To Be Argued By:
David W. Faber
Time Requested: 30 Minutes

APL-2020-00043

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

Court of Appeals

STATE OF NEW YORK

In the Matter of the Claim for Benefits under the Workers' Compensation Law made by:

FRANCES VERNEAU,

Claimant,

against

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

Respondents,

and

SPECIAL FUND FOR REOPENED CASES and WORKERS' COMPENSATION BOARD,

Appellants.

BRIEF FOR RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. 500.1(f), the Respondent the Consolidated Edison Company of New York, Inc., has the corporate parent Consolidated Edison, Inc. The Affiliates and Subsidiaries of Affiliates are listed as follows:

- Ada Cogeneration Limited Partnership
- BGA, Inc.
- CED 42, LLC
- CED Ada, Inc.
- CED Generation Holding Company II, LLC
- CED Pilesgrove Holdings, LLC
- CED Wind Power, LLC
- CED/Delta Ada, LLC
- CED/SCS Newington, LLC
- CEDST, LLC
- CES/AEI/OLF Cogeneration, LLC
- Clove Development Corporation
- Competitive Shared Services, Inc.
- Con Edison Leasing, LLC
- Consolidated Edison Development, Inc.
- Consolidated Edison Energy, Inc.
- Consolidated Edison Leasing, L.L.C.
- Consolidated Edison Solutions, Inc.
- Custom Energy Services, LLC
- D.C.K. Management Corp.
- Dartmouth Business Park Solar, LLC
- Davids Island Development Corp.
- Flemington Solar, LLC
- Frenchtown I Solar, LLC
- Frenchtown II Solar, LLC
- Frenchtown III Solar, LLC
- Honeoye Storage Corporation
- Lebanon Solar, LLC
- Murray Hill Solar, LLC
- Newton Solar, LLC
- NUON Trust No. 3
- O&R Development, Inc.
- Orange and Rockland Utilities, Inc.
- Pike County Light & Power Co.
- Pilesgrove Solar, LLC
- Project Finance Fund III, LP
- ROCA Facility Trust No.2
- Rockland Electric Company
- Rockland Electric Co. Transition Funding LLC
- Steam House Leasing, LLC
- SunAmerica Affordable Housing Partners 93, LP
- X Holding LLC

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PRELIMINARY STATEMENT

This Brief is respectfully submitted on behalf of the self-insured employer Consolidated Edison Co. of New York, Inc. and their third-party administrator Sedgwick CMS, Inc. – Respondents. [Hereafter, "*SIE*"] This appeal is by permission of the Court of Appeals dated March 24, 2020 (*Verneau v. Consol. Edison Co. of New York,* 34 N.Y.3d 912 (2020)) granting the motion for leave to appeal to the N.Y.S. Court of Appeals filed by the Special Fund for Reopened Cases under WCL § 25-a ["*SPECIAL FUND*"] and the N.Y.S. Workers' Compensation Board. ["*BOARD*"] (R. 115, 116) This appeal is from the unanimous decision of the Appellate Division of the Supreme Court in the Third Judicial Department dated and entered July 03, 2019. (R. 117-122)

In *Matter of Verneau v. Consol. Edison Co. of New York,* 174 A.D.3d 1022 (3d Dep't 2019) the Appellate Division reversed the BOARD's decision filed May 09, 2018 (R. 13-17) The Appellate Division determined that the imposition of liability on the SPECIAL FUND was not precluded in a claim for consequential death by the Legislature's amendment of WCL § 25-a which closed the fund for reopened cases to new applications effective January 01, 2014. The Appellate Division held that WCL § 25-a (1-a) does not preclude the SPECIAL FUND from continuing to be liable for a causally related consequential death claim in a case

where the SPECIAL FUND was already deemed liable prior to the amendment of the statute.

This appeal is being prosecuted on a fully reproduced record. All references in parenthesis will be to the Record on Appeal unless otherwise indicated.

QUESTION PRESENTED

The question of law sought to be reviewed by the Court of Appeals is:

> Whether the Appellate Division, Third Department properly decided, when an underlying disability claim was found to fall within the provisions of Workers' Compensation Law § 25-a and the responsibility of the SPECIAL FUND, that a causally related consequential death claim filed after January 01, 2014 would also fall within the provisions of Workers' Compensation Law § 25-a where the SPECIAL FUND would be liable?

STATEMENT OF THE CASE

Robert Verneau ["DECEDENT"] was an employee of Consolidated Edison Co. of New York, Inc. – Respondent who had an established work-related occupational disease claim for pulmonary asbestosis, asbestos related pleural disease, chronic irritative bronchitis, and chronic obstructive pulmonary disease with a date of disablement ["*DOD*"] set at June 01, 2000 (WCB No. 0010 2143). At the April 16, 2014 hearing, as noted in FORM: EC-23 *Notice of Decision* filed April 22, 2014, liability for that underlying workers' Compensation claim was transferred from the SIE to the SPECIAL FUND pursuant to WCL § 25-a. "The [carrier] is discharged from liability. Effective as of December 11, 2011, the claim is the liability of the [SPECIAL FUND] for reopened cases as provided by [WCL

§] 25-a." (R. 23) In that BOARD decision filed April 22, 2014 there was a finding of no compensable lost time from November 21, 2006 to April 16, 2014 and the SIE was discharged from liability. (R. 23) More than five (5) years after the date the SPECIAL FUND was deemed liable for the underlying claim, and more than sixteen (16) years after the established date of disablement, the DECEDENT died on January 31, 2017 as a consequence of the work-related lung pathology established in DOD June 01, 2000 (WCB No. 0010 2143).

With a FORM: C-62 'Claim for Compensation in a Death Case' dated March 08, 2017 the DECEDENT's surviving spouse, Frances Verneau ["*CLAIMANT*"] filed a claim for workers' compensation death benefits alleging the DECEDENT's underlying workers' compensation claim was a contributing cause of death. (R. 34-35) At the first hearing dated May 24, 2017 the Workers' Compensation Law Judge ["*WCLJ*"] made a finding of prima facie medical evidence for a work-related death based on a medical record review report from Dr. Ira Gould (R. 49-53) and the WCLJ discharged from notice the SIE. The WCLJ determined the "…case if established will be responsibility of [SPECIAL FUND] per 25-a." (R. 56-57) The SPECIAL FUND did not object to the WCLJ's determination at that May 24, 2017 hearing and did not appeal to the BOARD from the WCLJ's FORM: EC-23 *Notice of Decision* filed May 30, 2017.

Thereafter, the SPECIAL FUND produced a medical record review report from its independent medical examiner Dr. David Kamelhar dated June 11, 2017 who denied the DECEDENT suffered a causally related consequential death related to the underlying occupational disease claim. (R. 25-32) At the July 12, 2017 hearing medical depositions were directed (R. 58-59) and the depositions of the SPECIAL FUND's Dr. Kamelhar and the CLAIMANT's Dr. Gould were completed on August 17, 2017 and September 22, 2017 respectively. At the October 18, 2017 hearing summations were presented to the WCLJ on the question of whether the DECEDENT suffered a causally related consequential death related to the underlying occupational disease claim for DOD June 01, 2000 (WCB No. 0010 2143). At that October 18, 2017 hearing, as noted in the FORM EC-23: *Notice of Decision* filed October 23, 2017, (R. 98-100) the WCLJ established the claim for DOA January 31, 2017 (WCB No. G183 0693) for a work-related death. The representative for the SPECIAL FUND objected to the establishment of the claim but did not make any argument at that October 18, 2017 hearing on the question concerning the SPECIAL FUND's liability under WCL § 25-a. (R. 86-97)

The SPECIAL FUND appealed to the BOARD on November 20, 2017 contending, based on this Court's decision in *American Economy Ins. Co. v. State of New York*, 30 N.Y.3d 136 (2017), that the transfer of liability under WCL § 25-a was barred by WCL § 25-a (1-a). (R. 101-109) The SPECIAL FUND maintained

the Fund for Reopened Cases under WCL § 25-a was not responsible for the claim for casually related consequential death on January 31, 2017 because it was a new claim for WCL § 25-a made after the amendment of the statute on January 1, 2014. (R. 101-109) The CLAIMANT's attorney, in their rebuttal to that appeal, contended the WCL § 25-a issue was not properly before the BOARD because the issue was not raised in a timely manner. (R. 111-114)

DECISION OF THE WORKERS' COMPENSATION BOARD

The BOARD, in the *Memorandum of Board Panel Decision* filed May 09, 2018, excused the SPECIAL FUND's failure to timely raise the issue of WCL § 25-a liability before the claim was established for a causally related consequential death. (R. 13-18) Relying on this Court's decision in *American Economy Ins. Co.*, *supra*., decided and entered October 24, 2017, the BOARD determined that the Appellate Division's decision in *Matter of Misquitta v. Getty Petroleum*, 150 A.D.3d 1363 (3d Dep't 2017) was no longer controlling. The BOARD reasoned that as this Court in the 2017 *American Economy Ins. Co.* decision determined WCL § 25-a (1-a) was constitutional that any claim for WCL § 25-a liability made after January 1, 2014 must be denied. The BOARD: "…this is true even where the underlying lifetime claim has been transferred to the [SPECIAL FUND]." (R. 16)

DECISION OF THE APPELLATE DIVISION

By *Notice of Appeal* filed May 23, 2018 (R. 9-12) the SIE appealed to the Appellate Division of the Supreme Court in the Third Judicial Department from the decision of the BOARD filed May 09, 2018. On appeal the SIE contended WCL § 25-a (1-a) did not foreclose the SPECIAL FUND's liability in a claim for a causally related consequential death where liability for the underlying claim had already been transferred prior to the amendment of the statute on January 01, 2014. In the decision decided and entered July 03, 2019 the Appellate Division agreed with the SIE and reversed the BOARD's decision in the *Memorandum of Board Panel Decision* filed May 09, 2018. (R. 117-122)

In *Matter of Verneau v. Consol. Edison Co. of New York,* 174 A.D.3d 1022 (3d Dep't 2019) the Appellate Division determined there was no violation of WCL § 25-a (1-a) which prohibits the BOARD from accepting, after January 01, 2014, an application by an employer or carrier for transfer of liability of a claim to the SPECIAL FUND. The imposition of liability on the SPECIAL FUND in the present case was not precluded by the statutory amendment given that liability was transferred to the SPECIAL FUND well before the January 01, 2014 closure date. There was no violation of the plain language of the statutory sentence at issue, as there was never any application by the SIE for transfer of liability after January 01, 2014, and this decision is supported by the Appellate Division's decision in *Matter*

of Misquitta, infra. which involved a factual scenario not dissimilar to the case at bar. The Appellate Division determined this Court's 2017 decision in *American Economy Ins.* is not inconsistent with the *Matter of Misquitta* decision and does not compel a contrary result. *Id.* at 1024-1025. *American Economy Ins. Co.* addressed the constitutionality of the 2013 amendment and did state or suggest that WCL § 25-a (1-a) applied to foreclose the SPECIAL FUND from continuing to be liable for consequential death claims where a decedent had an established workers' compensation claim for which the SPECIAL FUND was already liable prior to January 01, 2014. The Appellate Division: "To the extent that the [BOARD] relied on *American Economy* in concluding that liability for [CLAIMANT's] consequential death claim did not shift to the [SPECIAL FUND] under the circumstances presented here, and in the absence of any legal support for its conclusion, its decision must be reversed." *Id.* at 1025.

The Appellate Division denied motions filed by the SPECIAL FUND and the BOARD for permission to appeal to the Court of Appeals. By Decision and Order dated March 24, 2020 the Court of Appeals granted the SPECIAL FUND and the BOARD's motions for leave to appeal (R, 115, 116) and this appeal follows.

ARGUMENT

Relevant Statute

Workers' Compensation Law Section 25-a (1-a) provides:

> **"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." (Emphasis added.)

POINT I

THE PLAIN LANGUAGE IN WCL § 25-a (1-a) HAS NO APPLICATION TO A CONSEQUENTIAL DEATH CLAIM WHERE THE UNDERLYING DISABILITY CLAIM WAS FOUND TO FALL WITHIN THE PROVISIONS OF WCL § 25-a.

A. Because this case presents a question of statutory interpretation, no deference is due the Workers' Compensation Board.

Whether WCL § 25-a (1-a) precludes WCL § 25-a relief in a claim for consequential death, when the underlying disability claim was previously found to fall within the provisions of WCL § 25-a, is a pure question of statutory interpretation. The specific question of statutory interpretation placed before this Court is the meaning of the amended statute's precise language: "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…" WCL § 25-a (1-a). Because this case

presents a pure question of statutory interpretation dependent only on an accurate interpretation of legislative intent, no deference is due to the BOARD's determination. *See*, *Belmonte v. Snashall*, 2 N.Y.3d 560, 566 (2004); *De Mayo v. Rensselaer Polytech Institute, et al.*, 74 N.Y.2d 459, 462 (1989); *Matter of Krausa v. Totales Debevoise Corp*., 84 A.D.3d 1545, 1546 (3d Dep't 2011).

B. There can be no violation of WCL § 25-a (1-a) as the SIE never made an application for transfer of liability to the SPECIAL FUND after January 01, 2014.

The clearest indicator of legislative intent is the statutory text and the language itself, "…giving effect to the plain meaning thereof." *Matter of Krausa*, *Id*. at 1546. The plain meaning in the amended statute, the clear and unambiguous language in WCL §25-a (1-a), states the SIE is not permitted, after January 01, 2014, to make an application for the transfer of liability under WCL § 25-a. This record does not support a finding of a violation of WCL §25-a (1-a) because at no time did the SIE ever make an application concerning WCL § 25-a liability after January 01, 2014.

WCL §25-a (1-a) provides: "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]…" after January 01, 2014. When reviewing this record and addressing the plain meaning of the statute, it is evident that at no time did the SIE make any application after January 01, 2014 for transfer of

liability to the SPECIAL FUND. The Appellate Division in the decision below correctly states "…[t]he record does not indicate any violation of the plain language of the statutory sentence at issue. Indeed, the record does not contain any copy of any application by the [SIE] for transfer of liability of a claim to the [SPECIAL FUND], nor any indication that any such application was filed after January 01, 2014." *Matter of Verneau, supra.* at 1024.

C. When an underlying claim has already been found to fall within the provisions of WCL § 25-a no additional application to the SPECIAL FUND is needed when establishing a consequential injury, including a causally related consequential death.

Unlike a claim under WCL § 15-8, for example, (see, *i.e., Matter of Connolly v. Consolidated Edison,* 124 A.D. 3d 1167 (3d Dep't 2015)) no application is needed for the transfer of liability to the SPECIAL FUND in a consequential death claim where the underlying claim has already been found to fall within the provisions of WCL § 25-a. As in any claim for consequential injury to an underlying disability claim that has already been found to fall within the provisions of WCL § 25-a, no additional application to the SPECIAL FUND is needed as the transfer of liability occurs as a matter of law.

In the case at bar the DECEDENT's entire workers' compensation claim related to the occupational lung pathology for DOD June 01, 2000 (WCB No, 0010 2143) was transferred to the SPECIAL FUNDS under WCL § 25-a as of December 11, 2011 in the FORM: EC-23 *Notice of Decision* filed April 22, 2014 in DOD

June 01, 2000 (WCB No. 0010 2143). (R: 23) Although the 2013 amendment to WCL § 25-a (1-a) forecloses any claim against the SPECIAL FUND after January 01, 2014, and the DECEDENT's death on January 31, 2017 naturally falls after that cutoff date, this is a claim for a *consequential* injury causally related to an underlying established claim for a work-related lung pathology with a DOD set at June 01, 2000. The SIE made no application after January 01, 2014 for transfer of liability to the SPECIAL FUND and no application was necessary. There has been no violation of the clear and unambiguous language of the amended statute. The underlying occupational disease claim, and any consequential injury resulting from same including death, became the responsibility of the SPECIAL FUND as of December 11, 2011 when the DECEDENT's claim for DOD June 01, 2000 (WCB No. 0010 2143) was found to fall within the provisions of WCL § 25-a.

D. As the plain language of the amended statute is clear and unambiguous, as the SIE never made any application as contemplated by WCL § 25-a (1-a), the BOARD's only recourse is with the Legislature.

As the amended statute in question has clear and unambiguous language the BOARD's only recourse if it wants to prevent the lawful amendment of consequential claims, where an underlying claim has been found to fall within the provisions of WCL § 25-a, is with the Legislature. The SPECIAL FUND and the BOARD would have this Court read into the amended statute, to see something

that is clearly not there, to justify the preferred result to these proceedings and that is not proper.

Respectfully, if the Legislature wanted WCL § 25-a (1-a) to preclude any claim for consequential injuries including death, in claims such as in the case at bar where WCL § 25-a was already established in the underlying claim prior to January 01, 2014, the Legislature would have stated same in an unambiguous manner in the amended statute. The SPECIAL FUND and the BOARD should not be permitted to alter the plain language of the amended statute, the clear and unambiguous meaning of the language the Legislature approved in WCL §25-a (1-a), through appeals to New York State's Appellate Courts. Instead of multiple attempts for judicial revision the BOARD should be required to go to the Legislature and request whatever statutory amendment it deems warranted. In the past, when addressing different issues, the BOARD has gone to the Legislature for statute amendment when it disagreed with authoritative case law on a specific issue and it should be required to do the same here. (*See, i.e., LaCroix v. Syracuse Exec. Air Serv., Inc.,* 8 N.Y.3d 348 (2007) where this Court reversed the BOARD and determined the BOARD was not authorized to order schedule loss of use awards payable in a lump sum. Consequently, in 2009, the statute was amended where WCL §§ 15(3)(u) and 25(1)(b) authorized the payment of schedule loss of use awards in a lump sum.)

There can be no violation of WCL § 25-a (1-a) as the SIE never made an application for transfer of liability to the SPECIAL FUND after January 01, 2014. When an underlying claim has already been found to fall within the provisions of WCL 25-a no additional application to the SPECIAL FUND is needed when establishing a consequential injury, including a causally related consequential death. And, as the plain language of the amended statute is clear and unambiguous, as the SIE never made any application as contemplated by WCL § 25-a (1-a), the BOARD's only recourse is with the Legislature.

POINT II

A DEATH RELATED TO AN ESTABLISHED WORKERS' COMPENSATION CLAIM IS NOT A NEW INJURY OR ACCIDENT, BUT RATHER A NEW CLAIM CONSEQUENTIAL TO THE ORIGINAL INJURY.

A consequential death is not a new injury or accident, but rather a new claim consequentially related to the original injury. This longstanding principle was made clear in *Matter of Krausa, supra*., where the Appellate Division rejected the premise that a decedent's death date should be deemed an "accident" for purposes of the statute. Addressing a consequential death and the applicability of WCL § 15-8 (ee) the Appellate Division determined "…while claims for disability and death benefits are legally distinct and have different accrual dates for statute of limitations purposes (*see Matter of Zechmann v. Canisteo Volunteer Fire Dept.*, 85 N.Y.2d 747, 751-753 (1995)), "death [is not] a new injury" or accident, "but rather

a new claim consequentially related to the original injury" (*Commissioners of State Ins. Fund v. Hallmark Operating, Inc.*, 61 A.D.3d 1212, 1213 (3d Dep't 2009)." *Matter of Krausa, supra*., at 1546–47. In *Commissioners of State Ins. Fund* it was the date of the original injury, not the date of death, that determined what insurance carrier was obligated to defend the claim for death benefits. *Matter of Krausa* at 1213.

The case law provides that once liability has been transferred from the SIE to the SPECIAL FUND under WCL § 25-a that statute section contemplates that the SPECIAL FUND will take over all rights and responsibilities including any claim for consequential injury. In *Matter of De Mayo v. Rensselaer Polytech Inst.* this Court stated: "Once section 25-a (1) has been triggered, the insurance carrier has no further interest in payment of the claim. This statutory scheme contemplates that the Special Fund will step into the shoes of the insurance carrier and succeed to its rights and responsibilities." 74 N.Y.2d 459, 462–63 (1989).

And this transfer of liability where the employer or carrier has no further interest in payment of the claim would apply to any claimed consequential death. In *Matter of Fitzgerald v. Berkshire Farms Center & Services for Youth* the Appellate Division reversed the BOARD and determined, as the SPECIAL FUND was liable for an underlying claim under WCL § 25-a (1) and made payments to the date of decedent's death, that the carrier was not liable for the death benefit

claim. The Court: “Under the well-established interpretation of section 25-a, the [SPECIAL FUND] stepped into the carrier's shoes regarding this stale claim and made payments from November 2005 to October 2007. It would be antithetical to the settled statutory purpose to permit these payments to serve as a basis to place liability for the death claim on the carrier, which had already been discharged from liability for claims related to the 1994 incident.” 87 A.D.3d 353, 355 (3d Dep’t 2011).

A consequential death is not a new injury or accident, but rather a new claim consequentially related to the original injury. There is nothing in the 2013 amendment to WCL § 25-a or in the Memorandum in Support of the closure of the WCL § 25-a Fund that raises an exception to the longstanding precedent that, when the SPECIAL FUND is liable for the underlying claim under WCL§ 25-a, it is also liable for any consequential injury. No application was necessary for a transfer of liability to the SPECIAL FUND under WCL § 25-a after January 01, 2017 and after the DECEDENT died on January 31, 2017, because the transfer of liability was automatic as a matter of law at the moment the underlying claim was found to fall within the provisions of WCL § 25-a in December 2011. WCL § 25-a contemplates that once liability has been transferred from the SIE to the SPECIAL FUND the SPECIAL FUND will step into the shoes of the SIE and succeed to its rights and responsibilities including any claim for consequential death.

POINT III

"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." ***Matter of Misquitta*** **at 1365.**

A. When the SPECIAL FUND is deemed liable under WCL § 25-a it will also be liable for any consequential injury, including death, regardless if the death is after January 01, 2014.

When the SPECIAL FUND is deemed liable under WCL § 25-a in a workers' compensation claim it will also be liable for any consequential injury, including death, regardless if the consequential injury was after January 01, 2014. The above referenced quote from the Appellate Division, Third Department in *Matter of Misquitta* is the point the BOARD refuses to acknowledge in its *Memorandum of Board Panel Decision* filed May 09, 2018. (R. 13-18) The *Matter of Misquitta* decision is also the precedent the SPECIAL FUND tries to convince the Court to rescind in the present appeal. The *Misquitta* decision is sound and fully supported by the fundamental principal of the workers' compensation statute that, once the SPECIAL FUND is deemed liable under WCL § 25-a, no further application is needed and the SPECIAL FUND will be liable for any consequential injury, including death, even if the consequential injury was after January 01, 2014.

In *Matter of Misquitta* the Appellate Division faced a fact pattern not dissimilar to the case at bar and determined the SPECIAL FUND remains liable for the claim for death benefits. The Appellate Division properly found that it was of no consequence whether the decedent's death was before or after the amendment of the statute on January 01, 2014 as the Court was addressing a claim for a consequential death causally related to an underlying claim that had already been found to fall within the provisions of WCL § 25-a. Moreover, there is no credible basis for the BOARD's inference in the *Memorandum of Board Panel Decision* filed May 09, 2018 that this Court's 2017 decision in *American Economy Ins. Co.* somehow modified or overruled *Matter of Misquitta* – it did not.

B. This Court's 2017 decision in *American Economy Ins. Co.* did not overrule or modify the Appellate Division's decision in *Matter of Misquitta* in any way.

In *Matter of Misquitta* the Appellate Division definitively stated that, although a claim for death benefits is a separate and distinct legal proceeding, where liability for the underlying claim has already been transferred to the SPECIAL FUND, and the employee later dies as a consequence of the original claim, the SPECIAL FUND remains liable for the claim for death benefits. Based on the scenario presented in the case at bar, a scenario not dissimilar to that in *Misquitta*, the SIE need not obtain another transfer of liability to the SPECIAL FUND upon DECEDENT's death as liability had already been transferred prior to

the January 01, 2014 amendment of WCL § 25-a. At no time in the case at bar did the SIE make any application either on or after January 01, 2014 for transfer of liability to the SPECIAL FUND.

WCL § 25-a (1-a) has no impact on the SPECIAL FUND liability for the present claim for which liability was transferred as of December 11, 2011 in the FORM: EC-23 *Notice of Decision* filed April 22, 2014 in DOD June 01, 2000 (WCB No. 0010 2143). (R: 23) The BOARD's position below that this Court's decision in *American Economy Ins. Co.* somehow modifies or overrules *Matter of Misquitta* is misplaced and not supported by a review of those decisions. The Court of Appeals in *American Economy Ins. Co.* was addressing the constitutionality of the 2013 amendment to WCL § 25-a which added the closure provision of WCL § 25-a (1-a) effective January 01, 2014 and that decision has little application to the issue at bar. The *Matter of Misquitta* ruling is the authority on the issue presented, and it is the precedent that should have been followed by the BOARD under the doctrine of *stare decisis*.

Respectfully, if the Attorney General's office, appearing for the BOARD in *Matter of Misquitta* disagreed with the Appellate Division's ruling a Motion for Permission to Appeal to the Court of Appeals, or a motion directly to the Court of Appeals, or both, should have been filed. Or possibly the BOARD could seek a Legislative amendment as it has been known to do when it disagrees with

authoritative case law on a specific issue. But until such time as the Legislature modifies WCL § 25-a to concur with what is being claimed by the SPECIAL FUND and the BOARD the interpretation of the statute, the legal ramifications of WCL § 25-a and its application to a consequential death claim where SPECIAL FUND liability has already been established in the underlying claim, is clear. The Appellate Division's 2017 decision in *Matter of Misquitta v. Getty Petroleum* is the binding precedent.

C. This Court's decision in *American Economy Ins. Co.* was primarily addressing the constitutionality of the 2013 amendment of the workers' compensation statute.

In *Matter of Misquitta* there exists a footnote that is relevant to the BOARD's misinterpretation of this Court's 2017 ruling in *American Economy Ins. Co.* In the footnote the Appellate Division, Third Department cites the Appellate Division, First Department's initial decision in *American Economy Insurance Company v. State of New York,* 139 A.D.3d 138 (1st Dep't 2016) which was later reversed by this Court. In that footnote the Appellate Division stated: "…[w]e need not address the constitutionality of the amendment closing the [SPECIAL FUND], as we have concluded that the [SPECIAL FUND] remained liable for the death benefit claim based upon the 2000 transfer of liability under [WCL] section 25-a." *Matter of Misquitta* at 1365. There was nothing in this Court's 2017 *American Economy Ins. Co.* decision that modified or overruled *Matter of Misquitta,* and

there was no ambiguity in the Appellate Division's analysis of the issue that would permit the BOARD to reach a different conclusion in the present claim. This Court's later decision in *American Economy Ins.*, reversing the Appellate Division, First Department's decision on constitutional grounds in no way altered the Appellate Division's reasoned decision in *Matter of Misquitta* or in the case at bar. And, in the case at bar, the Appellate Division properly states this Court's decision in *American Economy Ins. Co.* does not compel a different result as that decision addressed the constitutionality of the 2013 amendment to the workers' compensation law.

There is no real distinction between the fact scenarios in this case at bar and the *Matter of Misquitta*. The SPECIAL FUND and the BOARD's position below that this Court's 2017 decision in *American Economy Ins. Co.* somehow limits the Appellate Division's decision in *Matter of Misquitta* is not supported by a review of those decisions. Until such time as the BOARD can persuade the Legislature to amend the statute the *Matter of Misquitta* is controlling and, when the SPECIAL FUND is deemed liable under WCL § 25-a in an underlying claim, it is also liable in any consequential claim regardless of whether the consequential injury results in death after January 01, 2014.

D. The argument that case law does not support the transfer of liability to the SPECIAL FUND upon a finding of consequential death, when the underlying claim was already found to fall within the provisions of WCL §25-a, is not correct.

The SPECIAL FUND now contends in the present appeal that *Matter of Misquitta* and *Matter of Fitzgerald* are contrary to this Court's decision in *Matter of Zechmann v. Canisteo Volunteer Fire Dept.*, 85 N.Y.2d 747 (1995). We disagree. In *Matter of Zechmann* this Court determined a claim for death benefits, where the underlying claim was found to be the responsibility of the SPECIAL FUND under WCL § 25-a, was a new claim separate and distinct from the closed disability claim, and did not constitute the reopening of a closed case for the purposes of WCL § 123. *Id.* at 753. It is not insignificant that in *Matter of Zechmann*, as in *Commissioners of State Ins. Fund*, it was the date of the underlying injury, not the date of death, that determined what carrier was responsible for the consequential death claim and, in *Zechmann*, the SPECIAL FUND did not dispute that as the requisite period of time had lapsed that the death claim fell within the provisions of WCL § 25-a. This Court determined that WCL § 123 would not be a bar to the claim for death benefits. On the WCL § 25-a issue, however, this Court stated: "The primary purpose of Section 25-a(1) is to transfer liability for awards from employers and carriers to the Special Fund where, as here, death resulting from the injury occurred more than seven years from the date of the injury and more than three years after the last payment of compensation (Workers'

Compensation Law Section 25-a[1][3]; see also *Minkowitz,* Practice Commentaries, McKinney's Cons. Laws of NY, Book 64, Workers' Compensation Law Section 25-a, at 358). The Special Fund has conceded its liability under this Section, if the award is not time-barred (see also, *Matter of Riccardi v. Dellwood Dairy Co.*, 38 A.D. 2d 666, 666-667 (3d Dep't 1971))." *Id*. at 752.

It is noteworthy that the BOARD, in their decision below filed May 09, 2018, maintained it was this Court's decision affirming the constitutionality of WCL § 25-a (1-a) in *American Economy Ins. Co.* that somehow modified the Appellate Division's decision in *Matter of Misquitta*. Now the SPECIAL FUND wants to rely on this Court's decision in *Matter of Zechmann* even though said decision is not inconsistent with the later Appellate Division decisions in *Matter of Misquitta* and *Matter of Fitzgerald* and actually supports the SIE's position in the present appeal. In *Matter of Zechmann* this Court restated the fundamental principle that the primary purpose of WCL § 25-a (1) was to transfer liability from employers and carriers to the SPECIAL FUND where death resulting from a work injury occurred more than seven years from the date of the injury and more than three years after the last payment of compensation. This is not inconsistent with the decision in *Matter of Misquitta* where the Appellate Division stated "…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." *Id.* at 1365. This rationale is also not dissimilar to the Appellate Division's 2011 decision in *Matter of Fitzgerald v. Berkshire Farms Center & Services for Youth* where it was determined it would be antithetical to the settled statutory purpose of WCL § 25-a "to place liability for the death claim on the carrier, which had already been discharged from liability." *Id.* at 355.

E. The *Matter of Connolly v. Consolidated Edison* is not inconsistent with the decision of the Appellate Division in the case at bar.

The SPECIAL FUND has also argued that the *Matter of Misquitta* and *Matter of Fitzgerald* are at odds with the Appellate Division's decision in *Matter of Connolly v. Consolidated Edison*, 124 A.D.3d 1167 (3d Dep't 2015). Again, as correctly pointed out by the Appellate Division in this decision under appeal, the *Matter of Connolly* involved "a claim for reimbursement" of death benefits from the Special Disability Fund under a completely different statutory provision (WCL § 15(8)(h)(2)(A)). It was noted that by the Appellate Division that awards made pursuant to WCL § 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 § 15(8)(f); see WCL § 15(8)(g))." *Matter of Verneau* at

1025. The Appellate Division goes on, citing this Court's decision in *Matter of De Mayo, supra*. stating once WCL 25-a(1) has been triggered, the insurance company has no further interest in payment of the claim as the "…statutory scheme contemplates that the [SPECIAL FUNDS] will step into the shoes of the insurance carrier and succeed to its rights and responsibilities." *Id*. at 1025.

The statutory scheme under WCL § 25-a is different than that contemplated by WCL § 15 (8). Once WCL § 25-a (1) "liability [was] triggered, as a matter of law, upon the passage of time provided by the statute" (*Matter of Goutremout v. Advance Auto Parts*, 134 A.D. 3d 1194 (3d Dept., 2015)) the employer or carrier has no further obligation and no application is warranted as the SPECIAL FUND steps into the shoes of the employer or carrier and succeeds to its rights and responsibilities. This reasoning supports the Appellate Division's conclusion in the case at bar that another transfer of liability to the SPECIAL FUND after January 1, 2014 did not occur in this case, and indeed was not necessary, for the liability remained with the SPECIAL FUND since the transfer of liability under WCL § 25-a in December 2011. The transfer of liability to the SPECIAL FUND does not require an application and is triggered by the passage of time.

WCL § 25-a is applicable to a claim when the time requirements are satisfied. In the case at bar the requirements were satisfied as of December 11, 2011, long before the January 01, 2014 closing of the Fund for Reopened Cases.

The Appellate Division's decision in the matter at bar is supported by legal precedent and is not contrary to any prior decisions by the Appellate Division or this Court.

POINT IV

THE APPPELLATE DIVISION'S DECISION IS CONSISTENT WITH THE PLAIN LANGUAGE OF WCL § 25-a (1-a) AND THE INTENT OF THE LEGISLATURE.

A. The Court of Appeals considered the effect of the amended statute would have on injuries that occurred prior to January 01, 2014 where WCL § 25-a liability may have been established, but for WCL § 25-a (1-a).

In its summary of the circumstances leading to the 2013 amendment to WCL § 25-a (1-a) this Court noted in its 2017 decision in *American Economy Ins. Co.* that the amendment of the statute provided that no application for a transfer of liability of a claim to the SPECIAL FUND shall be accepted on or after January 1, 2014, but that the SPECIAL FUND remained open to administer reopened cases previously assigned to it. In reaching the conclusion that the amendment to the statute was not unconstitutional this Court only considered the effect the amendment of the statute would have on injuries that occurred prior to January 01, 2014 where WCL § 25-a liability may have been established, but for the amendment, and not injuries that occurred before January 1, 2014 where liability under WCL § 25-a had already been established.

The SPECIAL FUND's argument in the present appeal that WCL § 25-a (1-a) should act as a bar for WCL § 25-a relief in a consequential death claim, where

WCL § 25-a liability was already established in the underlying disability claim, is contrary to this Court's 2017 analysis in *American Economy Ins. Co.* In that decision this Court indicated that despite the closure of the SPECIAL FUND to new cases subsequent to January 01, 2014, the SPECIAL FUND remained open to administer cases previously assigned to it. The case at bar clearly falls into that category of cases being referenced in this Court's 2017 decision in *American Economy* Ins. *Co.* - a case where liability had been transferred to the SPECIAL FUND prior to January 01, 2014 that was fully funded at the time of the statutory amendment.

B. Claims such as the underlying claim at bar where WCL § 25-a was previously established, and any consequential claim related to same, were fully funded by assessments prior to the amendment of the statute.

The core of the matter is the 2013/2014 Executive Budget and the amended statute does not address the scenario at bar, and the Appellants are attempting to read into the amended statute something that does not exist. The BOARD is taking a liberal interpretation of the Memorandum in Support of the legislation and there is no guidance provided, prior to the amended statute taking effect, that has application to the scenario at bar. Those claims where WCL § 25-a had previously

been established prior to the amendment of the statute effective January 01, 2014, including the underlying claim at bar for DOD June 01, 2020 (WCB No. 0010 2143), were fully funded by assessments as of the passage of the Executive Budget and the amendment of the statute. The Memorandum in Support of the 2013-2014 Executive Budget addresses the fact that the premiums paid by carriers and, in this case, a selfinsured-employer have already covered the liability of cases that remain the responsibility of the SPECIAL FUNDS, which would also include any consequential death claim.

C. Hypothetical scenarios guessing how long the Fund for Reopened Cases will be required to remain open have little connection to the reality of the cases before the Courts, and the answers to hypothetical questions, as improbable as they may be, are best addressed by the Legislature.

The SPECIAL FUND and the BOARD have also argued the Appellate Division's decision in the case at bar will result in the Fund for Reopened Cases remaining open for decades, because death benefits can extend for many years when there are younger surviving spouses and minor or disabled children of the deceased. The SPECIAL FUND has gone as far as presenting an improbable scenario involving a decedent married to a spouse twenty-five years his junior, giving birth to a daughter with a permanent disability, who might be entitled to death benefits through the year 2110. The reality of these cases before the Court

and those before the Appellate Division are very different than the improbable hypothetical presented on appeal.

In the present case the DECEDENT died on January 31, 2017 at the age of 76, and his surviving spouse the CLAIMANT was seventy-four years of age. And in the *Matter of Rexford v. Gould,* 174 A.D.3d 1026 (3d Dep't 2019), also being reviewed by the Court, the decedent died at the age of seventy with no legal dependents. There are five other cases involving this same issue currently pending in the Appellate Division, Third Department. The decedent in *Lucks v. Volt,* App. Div No. 528032 died at the age of eighty-five and had no legal dependents; 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.* App. Div. No. 527981 died at the age of seventy-nine leaving a surviving spouse who is now eighty-two years old.

The hypothetical scenario set forth by the SPECIAL FUND referencing a significantly younger surviving spouse with a disabled child is improbable and not consistent with any of the pending cases before the Appellate Division and the

Court of Appeals. Hypotheticals and guesswork should not rule the day, especially where there is clear and unambiguous statutory language and case law on point. We also respectfully submit the answers to these hypothetical questions, as improbable as they may be, are best addressed by the Legislature.

D. The intent of the Legislature is best derived from the clear and unambiguous language of the amended statute.

The BOARD also maintains there are nine thousand cases where liability for a lifetime benefit awards have been transferred to the Fund for Reopened Cases, and the Appellate Division's decision below is contrary to the Legislature's intent to close the Fund and will force it to remain open for decades to come. Again, we submit the "intent" of the Legislature is best reflected in the clear and unambiguous language of the amended statute. The clear and unambiguous language set forth in the amended statute would have no application to the case at bar as the SIE made no application for WCL § 25-a relief after January 01, 2014, nor was it required to in a claim for consequential death where the underlying claim was previously found to fall with the provisions of WCL § 25-a.

There are thousands of WCL § 25-a cases where no indemnity payments are paid and the SPECIAL FUND continues to pay for medical treatment. As long as we are dealing with hypotheticals the BOARD has not indicated the average or median age of any claimant in these claims, and it is just as likely as not that many claimants are under the age of thirty. The point is the SPECIAL FUND is required

to remain open for many decades regardless of the decisions now under appeal and before the Appellate Division and the Court of Appeals. The 2013 amendment to the workers' compensation law requires that the SPECIAL FUND remain open to administer all claims assigned to it prior to January 01, 2014 and this, we contend, would include any consequential injury related to a claim that was previously found to fall within the provisions of WCL § 25-a.

Finally, the BOARD maintains if the Legislature intended to except from its general prohibition on the transfer of claims to the SPECIAL FUND those new claims for death benefits that arose from the same injuries that gave rise to the lifetime claims previously transferred to the SPECIAL FUND it "knew how to do so" and any omission of language creating such a carve-out must be construed as intentional. (BOARD Appellant Brief, p. 20). This novel argument ignores the fact that the legislation allows the SPECIAL FUND to remain open to administer cases previously assigned to it prior to January 01, 2014 and would also apply to any consequential injury related to those cases. Moreover, it can just as easily be argued that if it was the Legislature's intent was to apply the closing of the SPECIAL FUND to causally related consequential death claims where liability for the underlying disability claim had already been transferred under WCL § 25-a "…it knew how to do so."

If the BOARD wants to close what it perceives as a loophole in the amended statute the remedy lies with the Legislature, not the Appellate Courts of New York State. In the Appellate Division's decision below it was noted this Court's decision in *American Economy Ins. Co.* "…did not specifically state or otherwise suggest 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." *Matter of Verneau* at 1025. This clearly was the correct interpretation of the legislative amendment and this Court's 2017 decision in *American Economy Ins. Co.* Speculation as to what the Legislature's "intent" was in the wording of the amended statute is belied by the clear and unambiguous language of WCL § 25-a (1-a). The clearest indicator of legislative intent is the statutory text (*Matter of Krausa, supra* at 1546) and there is nothing in the plain language of WCL § 25-a (1-a), nor is there any suggestion in the legislative history leading to the 2013 amendment of the statute, to suggest that deaths that are consequentially related to underlying workers' compensation claims that were already transferred under WCL § 25-a prior to January 01, 2014 are no longer the responsibility of the SPECIAL FUND.

CONCLUSION

Wherefore, the Respondent's Consolidated Edison Company of New York, Inc. and Sedgwick Claims Management Services, Inc. respectfully request that the Order of the Appellate Division reversing the Workers' Compensation Board be ***AFFIRMED.***

Dated: November 17, 2020
Tarrytown, NY

Respectfully submitted,

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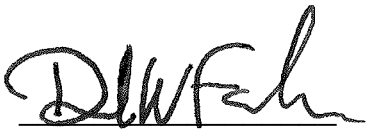

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

A proportionally spaced typeface was used, as follows:

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