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Supreme Court, Appellate Division, Third Department, New York

In the Matter of

FRANCES VERNEAU, Claimant

v.

CONSOLIDATED EDISON CO OF NEW YORK INC ET AL, Appellant

and

SPECIAL FUND FOR REOPENED CASES, Respondent

and

WORKERS' COMPENSATION BOARD, Respondent

July 3, 2019

Facts: This is an Appeal from a decision of the Workers' Compensation Board which ruled that liability did not shift to the Special Fund for Reopened Cases pursuant to Section 25-a. In this claim, the case was established for occupational disease with a date of disablement of June 1, 2000 regarding conditions of pulmonary asbestosis, asbestos-related pleural disease, chronic irritative bronchitis and chronic obstructive pulmonary disease. Liability for the claim is transferred effective December 2011 from the self-insured employer to the Special Fund for Reopened Cases pursuant to Section 25-a. The claimant then died in January, 2017. In March 2017, a death claim was filed alleging that the decedent's asbestosis contributed to the death. The claim was initially indexed against the Special Funds but then a corrected Notice of Indexing naming the self-insured employer was filed. The claim was denied by the self-insured employer. Prima facie medical evidence was found for a consequential death, the employer was removed from notice and there was indication that the Special Fund would be liable if the death were causally related and continued the case. The case ultimately was established for consequential death resulting in the Special Funds being responsible for the claim. The Special Funds filed an Appeal. The Special Funds contended the transfer of liability was barred by Workers' Compensation Law Section 25-a(1-a). The Board agreed relying on the Court of Appeals

decision in American Economy Insurance Company v. State of New York, and concluded that Workers' Compensation Law Section 25-a liability did not apply to the case. The employer filed an Appeal.

Holding: *Reversed*

Discussion: The Court noted that the Court of Appeals has noted itself that one of the purposes for creation of the Special Fund was to ensure that injured workers with closed cases that unexpectedly reopened after many years due to a recurrence of malady, progress and disease not anticipated or a pathological development not previously prognosticated would continue to receive necessary benefits even if the insurance carrier became insolvent. Section 25-a was enacted to establish a framework for transferring liability from insurance carriers to the Special Fund for payment of stale claims meeting certain criteria. In 2013, the legislature decided to close it to new applications, referring to the Special Funds, and amended the statute by adding Workers' Compensation Law Section 25-a(1-a). This provided in relevant part that no application by a self-insured employer or an insurance carrier for transfer of liability of the claim to the Special Funds shall be accepted by the Board on or after January 1, 2014. Because this case involved the question of pure statutory analysis, the Court noted that it need not defer to the Board's interpretation of the statute. The Court noted that it agreed with the employer that the imposition of liability in the Special Fund in this case is not precluded by the statutory amendment. The Court noted that the record did not indicate any violation of the plain language of the statutory sentence at issue. The record did not contain a copy of any application by the employer for transfer of liability of the claim to the Special Fund after January 1, 2014. The Court noted the record did 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. The Court noted that this conclusion is supported by its decision in the Matter of Misquitta v. Getty Petroleum. While acknowledging that the consequential death claim is, in fact, a separate and distinct claim, the Court ruled that where liability for a claim has already been transferred from the carrier to 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. The Court further addressed the Court of Appeals decision in American Economy Insurance Company v. State of New York, noting that the Court did not specifically state or otherwise suggest Workers' Compensation Law 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. The Court noted the statutory scheme contemplates that the Special Fund will step into the shoes of the insurance carrier and succeed to its rights and responsibilities. The Court reversed the decision and remitted the matter to the Workers' Compensation Board for further proceedings not inconsistent with this decision.