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APP. DIV. THIRD DEPT. NO. 527837

Court of Appeals of the State of New York

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

FRANCES VERNEAU,

Claimant-Respondent,

-Against-

CONSOLIDATED EDISON CO. OF NEW YORK and SEDGWICK CLAIMS MANAGEMENT SERVICES,

Employer/Third Party Administrator Appellants

-And-

SPECIAL FUNDS CONSERVATION COMMITTEE 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 Rexford v. Gould,* 174 A.D.3d 1026 (3d Dep't 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 the 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 consequential 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 employer, Consolidated Edison Co. of N.Y., Inc., timely served and filed a notice of appeal to the Third Department under Workers' Compensation Law § 23 on May 18, 2018. (R2-3.[1])

The Workers' Compensation Board was served by regular mail directly, rather than through its attorney, with a copy of the Third Department's July 3, 2019 memorandum decision and order with notice of entry by regular mail on July 5, 2019. The Board moved in the Third

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

Department for reargument or leave to appeal to this Court on August 7, 2019, and thus within 35 days of such service.[2] 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 Board was served with notice of entry of the denial at the earliest on November 11, 2019, when the Special Fund for Reopened Cases properly served its motion for leave to appeal in this Court, a motion that included a copy of a notice of entry.[3] Because this motion is made within 35 days of November 11, 2019, it is timely.

While claimant purportedly served the Board directly, rather than through its attorney, on October 8, 2019, with notice of entry the Third Department's decision denying the leave motion, such service was

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[2] For the same reasons that direct service of the Third Department's resulting order on reargument was ineffective to commence the running of the limitations period for seeking leave from the Court of Appeals, *see infra* at 4, this service was also ineffective. The Board did not object to that ineffective service, however.

[3] The Board has no record of having been served with any such notice of entry before that date.

ineffective to commence the running of the limitations period in which to seek leave to appeal from this Court. The Board is a party to this action and is represented by the Attorney General. *See* Workers' Compensation Law § 23. Accordingly, service of all papers was required to be made on this office. C.P.L.R. 2103(b) ("[P]apers to be served upon a party in a pending action shall be served upon the party's attorney.") By failing to serve notice of entry upon the Attorney General, the counsel of record, claimant did not commence the limitations period in C.P.L.R. 5513(a) with its October 8, 2019, defective service directly on the Board. *See Matter of Odunbaku v. Odunbaku*, 28 N.Y.3d 223, 227-28 (2016) (service upon a party rather than the attorney did not suffice to commence a limitations period); *Bianca v. Frank*, 43 N.Y.2d 168 (1977) (same).

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 qualifies for consideration 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. *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).

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. Also as in *Sica,* that remittal is not for mere ministerial matters; the Workers' Compensation Board must still finally determine whether decedent's death was in fact causally related

to the injury that resulted in his lifetime benefits and, if so, what the proper calculation of the death benefit should be.[4] 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.

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[4] We are advised that, while this matter remained pending in the Third Department, the agency went on to consider whether the decedent's death was in fact causally related to the injury that gave rise to his lifetime-benefits award. While a worker's compensation law judge has found that the death was causally related, applications for Board review of that finding remains pending.

STATUTORY BACKGROUND[5]

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

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[5] The following background section is identical to the background section presented in the Board's motion for leave to appeal in *Rexford,* 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 1933, 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,[6] 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

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[6] 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.

further proceedings were foreseen." *American Economy Ins. Co. v. State of New York*, 30 N.Y.3d 136, 141 (2017).

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

Francis Verneau was found disabled from work on account of pulmonary asbestosis, asbestos-related pleural disease, chronic irritative bronchitis and chronic obstructive pulmonary disease all related to his work activities, and was awarded workers' compensation benefits effective June 1, 2000. (R10.) In December 2011, liability for

those lifetime benefits was transferred from his employer, Consolidated Edison of New York, to the Special Fund for Reopened Cases under WCL § 25-a. (R14.) The Special Fund thereafter remained responsible for those benefits.

Mr. Verneau (hereinafter decedent) died in January 2017. In March of that year, his widow (claimant) applied for consequential death benefits, alleging that decedent's asbestosis contributed to his death. (R25.) The Board initially identified the claim as a claim against the Special Fund, but it issued a correction the following day identifying the claim as a claim against decedent's employer. (R27, 29.) The employer filed a denial, and a hearing was held at which both the employer and the Special Fund were present. (R12.)

Following the hearing, the Workers' Compensation Law Judge (WCLJ) issued a decision designating Special Fund as the entity responsible for the claim and removed the employer from notice. (R45-47.) After other proceedings, the Special Fund administratively appealed. The Board Panel reversed the WCLJ's decision, holding that under WCL § 25-a(1-a), a claim for consequential death benefits submitted after the January 1, 2014 cut-off was time barred.

On the employer's appeal to the Third Department, the court reversed the Board Panel's determination and held that the Special Fund was responsible for the claim for death benefits. *See Matter of Verneau v. Consolidated Edison,* 174 A.D.3d 1022 (2019 Slip Op. 05369) (3d Dep't 2019).

In so holding, the Third Department relied on its earlier decision in *Matter of Misquitta v. Getty Petroleum,* 150 A.D.3d 1363 (3d Dep't 2017). *See Verneau,* 174 A.D.3d at 1024. The Third Department rejected the argument that this Court's intervening decision in *American Economy* warranted reexamination of that precedent. *Id.* at 1025-26. Instead, 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 consequential death benefits is automatically transferred to the fund, even for claims arising after the January 1, 2014 cut-off date.

The Third Department 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 Third Department reasoned that the cut-off date imposed by WCL § 25-a(1-a) did not apply to the particular case before it. *Id.*

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 consequential 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.[7] 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. No. 527981.

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[7] Available at: http://www.nycourts.gov/reporter/webdocs/PPGG_Article_VIIMS.pdf.

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.

While the Third Department purported to base its ruling on an alternative ground—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.[8]) 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).

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[8] Available at: http://www.wcb.ny.gov/content/main/forms/rfa-2.pdf.

Here, the issue whether liability for consequential death benefits should be transferred to the fund was plainly raised, because the WCLJ decided precisely that transfer issue. (R45-47.) Thus, the Board reasonably concluded that the statutory requirement for "an 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 OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

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

FRANCES VERNEAU,

Claimant,

- against -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., et. al.,

Appellants,

- and

SPECIAL FUND FOR REOPENED CASES,

Respondent,

-and-

WORKERS' COMPENSATION BOARD,

Respondent.

MEMORANDUM & ORDER WITH NOTICE OF ENTRY

Index No. 527837

S I R S:

PLEASE TAKE NOTICE that the within is a true copy of a Memorandum and Order duly entered in the Office of the Clerk of the within named Court on July 3, 2019.

DATED: July 5, 2019
Tarrytown, New York

YOURS, ETC.

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

Decided and Entered: July 3, 2019 527837

In the Matter of the Claim of
FRANCES VERNEAU,
Claimant,
v

CONSOLIDATED EDISON CO. OF
NEW YORK, INC., et al.,
Appellants, MEMORANDUM AND ORDER
and

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.

Cherry, Edson & Kelly, LLP, Tarrytown (Ralph E. Magnetti of counsel), for appellants.

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

Mulvey, J.

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

Claimant's husband (hereinafter decedent) was diagnosed with pulmonary asbestosis, asbestosis related pleural disease, chronic irritative bronchitis and chronic obstructive pulmonary disease related to his work activities. He applied for workers' compensation benefits, and his claim was established for an occupational disease, with a date of disablement of June 1, 2000. Liability for the claim was transferred, effective in December 2011, from the self-insured employer to the Special Fund for Reopened Cases pursuant to Workers' Compensation Law § 25-a.

Decedent died in January 2017. In March 2017, claimant applied for workers' compensation death benefits alleging that decedent's asbestosis contributed to his death. The Workers' Compensation Board initially indexed the case against the Special Fund, but subsequently issued a corrected notice naming the self-insured employer as the carrier. The self-insured employer, through its third-party administrator (hereinafter collectively referred to as the employer), submitted a denial. Following a hearing, a Workers' Compensation Law Judge (hereinafter WCLJ) found prima facie evidence of consequential death, removed the employer from notice, indicated that the Special Fund would be liable if the death were causally related, and continued the case.[1] Following a subsequent hearing, the WCLJ established the case for consequential death, resulting in the Special Fund being responsible for the claim.

The Special Fund sought review by the Board, contending that the transfer of liability was barred by Workers'

[1] It is unclear why the employer was removed from notice and the Special Fund was deemed responsible for any awards, inasmuch as the record does not contain the transcript of that hearing and the WCLJ's decision does not explain those rulings.

Compensation Law § 25-a (1-a). A panel of the Board agreed, relying 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]), and concluded that Workers' Compensation Law § 25-a liability did not apply to the case. The employer appeals.

The Court of Appeals has noted that one of the purposes for the creation of the Special Fund 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,' would continue to receive necessary benefits, even if the insurance carrier had become insolvent" (American Economy Ins. Co. v State of New York, 30 NY3d at 141, quoting Matter of Ryan v American Bridge Co., 243 App Div 496, 498 [1935], affd 268 NY 502 [1935]). In furtherance of this purpose, Workers' Compensation Law § 25-a was enacted to establish a framework for transferring liability from insurance carriers to the Special Fund for the payment of stale claims meeting certain criteria (see American Economy Ins. Co. v State of New York, 30 NY3d at 141; Matter of Goutremout v Advance Auto Parts, 134 AD3d 1194, 1195 [2015]; see also Workers' Compensation Law § 25-a [1]). In 2013, however, due largely to the increase in the cost of operating the Special Fund, the Legislature decided to close it to new applications and amended the statute by adding Workers' Compensation Law § 25-a (1-a) (L 2013, ch 57, § 1, part GG, § 13; see American Economy Ins. Co. v State of New York, 30 NY3d at 142-143). Workers' Compensation Law § 25-a (1-a) provides, as relevant here, 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]." Because this case involves a question of pure statutory analysis, we need not defer to the Board's interpretation of the statute (see Matter of De Mayo v Rensselaer Polytech Inst., 74 NY2d 459, 462 [1989]).

We agree with the employer that the imposition of liability on the Special Fund in this case is not precluded by

the above statutory amendment, given that liability was transferred to the Special Fund in December 2011, well before the January 1, 2014 closure date. The record does not indicate any violation of the plain language of the statutory sentence at issue. Indeed, the record does not contain a copy of any application by the employer for transfer of liability of a claim to the Special Fund, nor any indication that such an application was filed after January 1, 2014. Thus, the record does not support a finding of a violation of the statute prohibiting the Board from accepting, after the cut-off date, any application by an employer or carrier for transfer of liability of a claim to the Special Fund (see Workers' Compensation Law § 25-a [1-a]).

This conclusion is supported by our decision in Matter of Misquitta v Getty Petroleum (150 AD3d 1363 [2017]), which involved a factual situation similar to that presented here. In Misquitta, the decedent had an established workers' compensation claim that had been transferred to the Special Fund prior to his death and, after his death, his widow filed a claim for workers' compensation death benefits. While acknowledging that the consequential death claim was separate and distinct from the decedent's original claim, this Court ruled that "where . . . liability for a claim has already been 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" (id. at 1365).[2]

[2] To the extent that some parties contend that our decision in Matter of Connolly v Consolidated Edison (124 AD3d 1167 [2015]) is controlling here, we disagree. Connolly is not inconsistent with Misquitta, as Connolly involved "a claim for reimbursement" of death benefits from the Special Disability Fund under a completely different statutory provision (Workers' Compensation Law § 15 [8] [h] [2] [A]). Awards made pursuant to Workers' Compensation Law § 15 (8) "shall be made against the employer or his or her insurance carrier," who "shall in the first instance make the payments of compensation and medical expenses provided by this subdivision," but may then be reimbursed by the Special Disability Fund upon making a claim for such reimbursement (Workers' Compensation Law § 15 [8] [f]; see Workers' Compensation Law § 15 [8] [g]). Comparatively,

Significantly, this Court specifically found that Workers' Compensation Law § 25-a (1-a), closing the Special Fund to applications filed after January 1, 2014, was inapplicable given that liability had been transferred to the Special Fund in 2000 (id.).[3]

The Court of Appeals' decision in American Economy Ins. Co. v State of New York (30 NY3d 136 [2017], supra) is not inconsistent with Misquitta and does not compel a contrary result. The only issue before the Court in American Economy was the constitutionality of the 2013 amendment adding the closure provision of Workers' Compensation Law § 25-a (1-a), which was challenged as retroactively imposing unfunded costs upon insurance companies for policies that were finalized before the effective date of the amendment. The Court rejected the insurance companies' claims under the Contract Clause (see US Const, art I, § 10 [1]) and the Takings Clause (see US Const 5th Amend), as well as their substantive due process challenge (American Economy Ins. Co. v State of New York, 30 NY3d at 150-158). Notably, the Court did not specifically state or otherwise suggest that Workers' Compensation Law § 25-a (1-a) applied to foreclose the Special Fund from continuing to be liable for consequential death claims arising where a decedent had an established workers' compensation claim for which the Special Fund was already liable prior to January 1, 2014. To the extent that the Board relied upon American Economy in

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"[o]nce [Workers' Compensation Law §] 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 De Mayo v Rensselaer Polytech Inst., 74 NY2d 459, 462-463 [1989]; see Matter of Fitzgerald v Berkshire Farm Ctr. & Servs. for Youth, 87 AD3d 353, 355 [2011]).

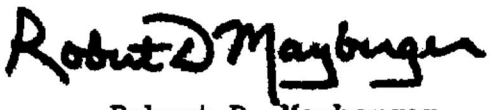
[3] This Court was well aware that an appeal in American Economy was pending before the Court of Appeals, but found it unnecessary to address the constitutionality of the 2013 amendment adding Workers' Compensation Law § 25-a (1-a) (Matter of Misquitta v Getty Petroleum, 150 AD3d 1363, 1365 n [2017]).

concluding that liability for claimant's consequential death claim did not shift to the Special Fund under the circumstances presented here, and in the absence of any other legal support for its conclusion, its decision must be reversed.

Clark, J.P., Devine, Aarons and Rumsey, 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:



Robert D. Mayberger
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

----------x

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

FRANCES VERNEAU,

Claimant,

- against -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., et. al., Appellants,

- and

SPECIAL FUND FOR REOPENED CASES,

Respondent,

-and-

WORKERS' COMPENSATION BOARD,

Respondent.

----------x

DECISION & ORDER ON MOTION
NOTICE OF ENTRY

Index No. 527837

S I R S:

PLEASE TAKE NOTICE that the within is a true copy of the Decision and Order on Motion duly entered in the Office of the Clerk of the within named Court on October 3, 2019.

DATED: October 8, 2019
Tarrytown, New York

YOURS, ETC.

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

Decided and Entered: October 3, 2019 527837

In the Matter of the Claim of FRANCES VERNEAU,
Claimant,
v
CONSOLIDATED EDISON CO. OF NEW YORK, INC., et al.,
Appellants,
and
SPECIAL FUND FOR REOPENED CASES,
Respondent.
WORKERS' COMPENSATION BOARD,
Respondent.

DECISION AND ORDER ON MOTION

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. Mayberger
Clerk of the Court

Exhibit H