, the a(2) supplement payment, is an advance
8 payment of compensation, and I say that for a number of
9 reasons. An advance payment of compensation is the
10 language from the workers' compensation statutes,
11 particularly section 25(4)(a). The a(2) benefit is
12 calculated based on salary. It includes collectively
13 bargained raises or collectively bargained diminutions in
14 salary.

15 JUDGE TROUTMAN: Can't you get even pension
16 benefits based on what your salary was? But once you
17 retired, you aren't getting your salary anymore.

18 MR. MEAD: You're not getting salary, but you are
19 under this specific statute, which is a very unique animal
20 in the law. You are getting a wage replacement supplement.
21 That's the way I would characterize it.

22 JUDGE CANNATARO: So Counsel, Harzinski was
23 decided like thirty-five years ago, would you say that
24 everyone's been operating under a misconception as far as
25 the a(2) goes for thirty-five years?

1 MR. MEAD: No. What I would say is that
2 Harzinski was correctly decided, but the foundation for the
3 ruling was incorrect. And that other courts that have
4 dealt with this, the Farber case, for example - - -

5 JUDGE TROUTMAN: So you agree - - -

6 JUDGE HALLIGAN: What do you mean by that,
7 exactly?

8 MR. MEAD: Yes.

9 JUDGE TROUTMAN: So you agree that Harzinski did
10 say it wasn't salary or wages?

11 MR. MEAD: Yes. They - - - the Harzinski case
12 was dealing with - - - first of all, it's very important to
13 point out - - - an accidental disability retirement. And
14 under the statutory scheme, in an accidental disability
15 retirement, the retirement system will reduce the pension
16 payable to the employee by the amount of the workers'
17 compensation award.

18 JUDGE SINGAS: But that distinction wasn't
19 important for Harzinski.

20 MR. MEAD: Well, I think it actually was in terms
21 of what the final determination should be, because if we go
22 back to Jefferson and the progeny of cases that deal with
23 employer reimbursement - - - and that was the question
24 before the court in Harzinski, should the employer be
25 entitled to reimbursement - - - the que - - - the guiding

1 fundamental principle, and the principle that we believe
2 this court should follow in this case, is the avoidance of
3 a disproportionate result to either party, either the
4 employer or the employee. So in Harzinski, they - - - the
5 court determined - - - albeit - - - and from my
6 perspective, on incorrect grounds, because, in my view,
7 207-a(2) is a wage benefit.

8 JUDGE RIVERA: But they argue you have a remedy.
9 It's just you think the remedy isn't one that really should
10 be applied to you. But there is a remedy, right?

11 MR. MEAD: Well, the remedy under General
12 Municipal Law 207-a(4-a) is a prospective remedy once the
13 workers' compensation award has been made and after the
14 a(2) benefit has been calculated and the pension is being
15 paid.

16 But in the circumstances of - - -

17 CHIEF JUDGE WILSON: I want to be clear what you
18 mean by prospective remedy, that it - - - you can
19 procedurally not start the remedy until some future point,
20 or that you cannot recoup monies that hap - - - that you
21 were owed, let's say, before that point.

22 MR. MEAD: Well, the a(4-a) statute itself says -
23 - - and I'm not looking at it, so I can't quote it exactly
24 - - - but basically, workers' compensation awards once
25 finally determined. So they - - - it requires a

1 determination by the Board before you could start taking
2 credit for those workers' compensation awards.

3 CHIEF JUDGE WILSON: When you say prospective,
4 you just mean a filing date.

5 MR. MEAD: Right.

6 So in - - - to - - - back to Harzinski, if the
7 court there had determined - - -

8 JUDGE RIVERA: Sorry. What - - - I'm still not
9 understanding why this remedy is not adequate.

10 MR. MEAD: So there are a number of reasons why I
11 would say it's not adequate. Number one is that in - - -
12 under the facts of the case that's before you, there were
13 three years of retroactive workers' compensation benefits -
14 - -

15 JUDGE HALLIGAN: Could you have done anything in
16 that three-year window?

17 MR. MEAD: Perhaps. But even if they had, there
18 still would have been a retroactive period of award.

19 JUDGE HALLIGAN: Okay. But presumably,
20 significantly less.

21 MR. MEAD: It could have been less, but the
22 fundamental principle is the same. In other words, there's
23 going to be a period of time here in almost all of these
24 cases, especially if the employer puts the person right on
25 to the a(2) benefit as soon as they can - - - where the

1 Workers' Compensation Board has not yet made the awards for
2 the post-retirement period, and there's going to be this
3 retroactive period.

4 JUDGE HALLIGAN: In your experience, if that's
5 pursued - - - and your adversaries may have a view about
6 this as well - - - but if that's pursued in a prompt
7 manner, how long does it take to get that award?

8 MR. MEAD: Well, it may be on the order of months
9 instead of years.

10 JUDGE RIVERA: But - - -

11 MR. MEAD: But it's still - - - there's still
12 this retroactive period.

13 JUDGE RIVERA: Why is it an inadequate remedy? I
14 don't think you responded.

15 MR. MEAD: Okay. So there's a number of reasons
16 why it may be inadequate, and it's going to depend on a
17 particular case, but there's no guarantee - - -

18 JUDGE RIVERA: Why is it inadequate here?

19 MR. MEAD: It's inadequate here - - -

20 JUDGE RIVERA: Yes.

21 MR. MEAD: - - - because we don't know whether
22 the claimant would be entitled to a(2) benefits going
23 forward in time. In this particular case, I think he was,
24 but it's not in - - - it's not present in the record. And
25 we would argue that that actually would be outside the

1 jurisdiction of the Workers' Compensation Board anyway. So
2 whether the employer could potentially, in a particular
3 case, recoup the double payment out of future a(2) benefits
4 or not, they still should be entitled to the reimbursement,
5 so they don't have to go that route. I mean, it's just a
6 tremendous inefficiency if we force the employer to try to
7 recoup a double payment of benefits out of future payments
8 that we don't know for sure are even going to be made. The
9 a(2) benefit ends if the person - - -

10 JUDGE RIVERA: Isn't that an argument for the
11 legislature? I mean, if that's the remedy that they've
12 designed - - -

13 MR. MEAD: Well, it would be if there weren't
14 clear legislative intent already in the statute.

15 JUDGE HALLIGAN: Does your approach leave a
16 different course for accidental and performance of duty?
17 It seems that it does.

18 MR. MEAD: Yes. Because the fundamental guiding
19 principle, dating back to Jefferson and Poupard, these
20 cases all say that an employer gets reimbursement so long
21 as it doesn't result in a disproportionate result. There's
22 nowhere in the statute, for example, like these - - -
23 Jefferson and Poupard are good cases for me to expound
24 upon.

25 JUDGE HALLIGAN: Why would it be sensible for the

1 legislature to choose a different scheme for those two
2 types of benefits?

3 MR. MEAD: Which two types of benefits?

4 JUDGE HALLIGAN: No, I asked you whether or not,
5 under your reading, there would be a different approach for
6 accidental and performance of duty, and you said, yes,
7 there would be. And I'm asking you why that would be a
8 sensible result from the legislature's perspective.

9 MR. MEAD: So because of the fact that under
10 accidental, the retirement system takes credit for the
11 workers' comp payment.

12 JUDGE HALLIGAN: It's done on the front end, and
13 it's done by operation of statute, I think you're saying.

14 MR. MEAD: It's done by operation of statute.
15 Once the retirement system gets information about the
16 amount of workers' compensation benefit, they then reduce
17 the pension amount. So it would be unfair for an
18 accidental disability retirement recipient to also have the
19 employer take credit for those same workers' compensation
20 benefits and reduce the a(2) benefit in that case. That's
21 why I say Harzinski was correctly decided.

22 CHIEF JUDGE WILSON: So ADR - - - just so you can
23 - - - just so I understand this - - - in an ADR case, is
24 there a lag of the sort you described between when the
25 pension system can recoup monies?

1 MR. MEAD: In what kind of case?

2 CHIEF JUDGE WILSON: An ADR case. So in an ADR -
3 - - if I understand it correctly, in an ADR case, the
4 pension system is paying seventy-five percent of the salary
5 on retirement, right? And the pension system directly
6 deducts the workers' comp benefit, right?

7 MR. MEAD: That's correct.

8 CHIEF JUDGE WILSON: And so - - - but the
9 workers' comp benefit, as I understood your earlier
10 answers, isn't - - - might not be determined already by the
11 point in time that the employee goes on to ADR.

12 MR. MEAD: That's true.

13 CHIEF JUDGE WILSON: Although, there could be a
14 lag of several months of the type you were describing.

15 MR. MEAD: That's true.

16 CHIEF JUDGE WILSON: What does the pens - - -
17 what happens to the pension system in that circumstance?

18 MR. MEAD: Well, there's a couple of things I
19 would say here is whereas the - - -

20 CHIEF JUDGE WILSON: Does it recoup the gap, or
21 does it forgo the gap?

22 MR. MEAD: I don't know what the pension system
23 does. I suspect that they take credit for it in some
24 manner going forward and avoi - - - and they take credit
25 for it from the moment that the workers' comp award is

1 made.

2 But what I would say there is - - -

3 CHIEF JUDGE WILSON: They also don't know about
4 the same things you don't know, essentially.

5 MR. MEAD: Well, that's true, but the pension
6 system does have some fundamental differences from the
7 municipality under the a(2). The a(2) benefit ends upon
8 retirement age. It ends if the claimant does any kind of
9 work whatsoever. So there's no guarantee that the a(2)
10 benefit going forward is going to be there; whereas, the
11 pension system has, presumably, the rest of the person's
12 life to take credit for these amounts. So I think the
13 overpayment issue from the pension systems standpoint is
14 eminently correctable; whereas - - -

15 JUDGE RIVERA: Does the collective bargaining
16 agreement address any of these - - - I guess what you - - -
17 lapse, gaps, whatever you want to call them?

18 MR. MEAD: So I believe the collective bargaining
19 agreement is left out of this record, and I don't believe
20 it says anything about this particular issue before this
21 municipality.

22 One thing I wanted to point out about the change
23 in the law that goes back to the legislative intent, the
24 creation of the performance of duty disability retirement
25 and the corresponding creation of General Municipal Law

1 207-a(4-a) only makes sense if the legislature intended to
2 avoid a duplication of benefits. Under the accidental
3 disability retirement, the retirement system takes the
4 credit for the pension. When the legislature created the
5 performance-of-duty pension under 363-C, it gave no right
6 of pension reduction to the retirement system but created
7 the a(4-a) reduction right on the 207-a(2) side.

8 We submit that no corresponding change was needed
9 to the Workers' Compensation Law, because the statutory
10 right to obtain reimbursement of the retroactive
11 compensation payments already made existed under Workers'
12 Compensation Law Sections 30 and 25.

13 207-a(4-a), as Your Honors have pointed out,
14 points - - - provides a clear avenue to avoid the
15 duplication of benefits, but that's only for the a(2)
16 benefit made after the award of compensation is made. And
17 here, we submit that where the a(2) benefit went on for
18 several years before the award of compensation was made,
19 the employer must be entitled to reimbursement of the
20 retroactive portion of the compensation payments in order
21 to avoid the duplication of benefits.

22 And I see that my time is up.

23 MR. BROCKNER: May it please the court. Dustin
24 Brockner, on behalf of the Workers' Compensation Board.

25 The Third Department correctly held Newburgh is

1 not entitled to reimbursement for the pension supplements
2 it paid. Newburgh has a different remedy to avoid
3 overlapping benefits.

4 JUDGE HALLIGAN: What do you say about the gap?

5 MR. BROCKNER: Which gap is she - - -

6 JUDGE HALLIGAN: Sorry. As I understand your
7 adver - - - one of your adversaries argument is that even
8 if they have a remedy, there will be some period of time
9 that will lapse before they can secure, whether it's an
10 offset or a reimbursement, and cannot recoup the money in
11 that window of time, and that's why, in their view, their
12 approach is the fairer and more sensible one.

13 MR. BROCKNER: Several responses. Just
14 preliminarily, this is a function in part of a no - - - the
15 kind of workers' comp award. There is nonscheduled awards.
16 Other awards are continuing, or there's a lump sum payment.
17 So we're in a pretty unique situation to begin with.

18 That - - - at the same time, what they should do,
19 knowing the rule is they get - - - they tell the Workers'
20 Comp Board promptly about the retirement. I mean, they
21 could tell them about the application. They could give
22 them advanced - - - the workers' comp proceeding advanced
23 warning. That - - - there is this application pending, and
24 upon - - -

25 JUDGE HALLIGAN: Do you dispute - - - does that

1 allow them to bring that gap to zero and fully recoup
2 everything, or does it reduce the amount of time in which
3 there's some payments they can't recoup?

4 MR. BROCKNER: I think it - - - done timely, they
5 could - - - it could bring it down to zero. Also, the
6 application betwe - - - there's also a time gap - - - time
7 lapse with the retirement system where it still takes eight
8 to twelve weeks for it to - - - those payments to start
9 running. So they can, with the pro - - - provided they
10 give prompt notice to the Board, reduce it to zero. And -
11 - -

12 JUDGE HALLIGAN: And I know you just said that
13 the type of workers' comp benefits here are not the most
14 typical ones, but I would have guessed that this conundrum
15 would have arisen before, certainly in the in the post-
16 Harzinski years. Is that approach that you're suggesting
17 one that other municipalities have successfully adopted, or
18 is that a theoretical approach?

19 MR. BROCKNER: I'm not aware of that being done,
20 but that's also in part because the Board doesn't
21 administer the remedy under GML 207 4 - - - 207(4-a), so we
22 - - - we - - - the Board doesn't have insight as to how
23 municipalities and retired firefighters are negotiating
24 this situation. Again, it's also - - - could be subject to
25 collective bargaining agreement. So because it's not a

1 remedy the Board administers, and how to balance the
2 benefits is something that the Board doesn't see; it's not
3 - - - I don't have a case of a Board proceeding where that
4 happens, but - - -

5 JUDGE CANNATARO: Just so I'm clear, and this is
6 sort of a follow up.

7 MR. BROCKNER: Yeah.

8 JUDGE CANNATARO: Did you say that this type of
9 situation only arises when the award is a nonscheduled
10 award - - -

11 MR. BROCKNER: Where there's ongoing awards
12 because nonscheduled awards can be made - - - sorry - - -
13 excuse me - - - certain kinds of awards be paid in a lump
14 sum up front, so then you have the award. Or a permanent
15 disability award is ongoing. And even here, it could have
16 been ongoing. The - - - it is true that the employer said
17 - - - and this is in record 107 - - - they were the ones
18 who terminated the ongoing payments. They could have said
19 in the - - - in a future case, now that they know the
20 rules, keep it - - - keep the award going because the - - -
21 they're going to be shift - - - shifted, and we'll take the
22 reimbursements until they retired, and then we'll reduce
23 the pension supplements. So they could do this all by
24 going to the Board in the first instance and providing this
25 information, and they have the remedies under 407(a).

1 And I actually would like to then turn to the - -
2 - their attempt to distinguish between accidental
3 disability pension and performance of duty disability
4 pensions. The question here is whether these pension
5 supplements are reimbursable wages under workers' comp law.
6 It does not, as a statutory matter, depend on this external
7 factor of whether or not the retirement system decides to
8 grant an accidental disability pension and performance of
9 duty pension. There is nothing in the statutory language
10 suggests that that makes a difference under the workers'
11 comp law.

12 JUDGE SINGAS: Point well taken. But why aren't
13 these supplemental payments more in the manner of wages
14 under 25(4) (a)? What's the argument there? Because I
15 think they have a pretty good argument on that.

16 MR. BROCKNER: Okay. I'll address that, and then
17 I want to play out what happens if you accept that
18 argument. So you're talking about the second half of
19 25(4) (a). That is payments - - - that has been construed
20 by this court and applied for one hundred years as
21 continued payment of wages - - - almost always full wages.
22 And that applies where the worker remains on the payroll,
23 and the employer continues to pay them their salary. That
24 is how it's been - - - that was the reason it was added in
25 1930, and it's been applied consistently in that way;

1 whereas, in this case, we're in a fundamentally different
2 situation.

3 JUDGE SINGAS: I thought it was applied when you
4 give a loan, let's say, because otherwise, it would - - -
5 if it was just salary, then it would just be called salary.
6 I don't know why it would be called in like manner as
7 wages.

8 MR. BROCKNER: It's not called wages because
9 wages under workers' comp law refers to services being
10 rendered and payments in exchange for that. So it can't
11 becbecause they're disabled, they're not working, it's not
12 - - - it's not actually wages as defined in the workers'
13 comp law, but it's similar to. It's the same amount. It's
14 paid in the same manner, and they stay on the payroll.

15 By contrast, here, they're off the payroll,
16 they're disabled, and they're retired. And also, the
17 context here in - - - where you have overlapping workers'
18 comp, disability pension, and GML, the legislature speaks
19 very clearly when it wants to provide the remedy. It did
20 here with the GML 207(4-a). It did that for the retirement
21 system and - - -

22 JUDGE RIVERA: If the remedy doesn't resolve the
23 problem of duplicative payments, should we take that into
24 account when interpreting the statute? Because isn't the
25 primary goal there to avoid the duplication?

1 MR. BROCKNER: Right. You could take into
2 account, but that does - - - that overlooks - - - we were
3 talking about the remedy before the award is made, how to
4 make sure we have a prompt award rather than waiting years
5 before we bring it to the Board's attention. That's one
6 possibility. The other is under 407-a(4-a). They have a
7 remedy. They could seek - - - they could reduce future
8 pension supplements. They have nothing in the record
9 saying they can't do that. So they could take an
10 additional credit of future pension supplements. Not just
11 that, they could also seek recoupment - - -

12 JUDGE TROUTMAN: Double recovery?

13 MR. BROCKNER: What was that?

14 JUDGE TROUTMAN: Do you agree that there was
15 double recovery?

16 MR. BROCKNER: We agree that there's overlapping
17 benefits, and that the municipality has a remedy. It's
18 just not one that the Board administers. So we - - -
19 really we - - - then they - - - if - - -

20 JUDGE TROUTMAN: They've gotten double recovery.
21 But in order for them to get reimbursed, they had certain
22 rights, and they didn't do it the right way, so they have
23 to suffer the consequences?

24 MR. BROCKNER: And - - -

25 JUDGE TROUTMAN: Or they can do it in the future

1 in the other ways that have been suggested?

2 MR. BROCKNER: In the future and to today. So
3 that the claimant might have received overpayments, that
4 doesn't mean they're entitled to overpayment. And the
5 municipality can - - - has other remedies where they could
6 deduct future pension supplements, or they could bring
7 recoupment - - - seek recoupment from the claimant. You -
8 - - we overpaid you. You owe money. That is another
9 remedy. So we're - - - we've identified - - -

10 JUDGE TROUTMAN: That's not in the manner that
11 they were asking for in this case.

12 MR. BROCKNER: They have not - - - I don't - - -
13 they have not done that. I don't know - - - because that's
14 a remedy the Board doesn't administer. We're talking - - -

15 JUDGE TROUTMAN: Right. The Board - - - the
16 point is - - - what you're saying - - - the Board did what
17 it was constrained to do.

18 MR. BROCKNER: That's correct. They did - - -
19 they have - - - the municipality has a remedy. I think
20 they're asking for a second remedy.

21 JUDGE RIVERA: Well, is he then incorrect that
22 potentially there are no future payments? And then I
23 assume you would say, then you're left with an action
24 against the firefighter to recoup. Right. Is he incorrect
25 that there - - - there may not be future payments from

1 which to take credit?

2 MR. BROCKNER: That's correct. But they're
3 pretty certain - - - I - - - where he explains there's
4 uncertainty about it. I don't know what he's referring to
5 because they last until the mandatory retirement age. I
6 don't have that information. They would.

7 JUDGE CANNATARO: The point that - - -

8 MR. BROCKNER: Yeah.

9 JUDGE CANNATARO: I mean, I think you just - - -

10 MR. BROCKNER: Sorry.

11 JUDGE CANNATARO: - - - made the point that I was
12 going to ask. At some point, this disability retirement
13 becomes a service retirement, right? And then he - - - he
14 takes the pension based on a service retirement; is that
15 right?

16 MR. BROCKNER: No. My understanding is because
17 he's on performance of disability - - - disability, that's
18 his pension for his - - - that's - - - that is his pension.

19 JUDGE CANNATARO: Does it last for the rest of
20 his life?

21 MR. BROCKNER: That's correct.

22 JUDGE HALLIGAN: I want to make sure I understand
23 a part of the statutory scheme. So as I read it - - - but
24 it's complicated - - - correct me if I am getting it wrong
25 - - - 364 governs payments under 363, which is accidental

1 disability, yes? And 364 says that those payments shall be
2 reduced by the amount of benefits that are payable under
3 workers' comp, right? There's not, I don't think, a
4 parallel provision for 363-C, performance-of-duty benefits;
5 is that right? And if that's correct, what do we make of
6 the distinction? Does it matter for your argument? And
7 why not if it doesn't?

8 MR. BROCKNER: I don't think it matters. One
9 thing is in 364, it also gives the retirement system a
10 clear right to reimbursement, and we don't - - - so that
11 shows the legislature, when they want to give a
12 reimbursement right, can speak clearly, and they don't have
13 - - - there's no equivalent provision for performance of
14 duty disability pension grant to the municipality.

15 JUDGE HALLIGAN: You would make sort of an
16 expressio unius argument. Either the legislature included
17 it, but not with respect to the other. Is that your - - -

18 MR. BROCKNER: That - - - that's one of the
19 arguments. Another argument is - - - like, what the
20 provisions that they're relying on in the workers' comp
21 law, nothing in the text of those provisions - - - it's
22 just whether or not it's salary or wages within - - - you
23 know, under GML 207-a - - - nothing in that statutory
24 language suggests that it turns on the external factor of
25 whether or not the retirement system under the retirement

1 system law decides whether or not to grant an accidental
2 disability pension or performance-of-duty disability
3 pension. We're saying that's an atextual - - - it's a
4 creative policy solution under the specific facts of this
5 case, but it has no basis in the statutory text.

6 And if you were to say - - - and the other thing
7 is if you - - - well, another concern would be you could
8 have competing claims. If you say, fine, every - - - it is
9 reimbursable, the - - - regardless - - - it's all
10 reimbursable regardless of whether or not it's an
11 accidental - - -

12 JUDGE HALLIGAN: What is the it you're referring
13 to?

14 MR. BROCKNER: Excuse me - - - what I want to
15 just briefly say is, if the court was to hold that the
16 pension supplements the municipality - - - municipality
17 pays. If that is wages, regardless of the disability
18 pension - - - just put that aside and say that it always is
19 - - - you would have competing claims where the retirement
20 system comes in, is claiming reimbursement, and the
21 municipality comes in claiming reimbursement for the same
22 pot of money, and there's no statutory guidance on how the
23 legislature - - - I mean, excuse me - - - no statutory
24 guidance for how the Workers' Comp Board can resolve that
25 kind of claim, suggesting it's not a question the Board

1 should be put in. And the municipality doesn't really
2 dispute that and instead has this atextual policy solution
3 where, whether it's wages or reimbursable turns on what the
4 retirement system decides to do, and there's just no
5 textual basis to have reimbursable ability turn on that - -
6 - on that issue.

7 JUDGE CANNATARO: (Audio interference)
8 legislature (audio interference).

9 MR. BROCKNER: That's correct. If there is a
10 problem - - - which the municipality has avenues, has - - -
11 has relief available to it before the award is made and
12 after.

13 Thank you.

14 MR. CAHILL: May it please the court, Richard
15 Cahill Jr., on behalf of Adam Schulze, the injured worker.

16 I'd like to address my remarks primarily to the
17 question asserted by the City of Newburgh that the remedy
18 under 207-a(4-a) is inadequate. I would respectfully
19 assert to this court that it is an adequate remedy if it is
20 asserted timely, and if it had been asserted at all in this
21 case. The remedy was never asserted. From the beginning,
22 they were asserting a claim for reimbursement, which does
23 not apply under the laws.

24 A question was raised about 25(4)(a). 25 or - -
25 - 25(4)(a) specifically says that reimbursement applies

1 when the employer, quote, has made payments to an employee
2 in a manner like wages, close quote.

3 JUDGE SINGAS: (Audio interference) - - -

4 MR. CAHILL: Yes, Your Honor.

5 JUDGE SINGAS: - - - statutory scheme is to avoid
6 these duplicative payments, right? Some are more
7 complicated, some, you know, less - - - more easy to
8 understand. But fundamentally, why should your client get
9 to keep this \$106,000?

10 MR. CAHILL: My client made claim - - -
11 appropriate claims. They were ruled in his favor. The
12 City of Newburgh had a remedy. They didn't claim it. And
13 they don't have to claim the remedy. As was noted before,
14 in some cases there are collective bargaining agreements
15 where it's dealt with differently. There's nothing that
16 says the city - - -

17 CHIEF JUDGE WILSON: (Audio interference) - - -

18 MR. CAHILL: Yes, Your Honor.

19 CHIEF JUDGE WILSON: I mean, you may not know,
20 but your client was receiving workers' compensation
21 payments for quite a while and then - - -

22 MR. CAHILL: Not at the time.

23 CHIEF JUDGE WILSON: - - - and then stopped
24 receiving them.

25 MR. CAHILL: No, Your Honor. What happened was

1 the claimant was classified with a permanent partial
2 disability. At the time he was classified, he was still an
3 employee, and he was being paid wages under 207-a(1).

4 CHIEF JUDGE WILSON: And (audio interference) - -
5 -

6 MR. CAHILL: And as noted by my colleague - - -

7 CHIEF JUDGE WILSON: - - - he was - - - he was
8 appearing in proceedings in front of the Board, or no?

9 MR. CAHILL: When the Board granted hearings, he
10 did appear, and there were things that were made.

11 CHIEF JUDGE WILSON: So he knew the amount of the
12 payments. They were just going to the municipality.

13 MR. CAHILL: He knew that he was receiving his
14 wages under 207-a(1).

15 CHIEF JUDGE WILSON: Did he have to appear before
16 the Board - - - or somebody on his behalf - - - each time
17 those were renewed? Because they came in many tranches,
18 right?

19 MR. CAHILL: A claimant is not required to
20 appear. A claimant may appear if he has counsel to appear
21 before him. What's important in this case, however, is
22 this; when the City of Newburgh received the determination
23 from the retirement system, there were no payments being
24 made of workers' compensation. They were on notice at that
25 point. We have this retirement. This gentleman is going



1 to go off the payroll. We are going to have to soon stop
2 paying him wages and begin paying him pension supplements
3 under 207-a(2). At that point, the City of Newburgh is on
4 notice. They know this is going to happen. They know
5 there's been a determination that he can get up to 375
6 weeks. That's been decided.

7 Now, at this point, there's no awards being paid.
8 At this point, to effectively manage their claim, it is
9 incumbent upon the City, if they want to assert this
10 credit, to file an RFA-2 with the Board and say, Board,
11 we've received this notice. This gentleman is going to be
12 taken off the payroll. We want to reserve our rights under
13 207-a(4-a). We ask you not to enter the awards until we
14 can have a hearing, we can appear in front of you, and so
15 forth. They didn't do that. They simply didn't do it.
16 Now, they have the right to assert that credit, and they
17 didn't do it. This is - - -

18 JUDGE RIVERA: Could they seek to recoup now?

19 MR. CAHILL: That is unclear - - -

20 JUDGE RIVERA: Perhaps not through that process,
21 but - - -

22 MR. CAHILL: That is unclear from the statute.
23 The statute is silent as to whether it's retroactive. The
24 statute does not say who enforces it. I know it was
25 asserted by my colleague, Mr. Brockner, in his brief, that

1 it is done automatically by the municipality. The statute
2 doesn't say one way or the other.

3 What I will also note is this, there was a
4 similar statute passed at one time, section - - - amend - -
5 - amendment of Section 15(3)(w) of the Workers' Comp Law.
6 And that statute determined that when an individual was
7 classified with a permanent partial disability, labor
8 market attachment will no longer apply. Well, that was
9 silent when it came to retroactivity. But aggressive
10 claimants attorneys actually raised the issue, litigated it
11 before the Board and brought it up. And if memory serves
12 me right, it was the O'Donnell case where the Third
13 Department said, yes, based on our review of the bill
14 jacket and everything that was done, it was intended to be
15 retroactive.

16 City of Newburgh could have done that, too, but
17 they didn't. This is a unique case because the City of
18 Newburgh simply - - - and I - - - and I'm going to say,
19 this is not directed to my colleague - - - the City of
20 Newburgh dropped the ball. They didn't do what they were
21 supposed to do. They could have aggressively handled this
22 claim. They could have filed an RFA-2. They could have
23 raised the issue of retroactivity, which is an interesting
24 issue, and I wish it had been raised so we could have
25 briefed it and really gotten into it because it would be an



1 interesting argument. Unfortunately, it was never raised.
2 And they could have pursued that, but they didn't. The
3 fact that there are - - -

4 JUDGE HALLIGAN: What is an RFA-2?

5 MR. CAHILL: It stands for Request for Further
6 Action. And when you hear the number 2, that refers that
7 it's coming from an employer or a self-insured or a
8 carrier.

9 JUDGE HALLIGAN: What would it enable you to do?

10 MR. CAHILL: It's asked the - - - it asked the
11 Board, we have this - - - these issues, and you can set it
12 forth in the form. We ask the Board either for a decision
13 or a hearing so that this important issue can be addressed
14 before the Board. If it - - -

15 JUDGE HALLIGAN: So you're saying it would be a
16 mechanism for them to force some resolution, and therefore,
17 be able to secure reimbursement in a more a more timely
18 way?

19 MR. CAHILL: Yes, Your Honor. Yes. Your Honor.
20 And - - -

21 JUDGE CANNATARO: It doesn't in any way affect
22 the flow of payments once the award is paid, does it?

23 MR. CAHILL: You mean the filing of an RFA-2?

24 JUDGE CANNATARO: Yes.

25 MR. CAHILL: It can, Your Honor. RFA-2s could be

1 used for a variety of reasons. If the self-insured or
2 employer or carrier has filed an RFA-2, and they've
3 presented a reason for the Board to consider why they
4 should hold off addressing payments, they can.

5 In addition, under section 23 of the Workers'
6 Compensation Law, when any awards are made, the
7 municipality and/or their carrier or third-party
8 administrator has the right to file an appeal, and the
9 legislature has put a provision in place under Section 23
10 that says the awards are stayed pending an appeal.
11 Currently, those appeals are left - - - lasting at least a
12 year or more, which gives plenty of time to avoid this
13 problem.

14 And what I would point out to this court - - - I
15 forget which judge - - - which of you mentioned it - - -
16 but somebody had asked about the lack of case law on this
17 point that has never been never been raised. I would
18 submit the reason there's not so much case law on this is
19 that the remedy works if it is timely asserted and if it's
20 asserted at all. So - - -

21 JUDGE RIVERA: And this timely remedy that you
22 say they didn't assert, this is what he was discussing with
23 respect to give advance notice to the Board, file before
24 the Board. Are you both talking about the same thing?

25 MR. CAHILL: The remedy we're talk - - - well - - -

1 -

2 JUDGE RIVERA: Yes.

3 MR. CAHILL: - - - I believe the remedy - - -
4 well, I won't speak for my colleague - - - but the remedy
5 I'm speaking of, Your Honor, is 207-a(4-a), and it is the
6 ability of the municipality to file an RFA-2 and to - - -

7 JUDGE RIVERA: But you're saying it's advanced,
8 and that sounds like what he was referring to.

9 MR. CAHILL: Yeah, I - - - yes, my position is
10 similar to - - - to the - - - yes, - - -

11 JUDGE RIVERA: I guess, let me try it a different
12 way. Is there some other route that might fit what he was
13 describing as the way you would have put - - - they - - -
14 excuse me - - - that Newburgh could have put this to the
15 Board to avoid the situation they're in now?

16 MR. CAHILL: To the Board, no. But there is
17 another remedy, in theory, they could have done. And that
18 is, they could have filed an order to show cause at any
19 time and brought it before the New York State Supreme
20 Court, which would have had jurisdiction over the whole
21 megillah; whereas, the Board has - - - they've noted - - -
22 has limited jurisdiction. They could have filed an - - - a
23 - - - an order to show cause and brought it before a
24 Supreme Court judge and argued the whole thing. They
25 didn't do that.

1 This remedy has existed for quite some time, and
2 there's never been any substantial problems. And now we
3 come here, and you know, one can argue, well, my client
4 benefited from their mistakes, but that happens a lot when
5 you have reimbursement - - - regular reimbursement under
6 25(4) (a) or under Section 30, Subdivision 2. The
7 municipality must request it. And if they don't, the law
8 says that they don't get it - - -

9 JUDGE RIVERA: You're saying you don't know now -
10 - - or at least you're not willing to concede right now - -
11 - that they could seek some remedy now to get this money.

12 MR. CAHILL: The law - - - the law is unclear.
13 It doesn't specifically say whether it's retroactive or
14 not. And the payments now have been completed because the
15 375 weeks has been paid out. The only way that - - -
16 currently under the law - - - that there could be
17 additional payments is if this individual was to have
18 causal-related surgery and thus was entitled to total
19 disability. But that is speculative in nature.

20 And certainly, as a way it exists, if there were
21 additional payments in the future, the statute would
22 provide for it. But the statute doesn't discuss whether
23 it's retroactive or not. And unfortunately, they never
24 raised it.

25 And I see that my time has expired, and I thank

1 you.

2 JUDGE SINGAS: Counselor, is it the city's
3 position that they were not aware that the status changed
4 from an employee to a pensioner, or you were aware of it
5 but continued the payments for what reason?

6 MR. MEAD: They were aware of it. They continued
7 the payments because they found that he was eligible for
8 the a(2) supplement. So the municipality is charged under
9 General Municipal Law 207 with making the determination of
10 eligibility, which they made.

11 What I would point out here is that they're under
12 no obligation to ever request workers' compensation awards.
13 The claimant doesn't have to go and request the workers'
14 comp awards. He's already received his full salary. So
15 you know, I would - - -

16 JUDGE SINGAS: But the fraction of who's paying
17 what changes once he becomes a pensioner. And then isn't
18 it incumbent upon the city to say, look, we're not going to
19 pay his full wages anymore because now workers' comp kicks
20 in, and all we're responsible for is the difference.

21 MR. MEAD: If, in fact, there was a guarantee
22 that he was going to be entitled to workers' comp benefits
23 - - - I mean, 207 and workers' comp are separate. This
24 court has made that clear.

25 JUDGE SINGAS: Is he a party to all of these

1 hearings? Like, the city is a party to this, so you - - -
2 I don't think there's so - - - there's not that much
3 clarity or it's such an unknown. I think the City could
4 have figured out what it was - - - the error - - - that he
5 was entitled to and what their percentage of the formula
6 was.

7 MR. MEAD: Practically speaking, even if the
8 municipality follows the suggestion of claimant's counsel
9 that they file a request for action and obtain a workers'
10 compensation hearing, there's still a retroactive award of
11 benefits.

12 And our argument is not just a creative policy
13 solution; it is based on the statutory language in the
14 workers' comp law. And it states, if an employer has made
15 an advance payment of compensation - - - and then there's
16 this "or" that talks about employees and wages. I delete
17 that because I don't believe that the word "or" is
18 meaningless there.

19 I think, at that point, I skipped down to, "he
20 shall be entitled to reimbursement out of an unpaid
21 installment or installments of compensation due provided as
22 reimbursement is filed before the award of compensation is
23 made." They satisfied all of that here. It was a payment
24 of compensation. They filed their request for
25 reimbursement before the award was made. They should have

1 been entitled to the reimbursement.

2 To the extent that arguments have been made that
3 the workers' compensation statute doesn't distinguish
4 between accidental and performance of duty, I would just
5 point out again the logic of this court dating back to
6 Jefferson. There, leave credits were used. Those leave
7 credits were not restorable. The court reviewed the same
8 statutory language from section 25 and said, in that
9 circumstance, the employer is not entitled to the
10 reimbursement.

11 There's nothing in the statute that says that.
12 It's the intent of the statute to avoid a disproportionate
13 result to either the employer or the employee. That was
14 the guiding principle. If we follow that principle here,
15 we will again reach the reached the conclusion that the
16 employer must be entitled to reimbursement when these
17 retroactive awards of workers' compensation are made.

18 No one has had any lack of certainty about how to
19 handle employer reimbursement requests under the Jefferson
20 case. For more than forty years, everybody has agreed that
21 if the employer charges the employee accrued-leave credits
22 and will not restore them upon the receipt of the employer
23 reimbursement award, they are not entitled to that employer
24 reimbursement award. That's not specifically spelled out
25 in the statute, but because the overarching purpose of the

1 statute is the avoidance of a disproportionate result for
2 either party - - - and that's something that dates back a
3 hundred years to the beginning of the workers' comp law - -
4 -

5 JUDGE RIVERA: - - - Is it your position that you
6 cannot now recoup these monies? There's no path. It might
7 not be the ideal path from - your client's perspective. I
8 fully understand that and appreciate that. But is it your
9 position there is just no path?

10 MR. MEAD: No, I'm willing to affirmatively
11 assert, contrary to counsel, that they have a path and that
12 they could recoup them in the future out of a lawsuit, but
13 they don't have to under the statute here. They have a
14 statutory right to the reimbursement, and there's no reason
15 to force the employer in this situation to try to sue the
16 claimant for the \$100,000 back.

17 Thank you all very much for your time. Thank you
18 for coming to my hometown of Binghamton.

19 CHIEF JUDGE WILSON: Thank you.

20 (Court is adjourned)

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

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Schulze v. City of Newburgh FD, No. 32 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: C. Amis

Agency Name: eScribers
Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020
Date: March 24, 2025