



Zachary S. Weiss
Chair

ADMINISTRATIVE REVIEW DIVISION
WORKERS' COMPENSATION BOARD
20 PARK ST
ALBANY, NY 12207
www.wcb.state.ny.us

State of New York - Workers' Compensation Board

In regard to [REDACTED], WCB Case #0946 1338

MEMORANDUM OF BOARD PANEL DECISION

keep for your records

Opinion By: Mona A. Bargnesi
Mark D. Higgins
Frances Libous

In an application filed on December 17, 2008, the carrier's attorney requests review of the Workers' Compensation Law Judge's decision filed on December 5, 2008, which contained the findings made at a hearing held on December 2, 2008, when the carrier's claim for Workers' Compensation Law § 15(8)(d) reimbursement was denied.

The carrier's attorney contends that the carrier has produced sufficient evidence in support of the claim for reimbursement and requests that the Special Disability Fund be directed to reimbursement the carrier pursuant to Workers' Compensation Law § 15(8). The carrier's attorney cites several cases in support of the claim for reimbursement.

In a rebuttal served on January 16, 2009, the Special Funds Conservation Committee's attorney contends that the Special Disability Fund has no liability in cases where the carrier pays deficiency compensation. The Special Funds Conservation Committee's attorney requests further development of the record.

FACTS

In October 1994, the claimant filed a C-3 form, alleging that he developed respiratory ailments due to his occupational asbestos exposure. The carrier filed a C-250 form on October 20, 1995, asserting that the claimant has prior permanent impairments resulting from hypertension, gout, sinus problems, allergies, and pulmonary disease. The Special Disability Fund was placed on notice for the hearing held on July 9, 1996, the second hearing that was held in this matter. The Fund has been on notice for all of the dozens of hearings that have been subsequently scheduled and held.

After much litigation, the claim was established for an occupational disease in the nature of asbestos-related pleural disease that became disabling on December 27, 1993. Compensation benefits have been awarded for every period

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Claimant -	[REDACTED]	Employer -	[REDACTED]
Social Security No. -		Carrier -	
WCB Case No. -	0946 1338	Carrier ID No. -	W152003
Date of Accident -	12/27/1993	Carrier Case No. -	D-64-116-066
District Office -	NYC	Date of Filing of this Decision -	04/06/2009

ATENCION:

Puede llamar a la oficina de la Junta de Compensacion Obrera, en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclamacion(caso).

from December 27, 1993 to the present. The claimant had filed a third-party action based upon the asbestos exposure. The action has been settled with the carrier's consent for a gross amount of \$100,024.65, with the claimant thus far receiving a net settlement amount of \$72,813.00.

A hearing was held on December 2, 2008 to address the carrier's claim for reimbursement. The transcript from this hearing is very brief. The Special Disability Fund's representative asserted that the Special Disability Fund is not liable in cases where there is a claim for deficiency compensation. The representative did not produce any evidence or law in support of this assertion and did not request any development of the record. The Workers' Compensation Law Judge denied the carrier's claim for reimbursement and discharged the Special Disability Fund from notice.

ISSUES

The questions presented for review are whether the Special Disability Fund can be liable under Workers' Compensation Law § 15(8)(d) in cases where there is a claim for deficiency compensation, and whether the record requires further development regarding the carrier's claim for reimbursement.

ANALYSIS

The Special Disability Fund is incorrect in its assertion that it cannot be liable in any case where there is a payment of deficiency compensation. While, in certain situations, a transfer of liability to the Special Funds Conservation Committee pursuant to Workers' Compensation Law § 25-a is estopped if there is a claim for deficiency compensation (see Workers' Compensation Law § 25-a[8]), the provisions of Workers' Compensation Law § 15(8) do not contain a similar limitation of liability. The Special Disability Fund has not produced any evidence in support of its allegation.

Therefore, the Board Panel finds that a claim for deficiency compensation does not bar the carrier's claim for Workers' Compensation Law § 15(8) reimbursement.

The Special Disability Fund's request for further development of the record is denied. The Special Disability Fund has been on notice for this claim since the second hearing. More than thirteen years have lapsed since the carrier filed its notice of the claim for reimbursement and the Special Disability Fund has been on notice for nearly thirty hearings. There is no evidence that the Special Disability Fund has ever requested an opportunity to develop the record on this issue or that the Special Disability Fund has ever produced evidence or law on the issues pertaining to Workers' Compensation Law § 15(8)(d).

Therefore, the Board Panel finds that the Special Disability Fund has waived its opportunity to request an adjournment to produce evidence or to otherwise develop the record (*Matter of McKenzie v UJA-FFFD*, 47 AD3d 1181 [2008]).

The record contains sufficient evidence to support the claim for reimbursement. A C-250 form was timely filed on October 20, 1995. On this form, it is alleged that the claimant has prior permanent impairments resulting from hypertension, gout, sinus problems, allergies, and pulmonary disease. Dr. ██████ examined the claimant on October 25, 1995, at which time he stated that hypertension, gout, and sinus problems are prior permanent impairments that have caused the claimant's work-related disability to be materially and substantially greater. No

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Claimant -	██████████	Employer -	████████████████████
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evidence has been produced that contradicts Dr. [REDACTED]'s opinion.

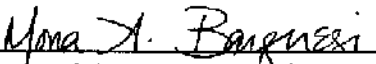
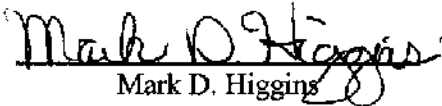
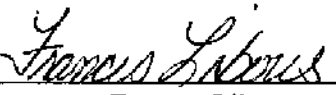
Therefore, the Board Panel establishes the carrier's claim for Workers' Compensation Law § 15(8)(d) reimbursement. The carrier is permitted to request reimbursement for benefits paid after the appropriate retention period has lapsed.

FINDINGS

The Board Panel finds, upon review of the record, that the claim for reimbursement is not barred by the claim for deficiency compensation, that the Special Disability Fund has waived the opportunity to request an adjournment to develop the record, and that the carrier has produced sufficient evidence that the claimant's prior permanent impairments have rendered his disability to be materially and substantially greater.

Accordingly, the Workers' Compensation Law Judge's decision filed on December 5, 2008 is REVERSED. The claim for Workers' Compensation Law § 15(8)(d) reimbursement is established.

All concur.

 <hr/> Mona A. Bargnesi	 <hr/> Mark D. Higgins	 <hr/> Frances Libous
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