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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF GREEN,

Respondent,

-against-

NO. 78

DUTCHESS COUNTY BOCES,
WORKERS' COMPENSATION BOARD,

Appellants.

20 Eagle Street
Albany, New York
September 14, 2022

Before:

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

Appearances:

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1 ACTING CHIEF JUDGE CANNATARO: Good afternoon.
2 The first appeal on today's calendar is in The Matter of
3 Green v. Dutchess.

4 Counsel?

5 MR. BROCKNER: Good afternoon. May it please the
6 Court, excuse me, Dustin Brockner on behalf of the Workers'
7 Compensation Board. May I have two minutes for rebuttal?

8 ACTING CHIEF JUDGE CANNATARO: You may have two
9 minutes.

10 MR. BROCKNER: Thank you.

11 For one hundred years, a nonschedule award
12 terminated when the worker died for reasons unrelated to
13 the disability. The deceased worker was not entitled to
14 any further benefits nor were their beneficiaries. The
15 decision below disrupted this century-old understanding.

16 JUDGE RIVERA: Counsel, doesn't - - - if we adopt
17 your interpretation, doesn't that reinstate this different
18 treatment between the SLU and the nonschedule awards that
19 the legislature clearly was trying to eliminate?

20 MR. BROCKNER: No, Your Honor. And for two
21 reasons. First, there's no indication that the
22 legislature, when it was imposing the caps in 2007 - - -
23 because prior to that, I think it's undisputed, there were
24 no posthumous - - - no way to possibly calculate posthumous
25 nonschedule award. So then the question becomes what did



1 the legislature indeed in 2007 when it imposed a maximum on
2 the - - - basically a ceiling on the maximum number of
3 benefits a worker could receive?

4 And the Appellate Division looked at that ceiling
5 and gave it a different function, that it was a way to
6 create, for the first time, calculate, and guarantee
7 posthumous nonschedule benefits. But there's nothing in
8 the legislative - - - the text or legislative history of
9 the caps to suggest that the legislature wanted the caps to
10 serve that function.

11 First, we could look at the text of the caps. It
12 says, "Compensation shall not exceed a certain number of
13 weeks of benefits". Caps are a - - - a ceiling, a limit,
14 on the maximum number of weeks a worker may receive,
15 provided that they satisfy the ongoing requirements of
16 15(3)(w).

17 JUDGE RIVERA: But then what - - - yeah. And
18 what about 15(4) though?

19 MR. BROCKNER: Your Honor, if you look - - -

20 JUDGE RIVERA: Aren't we - - - aren't we bound by
21 that plain language? There's no distinction amongst
22 awards.

23 MR. BROCKNER: Your Honor, if you look at 15(4)
24 in isolation - - -

25 JUDGE RIVERA: Uh-huh.



1 MR. BROCKNER: - - - it's plausible to read that
2 - - - read it as affecting both schedule and nonschedule
3 awards. But there's several reasons why that reading
4 fails.

5 First, again the other statute, the workers'
6 compensation laws interlocking provisions have to be read
7 together. And when you read 15(4) in conjunction with
8 15(3), it becomes - - - which is a provision that 15(4)
9 refers to - - - it becomes clear that nonschedule awards,
10 in particular, terminate upon the worker's death. That's
11 because section 15(3)(w) imposes two requirements on
12 nonschedule awards, continuance of disability - - -

13 JUDGE SINGAS: Why not just apply it and let the
14 legislature change the statutory language if that's what
15 they meant?

16 MR. BROCKNER: Because there's no indication that
17 the legislature intended for 15(4) to operate in that - - -
18 in that manner. It's - - - it was enacted over a hundred
19 years ago, around a hundred years ago for a specific
20 reason, to apply to schedule awards. And in that century
21 there was no court - - - neither the court nor the Board
22 had ever even suggested it could possibly could affect
23 nonschedule awards.

24 So just continuing to apply it as it's always
25 been understood, means to - - - continuing to recognize



1 that 15(4) affects schedule awards only. And that flows
2 from the fundamental differences between a schedule award
3 and a nonschedule award.

4 Schedule award is fixed for a set duration
5 benefits. A nonschedule award - - - it - - - a schedule
6 ward, therefore, it's a guarantee, it's an entitlement. A
7 nonschedule award is not a - - - doesn't guarantee any
8 benefits to worker.

9 ACTING CHIEF JUDGE CANNATARO: And what's the
10 language in 15(3)(w) that takes away the guarantee aspect
11 of it? Is it wage-earning capacity? Is it - - -

12 MR. BROCKNER: I - - - it's two provisions.
13 Well, first it's - - - it doesn't take it away. It's that
14 it's never offered in the first place.

15 ACTING CHIEF JUDGE CANNATARO: It never put it
16 in?

17 MR. BROCKNER: Yeah, exactly. So - - - and the
18 legislature clearly knows how to guarantee permanent
19 partial disability benefits. It does that in schedule
20 awards. It says an award shall be a certain rate for a
21 fixed number of weeks according to the statutory schedule.

22 There's no analogous language in the provision
23 governing nonschedule awards. It says instead that the - -
24 - payable during the continuance of the disability. So if
25 the disability no longer continues, such as when the worker



1 has died, no benefits are payable. And even in addition to
2 that, it is a function of the disability.

3 To calculate a rate of a nonschedule award, you
4 need to know how much the disability has impaired the
5 workers' wage earning capacity. But where workers died the
6 - - - for reasons unrelated to the disability, the - - -
7 that disability never - - - no longer can impair their wage
8 earning capacity.

9 ACTING CHIEF JUDGE CANNATARO: Just to confirm, a
10 schedule award is payable in full at the time it's made if
11 that's an election that's taken, isn't that right?

12 MR. BROCKNER: That's correct, Your Honor.

13 ACTING CHIEF JUDGE CANNATARO: And that's not
14 something that would apply for one of these nonschedule
15 awards, they're payable in increments over weeks?

16 MR. BROCKNER: That's correct. They're periodic
17 payments, Your Honor.

18 JUDGE RIVERA: And do the - - - just to clarify,
19 is your position that the benefits might actually fluctuate
20 during the life of the claimant?

21 MR. BROCKNER: That - - - that's exactly right,
22 Your Honor. They may fluctuate. They may be suspended
23 entirely. They are not at - - - that is the fundamental
24 feature of the nonschedule award. It is not an
25 entitlement, it is conditional. And when a workers has



1 died for reasons unrelated to the disability, they can no
2 longer - - - no further benefits can accrue and thus the
3 award terminates.

4 And if I may just return to the language of
5 15(4)? I think it - - - what it refers to is existing
6 awards under - - - awards that are still in existence. And
7 so for a schedule award, that's a guarantee, it's a fixed
8 number of weeks of benefits. It's existence doesn't depend
9 on the worker's life and can continue upon death. By
10 contrast, a nonschedule award's existence depends on the
11 workers satisfying ongoing conditions. And therefore, the
12 award no longer exists upon death.

13 And may I use just a - - - an example? Say a
14 worker receives a schedule award, guarantees her a hundred
15 weeks of benefits. She gets her hundred weeks of benefits.
16 They are paid to her. There are no further benefits and
17 the award has - - - did not - - - the schedule award has
18 terminated, there's - - - at that point.

19 If a - - - if that worker then dies for reasons
20 unrelated to the disability, if that surviving spouse tries
21 to say 15(4) hey it says pay me under 15(3), the response
22 would be there's no award in existence, there's nothing - -
23 - no further benefits have accrued, it's been - - - there's
24 not further benefits that can accrue, the award no longer
25 exists. And that's the same logic that applies to



1 nonschedule awards once a worker - - -

2 JUDGE RIVERA: So is that another way of saying -
3 - - or maybe this is not what you're saying so I'll just
4 ask it. Is that equivalent to saying it's not vested, it's
5 contingent throughout the life of the claimant until they
6 reach the cap, of course?

7 MR. BROCKNER: The - - - it is a contingent
8 award, absolutely. A gap - - - a schedule award is
9 guarantee. A nonschedule award is not. And that's - - -

10 JUDGE RIVERA: So the SLU - - -

11 MR. BROCKNER: - - - that fundamentally is - - -

12 JUDGE RIVERA: SLU is vested and the nonschedule
13 is contingent in one way or another?

14 MR. BROCKNER: Yes.

15 JUDGE RIVERA: Okay.

16 MR. BROCKNER: That's right, Your Honor.

17 And just - - - and also just returning to the
18 caps for a moment, again, there's no indication in the text
19 or legislative history to suggest the caps were a way to
20 create a entitlement to nonschedule benefits posthumously.
21 And in fact, that'd be contrary to the overall legislative
22 context.

23 The caps were, as this court has explained, a
24 concession to insurance carriers. One of the end many
25 purposes was to reduce costs. And the Appellate Division's



1 ruling, it's intention with that purpose, it would increase
2 costs. And given - - - and on top of that, the caps did
3 not displace the ongoing - - - long standing and ongoing
4 requirements imposed on nonschedule awards that we've been
5 discussing.

6 And if the legislature wants to guarantee
7 permanent partial disability and knows how to say so.
8 That's what it said for schedule awards. It has not said
9 the same thing for nonschedule awards. And it is - - - if
10 it would like to provide the Board with a way to calculate
11 nonschedule - - - posthumous nonschedule benefits, it can
12 say so. It hasn't done so. And there's no indication from
13 the - - - any of the history of 15(4) or the text of
14 15(3) (w) to suggest there should be posthumous - - - there
15 are - - - a way to calculate posthumous nonschedule awards.

16 ACTING CHIEF JUDGE CANNATARO: Thank you,
17 Counsel.

18 MR. BROCKNER: Thank you, Your Honor.

19 MR. MAGNETTI: If it please Your Honors, I'm
20 Ralph Magnetti from Cherry, Edson & Kelly, representing the
21 appellant, Dutchess County BOCES.

22 I guess to pick up where Mr. Brockner left off,
23 the first issue we have to deal with is whether the plain
24 language of Section 15(4) compels that nonscheduled awards
25 and scheduled awards be made in the same manner. Prior to



1 2007, that wasn't taking place. And we have to remember
2 that a statute must be construed as a whole and its various
3 sections must be considered together with reference to each
4 other.

5 So if you look at that case of Ace Fire
6 Underwriters v. The Special Fund, it dealt with Section 29,
7 subdivision 5 which said an employer - - - an employee or
8 the employee's dependents could make an application for a
9 nunc pro tunc order. It didn't say that the carrier or
10 anyone else could make such a request. But this court held
11 that the carrier in that case, who had given consent to the
12 settlement but then was unable to get consent from the
13 Special Fund, brought the proceeding to get nunc pro tunc
14 consent to the settlement against the Special Fund.

15 The plain language was not followed directly
16 because they took into account Section 29(1), which said
17 that consent had to be obtained from any party with a lien.
18 And that included the carrier and the Special Fund. So it
19 wouldn't make sense to not allow one carrier to get the
20 consent of the other carrier by court order. So clearly
21 the plain language doesn't always control in each case.

22 So in this case when you look at Section 15(4)
23 and take the statute in consideration as a whole, you have
24 to consider the language that Mr. Brockner was talking
25 about in Section 15(3)(w) which is the conditions upon a



1 nonschedule award are that it only is paid during the
2 continuance of the disability. And there has to be a nexus
3 between the disability and the loss of earnings. And that
4 naturally would have to - - -

5 JUDGE WILSON: Would you agree that it's - - -
6 it's the drafting of 15(4) is a little sloppy? That is, it
7 would have been easier to say 15(3) excepting (w)?

8 MR. MAGNETTI: Well, I think I point that out in
9 my brief, that (w) didn't exist in 1920.

10 JUDGE WILSON: Yeah.

11 MR. MAGNETTI: I believe it was (u). So you have
12 twenty sections or paragraphs that deal with schedule loss
13 of use awards. Then you have this one catchall phrase that
14 says, oh by the way in other cases to which schedule loss
15 of use awards don't apply, you have to look at the
16 employee's earnings, lost time - - -

17 JUDGE WILSON: Uh-huh.

18 MR. MAGNETTI: - - - whether the disability is
19 continuing, whether the disability is the cause of the loss
20 of earnings. And then when you take those factors into
21 account, you decide if that award should continue or not.

22 The statute itself even says that it's subject to
23 change on the Board's own motion or by the motion of either
24 party. The amount of the benefits fluctuate. They can go
25 up or down or stop completely during the course of a



1 permanent partial disability that's a nonschedule as
2 opposed to a schedule. So I think it - - -

3 JUDGE TROUTMAN: So do you agree that a
4 distinction should be made between the two types of awards
5 because scheduled is guaranteed where nonscheduled is
6 contingent?

7 MR. MAGNETTI: Yes, that's our position, of
8 course. And the reason we say that is because that's what
9 Section 15(3) says. So you're not bound by the language of
10 Section 15(4) saying just subdivision (3) without
11 distinguishing between the two.

12 So I guess the other question is whether the 2007
13 amendments or this court's decision in Mancini changed
14 anything. This court did say that one of the purposes of
15 the 2007 amendments was to limit the disparity between the
16 two types of awards. But that was in the context of what
17 was - - - what used to be lifetime award versus schedule
18 loss of use awards, which are paid for a finite number of
19 weeks.

20 I don't think it was meant to eliminate all
21 disparities between the two types of awards. In fact, this
22 court said in the O'Donnell case that issues such as labor
23 market attachment and showing that your loss of earnings is
24 related to the injury is still necessary in order to
25 receive that type of award, as opposed to a schedule loss



1 of use award.

2 So I don't think that the 2007 amendments or this
3 court's decision in Mancini dictate any different result.

4 Thank you.

5 ACTING CHIEF JUDGE CANNATARO: Thank you,
6 Counsel.

7 MR. DAUERER: Good afternoon. May it please the
8 court, my name is Louis Dauerer. I represent Kanye Khalid
9 Green in connection with this claim, which piggybacks on
10 the claim of his father who is now deceased.

11 Viewing this case, I believe, has to begin with
12 the 2007 amendments to - - -

13 JUDGE GARCIA: So Counsel, let me you that if you
14 were making this argument in 2006, would you win?

15 MR. DAUERER: I don't know. 15(4) was there at
16 the time and said the same thing it says now. It says an
17 award under subdivision (3). It was - - -

18 JUDGE GARCIA: It's a hard argument. I mean, the
19 - - - the statute's been around - - -

20 MR. DAUERER: Now - - -

21 JUDGE GARCIA: - - - for a hundred years now.

22 MR. DAUERER: Now, what I will tell you is had
23 Mr. Watson, who was injured the same year the statute was
24 amended - - - he was injured in late 2007 after the
25 workers' compensation law was amended to cap the PPD



1 benefits. Had he been injured in 2006, I would have told
2 him - - - if he had asked me how long are these benefits
3 going to continue, I would have said you're probably going
4 to get \$400 a week for life. And that would have been my
5 answer.

6 Now, after 2000 - - - March of 2017, the - - -
7 everything's turned upside down by the legislature,
8 nonscheduled permanent partial disability benefits are no
9 longer capped - - - are no longer open-ended, and last,
10 potentially, for life. They are now fixed from anywhere
11 from 225 weeks on the low side to 425 weeks on the high
12 side.

13 JUDGE GARCIA: Which is longer than the schedule
14 awards or no?

15 MR. DAUERER: Oh, boy. A schedule loss of use
16 award - - - the highest schedule loss of use award would be
17 get your arm cut off, you get 312 weeks of compensation for
18 a a hundred percent loss use to the arm.

19 JUDGE GARCIA: And the low end is?

20 MR. DAUERER: It could be any of - - - a five
21 percent loss use to the arm would be 15.1 weeks.

22 JUDGE GARCIA: Got it. Okay.

23 MR. DAUERER: Okay?

24 JUDGE GARCIA: And sorry to - - -

25 MR. DAUERER: And - - - and fingers, fifteen



1 weeks for a pinky.

2 JUDGE GARCIA: I didn't mean to quiz you on
3 types.

4 MR. DAUERER: That's why people love us comp
5 lawyers.

6 JUDGE GARCIA: So we were at the 07' changes.

7 MR. DAUERER: So with the 07' changes, everything
8 gets turned upside down. It's no longer a lifetime
9 benefit. We have - - - we have these caps. And I would
10 point out that Mr. Watson, from the time he was classified
11 until the time he passed away, he was working at two jobs,
12 light duty. There was a 700 - - - more than a \$750
13 shortfall between what he was earning at the time of the
14 injury, which was over \$1,700 a week, and - - -

15 JUDGE RIVERA: Do you agree that it could have
16 fluctuated or been suspended during his lifetime as Counsel
17 alluded?

18 MR. DAUERER: Oh, absolutely. If his earnings
19 would have increased, certainly. But because during the
20 entire time he was receiving the benefits, the earnings
21 information showed he was making - - - or there was more
22 than a \$750 gap between the pre-injury and the post-injury
23 wages - - -

24 JUDGE TROUTMAN: So with your agreeing that it
25 fluctuates, for the sake of argument, if you said there



1 were benefits allowed after death, how would you calculate
2 them?

3 MR. DAUERER: I think that the established rate
4 of compensation that he had been receiving could be
5 continued. And this is not an unusual - - -

6 JUDGE SINGAS: But could be continued at what
7 rate? That's the issue I'm having, right? So if these
8 benefits could fluctuate and are variant during your
9 lifetime, how do they suddenly crystalize into a lump sum
10 upon death?

11 MR. DAUERER: It wouldn't necessarily be a lump
12 sum upon death, okay? But I believe the Board could look
13 at this and say here's what the established loss of wage
14 earning capacity was, here is what the weekly benefit was
15 based upon his earnings, and project that for the remaining
16 cap weeks.

17 ACTING CHIEF JUDGE CANNATARO: So that goes back
18 to the contingency argument. Your adversary contends that
19 these awards are contingent upon meeting certain ongoing
20 requirements to collect the award. The fact that there
21 might have been some period of time where all the ongoing
22 requirements were met at a certain level, certainly doesn't
23 guarantee that those requirements would've continued to
24 have been met through what he described, I think, as the
25 ceiling time period for the benefit. And it seems as if we

1 have to have, like, crystal balls in order to determine
2 what the appropriate post-death award would be.

3 MR. DAUERER: That has been done in the past.
4 Under Kelly v. State Insurance Fund, it was always
5 projected. And that was limited by Burns, obviously. But
6 in death claims and in permanent total disability claims,
7 there's a projection of what the lost wage benefits would
8 be and how long they would last in order to calculate the
9 ATF deposit. So - - -

10 ACTING CHIEF JUDGE CANNATARO: So it's an
11 actuarial kind of thing?

12 MR. DAUERER: Yes, exactly.

13 ACTING CHIEF JUDGE CANNATARO: And what would
14 guide the courts? It may - - - is that information readily
15 available to a court when they're making a determination of
16 what the post-death award should be?

17 MR. DAUERER: Actually the Board does have an
18 actuarial unit that they do use to calculate ATF deposits
19 in nonschedule PPD cases and death claims.

20 JUDGE RIVERA: But - - but if I'm understanding
21 you, and correct me if I'm wrong, that is a guesstimate
22 about the life of the individual; is that correct?

23 MR. DAUERER: That's - - -

24 JUDGE RIVERA: Okay.

25 MR. DAUERER: Yes.



1 JUDGE RIVERA: But that's not going to address
2 wage earning capacity, which is the other basis for
3 fluctuation.

4 MR. DAUERER: Again, pre - - - pre Burns - - -

5 JUDGE RIVERA: Uh-huh.

6 MR. DAUERER: - - - when there was lifetime
7 permanent partial disability benefits, those benefits were
8 calculated. And - - -

9 JUDGE RIVERA: Uh-huh.

10 MR. DAUERER: - - - the case law goes into
11 painful detail on to how calculate - - - how to calculate
12 the, what was it called, the present value of the
13 extinguished benefits because of the carrier's credit on
14 the third party net recovery.

15 JUDGE RIVERA: And was it also an assessment of
16 the actual market, the employability, moving forward with -
17 - -

18 MR. DAUERER: No, it - - -

19 JUDGE WILSON: - - - what wages would be?

20 MR. DAUERER: Basically, we would look at what
21 the weekly rate of compensation was and if the person was
22 permanently partially disabled. In this case, Mr. Watson
23 was working and we used his earnings to calculate his
24 benefit.

25 In many cases with nonscheduled permanent partial



1 disabilities, the people are out of work and they receive a
2 weekly benefit based upon the percentage loss of wage
3 earning capacity. And that becomes a percentage of the
4 two-thirds rate. So if somebody is fifty percent impaired,
5 they would get one-half of two-thirds of their salary. And
6 would be then projected into the future.

7 JUDGE RIVERA: So to be clear, it - - - is it
8 your position - - - a slightly different question - - -
9 that his son - - - sympathies to his son - - - is entitled
10 to a lump sum or again sort of this installment until you
11 reach the cap?

12 MR. DAUERER: Well, the Appellate Division said
13 they weren't making any determination on that. And I think
14 - - - well, there's a couple of issues that come into play.
15 There's no provision within Section 15 for the - - - for
16 the - - - what was it, Section 23, that was amended to
17 allow for the lump sum - - -

18 JUDGE RIVERA: Uh-huh.

19 MR. DAUERER: - - - payment of the schedule? So
20 I would say it would be payable over time because - - - I
21 mean, I've - - - as a - - - what if - - - god forbid, what
22 if the son passes away? Okay. And then - - -

23 JUDGE RIVERA: Yeah, what - - -

24 MR. DAUERER: - - - and then there is no
25 dependent? So you would - - -



1 JUDGE RIVERA: Okay. So then what happens?

2 MR. DAUERER: Then the benefits would stop
3 because there's no more dependents. Now, in this case,
4 there was only, what, twenty-one weeks or so left on - - -
5 on Mr. Watson's nonscheduled permanent partial disability
6 at the time he passed away. And by the time this wound it
7 - - - wound its way through the appeals at the Workers'
8 Comp Board and the Appellate Division, then back to the
9 Board, well more than those number of weeks had passed so
10 he did receive a lump sum payment.

11 JUDGE GARCIA: Counsel, there is no provision for
12 a lump sum for nonscheduled awards, right? And you have
13 one for scheduled awards.

14 MR. DAUERER: Correct.

15 JUDGE GARCIA: So they're treated differently.
16 But isn't that also, somewhat, on the theory that you can
17 calculate the lump sum payment easily for a scheduled award
18 because it's never going to change, it's projected out over
19 a certain number of weeks. Whereas here, it's subject to
20 change based on these variables we've been discussing. So
21 isn't the same principal of no lump sum applicable to no
22 benefit after death?

23 MR. DAUERER: I respectfully disagree. And
24 would answer - - -

25 JUDGE GARCIA: I thought you might.



1 MR. DAUERER: And would answer no.

2 JUDGE GARCIA: But why?

3 MR. DAUERER: And the why is - - - when you look
4 at a schedule loss of use award, okay, that gets paid, a
5 person gets ten percent loss of use to the arm, 31.2 weeks,
6 paid at whatever the compensation rate is. And if they had
7 less than 30 - - - that number of weeks of lost time while
8 they were out of work post-injury, they get the balance
9 owed to them.

10 Now, there's also cases where the person may have
11 been out of work for forty weeks, in which case the
12 disability would exceed the schedule loss of use and they
13 don't get any money as a result of the schedule loss of use
14 award.

15 So it - - - it's not always as cut and dry in
16 terms of is it payable in a lump sum or isn't it. There's
17 many cases where my clients have been out of work longer
18 than the value of the schedule so they don't get anything.

19 Now, the thing is as far as viewing the
20 nonschedule and that there's no lump sum payment there, I
21 do understand the court's concern with well how do you
22 calculate it. And again, with somebody who's not out of
23 work - - - or excuse me, somebody who remains out of work
24 is getting their percentage of their average weekly wage on
25 that nonschedule award for the duration of the cap



1 benefits.

2 This case was a reduced earnings situation where
3 Mr. Watson had continued to work at two light duty jobs to
4 help supplement his income. So that is a very long-winded
5 answer to your question.

6 Now, looking at the - - -

7 JUDGE RIVERA: So if I'm understanding you on
8 that one - - - this is - - - you would say, in this case,
9 you look at whatever was the benefit at the time death? I
10 think that's what you're saying. That's the benefit moving
11 forward.

12 So then if I'm understanding you correctly, under
13 your interpretation, it doesn't mean that other claimants
14 in Mr. Greene's position would receive the cap or they
15 would always receive the cap? How does that work out
16 mathematically? Is your rule that they always receive the
17 cap? I guess that's the bottom line.

18 MR. DAUERER: Are you talking alive or dead - - -

19 JUDGE RIVERA: No, no, no.

20 MR. DAUERER: - - - to put it - - -

21 JUDGE RIVERA: Posthumous.

22 MR. DAUERER: Oh, posthumous?

23 JUDGE RIVERA: Let's say we agreed with you - - -

24 MR. DAUERER: Well, to - - - it's - - -

25 JUDGE RIVERA: - - - on that part?



1 MR. DAUERER: Obviously it depends on whether or
2 not there is a dependent. Okay?

3 JUDGE RIVERA: Well, I'm assuming someone's going
4 to receive the benefits, yes, that there's a dependent.
5 That's what I was saying, someone in the same position as -
6 - - I'm sorry - - -

7 MR. DAUERER: So if there is a - - -

8 JUDGE RIVERA: - - - your client?

9 MR. DAUERER: If there is a dependent, than my
10 answer to your question is yes, that the balance of the
11 nonscheduled PPD benefits should be paid based upon, again,
12 the plain language of - - - of Section 15(4).

13 JUDGE GARCIA: Was that the calculation that was
14 done here? I think it was \$19,000 and something.

15 MR. DAUERER: Yes.

16 JUDGE GARCIA: Was that based on that last
17 benefit amount before death?

18 MR. DAUERER: Correct, yes. That was 500 a week
19 for those, I think it was, twenty-one weeks or so.

20 It was mentioned in your decision in Mancini
21 about the - - - getting back to the 2007 amendments, to
22 bring parity between nonschedule and schedule loss of use
23 awards. So we have a situation where schedule loss of use
24 awards, the injured work really does not have to show any
25 loss of earnings in order to qualify for that benefit.



1 They get it whether they're working, not working, and that
2 gets paid out to them and can be paid in a lump. And, as
3 you noted in Youngjohn, if there is a dependent, that
4 entire award would get paid to that dependent.

5 In this case, we have an injured worker who
6 established a loss of earnings, a substantial loss of
7 earnings or greater than \$750 a week over the 320 weeks he
8 collected his nonschedule PPD benefits. And they were, you
9 know, set to end. And had he lived out a normal life
10 expectancy - - - he died at age fifty-five, which frightens
11 me because I'm now fifty-five years old. You know, what do
12 you do after that? His loss of earnings - - - you know,
13 while he may have gotten raises or something like that - -
14 - would, presumably, have continued. And pre-2007, he
15 would have continued to receive those lost wage benefits.

16 And here we have the legislature coming in and
17 saying well, we're going - - - we're going to cap these
18 benefits. And in Mr. Watson's case they were capped at 350
19 weeks because he was found with a fifty-one percent loss of
20 wage earning capacity. If he was found with a fifty
21 percent loss of wage earning capacity, we wouldn't even be
22 here because you only get 300 weeks for a - - -

23 JUDGE GARCIA: Counsel, in that legislative
24 scheme, there a was disparity. And it required the
25 legislature to come in and look at that particular issue,



1 figure out, okay, for a nonschedule we're going to give
 2 this certain amount of weeks in, you know, a uniquely
 3 legislative function here. And now it seems you're asking
 4 us to perform that type of feat and look at the statute and
 5 say okay, this is written, you know, because these awards
 6 are different we can't do this; but in fairness, we want to
 7 say you can recover this type of award based on a general
 8 idea of fairness. But that general idea of fairness didn't
 9 amend the statute. It was the legislature that amended the
 10 statute. And they did it somewhat surgically.

11 MR. DAUERER: Except that the plain language of
 12 15(4) is still there and doesn't differentiate between - -
 13 - you know, and as somebody noted, they could have said
 14 except for awards under 15(3) (w) but they didn't.

15 ACTING CHIEF JUDGE CANNATARO: Well, what about
 16 permanent total disabilities? Those aren't covered under
 17 15(4). There's a lack of fairness there. Does the next
 18 case get to come in and ask us to apply the fairness gloss
 19 - - -

20 MR. DAUERER: That I would believe - - -

21 ACTING CHIEF JUDGE CANNATARO: - - - to that
 22 category?

23 MR. DAUERER: Well, what I would argue is with a
 24 permanent total disability, there you have an injured
 25 worker who's significantly disabled, does receive a



1 lifetime benefit, but they do get the full two-thirds of
2 their average weekly wage for the duration of time of their
3 life.

4 JUDGE RIVERA: And it - - - it - - -

5 MR. DAUERER: And it's a higher - - - it's a
6 higher weekly benefit. I guess that's the - - -

7 JUDGE RIVERA: Let's turn on what this award - -
8 - I mean, his point is, or their point is, that the award
9 is extinguished, and that there is no award upon death and
10 that's why you can harmonize 15(4) and 15(3) the way they
11 suggest. But the other one, because it's vested - - -
12 right, this other award is vested, it's fixed, you're
13 certain to get it. You either got it at the lump sum up
14 front or if you passed away, you know, there's an issue
15 about that lump. But in any event, that's the amount - - -

16 MR. DAUERER: No, I - - -

17 JUDGE RIVERA: - - - that would have been
18 available.

19 MR. DAUERER: I appreciate that position. But I
20 believe it has to be looked in - - - within the context of
21 the legislature taking away lifetime benefits - - -

22 JUDGE RIVERA: Yeah.

23 MR. BROCKNER: - - - for all the other
24 nonschedule permanent partial disability benefits and those
25 people that continue working at light duty and receive no



1 compensation for that loss at all thereafter.

2 Thank you very much.

3 ACTING CHIEF JUDGE CANNATARO: Thank you,
4 Counsel.

5 MR. BROCKNER: Your Honors have been talking
6 about the rate. What would the rate be at time of death?
7 And these - - - nowhere can claimant point to where in the
8 statute the legislature's provided any guidance for the
9 Board to calculate that rate. That is - - - and that - - -
10 claimant's attorney suggested use an actuarial table.
11 That's what they do for our trust funds. That's Section
12 27.

13 In there, the legislature says use an actuarial
14 table. That's specifically authorized by the legislature
15 to use the actuarial table. The legislature has provided
16 no guidance to the Board on how to calculate a posthumous
17 nonschedule award in terms of the rate.

18 It's true the Board came up with a figure here,
19 but it lacked any guidance on how to do so. It just felt
20 it was constrained by the Third Department's ruling of the
21 claimant gets the award so it had to enter one.

22 But again, it is up for the legislature to tell
23 the Board, because it has no guidance to-date, on how to
24 set a rate when there's no longer any loss of wage earning
25 capacity caused by the disability, when there's no longer



1 any continuance of the disability either.

2 And so - - - and also one other thing is claimant
3 kept calling nonschedule awards before the caps a lifetime
4 award. That - - - they were not lifetime awards. They
5 were not fixed. They were still contingent, as they've
6 always been, as they still are on there being - - - on - -
7 - of these ongoing requirements which is continuance of the
8 disability and also a impairment of the earning potential.

9 And because those conditions cannot be satisfied
10 upon - - - after death, the nonschedule award no longer
11 exists, benefits can't accrue. And for that reason, we ask
12 this court to reverse the Third Department's decision.

13 ACTING CHIEF JUDGE CANNATARO: Thank you.

14 (Court is adjourned)

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

I, Jaymi D. Castleberry, certify that the foregoing transcript of proceedings in the Court of Appeals of Dutchess County BOCES & Workers' Compensation Board v. Matter of Green, No. 78 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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