

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: November 29, 2018

526524

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In the Matter of GRACE  
KELLY,  
Claimant,

v

NEW YORK STATE WORKERS'  
COMPENSATION BOARD et al.,  
Respondents.

MEMORANDUM AND ORDER

WORKERS' COMPENSATION BOARD,  
Respondent.

WALSH AND HACKER,  
Appellant.

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Calendar Date: October 9, 2018

Before: McCarthy, J.P., Devine, Mulvey, Rumsey and  
Pritzker, JJ.

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Walsh and Hacker, Albany (Kelly B. Dean of counsel), for  
appellant.

Barbara D. Underwood, Attorney General, New York City  
(Nina M. Sas of counsel), for Workers' Compensation Board,  
respondent.

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Pritzker, J.

Appeal from a decision of the Workers' Compensation Board,  
filed June 26, 2017, which, among other things, assessed a

monetary penalty against attorneys for the State Insurance Fund pursuant to Workers' Compensation Law § 114-a.

In 2006, claimant established a claim for an occupational disease involving both of her shoulders and her right elbow and, subsequently, was awarded workers' compensation benefits based upon a 15% schedule loss of use of her right arm. The State Insurance Fund (hereinafter SIF) made the last scheduled workers' compensation payment in October 2008. In 2013, the claim was amended to include an injury to claimant's neck as reported in 2010 medical notes.

In December 2013, SIF sought to reopen the case and transfer liability to the Special Fund for Reopened Cases pursuant to Workers' Compensation Law § 25-a. By decision filed July 11, 2014, a Workers' Compensation Law Judge (Cordovani, J.) found that Workers' Compensation Law § 25-a was inapplicable "at this time."<sup>1</sup> In 2016, SIF again sought to transfer liability to the Special Fund. By decision filed January 19, 2017, a different Workers' Compensation Law Judge found that Workers' Compensation Law § 25-a was "not applicable as previously found by Judge Cordovani." SIF sought review of that decision by the Workers' Compensation Board because the decision did not expressly state that Workers' Compensation Law § 25-a was not applicable "at this time." The Board affirmed the January 19, 2017 decision and, pursuant to Workers' Compensation Law § 114-a (3), assessed both SIF and its counsel, Walsh and Hacker, with separate \$500 penalties on the basis that the application for

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<sup>1</sup> During this time, the Workers' Compensation Board issued Board Subject No. 046-851 that held in abeyance all applications, including the one herein, to transfer liability to the Special Fund in accordance with Workers' Compensation Law § 25-a pending an appeal in American Economy Ins. Co. v State of New York (30 NY3d 136 [2017], cert denied \_\_\_ US \_\_\_, 138 S Ct 2601 [2018]), which challenged the validity and constitutionality of the 2013 amendment to Workers' Compensation Law § 25-a closing the Special Fund to new applications after January 1, 2014 (see Employer: Coca Cola, 2018 WL 1748515, \*3, 2018 NY Wrk Comp LEXIS 2032, \*8 [WCB Nos. 0031 4101, 09944153, Mar. 6, 2018]).

review was filed without reasonable grounds. Walsh and Hacker appeals, challenging the penalty imposed against it.

Inasmuch as the application for review was filed seeking administrative clarification/correction, we do not find that substantial evidence supports the Board's finding "that the application for review was filed by [SIF] without reasonable grounds" so as to warrant an assessment of penalties against Walsh and Hacker pursuant to Workers' Compensation Law § 114-a (3) (ii) (see generally Matter of Logan v Westchester Med. Ctr., 117 AD3d 1311, 1312 [2014]; compare Matter of Bailey v Achieve Rehab & Nursing, 119 AD3d 1255, 1255-1256 [2014]).

McCarthy, J.P., Devine, Mulvey and Rumsey, JJ., concur.

ORDERED that the decision is modified, without costs, by reversing so much thereof as assessed a penalty against Walsh and Hacker, and, as so modified, affirmed.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger  
Clerk of the Court