To be Argued by:
GLENN D. CHASE
(Time Requested: 10 Minutes)

APL No. 2020-00042
Appellate Third Department Case No. 527877

Court of Appeals

of the

State of New York

In the Matter of the Claim for Death Benefits under the Workers' Compensation Law made by

KRISTEN REXFORD, Administratrix of the Estate of REGINALD RADLEY (Deceased),

Claimant,

– against –

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

Respondents,

SPECIAL FUND FOR REPOPENED CASES,

Appellant,

WORKERS' COMPENSATION BOARD,

Appellant.

BRIEF FOR RESPONDENTS GOULD ERECTORS & RIGGERS, INC., ET AL

Tanisha Edwards, Esq.
General Attorney
NEW YORK STATE INSURANCE FUND
Post Office Box 66699
Albany, New York, 12206
Tel.: (518) 437-6439

Glenn D. Chase, Esq., *of Counsel*
WALSH AND HACKER
18 Corporate Woods Boulevard
Albany, New York, 12211
Tel.: (518) 463-1269
Fax.: (518) 432-1218
gdchase@walshandhacker.com

Attorneys for Respondents
Gould Erectors & Riggers, Inc., et al.

Dated: November 13, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

This matter appears before the Court pursuant to its decision rendered on March 24, 2020 which granted Appellants, the Special Fund for Reopened Cases (hereinafter "Special Fund") and the Workers' Compensation Board (hereinafter "WCB"), leave to appeal from a decision of the Appellate Division, Third Department filed on July 3, 2019. In its decision, the Appellate Division found that the Special Fund remained liable for the claimant's consequential death claim inasmuch as liability had been transferred to the Special Fund in 1997, well before the January 1, 2014 closure date set forth in Workers' Compensation Law (hereinafter "WCL") § 25-a (1-a).

This Brief is submitted on behalf of the employer, Gould Erectors & Riggers, Inc., and its carrier the New York State Insurance Fund (hereinafter "SIF") as a statement of their position that the Appellate Division decision is correct and should be affirmed.

WCL § 25-a (1-a) provides, in relevant part, that "[n]o application by a self-insured employer or an insurance carrier for transfer of liability of a claim to the [Special Fund] shall be accepted by the [B]oard on or after [January 1, 2014]." The record does not contain a copy of any application by the insurance carrier for transfer of liability of a claim to the Special Fund filed after January 1, 2014. To the contrary, liability was transferred to the Special Fund in 1997; no post-January 1, 2014 application for transfer of liability was made because liability had already been transferred to the Special Fund.

It is well-established that once Special Funds liability has been triggered, the insurance carrier has no further interest in payment of the claim (Matter of DeMayo v. Rensselaer Polytech Inst., 74 NY2d 459, 462[1989]; upon the transfer of liability, the Special Fund "step(s) into the shoes of the insurance carrier and succeed(s) to its rights and responsibilities" (Matter of DeMayo

v. Rensselaer Polytech Inst., 74 NY2d at 462-463). Here, the Special Fund stepped into the insurance carrier's shoes prior to January 1, 2014 and, as noted by this Court, "(t)he Fund remains open to administer reopened cases previously assigned to the Fund" (American Economy Insurance Co. v. State of New York, 30 NY3d 136, 143 [2017]).

QUESTIONS PRESENTED

1. Question: Did the Appellate Division properly determine that Workers' Compensation Law § 25-a(1-a) did not preclude Special Fund's liability for consequential death benefits, occurring in 2016, when the underlying disability claim was previously transferred to the Special Fund pursuant to Workers' Compensation Law § 25-a in 1997, long before the amendment of the statute which states that "(n)o 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 (01/01/2014)…".

Answer: Yes, the Appellate Division properly construed prior precedent and the applicable statutes in determining that the Special Fund was liable for the claim for consequential death benefits pursuant to § 25-a(1)(3) where a finding was made prior to 01/01/2014 transferring liability of the underlying disability claim to the Special Fund in accordance with § 25a.

STATEMENT OF FACTS

On August 31, 1987, the claimant, Reginald Radley, suffered a heart attack at work (R. 7). The claim for compensation benefits was established by the Workers' Compensation Board for a compensable heart condition, assigned WCB No.: 5871 8082 (R. 12) and awards were made for lost time from 09/02/1987 to 11/02/1987 (R. 14). In November of 1991 the claimant

had a second myocardial infarction which required hospitalization and subsequent coronary bypass surgery (R. 16-17). This treatment and care was found related to the original claim and awards were made for an additional period of lost time from 12/02/1991 to 03/23/1992, with no lost time awarded from 03/23/1992 to 01/03/1994 and again from 01/03/1994 to 11/17/1994 (R. 18-19).

The claimant returned to work thereafter and after a lapse of more than seven years from the date of accident on 08/31/1987 and more than three years from the last payment of compensation in November of 1994 the SIF applied for transfer of liability to the Special Fund pursuant to Workers' Compensation Law § 25-a (R. 21, 24-25, 29).

A hearing was held to address the carrier's request for transfer of liability on 03/10/1999 and in the Notice of Decision filed on 03/24/1999, liability was transferred to the Special Fund pursuant to Workers' Compensation Law § 25-a effective 11/23/1997. At the time of the transfer of liability there was a further finding of no additional lost time from 11/17/1994 to 03/10/1999 (R. 30).

Thereafter, pursuant to the transfer of liability under § 25-a, the Special Fund stood in the shoes of the carrier and for the next 19 years, administered the claim for disability benefits including medical treatment (R. 31-81).

In 2013, Workers' Compensation Law § 25-a was amended to include language that "(n)o application by a self-insured employer or insurance carrier for transfer of liability of a claim to the fund for reopened cases shall be accepted... on or after (01/01/2014)..." (*see*, Workers' Compensation Law § 25-a[1-a]).

On March 4, 2016 Mr. Radley died as a result of cardiopulmonary arrest due to or as a consequence of multi-organ failure and end stage heart failure (R. 82, 95).

A C-62 claim for Compensation in Death Case was filed in behalf of the dependents of the deceased employee by the claimant's daughter Kristen Rexford, the Administratrix of decedent's estate (R. 96), and the Board indexed the claim against the Special Fund (R. 97). In response to the notice of indexing the Special Fund advised that it does not complete the Board's Electronic FROI forms and as such was submitting an Affirmation controverting the claim on all issues including causal relationship (R. 99). On 11/07/2017, a hearing was held at which time the case was closed based upon a lack of prima facie medical evidence. Thereafter the claimant's attorneys submitted a form C-64 Proof of Death completed by Dr. Fein and signed on 11/06/2017 (R. 101-102).

At the hearing held on 01/02/2018 the Workers' Compensation Law Judge found sufficient medical evidence to proceed with the claim. The Special Fund contested financial liability for the claim based upon its interpretation of this Court's decision in American Economy Ins. Co. v. State of New York (30 NY3d 136 [2017]), that the Special Fund was definitively closed to new claims and the Judge directed that the SIF be placed on notice (R. 105-106). In response to being placed on notice the SIF filed a FROI-04 on 01/16/2018 in which it advised that it was not the proper carrier for the death claim, as it had previously been discharged from liability pursuant to the § 25-a finding made in the disability claim (R. 107-110).

At the hearing held on February 20, 2018, the SIF and the Special Fund each asserted their position with respect to the financial responsibility for the consequential death claim (R. 113-116). Based upon the WCB's interpretation of American Economy Ins., *supra*, the Judge held that the SIF was responsible for payment of benefits resulting from the consequential death (R. 117-121).

This finding was memorialized in a decision filed on 02/23/2018 (R. 130). The SIF filed a RB-89 Application for Board Review on 03/01/2018 setting forth its position that the Special Fund was the proper carrier for the consequential death claim in accordance with prior precedent, including Matter of Misquitta v. Getty Petroleum (150 AD3d 1363 [2107]), which held that where liability had previously been transferred to the Special Fund in an underlying disability claim, the Special Fund remained liable for subsequent consequential death benefits (R.132-139).

The Special Fund submitted an RB-89.1 Rebuttal of Application for Board Review (R. 143-150). On 05/09/2018, the Board issued a Memorandum of Board Panel Decision in which it found that as the Appellate Division's interpretation of Workers' Compensation Law § 25-a in Matter of Misquitta was inconsistent with the Court of Appeals decision in American Economy Ins., *supra*, the decision in Misquitta could not be followed. Therefore, the WCB held that pursuant to Workers' Compensation Law § 25-a (1-a) the "application for a transfer of liability" of the death claim which occurred after 01/01/2014 should be denied and the claim properly found the responsibility of the SIF (R. 196-200). The SIF appealed the Decision to the Appellate Division, (R, 201-202) which issued the Memorandum and Order dated 07/03/2019 which is the subject of the instant appeal (*see*, Matter of Rexford v. Gould Erectors and Riggers, Inc., [174 AD3d 1026]).

In its decision below, the Appellate Division, noted that it had addressed the very same issue in Matter of Vernuau v. Consolidated Edison Co. of NY, Inc., (174 AD3d 1022), and, for the reasons stated therein, it was the Court's conclusion that Misquitta was controlling and, therefore, the Special Fund was liable for the consequential death claim as liability had been

transferred to the Special Fund in 1997 well before the 01/01/2014 date set forth in Workers' Compensation Law § 25-a(1-a) (R. 216-219).

In Matter of Vernuau, *supra*, the Appellate Division noted that American Economy, did not control, as the issue raised therein concerned the constitutionality of the amendment to § 25-a and did not address the issue of § 25-a liability for a consequential death claim where decedent had an established workers' compensation disability claim in which liability had been transferred prior to January 1, 2014. By Decision entered on 03/24/2020 this Court granted Motions by the Special Fund and the WCB for leave to appeal (R. 214-215).

ARGUMENT

POINT I

THE APPELLATE DIVISION PROPERLY FOUND THAT § 25-A(1-A) DOES NOT DISCHARGE THE SPECIAL FUND FOR REOPENED CASES UNDER § 25-A AS LIABILITY FOR THE DISABILITY CLAIM HAD PREVIOUSLY BEEN TRANSFERRED TO THE SPECIAL FUND PURSUANT TO § 25-A(1)(2).

This Court in American Economy Insurance Co. v. State of New York (30 NY3d 136) in addressing whether or not the § 25-a(1-a) amendment to the Workers' Compensation Law was constitutional set forth the history as to the purpose behind the establishment of the Special Fund for Reopened Cases noting:

> Its original purpose was to ensure that injured workers with 'closed' cases that unexpectedly 'reopened' after many years due to, for example 'a recurrence of malady, a progress in disease not anticipated, or a pathological development not previously prognosticated' (Matter of Ryan v. American Bridge Co., 243 AD

> 496, 498 [3d Dept. 1935]) *affd.* 268 NY 502 [1935]) would continue to receive necessary benefits, even if the insurance carrier had become insolvent. The Fund was also created to protect insurance carriers and employers from uncertain future liability costs they might incur in these 'stale' cases (*see,* Id., at 498-499)

(American Economy Insurance Co. v. State of New York [30 NY3d 136, 141]).

Workers' Compensation Law § 25-a(1) allowed for transfer of cases to the Special Fund for Reopened Cases under the following circumstances. First where there has been a lapse of seven years from the date of injury or death and the claim was previously disallowed or otherwise disposed of without an award of compensation. The second circumstance would be when there was a lapse of seven years from the date of injury or death and a lapse of three years from the date of the last payment of compensation. Finally, where death resulting from the injury shall occur after the time limits under the provisions of the first or second paragraph shall have elapsed, subject to § 123, and testimony has been taken, if an award is made it shall be against the Special Fund (*see,* Matter of Ricciardi v. Dellwood Dairy Company, 38 AD2d 666 [1971])[1].

In Matter of Zechmann v. Canisteo Volunteer Fire Dept., (85 NY2d 747 [1995]) this Court was asked to address a claim for death benefits brought by the decedent's surviving spouse going back 44 years to an injury which occurred in 1951 where the last payment of compensation was made in 1955. The decedent died in 1986 and the surviving spouse brought a workers' compensation claim for death benefits. The Administrative Law Judge found that neither § 123

[1] In the instant matter medical testimony of the consultant for the Special Fund's Doctor Cantor (R. 151-174) and Doctor Fein (R. 176-194) was taken and a Decision rendered by the ALJ per the Notice of Decision filed 05/04/2018 that the claim was "deemed (a) no dependency death case" (R. 195) entitling the estate to a $50,000.00 award.

nor § 25-a applied and awarded benefits against the Self-Insured Fire Department. The Board modified finding that the death claim was not timed barred under § 123 and that § 25-a applied and the Special Fund appealed to the Appellate Division.

In affirming the Appellate Division Decision this Court noted that the claim would not be barred under § 123 as the claim for death benefits while arising out of the original case was not subject to the time limitations of § 123 because it was a "separate and distinct legal proceeding brought by the beneficiary's dependents and is not equated with the beneficiary's original disability claim" (Matter of Zechmann, *supra* at 751).

This Court went on to note that this comports with the structure of the Workers' Compensation Law which provides for separate benefits resulting from disability under § 15 whereas death benefits are addressed under Workers' Compensation Law § 16 (*see*, Matter of Zechmann, *supra* at 751, Commissioners of State Insurance Fund v. Hallmark Operating, Inc., 61 AD3d 1212, 1213.

This Court further noted that § 25-a(1) was enacted to transfer liability for awards from employers and carriers to the Special Fund where the death resulting from the injury occurred more than seven years from the date of that injury and it had been more than three years from the last payment of compensation (*see*, Workers' Compensation Law § 25-a[1][3]). In interpreting § 25-a(1)(3) this Court went on to note that § 123 did not apply as this was not a reopened claim to which the 18 and 8 year time limitations applied. The Court further noted that the date of death is required to determine when the statute of limitations applied and in order to be entitled to benefits the claimant only had to prove that the death was causally related to the accident of record which was uncontested (Matter of Zechmann, *supra* at 753, Commissioners of State Insurance Fund, *supra*).

In Matter of Riccardi v. Dellwood Dairy Co., 38 AD2d 666, claimant had a compensable heart attack in 1959 and was last paid compensation benefits in 1961. The case was reopened in 1968 and the claimant subsequently died in April of 1968 with a death claim being filed subsequent thereto. The Board made an award for disability from September 1966 up to the date of death and found the Special Fund liable for that claim but further held that the Special Fund was not liable for payment of the death benefits.

In reversing the Board, the Appellate Division, Third Department, found that § 25-a(1) did not apply as a claim had been made and established within seven years, nor did § 25-a(1)(2) apply as it has been construed to mean that the seven year period specified therein was measured from the date of death and not the date of injury. The Court did note however that the claim came under the express provisions of § 25-a(1)(3) as the death had occurred more than seven years after the initial injury and more than three years after the last payment of compensation (Matter of Riccardi, *supra* at 667).

Subsequent to its Decision in Riccardi, the Appellate Division, was asked to address the same issue in Matter of Fitzgerald v. Berkshire Farm Ctr. & Servs. for Youth, 87 AD3d 353 (2011). In Fitzgerald, the underlying claim had been transferred to the Special Fund. However, despite the long-standing precedent in Riccardi, the Board found that since the Special Fund had paid benefits to the decedent up until his death in October 2007 the time requirements under § 25-a(1) had not been satisfied. The Court reversed noting that § 25-a had been found to apply, with the Special Fund found responsible for the claim in November in 2005, as both the seven and three year timeframes for transfer of liability applied at that time. The Court went on to hold that the Special Fund having stepped into the shoes of the carrier in the stale claim was required to make payments which did not serve as a basis to place liability for the subsequent death claim on the

carrier which had already been discharged pursuant to the finding of § 25-a liability (Matter of Fitzgerald, *supra* at 355).

In Matter of Misquitta v. Getty Petroleum, 150 AD3d 1363, a case directly on point with that herein, in addressing an appeal by the Special Fund of a Decision in which both the Administrative Law Judge and the Workers' Compensation Board found that § 25-a(1-a) did not apply and, therefore, the Special Fund was responsible for the consequential death claim as liability for the underlying disability claim had previously been transferred to the Special Fund under § 25-a, the Appellate Division, following prior precedence, affirmed noting:

> "Liability for payment of a compensation award under (Workers' Compensation Law §) 25-a shifts from the insurance carrier to the Special Fund simply by virtue of the passage of the requisite period of time," and "(o)nce § 25-a(1) has been triggered, the insurance carrier has no further interest in payment of the claim" (Matter of DeMayo v. Rensselaer Polytech Inst., 74 NY2d 459, 462[1989]; *accord* Matter of Fitzgerald v. Berkshire Farm Ctr & Servs. For Youth, 87 AD3d 353, 355 [2011]). Thus, upon a transfer of liability, the Special Fund "step(s) into the shoes of the insurance carrier and succeed(s) to its rights and responsibilities" (Matter of DeMayo v. Rensselaer Polytech Inst., 74 NY2d at 462-463).

Matter of Misquitta v. Getty Petroleum, 150 AD3d 1363 at 1364.

In rejecting the Special Funds argument that the death case was a new claim, as it had been filed after the 01/01/2014 cut-off date for newly reopened cases, the Court in Misquitta noted that the Special Fund was correct that "a claim for death benefits... is a separate and distinct legal

proceeding by the beneficiary's dependents and is not equated with the beneficiary's original disability claim" (Matter of Zechmann v. Canisteo Volunteer Fire Dept., 85 NY2d 747, 751 [1995]; *see*, Commissioners of State Insurance Fund v. Hallmark Operating, Inc., 61 AD3d 1212, 1213 [2009]; Matter of Mace v. Owl Wire and Cable Co., 284 AD2d 672, 675 [2001]) Matter of Misquitta, *supra* at 1365.

The Court went on to note however that where liability for the underlying disability claim has already been transferred from the carrier to the Special Fund pursuant to a § 25-a finding, when the employee dies for reasons causally related to the original case the Special Fund remains liable for the consequential death benefits, stating "(t)hus under these circumstances, the claimant need not obtain another transfer of liability to the Special Fund upon decedent's death as liability had already been transferred" (Misquitta, *supra* at 1365). The Court further noted that this result is consistent with the purposes of Workers' Compensation Law § 25-a which was to shift the liability for stale claims to the Special Fund[2].

As is demonstrated by the long line of cases, before both the Appellate Division and this Court, the law is well settled that where the provisions of § 25-a(1) are met, and a finding of § 25-a liability has been made, while a claim for a consequential death may be considered a "distinct legal proceeding", it remains the liability of the Special Fund pursuant to § 25(1)(3) and thus there is no request for a new transfer of liability but rather, a continuation of the liability already deemed the responsibility of the Special Fund.

In the instant matter, liability for the underlying disability claim was transferred to the Special Fund effective 11/23/1997 per the Notice of Decision filed on March 29, 1999 as the seven

[2] While the WCB agreed in Misquitta that § 25a(1-a) did not apply, as liability had previously been transferred to the Special Fund, it now argues that Misquitta should be reversed.

and three year limitations under § 25a(1)(2) had been met since it was more than seven years from the date of the accident in 1987 and more than three years from the last payment of compensation in November 1994 (R. 30). Thereafter the Special Fund administered the claim for 19 years until March 4, 2016 when the claimant died (R. 82, 95), where upon claimant's daughter Kristen Rexford, as administratrix of decedent's estate, filed a claim with the Board for death benefits (R. 96).

At the time this claim was filed it was alleged that the decedent's demise was related to his prior compensable injury in 1987 and, after litigation, the Administrative Law Judge deemed the claim one for no dependency death, entitling the estate to an award in the amount of $50,000.00 (R. 195). In accordance with Workers' Compensation Law § 25-a(1)(3) and established case law the Appellate Division held that the Special Fund remained liable for the consequential death claim in view of the previous transfer of liability under § 25-a(1)(2).

The holding of the Appellate Division below, is in conformance with longstanding case law and this Court's acknowledgement in American Economy as to the purposes behind the establishment of the Special Fund for Reopened Cases, as it ensures that claimants will continue to receive necessary benefits even where the insurance carrier has become insolvent and further protects the carrier from the uncertainty of future liability that may accrue as a result of a stale claim.

The Special Fund and the WCB both argue that this interpretation of the law by the Appellate Division is erroneous as it fails to consider the "legislature's intent to close the Special Fund to new claims." In support of its argument, the WCB notes that there are "more than 9,000 cases in which liability for a lifetime benefit award has been transferred to the Special Fund where

the claimant is still living" and the underlying award could potentially give rise to a claim for death benefits.

Similarly, the Special Fund has posed a hypothetical scenario where an older claimant marries a younger spouse and has a disabled child. Based upon same it extrapolates that the Special Fund could remain liable for benefits for an additional 80 years.

However, neither the hypothetical presented by the Special Fund nor the Board's "argument" as to the number of potential claims which would remain the liability of the Special Fund has true merit.

We would note that the hypothetical presented by the Special Fund is precisely the reason why § 25-a was implemented, that is, to ensure that the claimant and/or beneficiary's continue to receive necessary benefits in stale claims and, in fact, as noted by this Court, *"(t)he Fund remains open to administer reopened cases previously assigned to the Fund"* (American Economy Ins., *supra* at 143, emphasis added). It is also for just such scenarios, as hypothesized by the Special Fund, that the Courts have determined that the transfer of liability occurs upon the finding that the Special Fund is liable under § 25-a and remains liable for the consequential death claim as the law is intended to ensure the continuity of benefits.

While the WCB argues that there are numerous claims which may possibly become the liability of the Special Fund pursuant to the Appellate Division's Decision, the Board fails to recognize and accept that these claims have previously been transferred to the Special Fund and remain their liability. Moreover, and more importantly, the WCB in citing to its "statistics" regarding 9,000 transferred claims conveniently fails to provide any additional information related thereto. In this vein, the WCB has not indicated the average or median age of the claimant in the

disability claim, whether or not there is an estate, widow or dependent, all of which would impact the length of time the Special Fund would remain liable for administering the claim.

The WCB also fails to indicate the number of claims in which 25-a liability has been found wherein the named employer has gone out of business and no longer provides compensation coverage and/or those instances where the carrier has become insolvent. Once again, it is for precisely these reasons that § 25-a was implemented, as noted by this Court in American Economy, and why the Courts have continuously interpreted the statute to require the Special Fund remain liable for previously transferred § 25-a claims where there is a consequential death related to the underlying disability case.

As has been stated by the Courts on numerous occasions once a § 25-a(1) determination has been made the carrier has no further interest in payment of the claim as the Special Fund "steps into the shoes" of the carrier and succeeds to its rights and responsibilities including payment of the claim for consequential death benefits.

POINT II

THE APPELLATE DIVISION DECISION IS NOT INCONSISTENT WITH THE PLAIN LANGUAGE OF WORKERS' COMPENSATION LAW § 25-A(1-A) NOR WITH THE INTENT OF THE LEGISLATURE.

In Matter of DeMayo v. Rensselaer Polytech Inst. (74 NY2d 459), this Court noted that the interpretation of Workers' Compensation Law § 25-a "involves a question... of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent" (Kurciscs v. Merchants Mut. Ins. Co., 49 NY2d 451, 459 (1980); Matter of Fitzgerald, *supra*, at 354; Matter of DeMayo, *supra*, at 462).

As noted by this Court in American Economy Ins., in its decision addressing the constitutionality of Workers' Compensation Law § 25-a(1-a) and the Legislature's intent to close

the Special Fund to new applications for transfer of liability made after 01/01/2014, the Special Fund remains open to administer those claims that have previously been transferred to the Special Fund before the 01/01/2014 "closing" date.

The Special Fund and WCB argue that since this Court, as well as the Appellate Division, have previously held that a claim for death benefits was a "new claim" that it stands to reason under Workers' Compensation Law § 25-a(1-a) that such claim is barred from "transfer" of liability where the claimant's demise occurred subsequent to 01/01/2014.

The crux of the issue is whether the consequential death claim is an entirely new claim or a continuation of the prior disability case.

As noted in "POINT I" above, it is abundantly clear that the Courts have continuously held that the distinction between claims is relevant only for purposes of assessing the applicability of the statute of limitations and does not affect the liability of the Special Fund when it has previously been found liable for the underlying disability claim in view of § 25-a(1)(3) which states that where death resulting from the injury occurs after the time periods noted in § 1 and § 2 the awards shall be made against the Special Fund.

Section 25-a(1)(3) does not indicate that the award is to be made against the employer or carrier on the risk on the date of death which is consistent with the purpose behind § 25-a to ensure that benefits are continued where an insurance company may become insolvent.

In addition, the Courts have consistently held that while there may be a legal distinction between disability benefits and death benefits under § 15 and § 16, where the provisions of § 25-a have been met with respect to the underlying disability claim the Special Fund remains liable for the consequential death benefit.

Nothing in Workers' Compensation Law § 25-a(1-a) changes this and it is clear from the arguments of Special Fund and the WCB that they wish this Court to reverse the Decision of the Appellate Division decision despite its being grounded in longstanding case law and in conformity therewith. In this vein while the Special Fund and the WCB argue that Misquitta and Fitzgerald were erroneously decided, it is clear that both cases are in conformance with this Court's holding in Zechmann and the Appellate Division's earlier decision in Matter of Riccardi, cited by this Court in Zechmann. Thus, in requesting that the Court reverse the Appellate Division decisions in Fitzgerald and Misquitta the Special Fund and the WCB are, in fact, requesting that this Court reverse its own decision in Zechmann, as well as, the Third Department's Decision in Riccardi.

The WCB further argues that "the legislature is presumed to be aware of the law in existence at the time of an enactment" Matter of Amorosi v. Colonie Ind. Cent. Sch. Dist., 9 NY3d 367, 375 (2007) which would include this Court's holding in Matter of Zechmann and, therefore, the consequential death claim is not subject to transfer. A careful reading of the WCB's argument demonstrates that it has either erroneously and/or deliberately conflated this Court's holding that a death claim is a distinct legal proceeding for the purposes of the applicability of § 123 and the statute of limitations with its ultimate determination that a consequential claim for death benefits arising from a disability claim which had previously been transferred to the Special Funds under § 25-a remained the liability of the Special Fund pursuant to § 25-a(1)(3). This holding confirmed the Appellate Division's decision in Riccardi and has been continuously followed by the Appellate Division, in Fitzgerald, Misquitta, Vernuau and the instant matter.

Moreover, in reading the text of the statute and considering the WCB's own argument that the Legislature is presumed to be aware of the law in existence at the time of an enactment, it is clear that the Legislature did not include the closing of the Special Fund to claims for consequential

death in instances where the underlying disability claim had already been transferred to the Special Fund pursuant to a finding that § 25-a applied.

As argued by the WCB in its brief, we submit that had the legislature intended to discharge the Special Fund from liability, in view of the established case law pertaining to consequential death claims in previously transferred disability cases, "it should have been aware of same and specifically addressed it in its Memorandum." Instead, the legislature chose to simply close the Special Fund to new claims for transfer occurring on or after 01/01/2014, failing and/or refusing to include language which would specifically over rule and/or modify legal precedent pertaining to previously established § 25-a disability claims in which a consequential death claim was subsequently brought.

As noted above, in Matter of DeMayo, this Court has previously held that "(o)nce § 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" (Matter of DeMayo, *supra* at 462-463).

This is entirely consistent with this Court's recitation of the history of Workers' Compensation Law § 25-a in American Economy Ins. where the Court noted that § 25-a was established to ensure that carriers were protected from future liability in stale claims and that claimants would continue to receive necessary benefits even if the insurance carrier had become insolvent.

POINT III

THE THIRD DEPARTMENT DECISION IN MATTER OF CONNOLLY IS NOT INCONSISTENT AS IT PERTAINS TO AN ENTIRELY UNRELATED STATUTORY SCHEME.

In the instant matter the issue is the effect of the amendment of § 25-a to include § 25-a(1-a) which prohibits an application by the self-insured employer or carrier to transfer liability for a claim to the Special Fund for Reopened Cases on or after 01/01/2014.

As noted by this Court in American Economy *supra* at 498-499 § 25-a is intended to ensure that injured workers, with closed cases that are unexpectedly reopened after many years, continue to receive necessary benefits even if the carrier became insolvent. In addition, the Special Fund was created to protect insurance carriers and employers from uncertain future liability costs they might incur in these stale cases.

In Matter of Connolly v. Consolidated Edison (124 AD3d 1167) the issue before the Court was whether or not the carrier was entitled to reimbursement from the Special Disability Fund pursuant to Workers' Compensation Law § 15(8)(ee). In Connolly there was an established disability claim and a separate and distinct death claim both of which were administered by and the responsibility of the carrier. Section 15(8) was amended to include 15(8)(h)(2)(aa) which directed that no carrier or employer may file a claim for reimbursement from the Special Disability Fund after 07/01/2010. The Court noted that the carrier's claim for reimbursement in the subsequent death claim, for which it remained liable, was barred as the statute precluded all new claims for reimbursement after 07/01/2010 in old claims and barred any such claims for reimbursement involving accidents on or after 07/01/2007.

In denying the employers request for reimbursement in the death claim based upon the applicability of § 15(8)(ee) in the disability claim, the Court noted that the statutory scheme and

case law clearly held that a claim for reimbursement for death benefits was a separate and distinct claim from the original claim for reimbursement for disability benefits noting its decision in Matter of House v. International Tale, 261 AD2d 687, 689 and Workers' Compensation Laws §§ 15(8)(ee), (f), (g), (h).

This statutory scheme is entirely distinct from that of § 25-a which is the subject of the instant matter wherein the issue pertains to a claim in which the Special Fund was previously found to be the liable carrier pursuant to a transfer of liability in 1997 and the claimant subsequently met his demise in March of 2016 and whether or not § 25-a(1-a) precludes a finding that the Special Fund remains liable for the consequential death claim. As such, the Court's decision in Connolly is entirely irrelevant and distinguishable from the facts and legal issue before the Court in this case.

POINT IV

THE THIRD DEPARTMENT'S INTERPRETATION OF § 25-A(1-A) IN VERNEAU IS NOT MISTAKEN.

In its brief, the Board would have this Court believe that the Appellate Division mistakenly took a formal approach to the language of § 25-a(1-a) to require that the carrier make a formal application for transfer of liability in order for the section to apply. However, a careful review of the decision clearly demonstrates that while it referenced the fact that no application by the carrier or employer to transfer liability had been made, in fact, the decision below was predicated upon the determination that liability had previously been transferred to the Special Fund upon the finding that § 25-a applied effective 11/23/1997.

In the instant matter while the WCB argues that the carrier filed applications for transfer, in view of the filing of the first report of injury (R. 107) and based upon the arguments made at the hearing held on 02/20/2018 (R. 111-127), the carrier did not, in fact, request transfer of liability

but instead argued, that the claim remained the liability of the Special Fund in view of the Board decision filed on 03/24/1999 which found that Workers' Compensation Law § 25-a was effective 11/23/1997 (R. 30) and established case law holding that where the claim had previously been transferred to the Special Fund, the consequential death claim remained its liability.

CONCLUSION

WHEREFORE, for the reasons stated above, it is respectfully submitted that this Court affirm the Appellate Division, Third Department's Decision below which found that § 25-a(1-a) does not shift liability back to the carrier in a consequential claim for death benefits when liability pursuant to § 25-a for the underlying disability claim was previously transferred to the Special Fund before January 1, 2014.

DATED: November 13, 2020
Albany, New York

Respectfully submitted,
Tanisha Edwards
General Attorney
New York State Insurance Fund
Attorneys for Respondents
P.O. Box 66699
Albany, New York 12206
(518) 437-6439

Glenn D. Chase
of counsel
Attorney Registration No.: 2174548
Walsh and Hacker
18 Corporate Woods Blvd.
Albany, New York 12211
Direct No.: (518) 225-0018
Main No.: (518) 463-1269
Fax No.: (518) 432-1218
Email: gdchase@walshandhacker.com

AFFIRMATION OF COMPLIANCE

Pursuant to 22 NYCRR 500.13 [c] [1], Glenn D. Chase, Attorney Registration No.: 2174548, hereby affirms that this brief was prepared on a computer using Times New Roman 12-point type. This brief contains 6,494 words inclusive of point headings, footnotes, signature blocks, table of contents, and table of citations, and exclusive of proof of service, affirmation of compliance, or any addendum authorized pursuant to 22 NYCRR 500.1 [h].

Glenn D. Chase
of counsel