No. APL-2020-00043

To be argued by:
PATRICK WOODS
10 minutes requested

State of New York
Court of Appeals

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

Claimant,

v.

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

Respondents,

SPECIAL FUND FOR REOPENED CASES,

Appellant,

WORKERS' COMPENSATION BOARD,

Appellant.

BRIEF FOR APPELLANT

LETITIA JAMES
Attorney General
State of New York
Attorney for Workers' Compensation Board
The Capitol
Albany, New York 12224
(518) 776-2020
(518) 915-7723 (*f*)
Patrick.Woods@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
ANDREA OSER
Deputy Solicitor General
PATRICK WOODS
Assistant Solicitor General of Counsel

Dated: October 6, 2020

Supreme Court, Appellate Division Third Department No. 527837

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PRELIMINARY STATEMENT

The Special Fund for Reopened Cases (Special Fund) was established by the Workers' Compensation Law in 1933 to protect workers by assuring funding for long-term claims and to relieve insurance carriers and self-insured employers of the unanticipated liability that arises when a case long closed is reopened due to unforeseen circumstances. The law permitted insurance carriers and self-insured employers, upon satisfying certain conditions, to transfer liability for workers' compensation claims to the Special Fund. More recently, the Legislature determined that the fund was no longer needed to protect workers, had become costly to employers, and was giving insurance carriers an unintended windfall. Accordingly, the Legislature enacted Workers' Compensation Law § 25-a(1-a) to close the fund to claims submitted for transfer on or after January 1, 2014, while keeping the fund open only as long as necessary to fund claims previously transferred.

The Appellate Division, Third Department, held in this case and in a companion case decided the same day—*Matter of Rexford*

v. Gould, 174 A.D.3d 1026 (3d Dep't 2019), *lv. granted* 34 N.Y.3d 912 (2020)—that a claim for death benefits is exempt from the bar of Workers' Compensation Law § 25-a(1-a) when it arises from the same injury that gave rise to a lifetime benefits claim that was previously transferred to the fund. This Court should reverse.

The Third Department's decisions in these cases create an exception to the statutory bar on transferring cases to the Special Fund that is unsupported by the text of Workers' Compensation Law § 25-a(1-a). The decisions are also in tension with this Court's decision in *Zechmann v. Canisteo Volunteer Fire Dep't*, 85 N.Y.2d 747 (1995), which held that claims for death benefits constitute new claims that are distinct from any related awards made during a worker's lifetime. And the decisions undermine the Legislature's goal to close the Special Fund as promptly as possible. A claim for death benefits can accrue long after liability for a related lifetime benefits claim has been transferred to the Special Fund, and a claim for death benefits can itself remain payable for many years. If allowed to stand, the Third Department's decision would require

the Special Fund to remain open for decades into the future, contrary to the unambiguous intent of the Legislature.

QUESTION PRESENTED

Whether Workers' Compensation Law § 25-a(1-a), which precludes transfer to the Special Fund for Reopened Cases of claims submitted on or after January 1, 2014, contains an implied exception for a claim for death benefits arising from the same injury that gave rise to a previously transferred claim for lifetime benefits.

JURISDICTIONAL STATEMENT

This Court granted leave to appeal on March 24, 2020. This Court has jurisdiction of the appeal because it presents a preserved question of law, and because, although the Third Department remitted the case for further proceedings before the Workers' Compensation Board (the Board), the Court nevertheless has jurisdiction over the appeal now under C.P.L.R. 5602(a)(2). *See Power Auth. of State of New York v. Williams*, 60 N.Y.2d 315, 323 (1983); *Matter of F.J. Zeronda, Inc. v. Town Bd. of Town of Halfmoon*, 37 N.Y.2d 198, 200-01 (1975).

STATUTORY BACKGROUND[1]

A. General Provisions

The Workers' Compensation Law (WCL) requires an employer to "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." 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). This system of mandatory insurance works for the benefit of the injured worker and "for the benefit of the state," which "otherwise might be charged with his support." *Matter of Waters v. William J. Taylor Co.*, 218 N.Y. 248, 252 (1916). Benefits available under the WCL include

[1] The following description of the statutory background is identical to that set forth in the Board's brief to this Court in *Matter of Rexford v. Gould*, No. APL-2020-00042.

medical benefits, *see* WCL § 13, wage-related compensation benefits, *see id*. § 15, and in the case of death, funeral expenses and death benefits payable to the employee's survivors, *see id*. § 16.

B. The Creation of the Special Fund for Reopened Cases

Under usual policy terms, insurance carriers and self-insured employers are responsible for the future payment of all workers' compensation obligations. As a result, carriers and self-insured employers can be liable for benefits for years or even decades after an injury occurs. Before January 1, 2014, however, a carrier or self-insured employer that satisfied certain conditions could avoid its long-term obligation to pay benefits by transferring the liability for those benefits to the Special Fund for Reopened Cases.

The Special Fund was established in 1933, L. 1933, ch. 384, § 2 (codified at WCL § 25-a), to address the risk that "awards in stale cases would never be paid, such as those where the employer had gone out of business, had left the jurisdiction, had died without means, or the insurance carrier had become insolvent," *Matter of Tipton v. Lang's Bakery*, 250 A.D. 696, 698-99 (3d Dep't), *aff'd*, 275

N.Y. 572 (1937). And as this Court explained in *American Economy Ins. Co. v. State of New York*, 30 N.Y.3d 136 (2017), the Special Fund also addressed the risk that insurance carriers faced when long-closed cases unexpectedly reopened, creating unanticipated liability. *See id.* at 141-42.

The Legislature addressed these risks by providing in WCL § 25-a an application process by which insurance carriers or self-insured employers who demonstrated satisfaction of four conditions could transfer liability for workers' compensation claims to the Special Fund. *See* WCL § 25-a(1); *see also American Economy*, 30 N.Y.3d at 141 & n.1 (explaining provision). First, the original claim for benefits had to have been closed in the sense that "no further proceedings were foreseen" by the Board. *See American Economy,* N.Y. 3d at 141. Second, the claim to be transferred had to be either the original claim for benefits that the Board subsequently reopened or a new claim "for death benefits in behalf of the dependents of a deceased employee." WCL § 25-a(1). The Board could reopen a claim for benefits in a variety of circumstances where additional issues had arisen for the Board to address, *see*

WCL § 123, such as "an unanticipated change in the claimant's medical condition," *American Economy Ins.*, 30 N.Y.3d at 141.[2] Third, seven years had to have passed since the date of injury. And fourth, three years had to have passed since "the last date of payment of compensation" to the claimant. *American Economy Ins.*, 30 N.Y.3d at 141 (citing WCL § 25-a(1)).

Upon demonstrating satisfaction of these conditions, the insurance carrier or self-insured employer was entitled to transfer liability for the claim to the Special Fund, which became responsible for paying the remaining lifetime benefits on the reopened claim or the benefits payable in the transferred death benefits claim. *See American Economy Ins.*, 30 N.Y.3d at 142. Thus, "the statutory scheme contemplate[d] that the Special Fund will step into the shoes of the insurance carrier and succeed to its rights and responsibilities" and "the insurance carrier has no further

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[2] A claim could not be reopened, however, "where the application is made 'after a lapse of eighteen years from the date of injury or death and also a lapse of eight years from the last payment of compensation.'" *Matter of Zechmann v. Canisteo Volunteer Fire Dep't.,* 85 N.Y.2d 747 (1995) (quoting WCL § 123).

interest in payment of the claim." *De Mayo v. Rensselaer Polyech Inst.*, 74 N.Y.2d 459, 462-63 (1989).

C. The Closure of the Special Fund for Reopened Cases to New Claims

In 2013, the Legislature determined that the Special Fund was no longer needed for the purposes for which it was designed and closed it to applications submitted on or 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 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.

The January 1, 2014 cut-off date followed the statute's enactment by nine months. Insurance carriers and self-insured employers thus received a "nine-month grace period during which the Board would consider new applications." *American Economy Ins.*, 30 N.Y.3d at 143. The Board could, however, make a finding

after the cut-off date with respect to an application submitted before that date. Otherwise, after the cut-off date, the fund was left "open to administer reopened cases previously assigned to the Fund." *Id.*

The Special Fund is supported by annual 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); *see also American Economy Ins.*, 30 N.Y.3d at141 (explaining this point). By the time the Legislature acted in 2013 to close the Special Fund to claims submitted on or after January 1, 2014, the fund's costs had "increased dramatically" over the years and the related assessments were costing New York employers hundreds of millions of dollars annually. *Id.* at 143. At the same time, insurance carriers were already charging premiums sufficient to cover their potential liability for unforeseen reopened claims. As a result, the Special Fund was providing insurance carriers with a windfall that the Legislature determined should not be permitted to continue. Mem. in Support, 2013-2014 N.Y. State Exec. Budget, Public

Protection and Gen. Gov. Art. VII Leg. at 29.[3] By closing the fund, the Legislature sought to end the give-away to carriers and also to provide relief to employers by eliminating the annual assessments.

Moreover, the Legislature had enacted a variety of mechanisms since the Special Fund's creation to address the risks to employees that the Special Fund was intended to address. For example, WCL § 107 establishes 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." And WCL § 50(3) requires self-insured employers to furnish security.

Until the Special Fund is ultimately closed and its liabilities fully resolved, however, the Board must continue to impose assessments that will be passed on to employers. *See* WCL § 25-a(3) (requiring the fund to maintain assets sufficient to "maintain the financial integrity of the fund"). The Board advises that in 2020 alone, those assessments have thus far amounted to $425,000,000.

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[3]http://www.nycourts.gov/reporter/webdocs/PPGG_Article_VIIMS.pdf.

The closure of the Special Fund followed the Legislature's 2007 closure of the Special Fund for Second Injuries or "Special Disability Fund," which reimbursed a carrier or self-insured employer for medical and indemnity payments made for certain types of injuries. WCL § 15(8). As with the Special Fund, the Special Disability Fund was phased out; the Legislature barred reimbursement for claims for injuries or illnesses with a date of accident or disablement on or after a fixed date—July 1, 2007—as well as claims submitted after a later fixed date—July 1, 2010—while leaving the fund open for years to handle previously accepted cases. WCL § 15(8)(h)(2)(A).

D. Death Benefits Claims

When a workplace "injury causes death," WCL § 16 provides a "death benefit" that is payable the worker's survivors. A death benefit is available to survivors both when a workplace injury immediately causes the worker's death and when a workplace injury causes the worker's death years or perhaps decades later. Thus, an injury resulting in a lifetime compensatory award can also give rise years later to a claim for death benefits if the death is

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).

This Court has held that "a claim for death benefits by an employee's survivors is entirely separate from the employee's claim for compensation benefits." *Matter of Hroncich v. Con Edison*, 21 N.Y.3d 636, 646 (2013) (citing *Matter of Zechmann v. Canisteo Volunteer Fire Dep't.,* 85 N.Y.2d 747, 753 (1995)). A "claim for death benefits is a new legal right" that accrues on "the date of the death giving rise to the claim." *Zechmann,* 85 N.Y.2d at 753 (1995). It "is a new claim" and not "a reopening of the original case." *Id*. at 751.

The Workers' Compensation Law provides a range of payment schedules for a death benefit that depend upon the nature of the worker's relationship to the survivors, if any, and whether those survivors are, themselves, disabled. The payment of death benefits to survivors can extend for many years. For example, a death benefit awarded to a deceased worker's disabled child is potentially payable for the child's lifetime. *See* WCL §§ 16 (3-a), (3-b); *see, e.g.*, *Kelly v. Sugarman*, 12 N.Y.2d 298 (1963) (involving death benefit

award made to the mentally disabled adult child of a deceased worker). Indeed, a death benefit claim may be brought more than 18 years after the injury causing the worker's death and more than eight years after the last payment on a lifetime claim, even though a new claim for wage replacement benefits relating to the same injury would be time-barred by the limitation on reopening cases in WCL § 123. *Matter of Zechmann,* 85 N.Y.2d at 753.

STATEMENT OF THE CASE

Francis Verneau was disabled from work on account of pulmonary asbestosis, asbestos-related pleural disease, chronic irritative bronchitis, and chronic obstructive pulmonary disease. Because these conditions were caused by his work activities, he was awarded workers' compensation benefits effective June 1, 2000. (R10.) In December 2011, liability for those lifetime benefits was transferred as provided in WCL § 25-a from his employer, Consolidated Edison of New York, to the Special Fund. (R14.) The Special Fund thereafter remained responsible for payment of those lifetime benefits.

Mr. Verneau died in January 2017. In March of that year, his

widow (the claimant in this case) applied for a death benefit award, alleging that Verneau'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 new claim against Verneau's employer. (R27, 29.) The employer denied liability, and a hearing was thereafter convened before a Workers' Compensation Law Judge at which both the employer and the Special Fund participated. (R12.)

The Workers' Compensation Law Judge issued a decision designating the Special Fund as the entity responsible for the new death benefits claim and removing the employer from the list of parties requiring notice of the proceedings. (R45-47.) On the Special Fund's administrative appeal, the Board reversed the Workers' Compensation Law Judge's decision, holding that under WCL § 25-a(1-a), a claim for death benefits submitted on or after the January 1, 2014 cut-off was time barred.

The employer appealed to the Third Department. Reversing the Board's determination, the Third Department held that the Special Fund was responsible for the death benefits claim. (R117-

122). The Third Department reasoned that where a decedent had obtained a lifetime benefits award, and the liability for that award had previously been transferred to the Special Fund, liability for the related death benefits claims is automatically the responsibility of the Special Fund, even though the death benefit claim had not even accrued until after the January 1, 2014 cut-off date set by the Legislature.

The Third Department additionally sought 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 an application had in fact 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 in any event. *Id.*

This Court thereafter granted leave to appeal from the Third Department's decision in this case and in another Third Department decision handed down the same day that involves the

same legal issue: *Matter of Rexford v. Gould,* 174 A.D.3d 1026 (3d Dep't 2019) *lv. granted* 34 N.Y.3d 912 (2020).

ARGUMENT

DEATH BENEFITS CLAIMS ACCRUING ON OR AFTER JANUARY 1, 2014 CANNOT BE TRANSFERRED TO THE SPECIAL FUND FOR REOPENED CASES

In WCL § 25-a(1-a), the Legislature barred the Board from transferring liability for claims submitted on or after January 1, 2014 to the Special Fund for Reopened Cases. The Third Department's decision here created an exception to that statutory bar that is unsupported by the statute's text or purpose. And contrary to the Third Department's holding, that statutory bar should not be evaded merely because an insurance carrier or self-insured employer opts not to submit a formal application for transfer, particularly where the Board has no practice of requiring formal applications. Accordingly, the Third Department's decision is incorrect and should be reversed.

A. The Third Department's Holding Creates an Exception to the Bar on Transfer that Is Unsupported by the Text of WCL § 25-a(1-a) and this Court's Precedents

With the enactment of WCL § 25-a(1-a), the Legislature clearly and unambiguously closed the Special Fund to claims submitted on or after January 1, 2014. "As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must be the language itself." *Raynor*, 18 N.Y.3d at 56. The text of WCL § 25-a(1-a) prohibits the transfer of liability of a claim from the original self-insured employer or insurance carrier to the Special Fund submitted on or after January 1, 2014:

> 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.

Nothing in this text admits an exception for a claim for death benefits submitted after the January 1, 2014 cut-off date, even one that arises from the same injury that resulted in a previously transferred claim for lifetime benefits.

"[T]he Legislature is presumed to be aware of the law in existence at the time of an enactment," *Matter of Amorosi v. S. Colonie Ind. Cent. Sch. Dist.*, 9 N.Y.3d 367, 375 (2007), including the longstanding rule that a claim for death benefits does not reopen an older closed claim, even if it stems from the same workplace injury. *Matter of Zechmann,* 85 N.Y.2d at 751. To the contrary, 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." *Id.* at 751; *see also Matter of Hroncich*, 21 N.Y.3d at 646 (reiterating this principle); 1934 N.Y. Op. (Inf.) Att'y Gen. 509, 510 (1934) ("In my opinion disability and death claims are entirely separate and independent of each other.").

This Court's rule in *Zechmann* reflects the fact that a claim for death benefits presents new issues that necessarily must be decided in the first instance at a new proceeding. At the threshold, a death benefit is available only if the workplace injury contributed to the death. WCL § 16. And the calculation of the death benefit turns not on the nature of the worker's disability and the extent to

which compensation for that injury is appropriate, but rather the level of financial support that the Legislature deemed appropriate for the deceased worker's survivor. WCL § 16. For example, a childless widow receives until death or remarriage 40% of the decedent's average wages, without regard to the extent to which wage-earning capacity was diminished by the workplace injury. WCL § 16(1-b). An orphaned child, by contrast, receives 66 2/3% of the decedent's average wages. WCL § 16 (3-a). And those payments continue until the child turns 18, until the child turns 23 if a full-time student, or for life if the child is disabled. WCL § 16 (3-a). As this Court has explained, death benefits are "not about replacing lost wages, but rather compensat[ing] for a life lost at least partly because of work related injury or disease." *Matter of Hroncich*, 21 N.Y.3d at 647.

If the Legislature had intended to except from its general prohibition on the transfer of claims to the Special Fund those new claims for death benefits that arose from the same injuries that gave rise to lifetime claims previously transferred to the Special Fund, "it knew how to do so, and any omission" of language creating

such a carve-out must be construed as intentional. *El-Dehdan v. El-Dehdan*, 26 N.Y.3d 19, 34 (2015) (citing McKinney's Cons. Laws of N.Y., Book 1, Statutes § 74; *Pajak v. Pajak*, 56 N.Y.2d 394, 397 (1982)). Indeed, the Legislature *did* create a carveout from WCL § 25-a(1-a) for requests for transfer of liability to the fund that were pending on the closure date; the statute goes on to provide that, as long as a claim was *submitted* for transfer before the statutory cut-off date, the Board could render a *finding* on that transfer request after that date. *See Closing of the Fund for Reopened Cases*, Board Subject No. 046-630 (Oct. 10, 2013) (explaining that transfer to the Special Fund may be fully litigated if the issue is raised before January 1, 2014).[4] But that exception does not apply here.

In holding the statutory bar of WCL § 25-a(1-a) inapplicable because "liability was transferred to the Special Fund in 2011, well before the January 1, 2014 closure date" (R120), the Third Department ignored the statutory text and did precisely what this Court made clear was forbidden in *Zechmann*—it conflated the

[4] http://www.wcb.ny.gov/content/main/SubjectNos/sn046_630.jsp

death benefits claim that accrued upon the decedent's death in 2017 with the decedent's claim for lifetime disability benefits that had been transferred to the Special Fund in 2011.

If, as this Court has consistently held, a death benefits claim is "a new legal right" that accrues on "the date of the death giving rise to the claim," *Zechmann*, 85 N.Y.2d at 753, then there is no claim and no liability to be transferred to the Special Fund while the decedent lives. Indeed, at the time that a lifetime claim is transferred, it is not known whether a causally related death benefit claim will ever lie. Only after the decedent has died does a death benefit claim accrue such that it could potentially be subject to transfer to the Special Fund. Because, however, the death benefits claim at issue here did not accrue until 2017, and thus after the January 1, 2014 cut-off date in WCL § 25-a(1-a), that claim could not be transferred to the Special Fund, even though an earlier, but separate and distinct, claim for lifetime benefits was transferred to the Special Fund in 2011.

The Third Department's reliance on its prior decisions in *Matter of Misquitta v. Getty Petroleum*, 150 A.D.3d 1363 (3d Dep't

2017), and *Matter of Fitzgerald v. Berkshire Farm Ctr. & Servs. For Youth*, 87 A.D.3d 353, 355 (3d Dep't 2011), was misplaced for the same reason it erred in this case. Both decisions—neither of which was appealed to this Court—made the same mistake of conflating an award of benefits to the decedent during the decedent's lifetime with responsibility for a death benefit claim filed by a decedent's survivors. Each decision erroneously assumed the transfer of the earlier lifetime benefit claim automatically effectuated a transfer of the later death benefit claim, even though that later claim had not accrued when the earlier lifetime benefit claim was transferred.

Nor does this Court's decision in *Matter of De Mayo v. Rensselaer Polyech Inst.*, 74 N.Y.2d 459, 462-63 (1989), support a different result. That case involved neither the transfer of a new claim for death benefits to the Special Fund nor two separate claims of any kind. Rather, in *De Mayo,* the Court held that the Special Fund was responsible for a late payment penalty when it did not timely make payment on a single transferred claim for disability benefits awarded to a living claimant. The Court observed, with respect to that lone claim, that once the claim had been transferred,

"the insurance carrier has no further interest in payment *of the claim*." *Matter of De Mayo v. Rensselaer Polyech Inst.*, 74 N.Y.2d 459, 462 (1989) (emphasis added). This Court did not hold, or even suggest, that the original insurer was relieved of liability for a new claim "entirely separate from the employee's claim for compensation benefits." *Matter of Hroncich*, 21 N.Y.3d at 646. Indeed, it could not have done so consistent with its earlier decision in *Zechmann.*

The Third Department's decision here is also inconsistent with its own prior precedent. In *Matter of Connolly v. Consolidated Edison*, 124 A.D.3d 1167 (3d Dep't 2015), a self-insured employer requested 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, a fund similar to the Special Fund for Reopened Cases. *See supra* at 11. 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 statutory cut-off date. *Matter of Connolly,* 124 A.D.3d at 1169-70. Unlike here, the Third Department correctly

recognized in *Connolly* 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 purposes of death benefits reimbursement." *Id.* at 1169 (internal citation omitted). 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 (R120-21), suffice to distinguish the decision. The schemes are the same in substance.

In sum, the text of WCL § 25-a(1-a) closed the Special Fund to claims submitted as of January 1, 2014, and this Court's precedents make clear that a death benefit claim is a new claim. Consequently, the Third Department's holding below, which would transfer to the Special Fund a new death benefit claim submitted on or after January 1, 2014, is incorrect and must be reversed.

B. The Third Department's Holding is Contrary to the Will of the Legislature that the Special Fund be Closed Expeditiously

Even if WCL § 25-a(1-a)'s text and this Court's precedent were not sufficient to resolve the issue (but they are), the Third Department's decision is wrong for the additional reason that its interpretation is contrary to the intent of the Legislature. And "'[g]enerally, statutes designed to promote the public good will receive a liberal construction and be expounded in such a manner that they may, as far as possible, attain the end in view.'" *Carlson v. American Int'l Grp., Inc.*, 30 N.Y.3d 288, 306-07 (2017) (quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 341, Comment)).

As this Court recognized when it assessed the constitutionality of § 25-a(1-a) in *American Economy Ins. Co.*, the Legislature's intent when enacting § 25-a(1-a) was twofold. *See supra* at 9-10. First, the Legislature intended to provide a financial benefit to employers in New York State by closing the Special Fund and thereby "sav[ing] New York businesses hundreds of millions of dollars in assessments [to support the fund] every year." *American Economy Ins. Co.*, 30 N.Y.3d at 158. Second, the Special Fund had

effectively become a windfall for insurance carriers, absolving them of potential liability accounted for in the premiums charged to employers, which the Legislature sought to end. *Id*. at 143-44.

Both of these legislative purposes would be significantly frustrated if the Third Department's decision were permitted to stand. 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 injury has already been imposed on the Special Fund, the Third Department adopted a rule that will require the Special Fund to remain open and for assessments to continue for years if not decades to come. And in the meantime, insurance carriers will continue to be unfairly relieved of the liability for this category of death benefit claims.

The Special Fund cannot fully close until claims previously transferred to it are resolved. The Third Department's rule would require it to remain open still longer because 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. At a minimum, the Third Department's rule

would require the Special Fund to stay open until two years after the last living beneficiary of any award that had been transferred to it has died, regardless of when that award was fully paid out, to be sure no death benefit claim would follow. *See* WCL § 28 (two-year statute of limitations to bring a claim for death benefits). And if such a claim were brought, the resulting award could itself be payable over a period of decades, as in the case of a disabled surviving child's award under WCL §§ 16 (3-a) and (3-b). Under either scenario, the Special Fund would be required to stay open and retain funds far longer than the Legislature intended when it enacted WCL § 25-a(1-a).

Nor is there reason to think that the number of cases in which a new death benefit claim might be transferred to the Special Fund in the future is inconsequential. According to the Board's records, there are more than *nine thousand* cases in which liability for a lifetime benefit award has been transferred to the Special Fund and the claimant is still living. The injury underlying the award in any of those cases could potentially give rise to a new claim for death

benefits for which the Special Fund would be liable under the Third Department's erroneous holding.

Accordingly, the Third Department's decision should be reversed for the additional reason that it would undermine the intention of the Legislature to close the Special Fund expeditiously.

C. The Third Department's Alternative Holding Is Mistaken

The Third Department sought to provide an alternative reason for its holding that the death claim at issue here could be transferred without violating § 25-a(1-a). The court reasoned that the statutory cut-off applied only to new "applications" by insurance carriers or self-insured employers for the transfer of claims and, finding no evidence of any *formal* application for a transfer in the record in this case, the court concluded that § 25-a(1-a) did not apply. (R120.) That overly formalistic reading of § 25-a(1-a) is mistaken for two reasons.

First, the Third Department's interpretation of the statutory text to require a formal application from an insurance carrier or self-insured employer would disserve the Legislature's goal of

closing the Special Fund. "Words contained in a statute must, of course, be given the meaning to which they are reasonably entitled but this does not mean that [the Court] must accept the language in all of its sheer literalness and forget completely the object which the statute was designed to accomplish." *Kelly v. Sugarman*, 12 N.Y.2d 298, 300 (1963). If, as on the record here, a Worker's Compensation Law Judge could transfer a case to the Special Fund merely because the insurance carrier or self-insured employer opted not to submit a formal application, the statutory bar in § 25-a(1-a) could readily be evaded and the Legislature's goal of closing the Special Fund would be significantly undermined. Indeed, on the Third Department's reading, carriers and self-insured employers could transfer even reopened claims to the fund after January 1, 2014, merely by declining to submit formal applications for transfer and relying upon the Workers' Compensation Law Judge choosing to do so anyway. Any such result would be contrary to what the Legislature intended.

Second, the Third Department's reading ignores how transfers of liability to the Special Fund operate in practice. The

Board does not require a formal application by a self-insured employer or insurance carrier to transfer of liability for a claim to the Special Fund. To be sure, the Board provides 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.[5]) But as long as the transfer issue 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).

Here, the issue whether liability for consequential death benefits should be transferred to the fund was raised when the self-insured employer, Consolidated Edison, denied liability on the ground that it had been transferred to the Special Fund, causing the WCLJ to decide the 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, in accordance with the Legislature's intention to prohibit

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

all future transfers of a claim to the Special Fund. The Third Department's reasoning to the contrary cannot stand.

CONCLUSION

For the foregoing reasons, this Court should reverse the Third Department's decision below and confirm the Board's determination.

Dated: Albany, New York
October 6, 2020

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for the Workers' Compensation Board

By: Patrick A. Woods
Patrick A. Woods
Assistant Solicitor General

The Capitol
Albany, New York 12224
(518) 776-2020
Patrick.Woods@ag.ny.gov

BARBARA UNDERWOOD
Solicitor General
ANDREA OSER
Deputy Solicitor General
PATRICK A. WOODS
Assistant Solicitor General of Counsel

AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Patrick A. Woods, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6352 words, which complies with the limitations stated in § 500.13(c)(1).

Patrick A. Woods

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