

**Court of Appeals
Of the State of New York**

In the Matter of the Claim for Benefits under the Workers'
Compensation Law Made By:

KRISTIN REXFORD, ADMINISTRATRIX OF THE ESTATE OF REGINALD RADLEY
(DEC'D),

Claimant-Respondent,

-Against-

GOULD ERECTORS & RIGGERS, INC. AND THE STATE INSURANCE FUND,

*Employer/Insurance Carrier
Appellants*

-And-

SPECIAL FUND FOR REOPENED CASES AND WORKERS' COMPENSATION BOARD,

Respondents.

MOTION FOR LEAVE TO APPEAL

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Dated: November 27, 2019

NOTICE OF MOTION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE that, upon the annexed papers, and the record and briefs, the undersigned will move this Court at a Motion Term to be held on December 16, 2019, for an order granting the Workers' Compensation Board leave to appeal to the Court of Appeals. Leave to appeal is sought from the Memorandum and Order of the Appellate Division, Third Department, decided and entered July 3, 2019, which reversed a determination by the Workers' Compensation Board.

The motion will be submitted without oral argument.

Dated: Albany, New York
November 27, 2019

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MEMORANDUM OF LAW

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**MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR LEAVE TO APPEAL**

PRELIMINARY STATEMENT

The Court should grant leave to appeal to address the issue of statewide importance decided by the Appellate Division, Third Department, in this case. In its decision, and in *Matter of Verneau v. Con. Ed. Co. of N.Y., Inc.*, 174 A.D.3d 1022 (3d Dep't July 3, 2019), handed down the same day (and from which leave to appeal is separately sought), the Third Department erroneously held that liability for a claim for a work-related death should be transferred to the Special Fund for Reopened Cases, even though the Legislature expressly closed that fund to new claims after January 1, 2014. The new claim was related to a prior claim for lifetime workers' compensation benefits only in the sense that the death was causally related to the injury on which the prior lifetime-benefits claim was based. And that prior claim had been transferred to the Special Fund for Reopened Cases years before the Legislature closed the fund to new claims. The claim for death benefits was nonetheless a distinct new claim, as this Court explained in *Zechmann v. Canisteo Volunteer Fire Dep't*, 85

N.Y.2d 747 (1995). The Third Department's decision permitting the transfer of that new claim is contrary to the Legislature's decision to close the fund to new claims and cannot be reconciled with *Zechmann*.

Indeed, the Third Department's decision cannot be reconciled with one of its own decisions. In *Matter of Connolly v. Consolidated Edison*, 124 A.D.3d 1167 (3d Dep't 2015), the Third Department addressed the question whether liability for a claim for work-related death benefits could be transferred to a different special fund after the Legislature had closed that fund to new claims. There the Third Department correctly treated the death claim as a distinct new claim whose transfer was time-barred.

If allowed to stand, the Third Department's decision could require the Special Fund to remain open for decades into the future, because a claim for death benefits can arise long after an underlying work-related injury contributes to a death, and it can itself be payable for many years. Requiring the fund to stay open in this manner is directly contrary to the Legislature's intent to close the fund.

QUESTION PRESENTED

Can liability for a claim for causally related death benefits be transferred to the Special Fund for Reopened Cases if made after January 1, 2014, the date the Legislature closed that fund to new claims, notwithstanding that the death is causally related to an injury that resulted in a prior claim for lifetime benefits that was previously transferred to the fund?

TIMELINESS OF THIS MOTION

This motion is timely. The Board's underlying determination was rendered on May 9, 2018, and the State Insurance Fund timely served and filed a notice of appeal to the Third Department under Workers' Compensation Law § 23 on June 4, 2018. (R91-92, 201-202).¹ *See* WCL § 23.

The Workers' Compensation Board was served, through counsel, with a copy of the Third Department's July 3, 2019 memorandum

¹ Parenthetical references to "R__" refer to pages from the record on appeal that was before the Third Department.

decision and order with notice of entry by regular mail on July 5, 2019.² The Board thus had 35 days, or until August 9, 2019, to move for leave to appeal. The Board moved in the Third Department for reargument or leave to appeal to this Court on August 7, 2019, and its motion was timely. We note that, though separately represented, the Special Fund for Reopened Cases was served with a copy of the Third Department's decision on the same date, and it timely moved in the Third Department for reargument or leave to appeal to this Court on July 29, 2019.

The Third Department denied those motions on October 3, 2019. The Workers' Compensation Board was served, through counsel, with notice of entry of the denial by regular mail on October 25, 2019. Because this motion is made within 35 days of October 25, 2019, it is timely.

² Unlike the direct service that was made on the Workers' Compensation Board of notice of entry of the Third Department's decision in *Verneau*, see Motion for Leave by Workers' Compensation Board in *Matter of Verneau v. Con. Ed. Co.* (filed simultaneously herewith), the Board was properly served in this matter through counsel.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this motion and the proposed appeal under C.P.L.R. 5602(a). The issue presented is preserved. The Workers' Compensation Board argued throughout its brief in the Third Department (Br. at 4-13) that Workers' Compensation Law §25-a(1-a) prohibits the transfer of liability for a death benefits claim made after January 1, 2014 to the Special Fund. The issue presented is also a pure question of law.

Although the Third Department remitted the matter to the Board for further proceedings not inconsistent with its decision, the matter is nevertheless final, as the remand is only for the ministerial application of the Third Department's decision as to whether the Special Fund or State Insurance Fund will be required to pay claimants benefits. *See generally Burke v. Crosson*, 85 N.Y.2d 10, 15 (1995) (defining final order or judgment as one that disposes of all causes of action and leaves nothing but mere ministerial matters).

During the pendency of this matter in the Third Department, the agency went on to consider whether decedent's death was causally related to the injury that gave rise to decedent's lifetime-benefits award. *See Wertheim Affirmation in Support of Motion* (hereinafter

Wertheim Aff.). A worker's compensation law judge found that the death was causally related and awarded claimant specified benefits, to be paid by the State Insurance Fund. *See* Wertheim Aff. at ¶ 2 & Exs. A and B. The State Insurance Fund sought Board review of that determination solely for purposes of preserving its ability to continue contesting its liability for those benefits; it did not challenge any other aspect of the determination, such as the causal relationship finding or the amount of the award. *See* Wertheim Aff. at ¶ 3 & Exs. C and D. The Board accordingly has held review of that administrative appeal in abeyance pending the outcome of this litigation. *See* Wertheim Aff. at ¶ 3. The remittal directed by the Third Department thus requires the Board to do no more than apply that court's decision on whether the Special Fund or State Insurance Fund is liable for the payment of the claim. And that is the very issue for which this Court's review is sought.

Even if the Board's actions on remand required more than ministerial matters, the Court could consider this appeal under the exception to the finality requirement provided in C.P.L.R. 5602(a)(2).

In *Matter of Sica v. DiNapoli*, 29 N.Y. 3d 908 (2017), this Court granted leave to appeal from a 3-2 decision of the Third Department that had similarly remitted the matter before it—a retirement benefits

case—for further proceedings. It did so after dismissing an appeal that had been taken as of right from that decision, a dismissal reflecting the Court's determination that the remittal was not for mere ministerial purposes.

As in *Sica*, the Board seeks appeal in a proceeding against a public officer from a nonfinal judgment of the Appellate Division remitting the case for further proceedings. And as in *Sica*, regardless of how the agency ultimately rules on remittal on the remaining issues before it, the agency could be precluded from appealing the resulting new determination. That new determination, though made only as a result of the Third Department's direction, "would nevertheless be considered the agency's own determination and the agency would not be held to be a 'party aggrieved' for purposes of an appeal." Karger, *The Powers of the New York Court of Appeals* § 10:4, at 335 (Rev. 3d ed.) (citing *Matter of F.J. Zeronda, Inc. v. Town Bd. of Town of Halfmoon*, 37 N.Y.2d 198, 200 (1975); *Power Auth. of State of New York v. Williams*, 60 N.Y.2d 315, 323 (1983)). Accordingly, the Court has jurisdiction over this appeal now.

STATUTORY BACKGROUND³

Under the Workers' Compensation Law, an employer must "secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury." Workers' Compensation Law ("WCL") § 10(1). "An employer must secure the compensation for his employees by obtaining coverage from the New York State Insurance Fund, purchasing coverage from an approved private insurance carrier or obtaining approval from the Board to self-insure." *Matter of Raynor v. Landmark Chrysler*, 18 N.Y.3d 48, 53 (2011) (citing WCL § 50).

Workers' compensation benefits include benefits awarded to the worker during the worker's lifetime, such as medical benefits, *see* WCL § 13, and wage-related compensation benefits, *see id.* § 15, as well as benefits awarded to the worker's survivors in the case of the worker's death, *see id.* § 16. An injury resulting in a lifetime compensatory award can give rise years later to a claim for death benefits if the death

³ The following background section is identical to the background section presented in the Board's motion for leave to appeal in *Verneau*, which has been filed simultaneously herewith.

was causally related to the injury that resulted in the lifetime award. *See, e.g., Matter of Zechmann v. Canisteo Volunteer Fire Dep't.*, 85 N.Y.2d 747 (1995) (addressing such a claim).

In 1993, the Legislature established the Special Fund for Reopened Cases. L. 1993, ch. 384, § 2 (codified at WCL § 25-a). The statute provides that, after a lapse of a specified number of years from the date of an injury or death,⁴ an award for causally related additional benefits shall be made against the fund. *See* WCL § 25-a. As the courts have since explained, the provision in effect transfers to the fund liability that otherwise would have rested with the insurance carrier or self-insured employer, but the statute additionally requires that the case must previously have been closed, either formally or informally, meaning not that lifetime benefits had ceased, but rather that “no further proceedings were foreseen.” *American Economy Ins. Co. v. State of New York*, 30 N.Y.3d 136, 141 (2017).

⁴ The number of years depends on whether a claim for compensation based on injury or death was previously disallowed or otherwise disposed of without a compensation award (in which case the number of years is seven); whether a claim for compensation was allowed and payments have been made (in which case the number of years is seven, but there must also be a lapse of three years from the date of the last payment); or whether a death resulting from the injury occurs after the time limited by those foregoing provisions. WCL § 25-a.

The fund was created to address the risk that injured workers and their survivors faced if, by the time of a further injury or causally related death, the relevant insurance carriers had become insolvent or gone out of business. It also addressed the risk that insurance carriers faced when seemingly long closed cases unexpectedly reopened. *See id.* at 141-42. The fund is supported by assessments imposed upon insurance carriers, who pass the costs of those assessments on to their employer customers as surcharges or increased premiums. *See WCL § 151(1), (4).*

Since the fund's creation, the Legislature has enacted other mechanisms to address the risks that the fund was intended to address. *See, e.g., WCL § 107* (creating the workers' compensation security fund "to assure persons and funds entitled thereto the compensation and benefits provided by the chapter for employments insured in insolvent carriers"); *WCL § 50(3)* (requiring self-insured employers to furnish security).

In 2013, the Legislature closed the fund to applications submitted after January 1, 2014. *See Budget Reconciliation Act of 2013, L. 2013 ch. 57, § 1, part GG, § 13* (eff. Mar. 29, 2013) (codified at *WCL § 25-a(1-a)*). Under *WCL § 25-a(1-a)*:

No application by a self-insured employer or an insurance carrier for transfer of liability of a claim to the fund for reopened cases shall be accepted by the board on or after the first day of January, two thousand fourteen.

The January 1, 2014 closing date was nine months from the date of the statute's enactment. Insurance carriers and self-insured employers thus received a nine-month grace period before the fund was closed to new applications. The Legislature however left the fund open to administer cases accepted before the January 1, 2014 cut off. The Special Fund for Reopened Cases continues to be funded through assessments imposed on insurers, the costs of which are passed on to employers. Until the fund is ultimately closed, the Board must continue to impose those assessments.

FACTS AND PROCEDURAL HISTORY

Reginald Radley suffered a work-related heart attack in 1987 and was awarded lifetime workers' compensation benefits, for which the State Insurance Fund was initially responsible. (R7, R30.) In 1997, liability for those benefits was transferred under WCL § 25-a from the State Insurance Fund to the Special Fund for Reopened Cases. The Special Fund remained responsible for those benefits thereafter. (*See* R31-52, 66-81.)

Mr. Radley (hereinafter decedent) died in 2016, and his daughter Kristin Rexford (claimant) thereafter filed the underlying claim for death benefits, alleging that decedent's death was causally related to the heart attack for which he had received workers' compensation benefits. (R95-96.) The Board initially identified the claim as a claim against the Special Fund. (R106.) The Special Fund contested liability, however, arguing that because the claim was a new claim for benefits, made after 2014, liability could not be transferred, but rather had to be borne by the employer's carrier, the State Insurance Fund. (R106.) The State Insurance Fund countered that liability should be borne by the Special Fund, because the prior claim for decedent's lifetime benefits had been transferred to the Special Fund in 1997. (R107-110.) The parties argued the point at a hearing. (R113-116.)

Following the hearing, the Workers' Compensation Law Judge found that the State Insurance Fund was the responsible carrier. (R130-131.) A Board Panel affirmed that decision, holding that under WCL § 25-a(1-a), a claim for causally related death benefits submitted after the January 1, 2014 cut-off was time barred. (R196-200).

On the State Insurance Fund's appeal to the Third Department, that court reversed the Board Panel's determination and held that the

Special Fund was responsible for the claim for death benefits. *See Matter of Rexford v. Gould*, 174 A.D.3d 1026 (3d Dep't 2019). The Third Department's decision incorporated the reasoning from *Matter of Verneau v. Con. Ed. Co. of N.Y., Inc.*, 174 A.D.3d 1022 (3d Dep't July 3, 2019), a decision handed down the same day that involved "facts virtually identical to those presented here." *Rexford*, 174 A.D.3d at 1027.

In *Verneau*, the Third Department reasoned that it was constrained by its earlier decision in *Matter of Misquitta v. Getty Petroleum*, 150 A.D.3d 1363 (3d Dep't 2017), rejecting the argument that this Court's intervening decision in *American Economy* warranted reexamination of that precedent. 174 A.D.3d at 1025-26. The Third Department held that, where a decedent has previously established a claim for lifetime benefits for which the Special Fund for Reopened Cases is already liable, liability for a claim for causally related death benefits is automatically transferred to the fund, even for claims arising after the January 1, 2014 cut-off date. *Id.* at 1024-25.

The *Verneau* Court additionally purported to offer an alternative basis for its holding. It noted that the "plain language of the statutory sentence at issue" contemplates an "application by a self-insured

employer or an insurance carrier for transfer of liability of claim to the fund for reopened cases.” *Id.* (citing WCL § 25-a(1-a). Because the record before it contained no such application or indication that any such application had been filed after January 1, 2014, the *Verneau* Court reasoned that the cut-off date imposed by WCL § 25-a(1-a) did not apply to the particular case before it. *Id.* The *Rexford* Court appears to have adopted this part of the *Verneau* holding as well.

REASONS FOR GRANTING LEAVE TO APPEAL

I. The Issue Presented is of Statewide Importance.

If permitted to stand, the Third Department’s decision will have a long-lasting, statewide effect that is directly contrary to the Legislature’s intent to close the Special Fund for Reopened Cases and to place the risk of future reopened cases squarely on insurance carriers and self-insured employers.

By holding that claims for causally related death benefits automatically transfer to the fund when liability for a prior claim for lifetime benefits arising from the same workplace injury has already been imposed on the fund, the Third Department adopted a rule that likely would require the fund to remain open for decades. A claim for

causally related death benefits can arise many years after the underlying work-related injury, and thus could be asserted for the first time many years from now. And payments for such causally related death benefits can themselves extend for many years. Death benefits can be awarded to much younger surviving spouses and minor or disabled children of the deceased. *See* WCL § 16(1-b)–(4-c). Indeed, death benefits awarded to dependent children who are themselves disabled are potentially payable for the *child's* lifetime. *See* WCL §§ 16 (3-a), (3-b).

When the Legislature acted in 2013 to close the fund to new claims submitted after January 1, 2014, it noted that the fund's costs had "increased dramatically" over the years, costs that were borne by the assessments imposed on employers. At the same time, however, insurance carriers were already charging premiums sufficient to cover their potential liability for unforeseen reopened claims. As a result, the Special Fund had come to serve as nothing more than a windfall for insurance carriers that should not continue. Mem. in Support, 2013-2014 NY St. Exec. Budget, Public Protection and Gen. Gov. Art. VII

Leg. at 29.⁵ While the Legislature's January 1, 2014 cut-off date gave insurance carriers and self-insured employers a nine-month grace period, and the Legislature also assured that the fund would remain open for claims already pending with the fund, there is no reason to think that the Legislature intended that windfall to continue to protect insurance carriers and self-insured employers so indefinitely into the future.

Nor is there reason to think that the Third Department's approach will affect only a small number of cases. The Third Department's docket shows that there are at least five more cases involving the same issue currently pending in the Third Department. *See Kelly v. Con. Ed.*, App. Div. No. 528566; *Lucks v. Volt*, App. Div. No. 528032, *Crist v. N.Y.S. Police*, App. Div. No. 528307; *Daly v. Westchester Medical Center*, App. Div. No. 530287 and *Bahan v. Trading Port Inc.*, App. Div. 527981. And the Third Department is the only department of the Appellate Division that hears appeals from final determinations of the Workers' Compensation Board. WCL § 23.

⁵ Available at:

http://www.nycourts.gov/reporter/webdocs/PPGG_Article_VIIMS.pdf.

To the extent that the Third Department also purported to base its ruling on the alternative ground invoked in *Verneau*—the absence of evidence of an “application by a self-insured employer or an insurance carrier for transfer of liability of a claim to the fund for reopened cases”—its overly formalistic approach disserves the Legislature’s intent to close the fund and overlooks the Board’s own practices governing transfers of liability to the Special Fund.

The Board does not require a written application by a self-insured employer or insurance carrier to transfer of liability for a claim to the fund. The Board does provide a form—an “RFA-2”—that allows a carrier to raise the transfer issue in writing. (*See Request for Further Action By Carrier/Employer Form.*⁶) But as long as the issue of transfer is raised at or before the hearing, either orally or in writing, the Board deems an application for transfer to have been made. *See, e.g., Matter of DEL Labs, 2009 NY Wrk. Comp. LEXIS 80 at *16 (2009).*

Here, the State Insurance Fund contested its responsibility for the claim for causally related death benefits on its First Report of Injury form (R107), and again at the hearing before the Workers’

⁶ Available at <http://www.wcb.ny.gov/content/main/forms/rfa-2.pdf>.

Compensation Law Judge (R113-15). The Board thus reasonably concluded that the requisite "application for transfer by a self-insured employer or insurance carrier" had been satisfied.

The issue of statewide importance implicated here is thus not readily avoided through the Third Department's purported alternative holding.

II. The Third Department's Decision Cannot Be Reconciled With this Court's Decision in *Zechmann* or the Third Department's Own Decision in *Matter of Connolly*.

The Court should grant leave for the additional reasons that the Third Department's decision cannot be reconciled with this Court's decision in *Zechmann* or with the Third Department's own decision in *Matter of Connolly*.

In *Zechmann*, this Court held that "a claim for death benefits . . . is a separate and distinct legal proceeding brought by the beneficiary's dependents and *is not equated with the beneficiary's original disability claim.*" 85 N.Y.2d at 751 (emphasis added). A death benefits claim is "a new legal right" that accrues on "the date of the death giving rise to the claim." *Id.* at 753. Thus, under *Zechmann*, as long as a worker is receiving lifetime benefits, there is no death benefits claim, and,

accordingly, no related liability for any such claim that can be transferred to the Special Fund. Only upon a decedent's death does any such claim accrue, an accrual that raises for the first time the question where liability for any such claim should be imposed.

Moreover, liability for all workers' compensation claims is imposed, in the first instance, on the employer and, unless the employer is self-insured, derivatively on the employer's the worker's compensation insurance carrier. *See* WCL § 10(1). Where a claim for lifetime benefits has previously been transferred to the Special Fund for Reopened Cases, the accrual of a causally related death claim naturally raises the question whether liability for the death claim should similarly be transferred to the Special Fund for Reopened Cases. But that question nonetheless poses a transfer question.

The Third Department's decision erroneously conflates a claim for lifetime benefits with a claim for death benefits by holding that "where . . . liability for a claim has already transferred from the Carrier to the Special Fund and the employee thereafter dies for reasons causally related to the original claim, the Special Fund *remains* liable for the claim for death benefits," *Matter of Misquitta*, 150 A.D.3d at 1365.

Under *Zechmann*, the Special Fund cannot “remain liable” for a new claim that did not exist prior to the workers’ death.

The Third Department’s decision is even at odds with its own precedent. *Matter of Connolly v. Consolidated Edison*, 124 A.D.3d 1167 (3d Dep’t 2015), involved a self-insured employer’s request for reimbursement for a causally related death benefits claim from the widow of a claimant who died after the cut-off date for the closure of the Special Disability Fund. The Special Disability Fund was established to provide reimbursement for certain claims, including claims for injuries arising from silicosis or other dust disease. *See* WCL § 15(8)(ee). But the Legislature later closed the fund by barring claims for injuries or illnesses with a date of accident or disablement on or after July 1, 2007, or any claims after July 1, 2010. WCL § 15(8)(h)(2)(A).

In that context, the Third Department correctly held that the Special Disability Fund could not be responsible for what was in fact a new claim submitted after the cut-off date. *Matter of Connolly*, 124 A.D.3d at 1169-70. Indeed, the Third Department expressly recognized that the “right to death benefits does not accrue prior to death’ and death, while not a new injury or accident, results in a ‘new claim’ for purpose of death benefits purposes.” *Id.* at 1169 (internal citation

omitted). The Special Disability Fund could thus not be held liable for claimant's causally related death claim, even though the fund had been responsible for the payment of the claimants benefits during his lifetime. *Id.* at 1169-70. And while the statute governing the Special Disability Fund utilized a scheme in which insurance carriers and self-insured employers were reimbursed by the fund for benefit claims, rather one in which liability for benefit claims was transferred to a fund, that formal distinction does not, as the Third Department asserted, *Verneau*, 174 A.D.3d at 1025 n.2, suffice to distinguish the decision. The schemes are the same in substance.

The Third Department's decision here, in contrast, fails to recognize the legally distinct nature of a claim for lifetime benefits and a claim for causally related death benefits.

CONCLUSION

For all these reasons, the Court should grant leave to appeal.

Dated: Albany, New York
November 27, 2019

Respectfully submitted,

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APPENDIX

SUPREME COURT STATE OF NEW YORK
APPELLATE DIVISION - THIRD DEPARTMENT

In the Matter of the Claim of,
KRISTEN REXFORD as Administrator of the
Estate of REGINALD RADLEY,
Claimant,

RECEIVED

JUL 08 '19

against

STOCKTON, B'...

GOULD ERECTORS & RIGGERS et al,
Appellants,

NOTICE OF ENTRY

and

WORKERS' COMPENSATION BOARD,
Respondents,


SPECIAL FUND FOR REOPENED CASES,
Respondents,

DOCKET NO. 527877

PLEASE TAKE NOTICE that the attached is a true copy of Memorandum and Order
of the Supreme Court, Appellate Division, Third Judicial Department, decided by the
Court and entered by the Clerk, Robert D. Mayberger, on July 3, 2019.

Dated: Albany, NY
July 3, 2019

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State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 3, 2019

527877

In the Matter of the Claim of
KRISTEN REXFORD, as
Administrator of the
Estate of REGINALD
RADLEY, Deceased,
Claimant,

v

GOULD ERECTORS & RIGGERS, INC.,
et al.,
Appellants,
and

MEMORANDUM AND ORDER

SPECIAL FUND FOR REOPENED
CASES,
Respondent.

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: May 30, 2019

Before: Clark, J.P., Mulvey, Devine, Aarons and Rumsey, JJ.

William O'Brien, State Insurance Fund, Albany (Edward Obertubbesing of counsel), for Gould Erectors & Riggers, Inc. and another, appellants.

Habberfield Kaszycki, LLP, Buffalo (Matthew R. Mead of Stockton, Barker & Mead, LLP, Troy, of counsel), for Special Fund for Reopened Cases, respondent.

Letitia James, Attorney General, New York City (Marjorie S. Leff of counsel), for Workers' Compensation Board, respondent.

Rumsey, J.

Appeal from a decision of the Workers' Compensation Board, filed May 9, 2018, which ruled that liability did not shift to the Special Fund for Reopened Cases pursuant to Workers' Compensation Law § 25-a.

In August 1987, claimant's father (hereinafter decedent) sustained a heart attack while working for the employer. He filed a claim for workers' compensation benefits that was found to be compensable. He returned to work thereafter, but continued to experience heart problems and sustained a second heart attack in November 1991. Further proceedings were conducted in connection with his claim in the years that followed and, effective November 23, 1997, a Workers' Compensation Law Judge (hereinafter WCLJ) transferred liability for the claim from the State Insurance Fund to the Special Fund for Reopened Cases pursuant to Workers' Compensation Law § 25-a.

Decedent died of cardiac arrest on March 4, 2016. Claimant, as administrator of his estate, applied for workers' compensation death benefits alleging that decedent's August 1987 heart attack contributed to his death. The Workers' Compensation Board issued a notice indexing the claim against the Special Fund. The Special Fund, in turn, controverted the claim. Following a January 2018 hearing, a WCLJ found prima facie evidence of causally-related death and continued the case. At the next hearing, the Special Fund and the State Insurance Fund each maintained that they were not the carrier responsible for the claim under Workers' Compensation Law § 25-a. The WCLJ ruled, among other things, that the State Insurance Fund was the proper carrier based on the Court of Appeals' decision in American Economy Ins. Co. v State of New York (30 NY3d 136

[2017], cert denied ___ US ___, 138 S Ct 2601 [2018]). The employer and the State Insurance Fund (hereinafter collectively referred to as the carrier) sought review by the Board, asserting that the Special Fund was responsible because liability had previously been transferred to it under Workers' Compensation Law § 25-a. A panel of the Board disagreed and ruled, relying on Workers' Compensation Law § 25-a (1-a) and the decision in American Economy, that Workers' Compensation Law § 25-a liability did not apply to the case and that the Special Fund was not responsible. The carrier appeals.

The carrier argues that the Board's decision is contrary to this Court's ruling in Matter of Misquitta v Getty Petroleum (150 AD3d 1363 [2017]), which was decided after the enactment of Workers' Compensation Law § 25-a (1-a), and holds that the Special Fund remains liable for consequential death claims in situations where the decedent had a compensable workers' compensation claim, liability for which was transferred to the Special Fund prior to January 1, 2014. We have addressed this very same issue in Matter of Verneau v Consolidated Edison Co. of New York, Inc. (___ AD3d ___ [decided herewith]) on facts virtually identical to those presented here. For the reasons stated therein, we conclude that Misquitta is controlling and that the Special Fund is liable for claimant's consequential death claim inasmuch as liability had been transferred to it in 1997, well before the January 1, 2014 closure date set forth in Workers' Compensation Law § 25-a (1-a). The decision in American Economy does not dictate a contrary result. Accordingly, the Board's decision must be reversed.

Clark, J.P., Mulvey, Devine and Aarons, JJ., concur.

ORDERED that the decision is reversed, without costs, and matter remitted to the Workers' Compensation Board for further proceedings not inconsistent with this Court's decision.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive style with a large, prominent "R" and "M".

Robert D. Mayberger
Clerk of the Court

SUPREME COURT STATE OF NEW YORK
APPELLATE DIVISION-- THIRD DEPARTMENT

In the Matter of the Claim of,
KRISTEN REXFORD, AS ADMINISTRATOR
OF THE ESTATE OF REGINALD RADLEY, DECEASED
Claimant,

against

GOULD ERECTORS & RIGGERS, ENC. et al,
Appellants,

and

SPECIAL FUND FOR REOPENED CASES,
Respondent,

and

WORKERS' COMPENSATION BOARD,
Respondents,

DOCKET NO. 527877

PLEASE TAKE NOTICE that the attached is a true copy of Decision and Order on
Motion of the Supreme Court, Appellate Division, Third Judicial Department, decided
by the Court and entered by the Clerk, Robert D. Mayberger, on October 3, 2019.

Dated: Albany, NY
October 25, 2019

Tanisha Edwards
General Attorney
Attorney of Record of the
State Insurance Fund
Attorney for the Respondent
One Watervliet Avenue Ext.
Albany, NY 12206
(518) 437-6961

By: Nancy E Wood
Nancy E. Wood
Of Counsel

COPY OF WITHIN PAPER
RECEIVED

OCT 30 2019

NYS Office of the Attorney General
N.Y.C Labor Bureau

NOTICE OF ENTRY

TO:

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Albany, NY 12206-2901

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Attn: Labor Bureau ✓
28 Liberty Street
New York, NY 10005

Stockton, Barker & Mead, LLP
433 River Street Suite 6002
Troy, NY 12180

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: October 3, 2019

527877

In the Matter of the Claim of KRISTEN
REXFORD, as Administrator of the Estate
of REGINALD RADLEY, Deceased,

Claimant,

v

DECISION AND ORDER
ON MOTION

GOULD ERECTORS & RIGGERS, INC.,
et al.,

Appellants,

and

SPECIAL FUND FOR REOPENED
CASES,

Respondent.

WORKERS' COMPENSATION BOARD,
Respondent.

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NYS OFFICE OF THE ATTORNEY GENERAL
NYC EMPLOYMENT SECURITY SECTION

Motion for reargument or, in the alternative, for permission to appeal to the
Court of Appeals.

Motion for permission to appeal to the Court of Appeals.

Upon the papers filed in support of the motions and the papers filed in opposition
thereto, it is

ORDERED that the motions are denied, without costs.

Clark, J.P., Mulvey, Devine, Aarons and Rumsey, JJ., concur.

ENTER:
Robert D. Mayburger
Robert D. Mayburger
Clerk of the Court

A009