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Worker's Compensation Board No. G1830693  
Appellate Division, Third Department Docket No. 527837

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# Court of Appeals

STATE OF NEW YORK



N.Y.S. COURT OF APPEALS In the Matter of the Claim for Benefits under the  
Workers' Compensation Law Made By:

FRANCES VERNEAU,

*Claimant-Respondent,*

*against*

CONSOLIDATED EDISON CO. OF NEW YORK and  
SEDGWICK CLAIMS MANAGEMENT SERVICES,

*Employer/Third-Party Administrator Appellants,*

*and*

SPECIAL FUNDS CONSERVATION COMMITTEE and  
WORKERS' COMPENSATION BOARD,

*Respondents.*

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**AFFIRMATION IN OPPOSITION TO  
MOTION FOR LEAVE TO APPEAL TO  
THE NEW YORK STATE COURT OF APPEALS**

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*Of Counsel:*

Ralph E. Magnetti

*Date Completed: December 5, 2019*

CHERRY, EDSON & KELLY, LLP  
*Attorneys for Employer/Third-Party  
Administrator Appellant*  
150 White Plains Road, Suite 209  
Tarrytown, New York 10591  
914-332-1800  
rmagnetti@cekesq.com

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COURT OF APPEALS  
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FRANCES VERNEAU,  
Claimant-Respondent.

-against-

CONSOLIDATED EDISON CO. OF N.Y., INC.,  
Employer-Respondent,  
SEDGWICK CLAIMS MANAGEMENT SERVICES,  
Third-Party Administrator-Appellants,  
SPECIAL FUND FOR REOPENED CASES,  
Respondent,

-and-

WORKERS' COMPENSATION BOARD,  
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**AFFIRMATION  
IN OPPOSITION  
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**RALPH E. MAGNETTI**, an attorney duly admitted to practice law before the Courts of the State of New York, affirms the following to be true under penalties of perjury:

1. I am a partner of the Law Firm of Cherry, Edson & Kelly, LLP, attorneys for Consolidated Edison Co. of N.Y., Inc., and Sedgwick Claims Management Services, the employer, and their third-party administrator-appellants. As such, I am fully familiar with the facts and circumstances surrounding this matter.

2. This affirmation is submitted in opposition to the Motion made on behalf of the Workers' Compensation Board seeking permission for leave to

appeal to the Court of Appeals from the Decision and Order of the New York State Supreme Court, Appellate Division, Third Judicial Department dated and entered July 3, 2019 which was served with a Notice of Entry on July 5, 2019 in *Matter of Verneau v. Consolidated Edison Co. of N.Y., Inc.*, 174 A.D. 3d 1022, 2019 N.Y. Slip Op. 05369 (3d Dept., 2019).

3. The Workers' Compensation Board seeks leave to appeal to the Court of Appeals after a similar request in the Appellate Division was denied, and after a Motion was made by the Special Fund for Reopened Cases seeking permission for leave to appeal to this Court, to which an Affirmation in Opposition to that Motion for leave to appeal to this Court was submitted on November 22, 2019. All of the arguments raised in the application now before this Court were raised in the Court below and in the Motion for leave to appeal filed by the Special Fund for Reopened Cases.

#### **PRELIMINARY STATEMENT**

The employer appealed the decision of the Workers' Compensation Board filed May 9, 2019 because it was erroneously determined that WCL 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 decision of the New York State Supreme Court, Appellate Division, Third Judicial Department, dated and entered July 3, 2019, reversed the decision by the New York State Workers' Compensation Board filed May 9, 2018, and ruled that the decision was inconsistent with the legal precedent established in *Matter of Misquitta v. Getty Petroleum*, 150 A.D. 3d 1363 (3d Dept., 2017), and prior cases addressing the same issue.

The Special Fund for Reopened Cases filed a Motion seeking permission from the Appellate Division to appeal to the Court of Appeals on July 29, 2019. The Appellate Division denied the Motion by Decision dated and entered October 3, 2019. A copy of the October 3, 2019 Decision with Notice of Entry was served upon the Respondents on October 8, 2019.

The Special Fund for Reopened Cases sought permission from this Court for leave to appeal. The same Motion is now being made by the Workers' Compensation Board.

## ARGUMENT

### POINT I

THE QUESTION PRESENTED BY THE SPECIAL FUND FOR REOPENED CASES AND WORKERS' COMPENSATION BOARD DOES NOT MERIT REVIEW BY THE COURT OF APPEALS.

The question being presented is whether liability in a claim for death benefits under the Workers' Compensation Law is the responsibility of the carrier or self-insured employer on the risk at the time of the original underlying injury rather than the Special Fund for Reopened Cases, where liability in the underlying lifetime claim had already been transferred to the Special Fund pursuant to WCL Section 25-a prior to January 1, 2014. This issue is not novel or of public importance, does not present a conflict with prior decisions of the Court of Appeals, or involve a conflict among the Departments of the Appellate Division. Furthermore, the decision was unanimous. There was no dissenting opinion.

It is being argued by the Special Fund for Reopened Cases and the Workers' Compensation Board that the issue is of statewide importance, and is contrary to the legislature's intent to close the Special Fund for Reopened Cases, because the holding by the Third Department will require the Special Fund for Reopened Cases to remain open for decades. This is not an accurate statement,

and it is not supported by this Court's reasoning in *American Economy Ins. Co. v. State of New York*, 30 N.Y. 3d 136 (2017). The decision noted that the 2013 amendment to WCL Section 25-a(1-a) provided that no application for transfer of liability of a claim to the Fund for Reopened Cases shall be accepted on or after January 1, 2014, but the Fund remained open to administer reopened cases previously assigned to the fund. The decision also noted that workers' compensation insurance policies are occurrence-based, meaning that each policy provides coverage for any claims arising from an accident occurring during that policy year, regardless of when the claim is made. Thus, in reaching the conclusion that the amendment in question was not unconstitutional, this Court only considered the effect that the amendment would have on injuries that occurred prior to January 1, 2014, where WCL Section 25-a liability may have been established, but for the amendment, not injuries that occurred before January 1, 2014, where Special Fund liability under WCL Section 25-a had already been established.

The decision by the Court below in this case, and in *Matter of Misquitta v. Getty Petroleum*, 150 A.D. 3d 1363 (3d Dept., 2017) determined that the Special Fund does remain liable for consequential death claims in situations where the decedent had a compensable workers' compensation claim and where liability for that claim had been transferred to the Special Fund prior to January 1, 2014. This

determination was consistent with its prior decision in *Matter of Fitzgerald v. Berkshire Farm Center & Services for Youth*, 87 A.D. 3d 353 (3d Dept., 2011), and the plain language of WCL Section 25-a(1)(3), which specifically provides that “where death resulting from the injury shall occur after the time limited by the foregoing provisions of (1) or (2) shall have elapsed [WCL Section 25-a(1)(2)]... if an award is made it shall be against the special fund provided by this section.”

The foregoing demonstrates that the issue in this case is not novel or of public importance, does not present a conflict with prior decisions, or involve a conflict among the Departments of the Appellate Division. The decision is consistent with the prior decisions in *Misquitta* and *Fitzgerald*, and nothing stated by this Court in *American Economy* compels a different result. Indeed, this Court specifically stated in its *American Economy* decision that despite the closure of the Special Fund to new cases subsequent to January 1, 2014, the Special Fund remained open to administer reopened cases that have previously been assigned to it. This case clearly falls into the category of cases being referenced in *American Economy*; a claim where liability has been transferred to the Special Fund prior to January 1, 2014.

As for the argument that the lower court’s decision will result in the Special Fund for Reopened Cases remaining open for decades, it was likely to remain



open for decades in any event. The Workers' Compensation Board argues that death benefits can extend for many years when there are younger surviving spouses and minor or disabled children of the deceased, but those are unusual scenarios that are no more likely to occur than the more typical cases that were transferred to the Special Fund for Reopened Cases prior to January 1, 2014. It is more likely that the Special Fund for Reopened Cases is already responsible for cases involving claimants who will be entitled to continuing benefits for another fifty years or more (i.e. cases where the claimants were forty years old or younger when the liability was assumed by the Special Fund prior to January 1, 2014). The present case involves a decedent who was being paid lifetime benefits until he passed away at the age of 76, leaving behind a 74 year old surviving spouse, so it will not lengthen the amount of time that the Special Fund must continue to exist, and the legislative purpose of closing the Fund for Reopened Cases will not be delayed by the decision of the Court below. The Workers' Compensation Board has also referred to the case that was decided by the Third Department on the same day as the present case, *Matter of Rexford v. Could*, 174 A.D. 3d 1026 (3d Dept., 2019), and five other cases involving the same issue currently pending in the Third Department. A review of those six cases reveals that the decedent in *Rexford* died at the age seventy, and had no legal dependants, the decedent in *Lucks v. Volt*, App. Div No. 528032, died at the age of eighty-five, and had no

legal dependants, the decedent in *Kelly v. Con Ed.*, App. Div. No. 528566, died at the age of seventy-three, leaving a surviving spouse who is now sixty-eight years old, the decedent in *Crist v. N.Y.S. Police*, App. Div. No. 528307 died at the age of eighty, leaving a surviving spouse who is now seventy-eight years old, the decedent in *Daly v. Westchester Medical Center*, App. Div. No. 530287 died at the age of seventy-three, leaving a surviving spouse who is now sixty-eight years old, and the decedent in *Bahan v. Trading Port Inc.*, died at the age of seventy-nine, leaving a surviving spouse who is now eighty-two years old. This demonstrates the fact that the hypothetical scenario of a “much younger surviving spouse and minor or disabled children of the deceased” referenced by the Motion made by the Workers’ Compensation Board is unlikely to occur, and the amount of time that the Special Fund will have to remain open based on the Third Department’s decision will not be affected.

Based on the foregoing, the argument that the present issue is of statewide importance is without merit.

## **POINT II**

THE THIRD DEPARTMENT’S DECISION IS NOT INCONSISTENT WITH THIS COURT’S DECISION IN *ZECHMANN* OR THE THIRD DEPARTMENT’S DECISION IN *MATTER OF CONNOLLY*.

The Appellants are now arguing that the decisions by the Third Department in *Misquitta* and *Fitzgerald* were either wrong, or did not consider the argument that a death claim is a “new claim legally separate and distinct from a closed disability claim” (citing *Zechmann v. Canistota Volunteer Fire Dept.*, 85 N.Y. 2d 747 (1995)). However, a review of the decision in *Zechmann* reveals that the Special Fund was not even opposing the fact that it was obligated to defend the claim for death benefits in that case, because liability for the underlying claim had already been shifted to the Special Fund under WCL Section 25(a). Although this Court determined in *Zechmann* that the death claim was a new claim for the purposes of determining whether the claim would be barred by WCL Section 123, the decision did not indicate that it was a new claim for which the Special Fund was no longer liable under WCL Section 25-a. After *Zechmann* was decided, this issue of liability for a death claim was addressed in *Commissioners of State Ins. Fund v. Hallmark Operating, Inc.*, 61 A.D. 3d 1212 (3d Dept., 2009), and it was held that the date of the original injury, rather than the date of death determined what insurance carrier was obligated to defend the claim for death benefits. Thereafter, the Workers’ Compensation Board has consistently held that when one workers’ compensation carrier provided coverage on the date of an accident or an occupational disease, and there was a different workers’ compensation carrier on the date that a death occurred, which was consequentially related to the original

date of accident or occupational disease, it is the workers' compensation carrier that was responsible for the original injury, not the workers' compensation carrier on the date of death that is responsible for the death claim. Thus, it logically follows that when the Special Fund under WCL Section 25-a assumes responsibility for a disability claim, and a death occurs that is consequentially related to that claim, the Special Fund for Reopened Cases remains responsible for the death claim. This is consistent with the statement made by this Court in *American Economy Ins. Co.*, which emphasized that workers' compensation insurance policies are occurrence-based, meaning that each policy provides coverage for any claims arising from an accident occurring during that policy year, regardless of when the claim is made.

Furthermore, the Third Department's decision is not at odds with the decision in *Matter of Connolly v. Consolidated Edison*, 124 A.D. 3d 1167 (3d Dept., 2015). As pointed out by the Third Department in its decision, *Connolly* involved "a claim for reimbursement" of death benefits from the Special Disability Fund under a completely different statutory provision (WCL Section 15(8)(h)(2)(A)). It was noted that awards made pursuant to WCL Section 15(8) "shall be made against the employer or his or her insurance carrier," who "shall in the first instance make the payments of compensation and medical expenses provided by this subdivision," but may then be reimbursed by the Special

Disability Fund upon making a claim for such reimbursement (WCL Section 15(8)(f); see WCL Section 15(8)(g)). However, once WCL Section 25-a(1) liability has been triggered, the insurance carrier has no further interest in payment of the claim. The statutory scheme contemplates that the Special Fund will step into the shoes of the insurance carrier and succeed to its rights and responsibilities (*Matter of DeMayo v. Rensselaer Polytech Inst.*, 74 N.Y. 2d 459, 462-463 (1989)).

This provides further support for the Third Department's reasoning that another transfer of liability of the claim to the Special Fund after January 1, 2014 did not occur in this case, and was not necessary for the liability to remain with the Special Fund for the death benefit claim. In *Matter of Goutremout v. Advance Auto Parts*, 134 A.D. 3d 1194 (3d Dept., 2015), it was held that liability for a claim shifts to the Special Fund "when an application for compensation is made by an employee ... after a lapse of seven years from the date of injury ... and also a lapse of three years from the date of last payment of compensation." It was further noted that when those time limitations are satisfied, the Special Funds "liability [was] triggered, as a matter of law, upon the passage of time provided by the statute" (*Matter of Martin v. New York Tel.*, 46 A.D. 3d 1196 (3d Dept., 2007)). This demonstrates that the transfer of liability to the Special Fund does not require an application, and is triggered by the passage of time, not when a

hearing is requested or when the issue is decided at a hearing. In *Tipton v. Lang's Bakery*, 250 A.D. 696 (3d Dept., 1937), the Court stated:

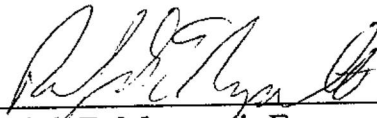
“By the terms of that statute [Section 25-a] the rights of the parties hereto become fixed three years after the last payment of compensation, and seven years after the accident ... Thereupon the employer had fulfilled all of the terms of the Workers' Compensation Law, and met all the obligations imposed thereby. The employer then stood relieved of all liability to make further payments in this case; and the Workers' Compensation Law no longer applied to it.”

In summary, the legal precedent cited above establishes that WCL Section 25-a is applicable to a claim when the time requirements are satisfied, and in this case, the requirements were satisfied long before the January 1, 2014 closing of the Special Fund for Reopened Cases. Thus, the Third Department's decision in this matter is fully supported by the legal precedent, and it is not contrary to any prior decisions made by the Third Department or this Court.

### **CONCLUSION**

Based on the foregoing, it is respectfully requested that the Motions made by the Special Fund for Reopened Cases and the Workers' Compensation Board for permission to appeal to the Court of Appeals be denied, and for other and further relief as the Court may deem proper.

Dated: Tarrytown, New York  
December 5, 2019



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Ralph E. Magnetti, Esq.  
CHERRY, EDSON & KELLY, LLP  
*Attorneys for Appellants, Consolidated  
Edison Co. of NY, Inc. and Sedgwick  
Claims Management Services*  
150 White Plains Road, Suite 209  
Tarrytown, NY 10591  
(914) 332-1800

Copies to:

Clerk of the Court of Appeals  
Court of Appeals Hall  
20 Eagle Street  
Albany, NY 12207

Letitia James  
Attorney General of the State of New York  
The Capitol  
Albany, NY 12224

Stockton, Barker & Mead, LLP  
433 River Street, Suite 6002  
Troy, NY 12180

Ouimette, Goldstein & Andrews, LLP  
88 Market Street, P.O. Box 192  
Poughkeepsie, NY 12602