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October 21, 2021

MEMORANDUM TO ALL CLIENTS

**RE: COURT OF APPEALS OF NEW YORK STATE GRANTS
MOTION FOR LEAVE TO APPEAL IN GREEN v. DUTCHESS
COUNTY BOCES, 37 N.Y.3d 907 (2021)**

Our office previously addressed the Appellate Division Decision in Matter of Green v. Dutchess County Boces, et al. 183 A.D.2d 23 (3rd Dept. 2020) in our Memorandum to All Clients regarding pertinent March, 2020 Appellate Division Decisions. A copy is annexed hereto. The Green Decision was a case of first impression which held that a Workers' Compensation claimant's remaining portion of weeks of a non-schedule PPD award was payable to the beneficiaries. In Green, the claimant was injured in a work-related accident and was classified PPD with a 51% loss of wage earning capacity entitling the claimant to lost wages not to exceed 350 weeks. The claimant died on March 12, 2018, and at that time 38.8 weeks were remaining on the statutory CAP. The Board initially held that the claimant's beneficiaries were not entitled to the remaining statutory CAP and the Board Panel affirmed indicating that upon his death the claimant no longer had causally related lost time or future earnings to lose as a result of the work-related injury.

The matter was appealed to the Appellate Division resulting in the Decision as indicated above. The Court held that the language employed by Workers' Compensation Law Section 15(4) reflects that the legislature intended that the subdivision should apply to all permanent partial disability awards made pursuant to subdivision 3, which would include both schedule loss of use and non-schedule permanent partial disability classifications. The Court further indicated that to limit the scope of Workers' Compensation Law Section 15(4) to only schedule loss of use awards and not include non-schedule permanent partial disability awards runs counter to the plain language of subdivision 4 and "creates disparity between the treatment of two types of beneficiaries receiving permanent partial disability compensation-schedule loss of use award recipients and non-schedule benefit recipients".

A request was made for leave to appeal to the Court of Appeals which is the highest Court in the State of New York, however, the Court dismissed the Motion on the basis that the Order sought to be appealed from did not finally determine the proceeding within the meaning of the Constitution. Accordingly, the matter was referred back to the Board Panel for proceedings consistent with the Appellate Division's Decision.

In a Decision dated April 1, 2021, the unanimous Workers' Compensation Board Panel in Matter of Dutchess County, Board Case No. 5071 4439 (decided 4/1/2021) held that it was "constrained to find that the claimant is entitled to an award in the amount of 38.8 weeks of compensation at the rate of \$500.00 per week. As the Appellate Division, Third Department took no position with respect to how the remaining weeks of benefits are to be distributed to the claimant, the Board Panel finds that the award is payable immediately in a single lump sum".

The Motion for Leave to Appeal to the Court of Appeals was renewed and the Motion was granted on September 14, 2021 in Green v. Dutchess County Boces, 37 N.Y.3d 907 (2021). A copy of the Court of Appeals Decision is attached which is a one page Decision simply indicating "Motion for Leave to Appeal granted".

Accordingly, at this time, the Decision of the Appellate Division finding that a decedents beneficiaries are entitled to the remaining weeks of the statutory CAP where there is a PPD remains the controlling law. In Green the Workers'

Compensation Board directed that the remaining weeks be paid in a single lump sum. Any cases that fall within this scenario prior to the anticipated Court of Appeals Decision will be subject to the Appellate Division's Decision pending the outcome of the appeal before the Court of Appeals.

Should you have any questions or should you wish to discuss this matter, feel free to contact our office at your convenience.

Very truly yours,
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Court of Appeals of New York
2021-383
September 14, 2021

Unpublished Disposition
Slip Copy, 2021 WL 4163873 (Table), 2021 N.Y. Slip
Op. 71467

**This motion is uncorrected and subject to revision
before publication in the printed Official Reports.**

OPINION OF THE COURT

Motions for leave to appeal granted.

In the Matter of the Claim of Kanye Khalid Green,
Respondent,

Copr. (C) 2021, Secretary of State, State of New York

v.

Dutchess County BOCES et al., Appellants.
Workers' Compensation Board, Appellant.

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**MEMORANDUM TO ALL CLIENTS OF
STEWART GREENBLATT MANNING & BAEZ**

**RE: PERTINENT MARCH, 2020 APPELLATE DIVISION, THIRD
JUDICIAL DEPARTMENT DECISIONS**

Looks like March, 2020 will also be an interesting month for the New York State Workers' Compensation Board. The Appellate Division, Third Judicial Department reversed the Board in the case of Matter of Green v. Dutchess County BOCES et al. ___ N.Y.S3d ___ (decided March 5, 2020). The Court reversed the Board's ruling that the claimant was not entitled to receive the remaining 38.8 weeks of the decedent's permanent partial disability award subsequent to the decedent's death.

Previously, in Matter of Arias v. City of New York N.Y.S3d ___ (decided February 27, 2020) the Appellate Division previewed the potential for this decision in footnote #3 of the Arias decision in which the Court specifically identified a problem with the Board's reasoning in the event the claimant suffers a death that is unrelated to the established sites of injury.

In Matter of Green the decedent was classified permanently partially disabled with a 51% loss of wage earning capacity which entitled the decedent to wage loss benefits not to exceed 350 weeks. The claimant died on March 12, 2018 at which point there were 38.8 weeks remaining in the statutory cap.

The attorneys for the decedent requested that the remaining cap be payable to the decedent's surviving child, pursuant to Section 15(4)(c) of the Workers' Compensation Law. The Workers' Compensation Board ruled that the decedent's son was not entitled to the posthumous award for the remaining 38.8 weeks of the non-schedule award because the claim abated upon the decedent's death. On appeal before the Board the Judge's decision was affirmed and specifically that Section 15(4) of the Workers' Compensation Law does not apply to a non-schedule permanent partial disability award since upon death the decedent no longer had causally related lost time or future earnings to lose as a result of his work related injury.

The Appellate Division determined that the issue before the Court was one of statutory interpretation and accordingly deference need not be accorded to the Board's interpretation. The Court then reviewed the statutory language and legislative intent under Workers' Compensation Law Section 15 and Workers' Compensation Law Section 15(4) as it applies both to a schedule loss of use and a non-schedule permanent partial disability classification. Based upon its analysis and review of the statutory language and legislative intent the Court held that there is no basis to distinguish a schedule loss of use and non-schedule awards where the plain language of Section 15(4) applies to any and all awards made under Workers' Compensation Law Section 15(3). The Court specifically held that their review of the statutory language and legislative intent reflects that the legislature intended Section 15(4) to apply to all permanent partial disability awards made pursuant to Section 15(3) of the Workers' Compensation Law.

The Court concluded that the recent amendments to the Workers' Compensation Law reflecting the legislature's intent to eliminate disparity between a schedule loss of use and a non-schedule permanent partial disability classification. Accordingly, the Court held that the claimant (the decedent's son) would be entitled to an additional posthumous award for the remaining weeks on the statutory cap.

In footnote #6 of the decision the Court specifically indicates "we take no position regarding the manner in which the remaining weeks of the non-schedule permanent partial disability award are distributed to the claimant." Presumably this would be left to the Board to address. Specifically, whether the remaining cap is paid as a lump sum or biweekly to and for the benefit of the persons enumerated in Workers' Compensation Law Section 15(4)(a-d).

Should you have any questions or should you wish to discuss this matter feel free to contact our office at your convenience.

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