State of New York
Court of Appeals

OPINION

No. 64
In the Matter of the Claim of
Frances Verneau,
Claimant,
v.
Consolidated Edison Co. of New
York, Inc., et al.,
Respondents,
Special Fund for Reopened Cases,
Appellant.
Workers' Compensation Board,
Appellant.

No. 65
In the Matter of the Claim of
Kristen Rexford, &c.,
Claimant,
v.
Gould Erectors & Riggers, Inc.,
et al.,
Respondents,
Special Fund for Reopened Cases,
Appellant.
Workers' Compensation Board,
Appellant.

Case No. 64:
Allyson Levine, for appellant New York State Workers Compensation Board.
Matthew R. Mead, for appellant Special Fund for Reopened Cases.
David W. Faber, for respondents.

Case No. 65:
Allyson Levine, for appellant Workers' Compensation Board.
Matthew R. Mead, for appellant Special Fund for Reopened Cases.
Glenn D. Chase, for respondents.

RIVERA, J.:

Under Workers' Compensation Law (WCL) § 25-a (1-a), no liability for claims submitted on or after January 1, 2014, may be transferred to the Special Fund for Reopened Cases (the Special Fund). The common issue presented in these appeals is whether WCL

§ 25-a (1-a) forecloses the transfer of liability for a death benefits claim submitted on or after the cut-off, regardless of the prior transfer of liability for a worker's disability claim arising out of the same injury. Based on the plain statutory language, which broadly applies to all claims submitted after the deadline, and our established precedent that a death benefits claim accrues at the time of death and "is a separate and distinct legal proceeding" from the worker's original disability claim (*Matter of Zechmann v Canisteo Volunteer Fire Dept*, 85 NY2d 747, 751 [1995]), we conclude that liability for the death benefits claims at issue here could not be transferred to the Special Fund.

I.

A. *Matter of Verneau v Consolidated Edison*

Francis Verneau suffered from several asbestos-related conditions caused by his work activities. He was awarded workers' compensation benefits effective June 1, 2000. In December 2011, liability for the claim was transferred, pursuant to WCL § 25-a, from his employer, Consolidated Edison of New York (ConEd), to the Special Fund, which then remained responsible for payment of those lifetime benefits. Verneau died in January of 2017. Claimant, his surviving spouse, applied for a death benefits award, contending that Verneau's death was attributable to his work-related injury. The Workers' Compensation Board indexed the claim against ConEd, as the employer. At a hearing before a Workers' Compensation Law Judge (WCLJ), ConEd, through its third-party administrator, disputed liability, in part for an alleged lack of causation. The WCLJ determined the death was causally related to the work-related injury and designated the Special Fund as responsible for the death benefits claim. The Special Fund administratively appealed, contesting its

liability under WCL § 25-a. The Board reversed, holding that under WCL § 25-a (1-a), the claim was time-barred, as it was submitted after the January 1, 2014 deadline. The employer appealed.

The Appellate Division reversed and, relying on its prior precedent, held that the Special Fund was responsible for death benefits claims arising from an injury for which the decedent had obtained a disability benefits award because liability for the disability claim had previously been transferred to the Special Fund before the statutory cut-off (*see Matter of Verneau v Consolidated Edison Co. of NY, Inc.*, 174 AD3d 1022, 1024-1026 [3d Dept 2019], citing *Matter of Misquitta v Getty Petroleum*, 150 AD3d 1363 [3d Dept 2017]). In the alternative, the Court held that the cut-off date did not apply because the record contained no application by the employer or insurance carrier for transfer of liability to the Special Fund (*Verneau*, 174 AD3d at 1024).

B. *Matter of Rexford v Gould Erectors & Riggers*

Reginald Radley suffered a work-related heart attack in 1987, while employed by Gould Erectors & Riggers (Gould), and was awarded workers' compensation benefits for which Gould's insurance carrier, the State Insurance Fund, was initially responsible. In 1997, liability for that claim was transferred, pursuant to WCL § 25-a, to the Special Fund. Radley died in 2016, and his daughter filed a claim for death benefits, alleging that her father's death was attributable to the injury for which he received workers' compensation benefits during his lifetime. The Workers' Compensation Board initially indexed the death benefit claim against the Special Fund. The Special Fund contested liability, arguing that

the claim was a new claim for benefits made after January 1, 2014, and could not be transferred. Thus, the Special Fund argued, liability for the claim remained with the State Insurance Fund, the carrier on risk. This point was contested at the hearing before a WCLJ, who subsequently found that the State Insurance Fund was responsible for payment of death benefits. The Board affirmed, and the State Insurance Fund appealed. The Appellate Division reversed, deciding the appeal with *Verneau* and applying the same analysis to conclude that the Special Fund was liable for the consequential death claim (*see Matter of Rexford v Gould Erectors & Riggers, Inc.*, 174 AD3d 1026, 1027 [3d Dept 2019]).

We granted the Board and Special Fund leave to appeal in both matters (*Matter of Verneau v Consolidated Edison Co. of NY, Inc.*, 34 NY3d 912 [2020]; *Matter of Rexford v Gould Erectors & Riggers, Inc.*, 34 NY3d 912 [2020]). For the reasons discussed below, we agree with appellants that the statute compels reversal.

II.

These appeals present a question of pure statutory interpretation: Does WCL § 25-a (1-a) foreclose transfer of liability for a death benefits claim submitted after January 1, 2014, to the Special Fund, where liability for the worker's original disability benefits claim had been transferred to the Special Fund prior to the statutory filing deadline? We conclude that it does.

The Special Fund was established in 1933, primarily to ensure benefits for claimants in cases of insurance carrier insolvency, employer inability to pay benefits, or upon the reopening of a long-closed matter (*see American Economy Ins. Co. v State of New York*,

30 NY3d 136, 141 [2017]; *Matter of Tipton v Lang's Bakery*, 250 AD 696, 698-699 [3d Dept 1937], *affd* 257 NY 572 [1937]). Under WCL § 25-a, liability for a claim could be transferred from the employer or carrier to the Special Fund once certain statutory conditions had been satisfied (*see e.g.* WCL § 25-a [1] [requiring, *inter alia*, seven years to have passed since the date of injury and requiring three years to have passed since the last payment of compensation]). Following transfer, "the insurance carrier ha[d] no further interest in payment of *the claim*" (*Matter of De Mayo v Rensselaer Polytech Inst.*, 74 NY2d 459, 462 [1989] [emphasis added]).

This statutory scheme continued until 2013, when the legislature amended the law by adding WCL § 25-a (1-a) and thereby closed the Special Fund to all new claims. Section 25-a (1-a) provides, in relevant part,

> "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."

In resolving the question before us, we apply our well-established rule that "[t]he primary consideration of courts in interpreting a statute is to 'ascertain and give effect to the intention of the Legislature'" (*Riley v County of Broome*, 95 NY2d 455, 463 [2000], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 92 [a], at 177). To that end, "the plain meaning of the statutory text is the best evidence of legislative intent" (*People v Cahill*, 2 NY3d 14, 117 [2003], citing *Riley*, 95 NY2d at 463).

Here, the plain text of WCL § 25-a (1-a) expressly provides that the statutory cut-off forecloses transfer of liability for "*a* claim" (emphasis added). The legislature's choice of the singular indefinite article—"a" claim—means the liability to be transferred is for a *single claim at the time of application*. Thus, the statute prohibits the transfer of liability for any claim that has accrued on or after the cut-off date.[1]

In *Matter of Zechmann v Canisteo Volunteer Fire Dept.*, decided nearly two decades prior to the enactment of WCL § 25-a (1-a), the Court concluded that "the accrual date" of a death benefits claim "necessarily must be the date of the death giving rise to [the] claim" (85 NY2d at 753). Critically, *Zechmann* also held that "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). We noted that the distinction between the two types of claims "has been recognized since the early days of workers' compensation law" (*id.*). We assume the legislature acts with knowledge of this Court's decisions (*see Matter of Amorosi v South Colonie Ind. Cent. Sch. Dist.*, 9 NY3d 367, 375 [2007] ["(T)he Legislature is presumed to be aware of the law in existence at the

[1] The dissent contends that, because "'claim' is not synonymous with 'liability'" (dissenting op at 4), when the statute uses the phrase "transfer of liability," it is necessarily referring to "liability for costs associated with the original claim, including the cost of a related death benefits claim" (*id.*). But nowhere does the statute suggest that a death benefits claim is merely an associated cost of a disability claim. Rather, a death benefits claim "is a separate and distinct legal proceeding" (*Zechmann*, 85 NY2d at 751). At bottom, the dissent cannot evade the plain import of the statutory text: "No application . . . for transfer of liability of *a* claim to the fund . . . shall be accepted . . . after [January 1, 2014]" (WCL § 25-a [1-a] [emphasis added]). The dissent does not—nor can it—explain how the statute's reference to the transfer of liability for "a" claim somehow also encompasses any and all "related claims for death benefits" (dissenting op at 9).

time of an enactment"]).[2] Indeed, the language of WCL § 25-a (1-a) in no way controverts our long-standing precedent establishing that death benefits are separate claims. And we have continued to treat death benefits as such, including mere months after the legislature enacted WCL § 25-a (1-a), when, in *Matter of Hroncich v Con Edison*, we cited *Zechmann*, reaffirming that "a claim for death benefits by an employee's survivors is *entirely separate* from the employee's claim for compensation benefits" (21 NY3d 636, 646 [2013] [emphasis added]).

Contrary to respondents ConEd's and Gould's arguments, liability for a death benefits claim cannot have been transferred along with liability for the disability claim because, "[c]learly, the cause of action for death benefits could not accrue prior to the death" (*id.*), irrespective of when liability for the disability claim was transferred to the

[2] While recognizing this principle, the dissent also insists that the "law in existence at the time" the legislature enacted WCL § 25-a (1-a) must be understood to include the Third Department's implicit holding in *Matter of Fitzgerald v Berkshire Farm Center & Services for Youth* (87 AD3d 353 [3d Dept 2011]) that the transfer of liability for a disability claim necessarily transfers any subsequent claim for death benefits (dissenting op at 3, 5-7). This argument fails for multiple reasons. First, it improperly casts the intermediate appellate court as the arbiter of New York law, when, in fact, it is "*this* Court's duty to say what the law is" (*Campaign for Fiscal Equity, Inc. v State*, 100 NY2d 893, 940 [2003] [Smith, J., concurring] [emphasis added]; *see also Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 334 [1988] [noting that the Court of Appeals is "the final arbiter of questions of State law"]). To the extent that *Fitzgerald* contradicts our holding in *Zechmann*, the former obviously cannot displace the latter's affirmance of a principle that "has been recognized since the early days of workers' compensation law" (*Zechmann*, 85 NY2d at 751). Moreover, *Fitzgerald* is in conflict with even other pre-amendment Third Department cases (*see e.g. Commrs of State Ins. Fund v Hallmark Operating, Inc.*, 61 AD3d 1212, 1213 [3d Dept 2009] ["Nor is death a new injury, but rather *a new claim* consequentially related to the original injury"] [emphasis added]). Thus, there is simply no merit to the dissent's contention that the legislature must have enacted WCL § 25-a (1-a) in conformance with the unstated holding of a single Third Department case, which contradicted not only that Court's other precedents but also ran afoul of this Court's holding in *Zechmann*.

Special Fund. Further, liability for death benefits is not automatic upon a finding of liability for disability benefits. Rather, liability for death benefits claims—"often, as here, involving the quite different question of whether the injury was causally related to the death" (*Zechmann*, 85 NY2d at 751)—must be established and, in fact, causal relation was disputed by respondents in their respective administrative proceedings. Put another way, respondents argued before the WCLJ and the Board that there was no causal connection between the work-related injury that was the basis for the transfer of liability for the disability claim during each worker's lifetime. Moreover, respondents' argument is further belied by the statutory structure and its intended purpose, which treat disability benefits as entirely distinct from death benefits (*compare* WCL § 15 ["Schedule in case of disability"] *with id.* § 16 ["Death benefits"]; *see also Hroncich*, 12 NY3d at 647). Thus, respondents' contention that the transfer of liability for the original disability claim must be understood as including the transfer of *all* consequential claims is unsupportable given the unambiguous language the legislature used, the law in existence at the time of amendment, and the overall statutory scheme.

Our interpretation of WCL § 25-a (1-a) furthers the legislature's goal in amending WCL § 25-a. The memorandum in support of the amendment explained that the Special Fund was originally intended "to provide [insurance] carriers relief in a small number of cases where liability unexpectedly arises" in long-closed cases (Mem in Support, 2013-2014 NY State Executive Budget, Public Protection and General Government Article VII Legislation at 29). Perversely, carriers reaped financial gains over the years by collecting premiums for liabilities they no longer shouldered. To that end, WCL § 25-a (1-a) was

enacted to "prevent a windfall for [insurance] carriers" whose liability for claims that "unexpectedly arise[] after a case has been closed for many years" was transferred to the Special Fund, even though "the premiums they . . . charged already cover this liability" (*id.*). Given this background, we have explained that "closing the [Special] Fund would save New York businesses hundreds of millions of dollars in assessments every year . . . . Delaying the Fund's closure," however, "would . . . delay[] this intended legislative benefit to New York businesses and employers for years, if not decades" (*American Economy*, 30 NY3d at 158-159).[3]

Adopting the Appellate Division's reasoning—that, once liability for disability benefits has been transferred to the Special Fund, the employer and carrier are thereby divested of all liability for future death benefits claims arising from the same injury—would be in contravention of the statutory text and our conclusions in *Zechmann* and *Hroncich* that a death benefits claim is separate from the original disability claim and would also result in leaving the Special Fund open for years, continuing the windfall to carriers that the amendment was expressly intended to eliminate.[4]

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[3] The dissent invokes the legislature's decision to allow for "an approximately nine-month grace period during which the Board would consider new applications" after the effective date of WCL § 25-a (1-a), which the dissent asserts is proof that the legislature did not really intend for the expeditious closure of the Special Fund (dissenting op at 10, citing *American Economy*, 30 NY3d at 143). On the contrary, the mere existence of a grace period constitutes a tacit recognition of the otherwise harsh outcome the legislature intended. In any event, a grace period of less than a year is hardly incontrovertible evidence that the legislature must have intended the fund to remain open to new claims "for years, if not decades" (*American Economy*, 30 NY3d at 159).

[4] According to the Board, there are currently more than 9,000 lifetime claims that have been previously transferred to the Special Fund where the claimant is still alive. The Appellate Division's rule would permit liability for death benefits claims to be transferred to the fund

In contrast, interpreting WCL § 25-a (1-a) as foreclosing transfer of liability for death benefits that accrue after the cut-off date minimizes costs and avoids the windfall that animated the amendment's passage. Further, there is no danger that reversal here would leave a decedent's survivor without benefits, as the legislature explicitly contemplated and addressed such a situation in other sections of the statute (*see e.g.* WCL § 107 [establishing the workers' compensation security fund "to assure to persons and funds entitled thereto the compensation and benefits provided by the chapter for employments insured in insolvent carriers"]; WCL § 50 [3] [requiring self-insured employers to furnish security]).

Finally, the Appellate Division's alternative ground for its decision in *Verneau*—that the statute does not apply here because there was no formal, written "application" for transfer of liability in the record—is wholly without merit. The statute imposes no such requirement on applications for transfer of liability, and, under longstanding Board practice, an application will be deemed to have been made when "any party rais[es] liability under WCL § 25-a at a hearing," as occurred here (*see Employer: DEL Labs*, 2009 WL 193434, *6, 2009 NY Wrk Comp LEXIS 4054, *16 [WCB No. 2940 8739, Jan. 14, 2009]).

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for each of those claims, as long as the death was causally related to the injury underlying the disability claim. Even assuming, conservatively, that only 10% of those claims resulted in a finding of liability for consequential death benefits, that would mean the Special Fund would remain open to pay those additional 900 claims—in an amount up to two-thirds of the decedent's average wages (*see e.g.*, WCL § 16 [2]). That is a large figure by any count, but it becomes even harder to square with the legislature's intent to expeditiously close the fund when one considers that death benefits claims may potentially be paid out, in some cases, for the entire lifetime of the decedent's surviving beneficiaries (as when the decedent has a permanently disabled child) (*id.*).

III.

Accordingly, in each matter, the Appellate Division order should be reversed, with costs, and the decision of the Workers' Compensation Board reinstated.

GARCIA, J. (dissenting):

The relevant amendment to the Workers' Compensation Law provides that "[n]o application . . . for transfer of liability of a claim to the fund for reopened cases shall be accepted" after January 1, 2014 (Workers' Compensation Law § 25-a [1-a]). In my view, we must determine when the transfer of "liability of a claim" occurs to properly apply the law. In these two appeals, the cost of liability for the related disability claims was assigned to the Special Fund for Reopened Cases years before the January 1, 2014 deadline for new transfers. I agree with the Appellate Division that, at that same time, responsibility for all

benefits on a reopened case, including those costs associated with a future claim for death benefits causally related to the injury underlying the previously assigned disability case, transferred to the Special Fund. In these appeals, no liability for payment of death benefits needed to be transferred to the Special Fund after the 2014 deadline. Therefore, I dissent from the majority's contrary holding absolving the Special Fund of responsibility for payment.

"Workers' compensation insurance is a heavily regulated area of the law," and the consequences of any modification to that law can be far-reaching, affecting both past and future allocation of risk and liability (*American Economy Ins. Co. v State of New York*, 30 NY3d 136, 140 [2017]). There can be no doubt that the law closing the Special Fund had such an impact (*id*. at 148-158). The legislature worked this change as follows:

> "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."

(Workers' Compensation Law § 25-a [1-a] [emphasis added]; *see also* L 2013, ch 57, part GG, § 13).

In these two appeals, it is undisputed that the obligation to pay benefits on the underlying disability claims transferred to the Special Fund before the January 1, 2014 deadline. The insurance carriers argue that this, in turn, conferred responsibility on the Special Fund for any future claims for death benefits causally related to the original injury.

In *Verneau*, the costs of the liability for Robert Verneau's underlying claim for disability benefits transferred to the Special Fund in 2011. Verneau died in 2017 and his widow subsequently filed a claim for death benefits. In *Rexford*, the costs related to Reginald Radley's disability benefits claim transferred to the Special Fund in 1997. Radley died in 2016, and his daughter filed a claim for death benefits in 2017. Despite the transfer of liability for the underlying disability claim before the cut-off date, the Special Fund and the Workers' Compensation Board argue, and the majority agrees, that the amendment prohibits assignment of liability of "new" claims for death benefits to the Special Fund after January 1, 2014.

This case involves application of our well-settled rules of statutory interpretation, and the "starting point" for that analysis "must be the plain meaning of the statutory text" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 [2001]). When performing that textual analysis, "meaning and effect should be given to every word of a statute" (*id*.). Moreover, as the majority emphasizes, "the [l]egislature is presumed to be aware of the law in existence at the time of an enactment" (*Matter of Amorosi v South Colonie Ind. Cent. Sch. Dist.*, 9 NY3d 367, 373 [2007]; *see* majority op at 7). Here, in the complex and highly-specialized area of Workers' Compensation Law, it is crucial that the Court consider the relevant legal framework at the time of the statute's enactment in 2013—including the allocation of claims, costs, and liabilities—and the operation of the amendment within that established framework.

The law provides that "[n]o application . . . 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" (Workers' Compensation Law § 25-a [1-a]). The majority assumes that because the causally related claims for death benefits are "new claims," liability for costs associated with those claims cannot be transferred after January 1, 2014 (*see* majority op at n 3). But "claim" is not synonymous with "liability," and we must give effect to the intent of the legislature as expressed through the language it used. I would hold instead, as did the court below, that liability for costs associated with the original claim, including the cost of a related death benefits claim, transferred with the original disability claim.

The majority's review of statutory context begins and ends with this Court's 1995 decision in *Matter of Zechmann v Canisteo Volunteer Fire Department* (85 NY2d 747 [1995]), a case "decided nearly two decades prior to the enactment of WCL § 25-a (1-a)" (majority op at 6). The lesson the majority takes from *Zechmann* is that 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" (*see id*., quoting *Zechmann*, 85 NY2d at 751). Given the majority's reading of the statute to bar the transfer of "new claims" after January 1, 2014, and given that *Zechmann* establishes that a claim for death benefits is a "new claim," the majority reasons that the statute bars transfer of these claims for death benefits (*see* majority op at 6-8). Moreover, according to the majority, divesting the employer and carrier of "all liability for future death benefits arising from the same injury" as the previously transferred disability claim "would . . . result in leaving the Special Fund open for years, continuing the windfall to carriers that the

amendment was expressly intended to eliminate" (*id.* at 9-10). Each step of this analysis is flawed.

Zechmann considered only "whether a claim by a surviving spouse for death benefits traceable to a 1951 injury suffered by a workers' compensation beneficiary [was] time-barred" (85 NY2d at 750). In rejecting several arguments that the filing of a death benefits claim was a "reopening of a closed case," we held that the claim for disability benefits was instead a "new claim" (*id.* at 753). But the sole issue in *Zechmann* was timeliness of the claim (*id.* at 750). We had no occasion to address whether liability for any future causally related death benefits claim was properly assigned to the Special Fund at the time liability for the underlying disability benefits claim transferred.

That issue was considered by the Appellate Division sixteen years later in *Matter of Fitzgerald v Berkshire Farm Center & Services for Youth* (87 AD3d 353 [3d Dept 2011]). In that case, the Workers' Compensation Board held that because disability benefits had been paid within three years of the death benefits claim, albeit by the Special Fund, the time requirements for shifting liability found in Workers' Compensation Law § 25-a (1) had not been satisfied with respect to the causally related claim for death benefits and therefore liability for that claim remained with the employer and its carrier (*Fitzgerald*, 87 AD3d at 354). The Third Department disagreed, holding that once the requirements for transfer of a "stale claim" had been satisfied, the Special Fund stepped into the shoes of the carrier and was liable for a subsequent causally related claim for death benefits whenever it accrued (*id*. at 355; *see also Matter of Riccardi v Dellwood Dairy Co.*, 38

AD2d 666 [3d Dept 1971]). This 2011 holding was never appealed by the Special Fund and was controlling in 2013 when the legislature amended Workers' Compensation Law § 25-a (1-a).

Not surprisingly, after enactment of the 2013 amendment, the Appellate Division applied the *Fitzgerald* rule to hold that the Special Fund remained responsible for a "consequential death claim" even though the original claimant's death occurred after the January 1, 2014 cut-off date (*Matter of Misquitta v Getty Petroleum*, 150 AD3d 1363, 1364 [3d Dept 2017]). The court acknowledged that the "[t]he Special Fund is correct that '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 1365, quoting *Zechmann*, 85 NY2d at 751), and specifically noted that separate statutory provisions apply for disability and death benefits (*id.*, citing Workers' Compensation Law §§ 15; 16; *see also* majority op at 8). Nevertheless, the court held that "where, as here, liability for a claim has already been transferred from the carrier to the 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" (*Misquitta*, 150 AD3d at 1365). "[U]nder these circumstances, claimant need not obtain another transfer of liability to the Special Fund upon decedent's death, as liability had already been transferred" (*id*.).

The majority's response to these carefully considered opinions is to instruct that this "intermediate appellate court" is not the "arbiter of New York law" and to cast the cases as

being in "conflict" with this Court's holding in *Zechmann* and with the Third Department's own precedent (majority op at n 2). But the lesson is gratuitous and the conflict illusory.

By law, an appeal of a decision of the Workers' Compensation Board must be taken to the Appellate Division, Third Department (Workers' Compensation Law § 23). "The rationale behind this provision is to create a court with a specific expertise to deal with the complexity of the appeals that are generated in this area" (*Matter of Empire Ins. Co. v Workers' Compensation Bd.*, 201 AD2d 425, 426 [1st Dept 1994]). So, while it is true the Third Department is not the final "arbiter" of New York law, it plays a unique role in developing the law of workers' compensation. And, as discussed, no appeal to this Court was taken from the Third Department's decision in either *Fitzgerald* or *Misquitta*.

Nor is there any conflict between *Fitzgerald* and *Misquitta* and this Court's holding in *Zechmann*. In *Misquitta*, the Third Department cited to *Zechmann*'s rule that "a claim for death benefits . . . is a separate and distinct legal proceeding . . . and is not equated with the beneficiary's original disability claim" (*Misquitta*, 150 AD3d at 1365, quoting *Zechmann*, 85 NY2d at 751). Nevertheless, because of the earlier transfer of responsibility for payment on the underlying disability claim, that court held that the Special Fund "remains liable for the claim for death benefits" (*id*.). There is simply no conflict between our holding concerning the accrual date of a claim for death benefits and the Third Department's holdings that responsibility for paying such a claim transfers to the Special Fund at the same time as the transfer of responsibility for payment of a causally related claim for disability benefits.

The majority also concludes that in *Fitzgerald* and *Misquitta,* the Third Department somehow "contradicted" its own precedent (majority op at n 2, quoting *Commissioners of State Ins. Fund v Hallmark Operating Inc.*, 61 AD 3d 1212, 1213 [3d Dept 2009] [echoing *Zechmann*, "nor is death a new injury, but rather a new claim consequentially related to the original injury"]). *Hallmark* concerned a dispute between a carrier and an insured over which policy covered a claim for death benefits—the policy in effect when the original disability occurred or the policy effective at the time of the employee's death (61 AD3d at 1212-13). The court held that the death benefits claim was payable under the earlier policy (*id.* at 1213). If anything, the holding that the earlier accident date "was the actual date of loss for both the original injury and the causally related death," and therefore the earlier policy was the operative one (*id.*), supports the later holdings in *Fitzgerald* and *Misquitta* that responsibility for claims related to the earlier injury, including the resulting death, transferred to Special Fund with the disability claim. In any event, the purported "conflict" between *Hallmark* and *Fitzgerald/Misquitta* rests on the same faulty premise underlying the majority's assertion that those holdings conflict with *Zechmann*—namely, the view that because the claim for death benefits is a "new claim," responsibility for paying that potential future claim can never be assigned to the Special Fund before accrual. But of course, the cases are perfectly consistent. In fact, the Third Department specifically acknowledged the holdings in both *Zechmann* and *Hallmark* in reaching its conclusion that the Special Fund "remain[ed] liable for the claim for death benefits" causally related to the previously transferred disability claim (*see Misquitta,* 150 AD3d at 1365 [citing both

cases]).

Moreover, whatever the majority's current view of the holdings in *Fitzgerald* and *Misquitta*, no appeal to this Court was taken in either case, and the rulings by the Third Department were binding on the Workers' Compensation Board.[*] Even if the majority now disagrees with the holdings in *Fitzgerald* and *Misquitta*, it still must overcome a more fundamental issue of statutory interpretation: we must assume the legislature was aware of the *Fitzgerald* rule requiring the Special Fund to pay causally related death benefits once the underlying disability claim was properly transferred to the Special Fund (*see Amorosi*, 9 NY3d at 373). In this case, we must assume the legislature was aware that the agency was operating consistently with the binding decisions of the Third Department, making "transfer" of related claims for death benefits unnecessary after responsibility for payment of the underlying disability claim had transferred to the Special Fund. Enacted against this framework, no "transfer of liability" — of "'a' claim" or any claim (*see* majority op at n 1) — needs to take place in such a case, and therefore the deadline is no bar to the Special Fund's responsibility for payment.

The majority is concerned with undermining the "purpose" of the statute (*see* majority op at 8-9, n 4), but that concern is misaligned with the balanced approach taken by the legislature. By far the most effective way of achieving the goal of "prevent[ing] a

[*] The Workers' Compensation Board clearly understood what *Fitzgerald* required. In the decision appealed by the Special Fund in *Misquitta*, both the Workers' Compensation Law Judge and the Board held that the Special Fund was liable for the death claim even though it "accrued" after January 1, 2014 (*Misquitta*, 150 AD3d at 1364).

windfall for [insurance] carriers" and closing off future liability would have been to close the Special Fund to any new "claims" effective immediately (*see American Economy Ins. Co.*, 30 NY3d at 144, quoting Mem in Support, 2013-2014 NY State Executive Budget, Public Protection and General Government Article VII Legislation at 29). Rather than a hard stop, however, the 2013 law included "an approximately nine-month grace period during which the Board would consider new applications" (*id.* at 143). The legislature also kept the Fund "open to administer reopened cases previously assigned to the Fund" (*id.*). An analysis that considers the existing state of the law with respect to "transfer" of claims for death benefits related to previously assigned disability claims, and the agency's practice in applying that law, furthers the legislature's careful balancing of the interests of all those affected by such a substantial change in the Workers' Compensation Law. As with liability for reopened cases previously assigned to the Special Fund, liability for death claims causally connected to previously assigned disability claims rested with the Special Fund and there it was intended to remain.

Accordingly, I would affirm the order of the Appellate Division and hold that because no separate "transfer" of liability to the Special Fund for the costs of the causally related death benefits claims was required, Workers' Compensation Law § 25-a (1-a) does not relieve the Special Fund of responsibility for these claims.

For No. 64:
Order reversed, with costs, and decision of the Workers' Compensation Board reinstated. Opinion by Judge Rivera. Chief Judge DiFiore and Judges Wilson, Singas and Cannataro concur. Judge Garcia dissents and votes to affirm in an opinion, in which Judge Fahey concurs.

For No. 65:
Order reversed, with costs, and decision of the Workers' Compensation Board reinstated. Opinion by Judge Rivera. Chief Judge DiFiore and Judges Wilson, Singas and Cannataro concur. Judge Garcia dissents and votes to affirm in an opinion, in which Judge Fahey concurs.

Decided November 23, 2021