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Supreme Court, Appellate Division, Third Department, New York

In the Matter of NICOLE SCANO, as administrator of estate of STEVEN SCANO,
deceased, Appellant

v.

DOCCS TECONIC CORRECTIONAL FACILITY, Respondent,

WORKERS' COMPENSATION BOARD, Respondent

Decided June 24, 2021

Facts: Appeal from decision which ruled the claim abated upon decedent's death.

Steven Scano, decedent, was directed to move a car in his employer's snowy parking lot and that activity purportedly caused his boots and socks to become wet and led to frostbite and a wound on the left foot. Treatment was sought two weeks later, left foot was found to be infected and exhibited signs of tissue necrosis. The decedent was admitted to the hospital where he was diagnosed with diabetes, underwent surgery to amputate and developed renal failure and secondary anemia. Decedent applied for Workers' Compensation benefits approximately one month after this incident. The claim was controverted, and the decedent was scheduled to testify at a hearing and undergo an independent medical examination. The decedent died before either could occur. There was testimony from the decedent's widow about what she knew about the genesis of his injuries and from a physician who had examined the decedent as well as an independent medical review of medical records. The carrier set forth an argument that the record could not be adequately developed given the decedent's death and that caused a prejudice because of the inability to question or have a medical expert examine the decedent. The carrier argued the claim should have abated at his death and the Board ultimately agreed and disallowed the claim. The widow appealed.

Holding: *Affirmed.*

Discussion: Where an injured employee dies before his or her Workers' Compensation claim can be adjudicated, the Board has discretion to continue the proceeding, resolve any controversies and if appropriate, make an award of Workers' Compensation benefits. The Court noted that the parties are entitled as a matter of due process to the essential elements of a fair trial in resolving the controversies unless they are waived. This includes the opportunity to cross-examine witnesses and to inspect documents and offer evidence in explanation or rebuttal. The Court went on to note that the Board had recognized that those opportunities may be impaired where an injured employee dies in the midst of his or her Workers' Compensation claim and has, as a result, declined to allow such a claim to proceed where the record is undeveloped and the employer or carrier is unable to cross-examine the deceased claimant. The Court noted the record was undeveloped in that the decedent did not testify nor was there any evidence submitted in the form of direct evidence detailing the decedent's work activities on March 20, 2017 which is the date of this alleged accident. The Court also noted that the medical evidence was deficient on this issue as well. The substantial evidence in the instant matter was not developed at the time of the decedent's death and the carrier would not have been able to cross-examine the decedent or have him examined on the outstanding issues.

Stewart, Greenblatt, Manning & Grov