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.

REPLY BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

The Third Department's decisions in this case and in the companion case, *Matter of Rexford v. Gould,* 174 A.D.3d 1026 (3d Dep't 2019), *lv. granted* 34 N.Y.3d 912 (2020), should be reversed.

As the Board demonstrated in its opening brief, the Third Department's decision is based on two untenable holdings. First, the court held that Workers' Compensation Law § 25-a(1-a)'s statutory bar on transferring new claims to the Special Fund for Reopened Cases ("Special Fund") does not apply to a new claim for death benefits that arises from the same injury that gave rise to a lifetime benefits claim previously transferred to the fund. That holding is unsupported by the text of Workers' Compensation Law § 25-a(1-a), is in tension with this Court's decision in *Zechmann v. Canisteo Volunteer Fire Dep't*, 85 N.Y.2d 747 (1995), and undermines the Legislature's goal to close the Special Fund for Reopened Cases as promptly as possible.

Second, the Third Department alternatively held that Workers' Compensation Law § 25-a(1-a)'s bar against new transfers may be evaded where an insurance carrier opts not to submit a

written application for transfer, but instead seeks a transfer indirectly by challenging its responsibility for a claim in another manner. The statute's reference to an "application" for transfer need not be read to require a written application, however. Any such reading ignores the reality that no formal application for transfer is required for the Board to consider whether a transfer of liability to the Special Fund is warranted. And allowing the Third Department's reading to stand would significantly undermine the Legislature's intent to close the Special Fund to new claims, as even new lifetime claims for a transfer to the Special Fund could evade § 25-a(1-a)'s statutory bar.

Respondents' opposition brief presents no argument that justifies these holdings. Instead, respondents rely on wrongly decided or irrelevant Appellate Division decisions that they incorrectly identify as binding precedent and statements that this Court made in *Matter of De Mayo v. Rensselaer Polyech Inst.*, 74 N.Y.2d 459 (1989), which respondents take out of context. Respondents also offer no defense of the Third Department's interpretation of the term "application" to mean a formal written

application, notwithstanding that the text does not require that interpretation, and that the interpretation would undermine the Legislature's intention to close the Special Fund to new claims as promptly as possible. While respondents seek to downplay the impact of the Third Department's holdings, they cannot deny that the Special Fund will be required to remain open for years or decades longer if it can be made responsible for death benefits claims accruing after § 25-a(1-a)'s 2014 cut-off date.

ARGUMENT

THE THIRD DEPARTMENT'S DECISION SHOULD BE REVERSED

A. This Court's Precedents Do Not Support Respondents' Position that a Not-Yet-Extant Claim for Death Benefits Automatically Transfers to the Special Fund When a Claim for Lifetime Benefits Arising from the Same Injury Transfers.

Respondents seek to avoid § 25-a(1-a)'s bar against new transfers by arguing that, when a claim for lifetime benefits is transferred to the Special Fund, a potential future claim for consequential death benefits arising out of the same injury automatically transfers to the Special Fund *at that time*. And

respondents argue (Br. at 19-20) that binding precedent so holds. This Court has never so held.

It is true that the *Third Department* held in two prior decisions that liability for a death benefits claim "remains" the responsibility of the Special Fund if the claim arises from the same injury as one that gave rise to a lifetime benefits claim that was previously transferred to the Special Fund. *See Matter of Misquitta v. Getty Petroleum*, 150 A.D.3d 1363 (3d Dep't 2017); *Matter of Fitzgerald v. Berkshire Farm Ctr. & Servs. For Youth*, 87 A.D.3d 353, 355 (3d Dep't 2011). It is unclear from those decisions whether the Third Department found that liability for the death benefits claims at issue had already transferred to the Special Fund, before they had even accrued, or whether their transfer was automatic upon their accrual because of their relationship to the previously transferred lifetime benefits awards. Either way, however, the Third Department's decisions are erroneous and do not bind this Court.

As explained in the Board's opening brief (*See* WCB Br. at 11-13, 18-24), those decisions—which were not reviewed by this

Court—were wrong for the same reason that the Third Department's decision is wrong in this case: They are contrary to this Court's holdings that a claim for death benefits brought by a worker's survivors 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, and that such a claim "is entirely separate from the employee's claim for compensation benefits," *Matter of Hroncich v. Con Edison*, 21 N.Y.3d 636, 646 (2013). Contrary to those holdings, the Third Department in *Misquitta* and *Fitzgerald*—and then again in the decision at issue here—erroneously assumed that the transfer of the earlier lifetime benefits claim entitled the self-insured employer or carrier to a transfer of the later-accruing claim for death benefits arising from the same injury, even though the death benefits claim was a new claim that had not accrued (and might never have accrued) at the time of the transfer of the earlier lifetime benefits claim.

It is also true that the Board took the incorrect position in *Misquitta* that the claim for death benefits at issue there could be the responsibility of the Special Fund, but that is of no consequence.

The Board was wrong and candidly repudiated its earlier position in the administrative decision rendered in this case, explaining that this Court's decision reversing the First Department in *American Economy Ins. Co. v. State of New York*, 30 N.Y.3d 136 (2017), had caused the Board to reconsider its position. (R13-17.) The Board thus satisfied its obligation to explain its reason for changing its position. *See Terrace Ct., LLC. v. N.Y.S. Div. of Hous. & Comm'y Renewal*, 18 N.Y.3d 446, 453 (2012); *Matter of Charles A. Field Delivery Serv.*, 66 N.Y.2d 516 (1985).

Respondents rely on only a single decision of *this* Court, namely *Matter of De Mayo v. Rensselaer Polyech Inst.*, 74 N.Y.2d 459, 462-63 (1989), for the proposition that a future claim for consequential death benefits—even one that may never accrue—transfers to the Special Fund upon the transfer of the lifetime benefits award arising from the same injury. But *De Mayo* does not support that proposition. *De Mayo* was not a death benefits case and did not involve two legally distinct claims. Rather, *De Mayo* addressed whether the Special Fund was responsible for a late payment penalty on a claim for lifetime benefits that had been

transferred. In that context, the Court held that, because the lifetime benefits claim had already been transferred, "the insurance carrier has no further interest in payment *of the claim*," i.e., that claim. *Matter of De Mayo v. Rensselaer Polyech Inst.*, 74 N.Y.2d 459, 462 (1989) (emphasis added). *De Mayo* neither held nor suggested that an insurance carrier would have no responsibility for payment of a future and legally distinct claim for benefits for a consequential death, merely because the prior lifetime benefits claim had been transferred to the Special Fund.

Respondents also erroneously rely on the Third Department's decisions *Matter of Krausa v. Totales Debevois Corp.*, 84 A.D.3d 1545 (3d Dep't 2011), and *Comm'rs of State Insurance Fund v. Hallmark Operating*, 61 A.D.3d 1212 (3d Dep't 2009), for the proposition that a potential future claim for consequential death benefits transfers to the Special Fund upon the transfer of the lifetime benefits award arising from the same injury because the death benefit clam is "causally related" to the same accident or injury as the claim for lifetime benefits. Neither case says that. Indeed, neither case involved a transfer of liability for any kind of

claim to the Special Fund. Rather, *Krausa* held that a date of death was not a "date of accident or disablement" under Workers' Compensation Law § 15(8)(h)(2)(A).[1] And *Comm'rs of State Insurance Fund* held that, when the Board listed a date of death as the date of injury for purposes of its electronic docketing system, it had not rendered a determination regarding which of two workers' compensation insurance policies was responsible for the claim.

Zechmann v. Canisteo Volunteer Fire Dep't, 85 N.Y.2d 747 (1995), explains the important distinction between lifetime benefits and death benefits. While *Zechmann* involved a statute-of-limitations issue, the Court discussed the more general principles distinguishing the two types of claims, and those principles are not limited to issues related to the statute of limitations, as suggested in the respondents' brief in *Rexford*. Specifically, the Court in *Zechmann* explained that it was "generally accepted" that disability

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[1] *Krausa* also involved the same statutory scheme that was at issue in *Matter of Connolly v. Consolidated Edison*, 124 A.D.3d 1167 (3d Dep't 2015). Given respondents' argument that *Matter of Connolly* is inapposite precisely because it involved that statutory scheme (Resp. Br. at 23-25), rather than the analogous one at issue here, respondents' reliance on *Krausa* is ironic.

benefits awards and death benefits awards were two "separate and distinct legal proceeding[s]," and the Court noted how that understanding "comports as well with the structure of the workers' compensation statute, which provides separately for disability benefits . . . and death benefits." *Id.* at 751.

Indeed, this Court has not understood *Zechmann*'s holding to be limited to issues relating to statutes of limitations. In *Matter of Hroncich v. Con Edison*, 21 N.Y.3d 636 (2013), the Court relied on *Zechmann* when it explained that "a claim for death benefits by an employee's survivors is entirely separate from the employee's claim for compensation and benefits." *Id.* at 646. And the issue in *Hroncich* had nothing to do with statutes of limitations. Rather, *Hroncich* addressed whether the value of a death benefits award should be apportioned between work-related and non-work-related causes.

Similarly, this Court's acknowledgment in *American Economy* that the Special Fund had been left "open to administer reopened cases previously assigned to the Fund," 30 N.Y.3d at 143, did not recognize a legislative intent to make the Special Fund

responsible for new death benefits claims accruing after § 25-a(1-a)'s 2014 deadline had passed. Newly arising death benefits claims are not properly characterized as claims "previously assigned to the Fund." And, as the Court squarely held in *Zechmann*, death benefit claims are not "reopened" claims at all, but rather entirely new and separate claims from lifetime claims arising out of the same injury. 85 N.Y.2d at 751-52.

B. The Text of the New-Claims Bar in § 25-a(1-a) Does Not Limit the Bar to Transfers Asserted in Written Applications.

Contrary to respondents' argument (Resp. Br. at 9-13), the Court should reject the Third Department's alternative rationale for its decision, namely that § 25-a(1-a)'s bar to new claims applies only when an "application" for a transfer of liability to the Special Fund has been made, and that where, as here, no *formal written* application has been made, this requirement is not satisfied. While there was no formal written application for transfer in the record below, respondents sufficiently raised the issue of transfer when they denied their liability for the death benefits claim at issue on the basis that liability properly lay with the Special Fund, causing

the WCLJ to decide the transfer issue. (R45-47.) Respondents' denial of liability based the theory that the liability belonged to the Special Fund constituted a sufficient "application" to transfer liability to the Special Fund under the only reasonable reading of § 25-a(1-a). As the Board explained in the opening brief (WCB Br. at 28-30), the term "application" need not be read to mean a *written* application. And the Third Department's insistence on reading the term that way should not stand for two reasons.

First, the Third Department's reading is contrary to the Legislature's clear statutory goal to close the Special Fund. The reading creates a loophole that permits insurance carriers to evade § 25-a(1-a)'s twin purposes of saving employers money by eliminating the Special Fund's assessments and eliminating the windfall to insurers that the Special Fund had come to provide. Under the Third Department's unreasonable reading, even a newly reopened claim for lifetime benefits could be transferred to the Special Fund, so long as the insurance carrier or self-insured employer opted not to submit a *written* application for transfer, but instead sought a transfer indirectly by raising the issue in another

way, for example, by denying responsibility for a claim. Respondents simply ignore this unacceptable consequence of the Third Department's overly formalistic understating of the term "application" and accordingly fail to explain how the Third Department's reading can be harmonized with the goals of the legislative scheme.

Second, respondents fail to dispute that the Third Department's overly formalistic reading does not match the reality of practice before the Board, where an application for transfer will be deemed to have been made so long as the issue was raised at or before the hearing, whether orally or in writing. *See, e.g., Matter of DEL Labs*, 2009 NY Wrk. Comp. LEXIS 80 at *16 (2009). Respondent's ignore this fact as well.

It is no answer to say, as respondents do (Resp. Br. at 13, 19-20, 27-29, 31), that Board must go to the Legislature to fix the problems created by the Third Department's overly formalistic interpretation. Courts are charged to interpret statutes "with the legislative goal in mind, so that controversies generated by ambiguities or gaps in the law may be resolved in accordance with

the legislative scheme." *Pell v. Coveney*, 37 N.Y.2d 494, 496 (1975); *see also Kelly v. Sugarman*, 12 N.Y.2d 298, 300 (1963) (Courts should not interpret statutory "language in all of its sheer literalness and forget completely the object which the statute was designed to accomplish.") No legislative fix is required where, as here, the problem was caused by an intermediate appellate court's erroneous interpretation of the existing text and may be remedied by this Court providing the proper interpretation.

C. Respondents Wrongly Downplay the Impact of the Third Department's Holdings

Respondents seriously understate the effects of the Third Department's holdings on how long the Special Fund will be required to remain open and how long the full the benefits of § 25-a(1-a)'s enactment will be delayed. While respondents attempt to frame the effects of the Third Department's holding as hypothetical or exaggerated, they cannot and do not dispute the core problem. Specifically, as explained in the Board's opening brief (WCB Br. at 25-28), the Special Fund cannot fully close until all of the claims for which it is responsible are resolved. Whether this Court permits the

transfer now of a new death benefits claim accruing after § 25-a(1-a)'s cutoff date, or accepts' respondents' argument that the death benefits claim was previously transferred, before accrual, when the lifetime benefits claim was transferred, it will add years or decades worth of payments to the Special Fund's obligations. There are more than *nine thousand* lifetime claims that have been transferred to the Special Fund where the claimant is still living. Even if only a fraction of those claims eventually produce death benefits claims arising out of the same underlying injuries, the Special Fund will be required to remain open for years or decades to come.

Finally, to the extent respondents suggest that assessments for claims for consequential death benefits have already been fully levied, they are simply wrong. While the Special Fund's assessments are now bundled into a single charge to employers covering multiple funds, those assessments to maintain the Special Fund continue annually and cost New York employers hundreds of millions of dollars each year. In 2020, for example, the Special Fund's portion of the bundled assessment charge was $425,000,000. If the Special Fund remains responsible for thousands of additional

death benefits claims that accrue in the future, those assessments will necessarily last longer and cost New York's employers more.

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
January 25, 2021

Respectfully submitted,

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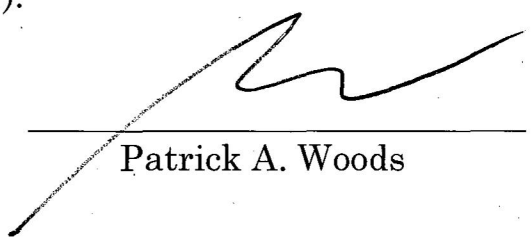
AFFIRMATION OF COMPLIANCE

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 3,131 words, which complies with the limitations stated in § 500.13(c)(1).



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