APL-2020-00042

STATE OF NEW YORK
COURT OF APPEALS

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

KRISTEN 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-Respondents

-And-

SPECIAL FUND FOR REOPENED CASES AND WORKERS' COMPENSATION BOARD,

Respondents- Appellants

BRIEF OF APPELLANT SPECIAL FUND FOR REOPENED CASES

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Oral Argument Requested

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STATEMENT OF THE ISSUES PRESENTED

I. Is a claim for death benefits a new claim requiring a new application to transfer liability to the Special Fund for Reopened Cases pursuant Workers' Compensation Law § 25-a?

Yes. A claim for death benefits is a new claim and requires a new request to transfer liability to the Special Fund for Reopened Cases.

II. Does the transfer of liability to the Special Fund for Reopened Cases in this case violate the prohibition against the submission of new applications to transfer liability to the Special Fund for Reopened Cases on and after January 1, 2014 set forth in Workers' Compensation Law § 25-a [1-a]?

Yes. As a new claim that accrued March 4, 2016, the transfer of liability to the Special Fund for Reopened Cases violates the prohibition against the submission of new applications to transfer liability to the Special Fund for Reopened Cases on and after January 1, 2014

JURISDICTION OF THE COURT OF APPEALS

The Court of Appeals has jurisdiction over this appeal pursuant to CPLR 5602[a][1][i] because the matter originated before an administrative agency and the July 3, 2019 Decision and Order of the Appellate Division is not appealable as of right.

The July 3, 2019 Decision and Order of the Appellate Division is a final determination of the liability of the Special Fund for Reopened Cases. Although the matter was remitted to the Workers' Compensation Board for further proceedings, those proceedings were required to be consistent with the Appellate Division decision and the Board is without discretion to relieve the Special Fund for Reopened Cases from liability.

STATEMENT OF THE CASE

Reginald Radley suffered a work-related heart attack in 1987. (R7, 10, 12) The Workers' Compensation Board awarded 24.6 weeks of temporary disability benefits for two periods of lost time ending March 23, 1992. (R14, 18) The case was closed without a finding of permanency in 1994. (R19) The case was reopened to address a dispute over medical bills but again closed in 1996. (R20)

In 1997, The State Insurance Fund requested that liability be transferred to the Special Fund for Reopened Cases pursuant to Workers' Compensation Law § 25-a. (R21) The State Insurance Fund again requested that liability be transferred to the Fund in 1998. (R29) A Workers' Compensation Law Judge granted the relief requested by The State Insurance Fund in 1999 and transferred liability to the Fund. (R30)

Mr. Radley died March 4, 2016. (R82, 95) A claim for death benefits was filed by his daughter, Kristen Rexford. (R96) The Board indexed a new case and assigned a new case number. (R97) The State Insurance Fund was placed on notice. (R105) The Special Fund for Reopened Cases asserted that it was not liable because it had been closed to new claims before Mr. Radley's death. (R106) The State Insurance Fund asserted that liability should remain with the Fund because of the 1999 transfer of liability in the injury case. (R111-129) At a hearing held

February 20, 2018 a Workers' Compensation Law Judge ruled that the State Insurance Fund was the proper carrier for the death claim pursuant to this Court's decision in American Economy. (R116-117, 120-121, 130) The State Insurance Fund appealed to the Board. (R132-139)

In a Memorandum of Board Panel Decision filed May 9, 2018, the Board affirmed the Law Judge determination that the Workers' Compensation Law § 25-a does not apply to the claim for death benefits. (R196-200) The State Insurance Fund appealed to the Appellate Division, Third Department. (R201-202)

In a July 3, 2019 decision the Appellate Division reversed the Board and imposed liability on the Fund. The Appellate Division referred to its decisions in *Verneau v Consol. Edison Co. of New York, Inc.* (174 AD3d 1022 [3d Dept 2019]) and *Matter of Misquitta v Getty Petroleum* (150 AD3d 1363 [3d Dept 2017])

This Court granted the Fund Leave to Appeal on March 24, 2020 (*Rexford v Gould Erectors & Riggers, Inc.*, 34 NY3d 912 [2020]).[1]

[1] The Workers' Compensation Board was also granted leave to appeal on March 24, 2020 (see *Rexford v Gould Erectors & Riggers, Inc.*, 2020 NY Slip Op 65002 [Ct App Mar. 24, 2020])

SUMMARY OF THE ARGUMENT

The Special Fund for Reopened Cases was closed to new applications for transfer on or after January 1, 2014. Claims for death benefits are new claims pursuant to this Court's interpretation of the Workers' Compensation Law. The claim for death benefits did not accrue until Mr. Radley died on March 4, 2016, after the Special Fund for Reopened Cases had already closed to new claims. Thus, the claim for death benefits asserted against the Fund was a new application for benefits asserted after January 1, 2014 and was barred by Workers' Compensation Law § 25-a [1-a]. The Appellate Division erred as a matter of law when it imposed liability for death benefits on the Fund.

ARGUMENT

I. TRANSFER OF LIABILITY TO THE SPECIAL FUND FOR REOPENED CASES CAN OCCUR ONLY AFTER SPECIFIC STATUTORY CRITERIA ARE MET

The Special Fund for Reopened Cases was created when the Legislature enacted Workers' Compensation Law § 25-a in 1933 (L.1933 Ch. 384). The Fund was created to protect injured worker benefits from insurer insolvency and to protect insurance carriers and employers from uncertain future liability costs they might incur in "stale" cases *Am. Economy Ins. Co. v State*, 30 NY3d 136, 141 [2017]; *Kaplan v Wirth & Birnbaum*, 301 NY 121 [1950]; *Matter of Ryan v Am. Bridge Co.*, 243 AD 496, 498 [3d Dept 1935]; *Vleck.v Parry*, 245 AD 416 [3d Dept 1935]). Claims for death benefits were not included in the 1933 version of § 25-a. The Legislature amended § 25-a to include claims for death benefits in May of 1934 (L. 1934 Ch. 694) (*see Vleck*, 245 AD at 417).

The protection offered to injured workers, employers and insurance carriers was achieved by shifting liability for compensation or death benefits from the employer or insurance carrier to the Special Fund for Reopened Cases after one of three statutory criteria are met. Workers' Compensation Law § 25-a [1] states:

> Notwithstanding other provisions of this chapter, when an application for compensation is made by an employee or for death benefits in behalf of the dependents of a deceased employee, and the employer has secured the payment of compensation in accordance with section

> fifty of this chapter, (1) after a lapse of seven years from the date of the injury or death and claim for compensation previously has been disallowed or claim has been otherwise disposed of without an award of compensation, or (2) after a lapse of seven years from the date of the injury or death and also a lapse of three years from the date of the last payment of compensation, or (3) where death resulting from the injury shall occur after the time limited by the foregoing provisions of (1) or (2) shall have elapsed, subject to the provisions of section one hundred twenty-three of this chapter, ... Such an application for compensation or death benefits must be made on a form prescribed by the chair for that purpose ....

A. *A Case Must Have Been Reopened After Being "Truly Closed"*

Transfer of liability to the Special Fund for Reopened Cases required that a case be reopened after being truly closed (*Matter of Pankiw v Eastman Kodak Co.*, 123 AD3d 1388 [3d Dept 2014]; *Casey v Hinkle Iron Works*, 299 NY 382, 385 [1949]; *Matter of Giansante v Seneca Cayuga Arc*, 137 AD3d 1450 [3d Dept 2016]). The initial opening and closing of a claim did not require the formality of a hearing before the Board (*see Riley v Aircraft Products Mfg. Corp.*, 40 NY2d 366, 370 [1976]). A case was considered closed when "no further proceedings were foreseen" *Casey*, 299 NY at 385).

B. *The Reopening of the Case Must Have Occurred After the Requisite Amount of Time Had Passed*

Cases were not eligible for transfer to the Fund unless a minimum of seven years had passed since the date of injury or death. In addition, at least three years must have passed since the last payment of compensation or the case must have

been disallowed or otherwise disposed of without an award of compensation Workers' Compensation Law § 25-a [1] [clauses 1, 2]).

Injuries that resulted in death that occurred more than seven years after injury were also eligible for transfer if the death occurred more than three years after the last payment of compensation or the case had previously been disallowed or otherwise disposed of without an award of compensation (§ 25-a [1] [clause 3]).

The passage of time was the primary consideration in determining whether a case must be transferred to the Fund (*see Ryan*, 243 AD at 499).

II. THE SPECIAL FUND FOR REOPENED CASES WAS CLOSED TO NEW CLAIMS ON OR AFTER JANUARY 1, 2014

The discussion of the prerequisites to the transfer of claims to the Fund in the previous section is stated in the past tense because the Fund is now closed to new claims. In 2013 § 25-a [1-a] was amended to prohibit the Workers' Compensation Board from accepting any application for transfer of liability of a claim to the Fund for Reopened Cases on or after January 1, 2014 (L 2013, ch 57, § 1, part GG, § 13 [eff Mar. 29, 2013]). By closing the Fund to new applications, the Legislature limited the future liabilities of the Fund to those cases that met the statutory time requirements and had a request to transfer liability to the Fund filed on or before December 31, 2013. Given the seven-year waiting period prescribed

by § 25-a [1], The Fund should not become liable for any claim based on injuries sustained on or after December 31, 2006.

This Court has reviewed the closing of the Fund to new claims in the context of its retroactive impact upon the risk to insurers for insurance contracts underwritten before the effective dated of the amendment to § 25-a [1-a]. In *American Economy Ins. Co.*, 30 NY3d 136), This Court concluded that any retroactive impact of the amendment is justified by a rational legislative purpose and upheld the closing of the Fund to new claims filed on or after January 1, 2014 (*American Economy Ins. Co.*, 30 NY3d at 159).

III. A CLAIM FOR DEATH BENEFITS IS A NEW CLAIM

The outcome of this case turns on whether a claim for death benefits is a new claim and requires a new application for transfer to the Fund.

In *Zechmann v Canisteo Volunteer Fire Dept.*, 85 NY2d 747 [1995]) this Court held that a claim for death benefits, for a death related to injuries that occurred many years earlier, is a new claim.

Gerald Angel sustained a compensable head injury in 1951. He was awarded temporary disability benefits. "The last payment was made in 1955, when the case was closed without a finding of permanent injury" (*Zechmann*, 85 NY2d at 750).

Angel died in 1986 after suffering a stroke. The WCB found that his death was related to the 1951 accident and transferred liability to the Special Fund for Reopened Cases pursuant to § 25-a. The Fund appealed, asserting that the claim for death benefits was untimely pursuant to Workers' Compensation Law § 123 because the claim was "reopened" more than eighteen years from the 1951 injury and more than eight years after the last payment of compensation in 1955 (*see* § 123). This Court rejected that assertion holding that a claim for death benefits is a new claim legally separate and distinct from the closed disability claim and does not constitute the reopening of a closed case (*Zechmann*, 85 NY2d at 753).

Here, the Appellate Division imposed liability on the Fund for death benefits because the Fund had been responsible for compensation and medical benefits in the accidental injury claim. The Court did no analysis of the time requirements set forth in § 25-a [1] and gave no consideration to this Court's 1995 determination that a death claim is a new claim that does not constitute the reopening of a closed case (*see Zechmann*, 85 NY2d 747).

IV. THE DECISION OF THE APPELLATE DIVISION IS CONTRARY TO THE PLAIN LANGUAGE OF WORKERS' COMPENSATION LAW § 25-A [1-A] AND THWARTS THE INTENT OF THE LEGISLATURE TO CLOSE THE SPECIAL FUND FOR REOPENED CASES

As amended in 2013, Workers' Compensation Law § 25-a [1-a] states "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 except that the board may make a finding after such date pursuant to section twenty-three of this article upon a timely application for review". "Essentially, the legislature closed the Fund to new applications after January 1, 2014, providing an approximately nine-month grace period during which the Board would consider new applications (internal citation omitted). The Fund remains open to administer reopened cases previously assigned to the Fund." (*American Economy Ins. Co.*, 30 NY3d at 143)

So, if the Fund was closed to new applications for transfer of responsibility for a claim after January 1, 2014 and a claim for death benefits is a new claim, why did the Appellate Division impose liability for a 2016 death claim on the Fund? The answer is traceable to this Court's decision in *Matter of De Mayo v Rensselaer Polytech Inst.*, 74 NY2d 459 [1989]).

In *De Mayo*, the Fund sought to avoid responsibility for a late payment penalty. After liability for an accidental injury claim was transferred to the Fund, the claimant was awarded a schedule loss of use of his right leg payable by the Fund. The payment was late, and a penalty was imposed upon the Fund. The Fund asserted that it was neither an employer nor a carrier and, therefore, was immune from the late payment penalty provisions of the Workers' Compensation Law. This Court firmly rejected the Funds argument and stated "[o]nce section 25–a (1) has been triggered, the insurance carrier has no further interest in payment of the claim. This statutory scheme contemplates that the Special Fund will step into the shoes of the insurance carrier and succeed to its rights and responsibilities." *De Mayo*, 74 NY2d at 462-63) This phrase reappeared in *Matter of Fitzgerald v Berkshire Farm Ctr. & Services for Youth*, 87 AD3d 353 [3d Dept 2011]).

Fitzgerald was a death claim that arose from a 2007 death that was deemed related to a 1994 injury claim. Liability for the 1994 injury claim had been transferred to the Fund in 2005. The Fund thereafter made lost wage payments until the claimant's death. The carrier contended that, although the Fund had made payments within three years of death, the carrier had not. Thus, the carrier contended, it met the time requirements for transfer of the death claim to the Fund. The Board refused to transfer the death claim to the Fund. The Board's analysis is instructive.

> Special Funds contends that the WCLJ correctly found Workers' Compensation Law § 25-a to be inapplicable, based upon an insufficient passage of time from the last payment of compensation up to the carrier's application for relief under the statute. Special Funds also contends that the WCLJ correctly interpreted *Riccardi v Dellwood Dairy Co.*, 38 AD2d 666 [3d Dept 1971], in finding that the statute does not distinguish between Special Funds or a carrier (such as the State Insurance Fund), in requiring a passage of three years from receipt of compensation awards before a transfer of liability can occur. Special Funds requests that the reserved decision be affirmed in its entirety.
>
> A "claim for death benefits is a separate and distinct claim from a claim for disability benefits for the underlying injury to which the death is causally-related (*see Matter of Zechmann v Canisteo Volunteer Fire Dept.*, 85 NY2d 747; *Matter of Brannigan v Town of Oyster Bay*, 141 AD2d 942; see also, Workers' Compensation Law §§ 15, 16)" (*Matter of Mace v Owl Wire & Cable Co.*, 284 AD2d 672 [3d Dept 2001]).
>
> Workers' Compensation Law § 25-a provides that after a lapse of seven years from the date of injury and after a lapse of three years from the date of last payment of compensation, if an award is made, it shall be against Special Funds. Furthermore, it is well established that the sole criterion for the shifting of liability under Workers' Compensation Law § 25-a is the passage of the requisite amount of time (*Matter of Casey v Hinkle Iron Works*, 299 NY 382 [1949]; *Matter of McQueen v New York State Div. of Parole*, 245 AD2d 851 [3d Dept 1997]). (*Employer: Berkshire Farm Ctr. &*, 2009 WL 5104447, at *2 [NYWorkCompBd Dec. 18, 2009])

Riccardi v Dellwood Dairy Co. (38 AD2d 666 [3d Dept 1971]), cited in the Board's decision is instructive. *Riccardi* was also a death claim found related to a work-related injury that occurred many years earlier. The Board refused to impose liability on the Fund for death benefits. The Appellate Division reversed and found the Fund liable for death benefits based on "condition 3" of § 25-a [1], to wit, the

death occurred in 1968, more than seven years after the underlying injury (1959) and more than three years from the last payment of compensation (1961). Thus, the *Riccardi* Court analyzed the passage of time criteria and found that the statute required a transfer of liability for death benefits to the Fund.

The Board's analysis in *Fitzgerald* was consistent with both the language of § 25-a [1] and the relevant precedent case law.

When *Fitzgerald* reached the Appellate Division, however, the Court applied the language of *De Mayo* and imposed liability for death benefits on the Fund even though payments had been made on the underlying injury case within three years of death (*see Fitzgerald*, 87 AD3d at 355). *Fitzgerald* imposed liability on the Fund based on criteria not found in § 25-a [1].

The Fund is not immune from liability in a death case. § 25-a [1] provides for Fund liability if death occurs more than seven years after the date of injury causing death and more than three years after the last payment of compensation (*see* Workers' Compensation Law § 25-a [1] [clause [1], [2]; *Riccardi*, 38 AD2d 666). The Fund is also liable if death occurs more than seven years after the date of injury causing death and a claim for compensation previously has been disallowed or otherwise disposed of without an award of compensation (*see* § 25-a [1] [clause

[3]]). But the statute does not say that the Fund is liable for death benefits because it had been found liable for compensation benefits in an earlier case.

The earliest judicial application of § 25-a [1] to a death case came soon after the statute was amended to include death cases in 1934. In *Vleck* (245 AD 416) Frank Vleck suffered a work-related left inguinal hernia in 1923. The injury resulted in surgery and disability with compensation last paid to him for a period ending August 18, 1924. He died in 1933 from peritonitis resulting from strangulation of the hernia. An award for death benefits was made against the employer and its carrier. On appeal, the Court ruled that the award for death benefits should have been made against the Fund because Mr. Vleck's 1933 death occurred more than seven years after his 1923 injury and more than three years after the last payment of compensation to him in 1924 (*see Vleck*, 245 AD at 418). So the Fund was liable for death benefits even though seven years had not lapsed from the date of death due to the plain language of Workers' Compensation Law § 25-a (1) (clause 3). In another case involving an allegedly "stale" claim, the Board was reminded that "[it] has no power except that found in the Workmen's (sic) Compensation Law" (*Ryan*, 243 AD at 499). The statute says nothing about imposing liability on the Fund in a death claim because liability was imposed on the Fund in an underlying disability claim.

The problem with using the pithy *De Mayo* language as the foundation for the *Fitzgerald* decision is that *De Mayo* is not a death case. In De Mayo, this Court was considering a single case arising from a work-related injury. This Court was not considering two cases: one arising from work-related injury; another from a subsequent death related to that injury. In *De Mayo*, the Fund did not dispute the transfer of liability from the original carrier to the Fund. The Fund sought only to avoid payment of a penalty. So, the *De Mayo* Court was not called upon to analyze the passage of time issues that determine whether liability is transferred.

The Fund does not dispute that once a claim has been transferred from a carrier to the Fund, *that* claim is the Fund's responsibility for the duration of *that* claim. But the Fund does not thereby become responsible for all subsequent claims filed by the same injured worker or that worker's survivors. Each new claim must meet the passage of time requirements of § 25-a [1]. The Fund respectfully submits that *Fitzgerald* was wrongly decided and should not be followed.

Fitzgerald was followed by *Misquitta* (150 AD3d 1363). There, liability for a 1985 heart attack was transferred to the Fund in 2000. The claimant died in 2014. By then, the legislature had closed the Fund to new applications so the Fund argued that it could not be held liable. Citing *Fitzgerald*, The Board ruled that the Fund was liable for the death claim because liability had previously been

transferred to the Fund in the underlying 1985 heart attack claim. The Board Panel decision states that "no separate application for WCL § 25-a relief was needed, because WCL § 25-a had already been found to apply in the underlying case. Therefore, it is irrelevant that the decedent in this case passed away after the last date upon which a request for WCL § 25-a relief would be considered timely (December 31, 2013)." (*Employer: Getty Petroleum*, 2016 WL 927656, at *3 [NYWorkCompBd Mar. 2, 2016])

The Fund appealed arguing that the Fund was closed to new claims by the 2013 amendment to § 25-a [1-a]. The Appellate Division acknowledged that "[t]he Special Fund is correct 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 (internal citations omitted). Indeed, there are separate statutory provisions for disability and death benefits" (internal citations omitted) (*Matter of Misquitta*, 150 AD3d at 1365). Nevertheless, the Court chose to follow *Fitzgerald* and affirmed the Board's imposition of liability on the Fund for a death claim that had not accrued before the Fund was closed. The Court found this result "consistent with the purpose of Workers' Compensation Law § 25–a, which is to shift the liability for paying stale claims to the [Special] Fund (internal quotation marks and citation omitted. *Matter of Misquitta*, 150

AD3d at 1365). No mention was made of the Legislature's revised intent to close the Fund.

Now come *Verneau* (174 AD3d 1022) and *Rexford v Gould Erectors & Riggers, Inc.* (174 AD3d 1026 [3d Dept 2019]), two death cases that accrued after the closing of the Fund. In both cases, liability in the underlying "lifetime" cases had been transferred to the Fund. Citing this Court's decision in *American Economy Ins. Co.* (30 NY3d 136), the Board refused to impose liability for the death cases on the Fund because amended § 25-a [1-a] prohibits new claims against the Fund from January 1, 2014 forward "even where the underlying lifetime claim has been transferred to the [Fund]" (*Employer: Con Edison*, 2018 WL 2327831, at *3 [NYWorkCompBd May 9, 2018]; *Employer: Could (sic) Erectors & Riggers Inc*, 2018 WL 2327832, at *3 [NYWorkCompBd May 9, 2018]).

Relying on *Misquitta*, the Appellate Division reversed both Board decisions and imposed liability for death benefits on the Fund.

The Fund respectfully submits that *De Mayo* was cited out of context in *Fitzgerald*, leading to the erroneous imposition of liability on the Fund. The error in *Fitzgerald* was compounded in *Misquitta* and applied to *Rexford* and *Verneau.*

The Appellate Division decision in this case is contrary to the Legislature's intent to close the Fund and save New York businesses hundreds of millions of dollars every year (*see American Economy Ins. Co.*, 30 NY3d at 158).

Consider the following hypothetical scenario that could result if the *Fitzgerald*, *Misquitta*, *Rexford*, and *Verneau* line of cases is permitted to stand. A 30-year-old man has a work-related heart attack in 2004. He returns to work after three months but continues under the care of a cardiologist. His symptoms worsen in 2012 and his cardiologist advises him to take a month off from work. His case is re-opened, and liability is transferred to the Fund in 2013. He resumes working but continues to see his cardiologist. In 2029 he marries a 30-year-old woman. Their daughter, born in 2030, suffers from a disability and requires significant care. He dies in 2034, leaving his surviving spouse and disabled daughter. The Board finds his 2004 heart attack contributed to his death and awards death benefits to his widow and surviving daughter. Following the *Fitzgerald*, *Misquitta*, *Rexford*, and *Verneau* line of cases, the Board imposes liability on the Fund. When she reaches age 18, the Board finds his daughter to be permanently and totally disabled and deems her eligible for ongoing death benefits. The surviving spouse dies in 2079 at age 80. The permanently and totally disabled daughter continues to receive benefits from the Fund until her death at age 80 in 2110, 96 years after the Fund was closed to new claims (*see* Workers' Compensation Law § 16 [2-a]).

The preceding paragraph is a hypothetical but plausible scenario if the *Fitzgerald*, *Misquitta*, *Rexford*, and *Verneau* line of cases is followed. If, however, the death claim described above is deemed to be a new claim requiring its own application to transfer liability, payments from the Fund would cease upon the death of the claimant in 2034, just 20 years after the Fund was closed to new claims. The surviving spouse and child would still be entitled to benefits, but those benefits would not be paid by the Fund.

V. THE APPELLATE DIVISION DECISION IS CONTRARY TO ITS OWN RULING AND REASONING IN *CONNOLLY V. CONSOLIDATED EDISION*

The Fund for Reopened Cases is not the first Special Fund closed by the legislature. In 2007, the Legislature closed the Special Disability Fund by barring claims for reimbursement arising from work-related injuries or illnesses occurring or after July 1, 2007 (*see* Workers' Compensation Law § 15 [8] [h] [2] [A] as amended by 2007 Sess. Law News of N.Y. Ch. 6 [A. 6163] [McKINNEY'S]). The Special Disability Fund reimburses employers and carriers for a portion of benefits paid in certain cases (*see* § 15 [8] [d], [e], [ee]).

After the closing of the Special Disability Fund, Consolidated Edison sought reimbursement from the Special Disability Fund for death benefits it paid arising from the 2011 death of an employee who had previously been disabled due to a

dust disease. Prior to the employee's death, The Special Disability Fund had been found liable to reimburse the employer for a portion of disability benefits paid pursuant to § 15 [8] [ee]). The employer argued that, since the Special Disability Fund was responsible for reimbursing disability benefits, it should also reimburse benefits paid due to a death related to the earlier disability. Here is the Appellate Division's response:

> We reject the employer's argument that its claimed entitlement to reimbursement from the Special Disability Fund is not a "new" claim, on the premise that it relates back to the original disablement in 1999 thereby establishing its right to reimbursement for a death occurring after July 1, 2010. In this regard, a claim for reimbursement for death benefits is "separate and distinct" from the original claim for reimbursement for disability benefits (internal citations omitted). That is, "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 purposes of death benefits reimbursement (*internal citations omitted*). (*Matter of Connolly v Consol. Edison*, 124 AD3d 1167, 1169 [3d Dept 2015])

This response to a claim of continuing liability of a Special Fund after it has been closed to new claims by the legislature is much different than the same Court's response here. If a claim for death benefits in *Connolly* is separate and distinct from the underlying disability claim, why would it be otherwise in *Misquitta*, *Rexford* and *Verneau*? If a claim for death benefits does not accrue before death in *Connolly*, why would a claim for death benefits be the responsibility of the Special Fund for Reopened Cases before the death has

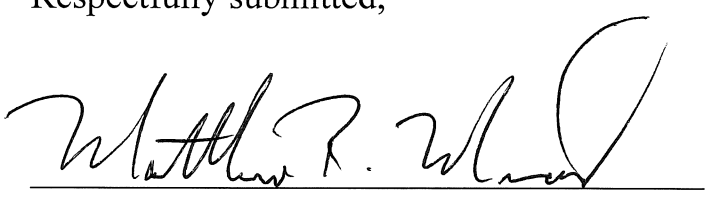
occurred? Absent a statutory provision that says otherwise, the Board and the Courts are obligated to apply the lapse of time requirements written by the Legislature into § 25-a [1].

CONCLUSION

The decision of the Appellate Division is contrary to the plain language of Workers' Compensation Law § 25-a [1-a] and the legislature's intent to close the Special Fund for Reopened Cases to new applications for transfer on or after January 1, 2014. It is well established that a claim for death benefits is a new claim. The claim for death benefits here did not accrue until March 4, 2016. Thus, no claim for death benefits existed until after the Fund was closed to new claims. The claim for death benefits asserted against the Fund was a new application for benefits asserted after January 1, 2014 and was barred by Workers' Compensation Law § 25-a [1-a]. The Appellate Division erred as a matter of law when it imposed liability for death benefits on the Fund. Its decision should be reversed, and the decision of the Workers' Compensation Board filed May 9, 2018 should be reinstated.

Dated this 27th day of July 2020.

Respectfully submitted,



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PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR 500.13 [c] [1] Appellant states:

This brief was prepared on a computer using Times New Roman 14-point type. This brief contains 5500 inclusive of point headings, footnotes, signature blocks, table of contents, and table of citations, and exclusive of proof of service, certificate of compliance, or any addendum authorized pursuant to 22 NYCRR 500.1 [h].