

Decided and Entered: July 1, 2010

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In the Matter of the Claim of
BOB PARKHURST,
Claimant,

v

UNITED RENTALS AERIAL
EQUIPMENT, INC., et al.,
Appellants.

WORKERS' COMPENSATION BOARD,
Respondent.

In the Matter of the Claim of
BARBARA A. LLOYD,
Claimant,

v

KELLY SERVICES, INC., et al.,
Appellants.

WORKERS' COMPENSATION BOARD,
Respondent.

MEMORANDUM AND ORDER

In the Matter of the Claim of
JAMES ARTHUR ROBINSON,
Claimant,

v

GOULD PUMPS ITT et al.,
Appellants.

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: April 26, 2010

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Before: Mercure, J.P., Peters, Spain, Rose and Kavanagh, JJ.

Buckner & Kourofsky, Rochester (Jacklyn M. Penna of counsel), for appellants.

Andrew M. Cuomo, Attorney General, New York City (Diana R. H. Winters of counsel), for respondent.

Rose, J.

Appeals from three decisions of the Workers' Compensation Board, filed June 22, 2009, June 25, 2009 and July 3, 2009, which among other things, directed each of the employers' workers' compensation carriers to make a deposit into the aggregate trust fund pursuant to Workers' Compensation Law § 27 (2).

Among the many amendments made to the Workers' Compensation Law in 2007, a provision was added to Workers' Compensation Law § 15 (3) (w) capping the number of weeks for which a claimant could receive that subdivision's non-schedule permanent partial disability (hereinafter PPD) benefits (see L 2007, ch 6, §§ 4, 82 [a]). This new cap on benefits only applies to accidents occurring after March 31, 2007, the effective date of the amendment. In each of the cases here, each claimant's injury was classified as a PPD and each claimant was awarded benefits under section 15 (3) (w). These PPD awards, however, were not capped because claimants' injuries all preceded the effective date of the amendment.

Workers' Compensation Law § 27 (2) was also amended in 2007 to require that any PPD award under Workers' Compensation Law § 15 (3) (w) made on or after July 1, 2007 must be paid into the aggregate trust fund (hereinafter the ATF) (see L 2007, ch 6, §

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46). Because each of the uncapped PPD awards here was made after July 1, 2007, the private insurance carriers for claimants' employers were ordered to make a lump-sum payment of the present value of the award into the ATF pursuant to the amendment to section 27 (2).

Arguing that the amendment to Workers' Compensation Law § 27 (2) mandating a lump-sum payment into the ATF was improperly applied retroactively to claimants' injuries because those injuries were sustained before the amendment's effective date, the carriers sought review by the full Workers' Compensation Board. The carriers also argued that mandating lump-sum payment of claimants' uncapped PPD awards is improper because the actual amounts of their future benefits are unpredictable and there is no reliable way to calculate their present values. The full Board found the language of section 27 (2) as amended to be unambiguous and to evince a clear intent to require payment into the ATF of all Workers' Compensation Law § 15 (3) (w) awards made after July 1, 2007 regardless of the date of injury. Claimants' employers and their private insurance carriers (hereinafter collectively referred to as the carriers) appeal.

We do not view these cases as presenting an issue of the retroactive application of the amendment to Workers' Compensation Law § 27 (2), for "[a] statute is not retroactive . . . when made to apply to future transactions . . . merely because such transactions relate to and are founded upon antecedent events" (McKinney's Cons Laws of NY, Book 1, Statutes § 51, Comment, at 87). Rather, because the newly mandated lump-sum payments into the ATF expressly apply to PPD awards made on or after July 1, 2007, a date that was after the enactment of the amendment, we view the carriers' contention to be that the Legislature intended to make the prospective application of the amendment to section 27 (2) dependent upon whether the PPD award is capped pursuant to the amendment to Workers' Compensation Law § 15 (3) (w). Regardless of how this contention is characterized, however, it is contradicted by the express language of the amendment to section 27 (2).

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"As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof" (Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583 [1998]; see Matter of Turdo v Dellicato Vineyards, 73 AD3d 143, 146 [2010]; Matter of Giello v Providence Fire Dist., 57 AD3d 1294, 1296 [2008]). Here, the plain language of the statutes and the legislative history of their amendments persuades us that the inclusion of a reference to Workers' Compensation Law § 15 (3) (w) in Workers' Compensation Law § 27 (2) was intended to expand the types of awards to which the latter's mandatory payment provision applies rather than to restrict it to awards that are capped by the amendment to section 15 (3) (w). Section 27 (2) expressly mandates payment into the ATF of "any such award made [under section 15 (3) (w)] on or after July first, two thousand seven" (emphasis added). "[T]he word 'any' has an expansive meaning" and should be broadly construed (United States v Gonzales, 520 US 1, 5 [1997]; see State of New York v Philip Morris, Inc., 8 NY3d 574, 580 [2007]). Since section 15 (3) (w) existed prior to the amendments, the reference in section 27 (2) to section 15 (3) (w) cannot be read to apply only to capped awards. Rather, the reference serves to add all section 15 (3) (w) PPD awards, whether they are capped or uncapped, to the other types of PPD awards for which payment into the ATF already was mandated by former section 27 (2). Moreover, nothing in the legislative history supports the carriers' claim that, despite the amendment's silence as to the date of injury, the Legislature intended to limit its new payment mandate to capped PPD awards alone.

Nor do the principles of statutory construction permit us to imply the limitation suggested by the carriers. Where, as here, "a statute describes the particular situations in which it is to apply and no qualifying exception is added, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" (Matter of Alonzo M. v New York City Dept. of Probation, 72 NY2d 662, 665 [1998] [internal quotation marks and citation omitted]; see Matter of Connor v Deer Park Union Free School Dist., 195 AD2d 216, 220 [1994];

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McKinney's Cons Laws of NY, Book 1, Statutes § 74). Inasmuch as the Legislature has directed that the relevant date for the application of the amendment to Workers' Compensation Law § 27 (2) is the date of the award and not the date of the accident, the Board properly applied its mandate prospectively to the awards made here.

The carriers also advance a number of arguments contending that it is unfair to require them to pay the present value of the PPD award into the ATF unless the award is capped by the amendment to Workers' Compensation Law § 15 (3) (w). Given the plain language of the amendment to Workers' Compensation Law § 27 (2), however, the Legislature has expressed its clear intent to mandate the payment of present value despite the possibility of future decreases or increases in claimants' entitlements. The carriers' claim that this policy choice by the Legislature produces unfair results is better addressed to that body (see Joblon v Solow, 91 NY2d 457, 465 n 2 [1998]; Matter of Mace v Owl Wire & Cable Co., 284 AD2d 672, 675 [2001]).

Finally, as for the carriers' contention that the Board's computation of the present value of each claimant's award is speculative or arbitrary and capricious because the actuarial tables used cannot accurately predict the amount or duration of an uncapped award, the Legislature has mandated that the present values of claimants' awards be computed using those tables (see Workers' Compensation Law § 27 [5]), and the carriers do not claim any inability to perform that calculation. While the future benefits to which claimants will be entitled may increase or decrease depending on a number of variables, those variables are omitted from the calculation by the Legislature's policy decision to use present value. Here, unlike the situation in Burns v Varriale (9 NY3d 207 [2007]) or Pettinelli v Degnon Contr. Co. (218 AD 7 [1926]), the Board has no discretion. Rather, it has a legislative mandate to compute the present values of claimants' awards. Having complied with the statute's directive, the Board's computations cannot be said to be arbitrary or capricious (see Matter of Baust v Levitt, 50 AD2d 627, 628 [1975], lv denied 38 NY2d 708 [1976]).

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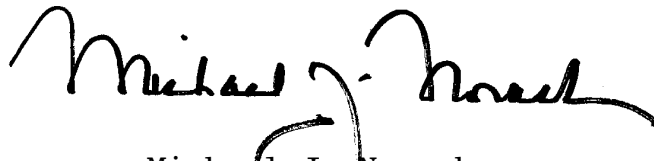
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Mercure, J.P., Peters, Spain and Kavanagh, JJ., concur.

ORDERED that the decisions are affirmed, without costs.

ENTER:



Michael J. Novack
Clerk of the Court