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Appellate Division Case No. 527877
Workers' Compensation Board No. G1832192

Court of Appeals
of the
State of New York

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NEW YORK STATE
COURT OF APPEALS

In the Matter of the Claim for Death Benefits Under the
Workers' Compensation Law by,

~~KRISTEN REXFORD, ADMINISTRATRIX OF THE~~
ESTATE OF REGINALD RADLEY (Dec'd),

Claimant,

- against -

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

Employer and Insurance Carrier Respondents,

SPECIAL FUND FOR REOPENED CASES (25-A),

Respondent,

WORKERS' COMPENSATION BOARD,

Respondent.

OPPOSITION TO MOTIONS FOR LEAVE TO APPEAL

WALSH AND HACKER
Glenn D. Chase, Esq.
Attorneys for Employer/Carrier
Respondent
18 Corporate Woods Boulevard
Albany, New York 12211
Tel.: (518) 463-1269
Fax: (518) 432-1218

Dated: December 6, 2019

STATE OF NEW YORK
SUPREME COURT

APPELLATE DIVISION
THIRD DEPARTMENT

In the Matter of the Claim for Death Benefits
Under the Workers' Compensation Law of

KRISTEN REXFORD, *Administratrix of the Estate of,*
REGINALD RADLEY (DEC'D), *Claimant-Respondent,*

-against-

COULD ERECTORS & RIGGERS INC., *Employer,* and
NEW YORK STATE INSURANCE FUND, *Carrier,*

Appellants,

and

SPECIAL FUND FOR REOPENED CASES
UNDER SECTION 25-A,

Respondent,

and

THE WORKERS' COMPENSATION BOARD,

Respondent.

**AFFIRMATION IN OPPOSITION TO MOTION FOR
LEAVE TO APPEAL TO THE COURT OF APPEALS**

W.C.B. No.: G183 2192
Docket: 527877

GLENN D. CHASE, an attorney admitted to practice law in the
Courts of the State of New York, affirms the following under penalties of
perjury:

1. I am a partner in the law firm of Walsh and Hacker appearing of counsel to the employer and its insurance carrier, the New York State Insurance Fund, and as such I am fully familiar with the facts and circumstances in the above-captioned matter.

2. This Affirmation is submitted in opposition to the Motion made by the Special Fund for Reopened Cases (25-a) (hereinafter "The Special Funds") which is returnable on 12/02/2019 and requests leave to appeal to the Court of Appeals from the Memorandum and Order of the New York State Supreme Court Appellate Division, Third Judicial Department decided and entered July 3, 2019.

3. This Affirmation is also submitted in opposition to the Motion made by Letitia James, Attorney General of the State of New York, returnable December 16, 2019, which also requests leave to appeal to the Court of Appeals from the Memorandum and Order of the New York State Supreme Court Appellate Division Third Department decided and entered July 3, 2019.

4. We submit that the Motions of the Special Funds and that of the Attorney General's office on behalf of the Workers' Compensation Board (hereinafter "the Board") should be denied in their entirety.

5. It is respectfully submitted that the Memorandum and Order of the Appellate Division Third Department decided and entered on July 3, 2019 which reversed the decision of the Board holding that the New York State Insurance Fund was the proper carrier liable for the claim resulting from the demise of Reginald Radley was properly decided and should not be disturbed.

6. The Special Funds and the Board allege that this matter is one of deep concern as the decision effectively precludes closure of the Special Funds for “Reopened Cases (25-a)” as intended by the legislation on or after January 1, 2014, which both parties allege was affirmed by this Court in its decision in American Economy Insurance Company v. State of New York 30 NY3d 136 (2017). The Special Funds and the Board further contend that the Appellate Division decision herein runs in conflict with this Court’s prior holding in Zechmann v. Canisteo Volunteer Fire Dept. 85 NY2d 747 (1995). However, the Board and Special Funds reliance upon these decisions is misplaced.

7. The Board would also have the Court believe that the Appellate Division decision is inconsistent with its prior decision in Matter of Connolly v. Consolidated Edison, 124 AD3d 1167 (2015), a case which is entirely distinguishable from the facts herein.

8. The instant matter involves a claim for death benefits brought by the decedent's estate as a result of his demise occurring on March 4, 2016 which was indexed by the Board against the Special Funds and assigned Board file number G183 2192.

9. Prior to the decedent's demise, Mr. Radley had suffered a work-related heart attack on August 31, 1997, which was established and assigned WCB No.: 5871 8082.

10. After the lapse of more than 7 years from the original work-related injury and more than three years from the last payment of workers' compensation benefits, the carrier applied to the Board for transfer of liability to the Special Fund for Reopened Cases pursuant to Workers' Compensation Law Section 25-a and by Notice of Decision filed on 03/24/1999, the Board discharged the carrier from liability and removed it from notice finding that the case became the liability of the Special Funds pursuant to Section 25-a effective 11/23/1997. Thereafter, the Special Funds remained liable for and administered the claimant's compensable heart claim including the payment for all treatment and care, including the placement of a pacemaker.

11. As noted in paragraph 8 above, the death claim was indexed against the Special Funds which advised that it was controverting the claim

on all issues at the hearing held in November of 2017. At that hearing, the Board closed the claim based upon arguments that there was a lack of prima facie medical evidence.

12. In January of 2018, the Special Funds advised, for the first time, that it was asserting that it was not the proper carrier for the death claim and that the matter should be the responsibility of the New York State Insurance Fund which had been the original carrier at the time of the August 1987 claim.

13. In response, the New York State Insurance Fund filed a denial raising all issues with regard to the death claim including whether or not it was the proper carrier in view of the fact that 25-a liability had been found in the original claim which was the basis for the subsequent death case.

14. On February 23, 2018, the Administrative Law Judge issued a decision in which it was found that the New York State Insurance Fund was the proper carrier pursuant to this Court's holding in American Economy.

15. The New York State Insurance Fund appealed this decision to the Board which thereafter issued a Memorandum of Board Panel Decision on 05/09/2018 in which it affirmed the Judge's decision erroneously holding that this Court's decision in American Economy foreclosed transfer of liability for the death claim to the Special Funds Conservation Committee.

16. The New York State Insurance Fund thereafter appealed the Board Panel Decision to the Appellate Division Third Department which issued its Memorandum and Order Decided and Entered on July 3, 2019, holding in view of its prior decision in Matter of Misquitta, as well as, its decision in Matter of Verneau also decided on July 3, 2019, that the death claim remained the liability of the Special Funds pursuant to the prior 25-a finding and that this Court's decision in American Economy did not dictate a contrary result.

17. In reversing the Board's Decision, the Appellate Division Third Department found, pursuant to established legal precedence, specifically Matter of Misquitta v. Getty Petroleum 150 AD3d 1363 (2017) that the Special Fund remained liable for consequential death claims in situations where the decedent had a compensable workers' compensation claim for which liability had already been transferred to the Special Fund prior to the closing of new transfers subsequent to January 1, 2014. The Court ruled that where liability for the underlying claim had previously been transferred to the Special Fund pursuant to Workers' Compensation Law Section 25-a and the employee subsequently died for reasons causally related to the original claim, the Special Fund remained liable for the subsequent death benefits

regardless of whether or not the death had occurred subsequent to January 1, 2014.

18. The Appellate Division further found, contrary to the assertions of the Special Fund and the Board, that this Court's Decision in American Economy Insurance Company v. State of New York 30 NY3d 136 (2017) cert denied 138 S CT 2601 (2018) did not dictated nor warrant a contrary result.

19. As noted in paragraph 16 above, when the instant matter was decided and entered by the Appellate Division, it also decided Matter of Verneau v. Consolidated Edison Co., 174 AD3d 1022 (2019). In Verneau, the Appellate Division was faced with the same issue presented to the Court herein in which the Board and Special Funds argued that American Economy precluded a transfer of liability to the Special Funds for the death claim. The Court rejected this argument noting that the issues before this Court in American Economy pertained to the constitutionality of the 2013 amendments to Workers' Compensation Law Section 25-a and did not address the specific issue presently before this Court as to whether or not the Special Funds remained liable for a consequential death claim where the decedent had an established workers' compensation claim for which the Special Fund had been found liable prior to January 1, 2014.

20. In addition to being consistent with its prior Decisions in Misquitta and Matter of Fitzgerald v. Berkshire Farm Center and Services for Youth 87 AD3d 353 (2011), we would note that the Appellate Division's Decision is entirely consistent with this Court's prior holding in Zechmann v. Canisteo Volunteer Fire Dept. 85 NY2d 747 (1995). In Zechmann, this Court addressed the Board's continuing jurisdiction to reopen claims under Section 123 of the Workers' Compensation Law and found that for the purposes of the application of that statute, the subsequent claim was not time barred against the Special Funds. In fact, in Zechmann, this Court reiterated that the Special Funds would remain liable for the subsequent death claim which occurred more than seven years from the date of injury and more than three years from the last payment of compensation.

21. In contrast to Zechmann, where the underlying issue was whether or not the surviving spouse would be able to pursue a claim for death benefits at all, the issue addressed by the Appellate Division herein solely concerns the question of which entity is liable for the death claim in the first instance. On that specific issue, this Court's observation in American Economy that the Special Funds remains liable to administer claims which had been transferred prior to January 1, 2014, was properly the focus of the Appellate Division decision.

22. This Court noted in Zechmann that the primary purpose of Section 25-a (1)(3) was to transfer liability for awards from employers and carriers to the Special Funds where, as here, death resulting from the injury occurred more than seven years from the date of the injury and more than three years after the last payment of compensation. These are precisely the facts herein as the death occurred more than seven years from the date of injury and more than three years from the last payment of compensation and the Special Funds had previously been found liable for the underlying compensation claim. As such, as found by the Appellate Division Third Department the Special Funds remains liable for the claimant's death benefits, a liability which it certainly should have and could have anticipated in view of its continued administration of the original claim in which it authorized and paid for treatment including the placement of a pacemaker. Thus, there is no request to transfer liability to the Special Fund for a claim for which it has not already been found liable, but only to continue that liability.

23. Moreover, the Appellate Division Decision is entirely consistent with the plain language of the statute which states under Section 25-a(1)(3) that

“where death resulting from the injuries shall occur after the time limited by

the... provisions of (Workers' Compensation Law Section 25-a)(1)(2) if an award is made it shall be against the Special Funds provided by this Section.”

24. As previously stated in the instant matter, the original injury occurred on August 31, 1987 and the claim was found the responsibility of the Special Funds in 1997 based upon the lapse of seven years from the date of injury and three years from the date of the last payment of compensation. When the decedent met his demise in March of 2016 as a consequence of the “original injury,” pursuant to the clear language of Workers' Compensation Law Section 25-a(1)(3), the award for death benefits remained the liability of the Special Funds. This liability was not a transfer of liability nor was any such transfer requested by the carrier as the law clearly mandates that the Special Funds remain liable for the claim which had already been transferred to it.

25. The Special Fund's and Board's further assertion that the Appellate Division Decision is in conflict with its prior decision in Matter of Connolly v. Consolidated Edison 124 AD3d 1167 (2015) is misplaced. In this vein, Connolly dealt with an application for relief under the provisions of Section 15-8(d) where the carrier requested a transfer of liability to the Special Funds under that provision. The Court noted that Connolly was

irrelevant to the instant issue as claims for reimbursement under Section 15-8 of the Workers' Compensation Law were precluded for any claims involving accidents or injuries after 07/01/2007. Moreover, and more importantly, the Court's Decision in Connolly pertains to an entirely separate and distinct statute; i.e. 15-8 as opposed to Section 25-a which is the subject of the instant matter. The only "common denominator" in the two cases is the fact that both claims involved the subsequent demise of a claimant.

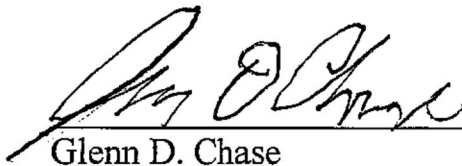
26. In the instant matter, the claimant's original injury occurred in 1987 and liability for that claim was subsequently transferred to the Special Fund in 1997. As such, as noted by the Courts, the Special Fund is the liable carrier for the death claim in accordance with Section 25-a(1)(3) of the Workers' Compensation Law as it was previously found liable for administering the claim and no new transfer is being requested.

27. Finally, while the Board and Special Fund argue that this Court should entertain the present application because should it fail to do so it will require the Special Fund to remain "open for decades into the future" contrary to the legislatures intent to close the fund, this argument ignores the fact that the claim for compensation had previously been transferred to the Special Fund, long before January 1, 2014. The Special Funds had already

been found liable for the claim and as such, it cannot now argue that it could not anticipate the consequent death claim.

WHEREFORE, it is respectfully submitted that the Motions of the Board and the Special Funds for Leave to Appeal to the Court of Appeals be denied in their entirety and for such other and further relief as this Court may deem proper.

DATED: December 5, 2019



Glenn D. Chase
WALSH AND HACKER
Attorneys for Employer/Carrier Respondent
18 Corporate Woods Boulevard
Albany, New York 12211
(518) 463-1269

TO:

Attorney General of the State of New York
Department of Law, Labor Bureau
28 Liberty Street, 15th Floor
New York, New York 10005

New York State Insurance Fund
1 Watervliet Avenue Ext
Albany, New York 12206

Stockton, Barker & Mead
433 River Street, Suite 6002
Troy, New York 12180

Sullivan, Keenan, Oliver & Violando, LLP
152 Central Avenue
Albany, New York 12206

Hon. John P. Asiello
Clerk of The Court
Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207