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Worker's Compensation Board No. G1830693
Appellate Division, Third Department Docket No. 527837

Court of Appeals

STATE OF NEW YORK



In the Matter of the Claim of

FRANCES VERNEAU,

Claimant,

against

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

Respondents,

SPECIAL FUND FOR REOPENED CASES,

Appellant,

and

WORKERS COMPENSATION BOARD,

Respondent.

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

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COURT OF APPEALS
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 N.Y., INC.,
Employer-Respondent,
SEDGWICK CLAIMS MANAGEMENT SERVICES,
Third-Party Administrator-Respondent,
SPECIAL FUND FOR REOPENED CASES,
Appellant,

-and-

WORKERS' COMPENSATION BOARD,
Respondent.

**AFFIRMATION
IN OPPOSITION
TO MOTION FOR
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RALPH E. MAGNETTI, an attorney duly admitted to practice law before the Courts of the State of New York, affirms the following to be true under penalties of perjury:

1. I am a partner of the Law Firm of Cherry, Edson & Kelly, LLP, attorneys for Consolidated Edison Co. of N.Y., Inc., and Sedgwick Claims Management Services, the employer, and their third-party administrator-respondents. As such, I am fully familiar with the facts and circumstances surrounding this matter.

2. This affirmation is submitted in opposition to the Motion made by the Special Fund for Reopened Cases-Appellant seeking permission for leave to appeal to the Court of Appeals from the Decision and Order of the New York

State Supreme Court, Appellate Division, Third Judicial Department dated and entered July 3, 2019 which was served with a Notice of Entry on July 5, 2019 in *Matter of Verneau v. Consolidated Edison Co. of NY, Inc.*, 174 A.D.3d 1022, 2019 N.Y. Slip Op. 05369 (3d Dept., 2019).

3. The employer-respondent appealed the decision of the Workers' Compensation Board filed May 9, 2019 because it was erroneously determined that WCL Section 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.

4. The decision of the New York State Supreme Court, Appellate Division, Third Judicial Department, dated and entered July 3, 2019, reversed the decision by the New York State Workers' Compensation Board filed May 9, 2018, and ruled that the decision was inconsistent with the legal precedent established in *Matter of Misquitta v. Getty Petroleum*, 150 A.D. 3d 1363 (3d Dept., 2017), and prior cases addressing the same issue.

5. The decision of the New York State Supreme Court, Appellate Division, Third Judicial Department, dated and entered July 3, 2019 was served with a Notice of Entry on July 5, 2019.

6. The Special Fund for Reopened Cases filed a Motion seeking permission from the Appellate Division to appeal to the Court of Appeals on July 29, 2019. The Appellate Division denied the Motion by Decision dated and entered October 3, 2019. A copy of the October 3, 2019 Decision with Notice of Entry was served upon the Respondent on October 8, 2019.

7. The Special Fund for Reopened Cases now seeks permission from this Court for leave to appeal. For the reasons which follow, the Motion made by the Special Fund should be denied.

8. The decision by the New York State Supreme Court, Appellate Division, Third Judicial Department properly determined that WCL Section 25-a(1-a) did not 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. This was consistent with the Court's prior decision in *Matter of Misquitta v. Getty Petroleum* (Id.), and nothing stated in the Court of Appeals Decision in *American Economy Ins. Co. v. State of New York*, 30 N.Y. 3d 136 (2017) suggested a contrary result.

9. The question presented by Special Fund for Reopened Cases does not merit review by the Court of Appeals. The issue was not novel or of public importance, does not present a conflict with prior decisions of the Court of

Appeals, or involve a conflict among the departments of the Appellate Division. Furthermore, the decision was unanimous. There was no dissenting opinion.

10. In fact, the argument made by the Special Fund, which was rejected by the Court below, was that the Court of Appeals' decision in *American Economy Ins. Co. v. State of New York*, (Id.), upholding the constitutionality of WCL Section 25(1-a) somehow overruled the decision by the Court below in *Misquitta*. Clearly, that argument was without merit, and had to be rejected, so the Respondent is now arguing that the *Misquitta* decision, as well as its predecessors, *Matter of Fitzgerald v. Berkshire Farms Center & Services for Youth*, 87 A.D. 3d 353 (3d Dept., 2011) and *Matter of DeMayo v. Rensselaer Polytech Inst.*, 74 N.Y. 2d 459 (1989) were either wrong, or did not consider the argument that a death claim is a "new claim legally separate and distinct from a closed disability claim" (citing *Zechmann v. Canistota Volunteer Fire Dept.*, 85 N.Y. 2d 747 (1995)). However, a review of this Court's decisions in *Zechmann* and *DeMayo* reveals that the Special Fund was not even opposing the fact that it was obligated to defend the claims for death benefits in those cases, because liability for the underlying claim had already been shifted to the Special Fund under WCL Section 25(a). Although this Court determined in *Zechmann* that the death claim was a new claim for the purposes of determining whether the claim would be barred by WCL Section 123, the decision did not indicate that it was a new claim for which the Special Fund was no longer liable under WCL Section 25-a. After *Zechmann*

was decided, this issue was addressed in *Commissioners of State Ins. Fund v. Hallmark Operating, Inc.*, 61 A.D. 3d 1212 (3d Dept., 2009), and it was held that the date of the original injury, rather than the date of death determined what insurance carrier was obligated to defend the claim for death benefits. Thereafter, the Workers' Compensation Board has consistently held that when one workers' compensation carrier provided coverage on the date of an accident or an occupational disease, but there was a different workers' compensation carrier on the date that a death occurred, which was consequentially related to the original date of accident or occupational disease, it is the workers' compensation carrier that was responsible for the original injury, not the workers' compensation carrier on the date of death that is responsible for the death claim. Thus, it logically follows that when the Special Fund under WCL Section 25-a assumes responsibility for a disability claim, and a death occurs that is consequentially related to that claim, the Special Fund for Reopened Cases remains responsible for the death claim. As for the statement made by counsel for the Special Fund for Reopened Cases at page 7 of its motion, suggesting that "the only way to transfer liability for the death claim to the Special Fund for Reopened Cases is to treat the death claim as a reopening of the lifetime claim – a maneuver that the Court of Appeals has specifically rejected", there is no decision by this Court that is contrary to the legal precedent that WCL Section 25-a applies to a death claim,

when WCL Section 25-a was already found to apply to the underlying disability claim.

11. Counsel for the Special Fund for Reopened Cases has also included rhetoric regarding the amount of money that businesses are going to save as a result of closing the Special Fund for Reopened Cases, and the unknown number of currently closed cases that may result in future claims for death benefits based on the decision at hand. This is a peculiar statement, given the fact that the Special Fund for Reopened Cases is in possession of all of the cases where WCL Section 25-a liability has already been established, and in many of those cases (like the present case where the decedent was being paid lifetime benefits until he passed away at the age of 76, leaving behind a 74 year old surviving spouse) the Special Fund for Reopened Cases is making payments to elderly individuals who are suffering from occupational diseases that may eventually lead to their demise. When and if that occurs, an elderly surviving spouse may be entitled to the payment of death benefits until death, but that will not significantly lengthen the amount of time that the Special Fund must continue to exist, so the legislative purpose of closing the Special Fund for Reopened Cases will not be delayed by the decision by the Court below. In *American Economy Ins. Co.*, this Court noted that the 2013 amendment to WCL Section 25-a (1-a) provided that no application for transfer of liability of a claim to the Fund for Reopened Cases shall be accepted on or after January 1, 2014, but the Fund remained open to administer

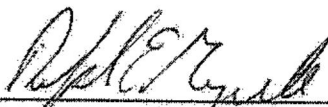
reopened cases previously assigned to the Fund. Thus, having the Special Fund for Reopened Cases remain liable for death claims consequentially related to an underlying claim for which they are already responsible is consistent with the statutory amendment. Therefore, the argument that a new transfer of liability subsequent to the decedent's death is required, but prohibited by WCL Section 25-a (1-a) because the death occurred after January 1, 2014 is without merit.

12. Based on the foregoing, it is respectfully submitted that the Special Fund for Reopened Cases-Respondent's Motion for leave to appeal to the Court of Appeals should be denied.

13. That the undersigned attorney of law under penalty of perjury states that the aforementioned statements are true.

WHEREFORE, it is respectfully submitted that the Special Fund for Reopened Cases-Respondent's Motion be denied in its entirety, and for such other and further relief as the Court deems just and proper.

Dated: Tarrytown, New York
November 20, 2019



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