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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF HRONCICH,

Respondent,

-against-

No. 145

CON EDISON, ET AL.,

Appellants.

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20 Eagle Street  
Albany, New York 12207  
September 9, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

DAVID W. FABER, ESQ.  
CHERRY EDSON & KELLY, LLP  
Attorneys for Appellants  
One Old Country Road  
Carle Place, NY 11514

LAURA ETLINGER, ESQ.  
NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL  
Attorneys for Respondent  
The Capitol  
Albany, NY 12224

Karen Schiffmiller  
Official Court Transcriber

1                   JUDGE GRAFFEO: 145, Hroncich against Con  
2 Edison.

3                   Counsel, do you wish to reserve any time  
4 for rebuttal?

5                   MR. FABER: Yes, three minutes, please,  
6 Your Honor.

7                   My name is David Faber. May it please the  
8 court; I represent Consolidated Edison of New York  
9 and Sedgwick Claims Management Services,  
10 Incorporated, the appellants in this matter. It's  
11 our - - -

12                   JUDGE GRAFFEO: Coun - - - counsel, why  
13 shouldn't this court accept the statutory  
14 interpretation that the board presented in the  
15 Buffalo Forge case?

16                   MR. FABER: Because we respectfully  
17 contend, Your Honor, that the Workers' Compensation  
18 was incorrect in their interpretation of Section  
19 15(8) (sic). And in the underlying claims, they  
20 completely don't even address Workers' Compensation  
21 Law Section 10 - - -

22                   JUDGE GRAFFEO: Shouldn't we focus on  
23 Section 16?

24                   MR. FABER: No, Your Honor.

25                   JUDGE GRAFFEO: Doesn't Section 16 deal

1 with the death benefits?

2 MR. FABER: It does, Your Honor, but we  
3 respectfully contend that Section 16, although it  
4 does not specifically address apportionment, nor does  
5 it prohibit apportionment, in the statutory language  
6 in support of this fundamental principal that  
7 liability should be apportioned in proportion to  
8 causation, stems from Section 15(7) and Section 10 of  
9 the Workers' Compensation Law.

10 JUDGE PIGOTT: You're say - - - you're  
11 saying 16 is a derivative, essentially, of 15. You  
12 can't a 16 claim without a 15 claim.

13 MR. FABER: The definition of "death" in  
14 the Workers' Compensation Law, "Death shall result  
15 from injury." You cannot have a work-related death,  
16 without having a work-related injury. They're part  
17 and parcel the same thing. They cannot be do - - -  
18 divorced from each other.

19 JUDGE GRAFFEO: Doesn't 15, though, deal  
20 with a work-related injury, and then a subsequent  
21 nonwork-related?

22 MR. FABER: Section 15 - - - well, if I  
23 may, Your Honor. Correct me if I'm wrong, but there  
24 are case - - - there's case law that the board  
25 recognizes where you have a work-related disability

1 and then a subsequent nonwork-related disability, and  
2 they will apportion benefits to the nonwork-related  
3 disability.

4 JUDGE ABDUS-SALAAM: But that's an injury,  
5 not death.

6 MR. FABER: Correct, Your Honor, but again,  
7 our contention is a definition of death, based upon  
8 the Workers' Compensation Law, death arises from  
9 injury, arising out of, and in the course - - -

10 JUDGE GRAFFEO: What about the fact that  
11 the death benefits are to be looked at independent  
12 from the disability benefits, that's there's a  
13 different legislative or public policy behind the  
14 death benefits - - -

15 MR. FABER: Well, then - - -

16 JUDGE GRAFFEO: - - - which is to assist  
17 the spouse, the dependents, whoever - - -

18 MR. FABER: Absolutely, Your Honor.

19 JUDGE GRAFFEO: - - - to replace that - - -  
20 that income.

21 MR. FABER: That's exactly what a death  
22 benefit award is. It's no different than a  
23 disability benefit award. That is, death benefits  
24 are directly related to the actual or presumed  
25 dependency or loss of support, based upon the

1 employee's demise.

2 JUDGE PIGOTT: So what should have happened  
3 here? He had a permanent partial disability.

4 MR. FABER: Yes.

5 JUDGE PIGOTT: Right? And do we know what  
6 the percentage of that partial disability was?

7 MR. FABER: I believe it was thirty-seven  
8 percent, if memory serves.

9 JUDGE PIGOTT: All right. And now that was  
10 before, of course, you know, he passed away. So are  
11 you saying that you're responsible for thirty-seven  
12 percent of any found death benefit?

13 MR. FABER: No, Your Honor. I'm saying the  
14 board was obligated, based upon this record, the  
15 uncontradicted record, that only twenty percent of  
16 the gentleman's demise was due to the work-related  
17 pathology, that the board was bound to take that into  
18 consideration when it made the death benefit award.

19 JUDGE SMITH: Well, does it make a dif - -  
20 -

21 JUDGE GRAFFEO: So how - so how much - - -  
22 tell us the dollar amount, because she was to receive  
23 409.31 a week - - -

24 MR. FABER: Right.

25 JUDGE GRAFFEO: - - - under the board

1 determination.

2 MR. FABER: It was actually 500 dollars.

3 JUDGE GRAFFEO: If we accept your - - -  
4 your argument, what does she get?

5 MR. FABER: Well, she would get twenty  
6 percent of 500 dollars. She would get twenty percent  
7 of the statutory maximum for that date of death. The  
8 reason why it was a 409 rate was because her rate of  
9 compensation was reduced because of - - - she was  
10 receiving survivors benefits under the Social  
11 Security Act.

12 JUDGE SMITH: So then - - -

13 JUDGE GRAFFEO: She gets eighty dollars?

14 JUDGE SMITH: Are you - - - I thought you  
15 said a hundred.

16 MR. FABER: No, no, no.

17 JUDGE SMITH: 20 percent of 500; I make  
18 that 100.

19 MR. FABER: She would make - - - she would  
20 - - - I would - - - based on the uncontradicted  
21 testimony of the claimant's own doctor, she'd be  
22 entitled to twenty percent of the statutory maximum  
23 that she would - - - what she would be entitled to in  
24 a death claim, so it'd be twenty percent of 500  
25 dollars.

1 JUDGE GRAFFEO: Oh, not twenty percent of  
2 the 409.31.

3 MR. FABER: No, absolutely not, no.

4 JUDGE SMITH: Does it - - - does it make a  
5 difference in this - - - I mean, in the Webb case,  
6 and some of the others, the - - - the majority - - -  
7 the evidence showed that the primary cause of death  
8 was the work-related accident. Here, it's eighty  
9 percent something else and only twenty percent death  
10 - - - only twenty percent the work. Does it - - -  
11 would it be reasonable to treat those cases  
12 differently?

13 MR. FABER: I - - - Judge, I agree with  
14 you. A one percent of a causation for a nonwork-  
15 related disability is sufficient to establish a claim  
16 for work-related disability or death, but based upon  
17 the discrimination of Webb and Buffalo Forge, the  
18 employer's liable for one hundred percent of the  
19 liability. That's completely unfair.

20 JUDGE SMITH: Yeah, well, I mean, I guess -  
21 - - I guess I'm asking if you - - - if it isn't  
22 possible to - - - yeah, I mean, I can - - - I can see  
23 the point of saying that if the - - - the workplace  
24 injury is the major contributor, the main reason the  
25 man died, then maybe there should - - - then even if

1           there were other reasons, maybe - - - maybe the  
2           workers' comp should pay the whole thing.

3                         But if the - - - if the work-related injury  
4           is one percent, does - - - isn't it a little rough to  
5           - - - to put the employer on the hook for a hundred  
6           percent of the benefits?

7                         MR. FABER: That's exactly our point, Your  
8           Honor.

9                         JUDGE SMITH: But then - - - but if - - -  
10          but on that theory, Webb - - - the result in Webb was  
11          right, and the result in a lot of those other cases  
12          is right, and this case is the exception.

13                        MR. FABER: Well, maybe that may be the  
14          case, but those other cases I believe you're  
15          referring to the Matter of Ricci and the Matter of  
16          Brown - - -

17                        JUDGE SMITH: Yes.

18                        MR. FABER: - - - where the Board - - - the  
19          Board and the Appellate Division Third Department  
20          applied this Section 15(7) apportionment test,  
21          whether or not the prior disability constituted a  
22          disability in a compensation sense. They applied  
23          that to that to that death benefit claim, and they  
24          determined that, yes, we want to apply this test, but  
25          the test was not met under these facts.

1                   JUDGE GRAFFEO:  Isn't - - - isn't an  
2                   administrative agency, if they explain their  
3                   rationale, aren't they allowed to change their  
4                   interpretation or their posture on an issue?

5                   MR. FABER:  Respectfully, Your Honor, no,  
6                   not in this situation.  When the statute, clearly in  
7                   our opinion, when you look at Workers' Compensation  
8                   Law Section 15(7) and Workers' Compensation Law  
9                   Section 10, which has equal application to both  
10                  disability and death benefit claims, the board cannot  
11                  of its own accord, sua sponte, indicate from here on  
12                  in, the employer's liable no matter what the  
13                  circumstance.

14                  JUDGE RIVERA:  I - - - I'm not clear on - -  
15                  - on your interpretation of the plain language of the  
16                  statute, be - - - it's obvious that the legislature  
17                  understood how to articulate and apportion a  
18                  requirement.  I don't see anything in the sections  
19                  you've cited to that specifically identify  
20                  apportionment in death penalty - - - in death - - -  
21                  excuse me, death - - - in death cases - - - death  
22                  benefit cases.

23                  MR. FABER:  Section - - -

24                  JUDGE RIVERA:  Where does it say that?

25                  MR. FABER:  Section - - -

1                   JUDGE RIVERA: 15(7) has a separate section  
2 for death - - - for apportionment that's not related  
3 to the death benefits.

4                   MR. FABER: Yes, Your Honor. Section 15(7)  
5 indicates that a previous disability will not  
6 preclude compensation for a later injury or death  
7 resulting therefrom. And compensation with death  
8 will be determined on the basis of the decedent's  
9 earning capacity at the time of the later injury  
10 causing death.

11                   JUDGE SMITH: Isn't - - - isn't 15(7)  
12 dealing with something totally different from what we  
13 have here? 15 - - - I mean, as I read 15(7), it's  
14 the case where, you - - - you injure your left hand,  
15 and you - - - you lose fifty percent of your earning  
16 capacity. Then you injure your right hand, and you  
17 lose the other fifty percent. Then - - - then, it  
18 seems fairly obvious, you should charge fifty percent  
19 to each injury.

20                   But this is - - - but this is a case where  
21 - - - it's different. Where you injure your left  
22 hand and you - - - yeah, you have a later injury that  
23 was - - - I'm getting this wrong - - - where you're  
24 working fine until the second injury, and then the  
25 second injury knocks you out. Then, as I read the

1 cases, they say every - - - you're a hundred percent  
2 liable on the second injury.

3 MR. FABER: Your Honor, in the statutory  
4 scheme, Workers' Compensation Law Section 10, which  
5 everybody concedes has equal application to both  
6 disability and death benefit claims, apportionment is  
7 permitted between a work-related accident and a  
8 subsequent nonwork-related disability. That's not  
9 Section 15(7); that's Section 10. It's our  
10 respectful contention, when you read Section 15(7) in  
11 conjunction with Section 10, and those cases - - -

12 JUDGE RIVERA: Why should we do that?

13 MR. FABER: Excuse me, ma'am?

14 JUDGE RIVERA: Why should we do that? Does  
15 Section 10 refer to the death benefits?

16 MR. FABER: Section 10 applies equally to  
17 both disability and death benefits, and that section  
18 of the statute has been used specifically in the  
19 Matter of Engle v. Niagara Mohawk, by the Appellate  
20 Division in 1958, affirmed by this court in 1959,  
21 that says without even considering Section 15(7), the  
22 workers' compensation statute does not require or  
23 permit the work-related accident to be charged more  
24 than its contribution to the injury if that causation  
25 is factually separable.

1 JUDGE SMITH: What - - - what - - - what  
2 case is that? What's that you're reading from?

3 MR. FABER: The Matter of Engle v. Niagara  
4 Mohawk - - -

5 JUDGE SMITH: Okay.

6 MR. FABER: - - - 1958.

7 JUDGE SMITH: And then section - - - I  
8 mean, Section 10 is just a general liability for  
9 compensation statute, and it says "The employer shall  
10 provide compensation for disability or death." Your  
11 argument is that providing compensation for death  
12 doesn't mean a hundred percent compensation for a one  
13 percent contribution.

14 MR. FABER: Exactly.

15 JUDGE GRAFFEO: Well, then why wasn't - - -

16 MR. FABER: Death arising out of - - - oh,  
17 forgive me, Your Honor.

18 JUDGE GRAFFEO: - - - the apportionment  
19 language in Clause 3, repeated in Section 16?

20 MR. FABER: I submit, Your Honor, and it  
21 didn't - - - you don't require it in Section 16, as  
22 it already is available in Section 15(7) and Section  
23 10, an it's unamended - - -

24 JUDGE ABDUS-SALAAM: If we decide - - -

25 JUDGE GRAFFEO: But if you look at the

1 legislative purpose that these are two separate types  
2 of recoveries: there's what an employee gets who's  
3 injured, and then there's what the family gets in the  
4 event that there's a death and they're - - - that it  
5 doesn't have to be the sole cause, or do you contest  
6 that as well?

7 MR. FABER: Absolutely - - - and if the  
8 slightest - - -

9 JUDGE GRAFFEO: It doesn't have to be the  
10 sole cause, so death benefits are separate from other  
11 considerations. Is there any legislative history  
12 that supports your intermingling of those provisions?

13 MR. FABER: Well, the board's own position.  
14 They're - - - they repeatedly and consistently  
15 apportion a claim for work-related death to a prior  
16 work-related disability. They do it all the time.

17 JUDGE ABDUS-SALAAM: Counsel, if we decide  
18 that Section 15(7) is not to be read the way that you  
19 read it, and that the board has a rational reason for  
20 changing its position, then are you saying we can  
21 still use Section 10 - - -

22 MR. FABER: Absolutely, Your Honor.

23 JUDGE ABDUS-SALAAM: - - - and that's the  
24 general section?

25 MR. FABER: Absolutely, Section 10 applies

1           equally to both parts of that statute, disability and  
2           death benefits.

3                         JUDGE SMITH: Under - - - under - - - under  
4           Section 10, isn't it possible to say that Brown is  
5           right, and Ricci is right, and what's the other - - -  
6           Webb is right, but this case is wrong, because this -  
7           - - in this case, you're awarding a hundred percent  
8           for a small minority of the cost?

9                         MR. FABER: A - - - absolutely. That's  
10          exactly our position, Your Honor. One percent  
11          causation is sufficient under the Workers'  
12          Compensation Board's interpretation of the law for  
13          one hundred percent of the liability. That's not  
14          consistent with the statutory scheme. Both  
15          disability benefits and work-related death benefits  
16          are based upon loss of wage or earning capacity.  
17          There's no rational basis for those awards to be - -  
18          -

19                         JUDGE SMITH: If you - - - if - - - on - -  
20          - on a - - - on a one - - - if it's - - - if the one  
21          percent theory works, it's - - - can - - - can the  
22          claimant in almost every case get a doctor to say,  
23          well, I think there might have been one percent  
24          contribution for the work-related injury?

25                         MR. FABER: We get that all the time, with

1 all due respect. I mean, the most minor - - -

2 JUDGE GRAFFEO: This - - - this individual  
3 did have an occupational disease, though. He had  
4 asbestosis.

5 MR. FABER: He absolutely did, ma'am. But  
6 he also didn't have any treatment for it more than  
7 ten years prior to his demise.

8 JUDGE GRAFFEO: So this isn't a case where  
9 somebody said, you know, maybe one percent he had  
10 some work related. I mean, there's - - - it's clear  
11 here he did an occupational disease.

12 JUDGE PIGOTT: Should we be relying on the  
13 death certificate? In other words, if there's a  
14 death certificate that said he died of thyroid  
15 cancer, end of story.

16 MR. FABER: No, I think they had the right  
17 to develop the record as to what the causes of death  
18 was, but the uncontradicted testimony by their own  
19 doctor - - - that is, the claimant's doctor, that is  
20 the widow is these proceedings - - - was the fact  
21 that only twenty - - - there was only a twenty  
22 percent related causative factor to the gentleman's  
23 demise.

24 JUDGE PIGOTT: Maybe - - - maybe I  
25 misunderstood. When Judge Smith asked you earlier on

1 if it's fifty-one percent - - - I mean, where - - -  
2 where do we draw the line here?

3 MR. FABER: I think it will be based on the  
4 substantial evidence. I think the board, as a trier  
5 of fact, would have the opportunity to review their  
6 evidence - - -

7 JUDGE PIGOTT: If there's substantial  
8 evidence that it's ten percent, do they win? Does  
9 the claimant win?

10 MR. FABER: If there's a one-percent  
11 contribution to the cause of death due to a work-  
12 related factor as an established claim, the argument  
13 here is whether or not the liability for the death  
14 benefit award should be one hundred percent of the  
15 liability when it's only a one-percent contribution.

16 JUDGE SMITH: Well, maybe I think - - - as  
17 I understand Judge Pigott's question, is when - - -  
18 when - - - if it's fifty-one percent, can it be a  
19 hundred percent liability?

20 MR. FABER: It's base - - - it would be a  
21 question of fact for the Board to determine. I  
22 submit if that - - -

23 JUDGE SMITH: But that doesn't sound like a  
24 question - - - that sounds like a question of law to  
25 me. I mean, I - - - I can understand your point,

1 that if it's one percent, it should be one percent or  
2 maybe zero.

3 MR. FABER: Right.

4 JUDGE SMITH: But if it's - - - if it's  
5 eighty percent attributable to the work-related  
6 cause, then maybe you don't apportion it, maybe you  
7 give the guy a hundred percent. Is that reasonable?

8 MR. FABER: Taking into account Brown and  
9 Ricci and even the Matter of Webb, if there's an  
10 eighty percent work-related factor to the death, I  
11 would submit that would probably be a hundred percent  
12 liability situation.

13 JUDGE ABDUS-SALAAM: But - - -

14 JUDGE PIGOTT: Well, they argue there is no  
15 apportionment. They say there's no apportionment in  
16 death. So it - - - it seems to me, it's either all  
17 or nothing, right?

18 MR. FABER: I think the statutory scheme  
19 clearly supports apportionment in a death benefit  
20 claim.

21 JUDGE SMITH: Well, wait, are you sure you  
22 want - - - it could be nothing, right? If it's all  
23 or nothing, it could be nothing? It wouldn't be  
24 irrational to say, if the - - - if the work-related  
25 accident was a one-percent contribution, then you

1 neglect the one percent and give - - - and give the  
2 claimant nothing.

3 MR. FABER: I think whatever the contri - -  
4 - contribution is, based upon the substantial,  
5 credible evidence, that would be the apportionment in  
6 a death benefit claim, just as it would be in a  
7 disability benefit claim.

8 JUDGE ABDUS-SALAAM: But you just agreed  
9 that if - - - if the work-related injury contributes  
10 eighty percent, that the worker's family should a  
11 hundred percent of the benefit.

12 MR. FABER: I didn't agree, Your Honor.  
13 What I - - - what I was suggesting was it's a  
14 determination for the board to make. In a situation  
15 such as in the Matter of Brown and in the Matter of  
16 Ricci - - -

17 JUDGE ABDUS-SALAAM: Well, why isn't this a  
18 determination that the board can make, that there  
19 should be no apportionment?

20 MR. FABER: Because it's not based upon  
21 substantial evidence. There's absolutely no evidence  
22 in this statute that the board should be able to make  
23 this determination, that under no circumstances  
24 should they be taken - - - should they take into  
25 account the apportionment of a nonwork-related

1           disability to a death benefit claim.

2                   JUDGE PIGOTT: All right. One - - - one  
3 more question. I know your time is up, but let me -  
4 - - let me - - - let's assume the Workers Comp - - -  
5 the Board is right, that there's no apportionment.  
6 And the proof is as it's indicated here, is that it's  
7 at most twenty percent, maybe as low as ten percent,  
8 the cause of death, that the major cause of death was  
9 thyroid cancer. Do you win or lose?

10                  MR. FABER: I think I - - - I - - - I win,  
11 because the apportionment would be reduced - - -

12                  JUDGE PIGOTT: There is no apportionment.

13                  MR. FABER: There'd be no apportionment?  
14 Then I - - -

15                  JUDGE PIGOTT: There's no apportionment.

16                  MR. FABER: No apportionment? I can't see  
17 how you could justify a hundred percent liability in  
18 a situation like this.

19                  JUDGE PIGOTT: There's no apportionment.  
20 So you're saying, you win.

21                  MR. FABER: I think so, yes.

22                  JUDGE PIGOTT: All right. So they get  
23 nothing.

24                  MR. FABER: In a situation based upon this  
25 record, I believe so, yes, sir.

1 JUDGE PIGOTT: Okay.

2 JUDGE GRAFFEO: All right, counsel. You'll  
3 have your rebuttal.

4 MR. FABER: Thank you, ma'am.

5 MS. ETLINGER: Good afternoon, Your Honors.  
6 May it please the court, Laura Etlinger for  
7 Respondent New York State Workers' Compensation  
8 Board.

9 JUDGE SMITH: Is it - - - is it - - - is it  
10 really - - - isn't it unfair, where your own doctor  
11 says that the - - - the occupational disease was a  
12 minor factor. Isn't it unfair to - - - to put the -  
13 - - the employer on the hook for a hundred percent?

14 MS. ETLINGER: No, I think the legislature  
15 made a policy decision that it is fair for several  
16 reasons.

17 JUDGE PIGOTT: So is the one percent okay?

18 MS. ETLINGER: Well, it - - - I think  
19 what's important to keep in mind is that there's a  
20 difference between causation and apportionment.

21 JUDGE SMITH: Okay, could you try answering  
22 the question first? Is one percent okay?

23 MS. ETLINGER: One percent may not be okay,  
24 and that may be something the court wants to answer  
25 in another case.

1                   JUDGE PIGOTT: Let's assume the guy loses  
2 his leg in a - - - in an industrial accident, and  
3 then he's driving, and because he kind of forgets  
4 that he lost his leg, he hits the wrong pedal, hits a  
5 tree and kills himself. Does he get a death benefit  
6 under workers' compensation?

7                   MS. ETLINGER: In a not dissimilar case,  
8 what the apport - - - Appellate Division held was  
9 that causation was not met in that case. That the  
10 employee - - - the employee's own actions were sort  
11 of a superseding cause. And I think going to  
12 causation is the way to answer what is - - - seems to  
13 be a concern here. That there may be instances where  
14 causation is so remote, where the work-related injury  
15 is so removed from the death - - -

16                  JUDGE SMITH: Well, it sounds - - - I mean,  
17 what about this case? I mean, the - - - he has an  
18 occupational disease. He does retire; he gets  
19 disability. And like a decade later, from unrelated  
20 causes, he gets thyroid cancer, and the claimant's  
21 doctor says "The man died of cancer of the thyroid  
22 gland. I do" - - - "I do believe that the disease  
23 was a factor, although a minor factor; it was a  
24 factor in contributing to his death." Is that enough  
25 to get - - - to get him a hundred percent death

1 benefit?

2 MS. ETLINGER: It is, and the legislature  
3 made that determination. Now - - -

4 JUDGE SMITH: What - - - what's the  
5 language in which do you - - - in which you read that  
6 determination?

7 MS. ETLINGER: There is nothing in the  
8 Workers' Compensation Law that authorizes  
9 apportionment - - -

10 JUDGE SMITH: Okay, well, if there's noth -  
11 - - if there's nothing - - - if there's nothing, why  
12 don't you take the common sense position that when  
13 they - - - when they said a - - - a death resulting  
14 from an injury, they meant primarily resulting from  
15 an injury?

16 MR. FABER: Well, they may have meant that  
17 for causation. Perhaps there's no causation - - -

18 JUDGE PIGOTT: But they did, then if it's  
19 not - - -

20 MS. ETLINGER: - - - but that was conceded  
21 in this case.

22 JUDGE PIGOTT: Then if it's not primarily,  
23 then - - - then - - - then in this case, the claimant  
24 would receive nothing, because the - - -

25 MS. ETLINGER: Well - - -

1 JUDGE PIGOTT: - - - primary cause of death  
2 was - - - was thyroid cancer.

3 MS. ETLINGER: If the legislature - - -  
4 when the legislature said, if the work-related injury  
5 causes the death - - -

6 JUDGE PIGOTT: Right.

7 MS. ETLINGER: - - - death benefits are  
8 payable - - -

9 JUDGE PIGOTT: Right.

10 MS. ETLINGER: - - - that's a question of  
11 causation. Appellants have conceded that causation  
12 was met here.

13 JUDGE SMITH: You say it's - - - you say  
14 it's - - - you say it's plain from the face of the  
15 statute that that means one per - - - that includes  
16 one-percent causation?

17 MS. ETLINGER: That's a question the court  
18 - - - this court has not answered in the Appellate  
19 Division - - -

20 JUDGE SMITH: Okay, you - - - you - - - you  
21 say it's plain - - - you say it does include twenty  
22 percent?

23 MS. ETLINGER: Well, causation is not - - -  
24 what - - - whatever the court rules in this case on  
25 apportionment does not preclude this court from

1 visiting the issue of causation and whether - - -

2 JUDGE PIGOTT: So we could say - - -

3 MS. ETLINGER: - - - one percent is

4 sufficient or twenty percent if sufficient.

5 Causation is not at issue in this case.

6 JUDGE PIGOTT: We could say that there is

7 no apportionment. That if the primary cause of death

8 is not work-related, there's no recovery. But in

9 this case, they've already conceded that one of the

10 causes of death was - - - and they - - - and they

11 therefore want to pay, it's just a question of how

12 much.

13 MS. ETLINGER: They want to pay. They're

14 only arguing that it should be apportioned to the - -

15 -

16 JUDGE PIGOTT: And we can say no

17 apportionment; you lose, because that's not your

18 argument. Your argument is not the one that we would

19 find if we were to say that cause of death means

20 primary cause of death.

21 MS. ETLINGER: If causation means the

22 primary cause - - -

23 JUDGE PIGOTT: Of death.

24 MS. ETLINGER: - - - that would be

25 something the court could rule in another case where

1 causation is - - -

2 JUDGE SMITH: And you - - - you would admit  
3 that that's a possible reading of the statute?

4 MS. ETLINGER: Of causation.

5 JUDGE SMITH: Yes.

6 MS. ETLINGER: But it's not - - - right - -  
7 - an issue that's not present in this case.

8 JUDGE GRAFFEO: What about their argument  
9 about 15(7) and - - -

10 MS. ETLINGER: They're - - -

11 JUDGE GRAFFEO: - - - the application of  
12 subdivision 2 - - - I guess it's Clause 2.

13 MS. ETLINGER: The second - - - they're  
14 relying on the second clause of Subdivision 7 of  
15 Section 15. Honestly, I can't quite understand how  
16 they read an apportionment rule for death benefits  
17 into that clause. What that clause - - - that - - -  
18 the second clause says is, "In determining  
19 compensation for the later injury or death, the  
20 employee's average weekly wages are the sum that  
21 shall reasonably represent the employee's earning  
22 capacity at the time of the later injury."

23 JUDGE RIVERA: Isn't the - - -

24 JUDGE PIGOTT: That - - - that could mean  
25 if - - - if he was twenty percent disabled that he

1 gets twenty percent death benefit.

2 MS. ETLINGER: Well, but it's really  
3 telling you is at what point in the sequence of  
4 events, because as - - - as the court noted,  
5 Subdivision 7 of Section 15 only involves situations  
6 where there are two disabilities, and the work-  
7 related injury is the second disability. In that  
8 circumstance - - -

9 JUDGE PIGOTT: Well, it could be the first.  
10 In other words - - -

11 MS. ETLINGER: Well, not under Section  
12 15(7). 15(7) is called "Previous Disability".

13 JUDGE PIGOTT: Oh, I see.

14 MS. ETLINGER: Yeah.

15 JUDGE SMITH: The - - -

16 JUDGE RIVERA: Well, we don't need to do  
17 anything. The language of the provision seems to me  
18 to be quite plain. Could you address your opponent's  
19 argument about Section 10?

20 MS. ETLINGER: Section 10 is a general  
21 provision, and it does not direct in any way how to  
22 calculate benefits. It's just a general provision  
23 that tells us that generally, compensation is  
24 provided for deaths and injuries that arise from  
25 employment.

1 JUDGE SMITH: Okay, but - - - but - - - but  
2 isn't what we're really arguing about - - - aren't  
3 there three ways to interpret that? One is to say,  
4 if the - - - if the workplace injury causes the death  
5 in any degree, it's a hundred percent compensable.  
6 Another is to say if the workplace - - - place injury  
7 is a primary cause, it's a hundred percent  
8 compensable. Another one is to say, add it up and  
9 split them up. Why is there - - - apportionment.  
10 Why is apportionment an impossible interpretation of  
11 Section 10?

12 MS. ETLINGER: We think the statutory  
13 structure overall explains that the legislature knew  
14 how to provide for apportionment when it intended to.

15 JUDGE SMITH: I mean, 15 - - - 15(7) is  
16 really a different thing, isn't it? 15(7) is where  
17 you have somebody who's already partially disabled,  
18 and suffers another injury.

19 MS. ETLINGER: And that's what the  
20 legislature was concerned about, the fact - - -

21 JUDGE SMITH: But that's - - - but that's -  
22 - - but that's not apportionment in the same sense.  
23 That's not apportionment where you have one event  
24 with several causes. The legislature - - -

25 MS. ETLINGER: Well - - -

1 JUDGE SMITH: - - - doesn't say anything  
2 about that anywhere, does it?

3 MS. ETLINGER: Yes, in the sense that - - -

4 JUDGE RIVERA: Given the possibility of  
5 these differences in percentages, wouldn't the  
6 legislature have taken that into account and been  
7 explicit, since it's able to do that in other  
8 sections of the law?

9 MS. ETLINGER: Well, and in fact, the  
10 legislature decided that different causes of the  
11 death should be considered, but only in a very narrow  
12 circumstance under Subdivision 8 of Section 15. And  
13 that section - - -

14 JUDGE RIVERA: Yes.

15 MS. ETLINGER: - - - was put into place to  
16 encourage employers to hire employees with previous -  
17 - -

18 JUDGE SMITH: That - - - that - - - that -  
19 - - where you can go to the special fund?

20 MS. ETLINGER: Where you go to the special  
21 fund. And in that case, when there was another  
22 cause, specifically a physical per - - - a permanent  
23 physical impairment, the legislature said, oh, in  
24 that instance, the employer should not be on the hook  
25 for the full amount of the death benefit.





1 (ph.); are you familiar with that case?

2 MS. ETLINGER: I'm - - -

3 JUDGE PIGOTT: Because I - - - I thought it  
4 was very interesting. It says a case where "a  
5 claimant's compensable injury was to his knee, and he  
6 later fell to his death off a ladder, because his  
7 injured knee gave out."

8 MS. ETLINGER: Yes, that was the case - - -

9 JUDGE PIGOTT: Compense - - -

10 MS. ETLINGER: - - - I was thinking of.

11 JUDGE PIGOTT: Compensable or not?

12 MS. ETLINGER: What the Appellate Division  
13 found was that that was not a cause of death.

14 JUDGE PIGOTT: Right.

15 MS. ETLINGER: Or cause of the  
16 compensation, yes, because - - -

17 JUDGE PIGOTT: Yeah, it says because  
18 climbing the ladder was such an - - -

19 MS. ETLINGER: Right.

20 JUDGE PIGOTT: - - - unreasonable thing to  
21 do.

22 MS. ETLINGER: So what the courts have said  
23 is we can look to causation to limit - - -

24 JUDGE PIGOTT: That's seems pretty  
25 arbitrary to me. I mean, why - - - why do we get to

1 say that, you know, the guy wants to climb a ladder,  
2 that's unreasonable, and the fact that your  
3 compensable injury caused your death, we're just  
4 going to ignore that? And yet in a case like this,  
5 where it's very clear that the primary cause of death  
6 was an unrelated disease, we say, well, that's okay.

7 MS. ETLINGER: But the difference is that  
8 the lynchpin for the decision in that case was the  
9 issue of causation, not apportionment. And the  
10 question here is only apportionment.

11 JUDGE SMITH: Are they - - - are those  
12 really separable? I mean - - -

13 MS. ETLINGER: Yes, they are separable.

14 JUDGE SMITH: Isn't apportionment - - - I  
15 mean, what your apportioning is causes.

16 MS. ETLINGER: But the legislature has  
17 determined that you should apportion causes only in  
18 limited circumstances.

19 JUDGE SMITH: Well, that - - - but isn't  
20 the - - - you - - - you say that, but what the legis  
21 - - - the only thing the legislature expressly  
22 determined is if you cause - - - that injuries that  
23 are caused are compensable - - -

24 MS. ETLINGER: Well - - -

25 JUDGE SMITH: - - - and can't call it - - -

1 can't - - - and can't apportionment be read into  
2 that?

3 MS. ETLINGER: Well, we think by saying  
4 that, the legislature decided when apportionment  
5 should be considered.

6 JUDGE SMITH: And you - - - you say - - -  
7 you say implicit in that is that a one percent cause  
8 gets a hundred percent compensation?

9 MS. ETLINGER: No, that's a question of - -  
10 - if it's - - - if the court finds causation.

11 JUDGE SMITH: You keep saying - - - you  
12 obviously do say that a twenty percent cause gets a  
13 hundred percent compensation, because that's what  
14 happened in this case.

15 MS. ETLINGER: Yes, and causation was  
16 conceded here. They're not arguing that the - - -

17 JUDGE PIGOTT: If you - - - if you - - - if  
18 it was - - - if it - - -

19 MS. ETLINGER: - - - asbestos was not the  
20 cause of death.

21 JUDGE GRAFFEO: Why - - - why - - - why did  
22 the agency change its posture on apportionment?

23 MS. ETLINGER: Because it realized after a  
24 while that the - - - what it was relying on was in  
25 dictum in an Appellate Division decision in Rados,

1 and that that dictum, which was not controlling  
2 because it was dictum, did not rest in any part of  
3 the statutory scheme. So looking at the statute  
4 itself, the board looked and decided, no, that was  
5 incorrect to rely on that dictum. There really is no  
6 basis for apportionment in the statutory scheme.

7 JUDGE SMITH: So you're - - - you're - - -  
8 but you're - - - I mean, if I'm hearing you right,  
9 you're conceding that if they had argued for zero in  
10 this case, they would have a better argument than  
11 they have for twenty percent?

12 MS. ETLINGER: I - - - I'm not sure they  
13 would have had a better argument. They would have  
14 had a different argument with a different - - -

15 JUDGE SMITH: And you - - -

16 MS. ETLINGER: - - - they would have been  
17 making an argument that causation standard was in  
18 fact in this case.

19 JUDGE SMITH: Well, let's - - - let's - - -  
20 let me just - - - humor me - - -

21 MS. ETLINGER: Sure.

22 JUDGE SMITH: - - - and test how good the  
23 argument is. Why isn't zero the right answer in a  
24 twenty-percent case?

25 MS. ETLINGER: Because the legislature

1 didn't provide for it.

2 JUDGE SMITH: And - - - and the same logic  
3 applies to one percent, doesn't it?

4 MS. ETLINGER: If causation is found.

5 JUDGE SMITH: Well, but wait a minute, wait  
6 a minute. It depends - - - the question - - - what  
7 causation means? If twenty per - - - the argument  
8 could be made; you said they abandoned it.

9 MS. ETLINGER: Oh, you mean, it's twenty -  
10 - -

11 JUDGE SMITH: You said they didn't make it.  
12 The argument could be made, twenty percent causation  
13 is not causation within the meaning of the statute.

14 MS. ETLINGER: Yes, that argument could be  
15 made.

16 JUDGE SMITH: What's wrong with that  
17 argument?

18 MS. ETLINGER: There's nothing wrong with  
19 that argument as an argument.

20 JUDGE SMITH: Nothing wrong with it. You  
21 concede - - - you concede that it's right?

22 MS. ETLINGER: No, I don't concede that  
23 it's right.

24 JUDGE PIGOTT: Well, if it's - - -

25 JUDGE SMITH: So what's wrong with it?

1 MS. ETLINGER: I don't think twenty percent  
2 is a de minimis.

3 JUDGE PIGOTT: What about one percent?

4 MS. ETLINGER: One percent really raises a  
5 question.

6 JUDGE PIGOTT: How can you make that  
7 argument? In other words, it seems to me that if  
8 it's a cause, then it has to be - - - you're saying  
9 there's no apportionment, so - - -

10 MS. ETLINGER: Well, there's no  
11 apportionment - - -

12 JUDGE PIGOTT: 99/1 is an apportionment,  
13 silly as it may seem. And it's seems to me - - -

14 MS. ETLINGER: But I think the way to get  
15 around it is to say when it's - - - if it's so de  
16 minimis - - - I don't know what the number is.

17 JUDGE PIGOTT: Well, let me ask it in  
18 another way. If this - - - if this man died of any  
19 natural causes, one of the contributing causes has  
20 got to be his asbestosis; I mean, it's a very serious  
21 disease. There is no way, absent an automobile  
22 accident or falling out of an airplane, that - - -  
23 that there wasn't going to be a death benefit in this  
24 case, wouldn't you agree? Any natural cause would  
25 have been, you know, and asbestosis.

1 MS. ETLINGER: I don't know. I don't know  
2 medically if that's - - - if that's correct. But I  
3 think there could be - - -

4 JUDGE PIGOTT: Well - - -

5 MS. ETLINGER: I think what the court is  
6 struggling with is that there could be a point in a  
7 case where the effect of the work-related injury is  
8 so de minimis - - -

9 JUDGE PIGOTT: No, no, what I'm arguing or  
10 interested in, is the fact that you say there's no  
11 apportionment.

12 MS. ETLINGER: There is no apportionment.

13 JUDGE PIGOTT: I'll go with that.

14 MS. ETLINGER: Okay.

15 JUDGE PIGOTT: He died - - - he died of  
16 thyroid cancer.

17 MS. ETLINGER: If he died of thyroid cancer  
18 and there was no evidence - - -

19 JUDGE PIGOTT: Why - - - why is there no  
20 evidence? He died of thyroid cancer. Let's assume  
21 there was.

22 JUDGE SMITH: But that's - - - that's a  
23 direct quote from the plaintiff's doctor - - -  
24 claimant's doctor.

25 MS. ETLINGER: That he died of thyroid

1 cancer, but that the asbestosis and the pleural  
2 scarring - - -

3 JUDGE PIGOTT: You want to apportion.

4 MS. ETLINGER: I'm sorry; I don't  
5 understand.

6 JUDGE PIGOTT: Because thyroid cancer was  
7 the cause of death, you say there's no apportionment.  
8 Cause of death: thyroid cancer, no compensation.  
9 You say, oh, no, no, no, part of - - - a portion of  
10 the cause of death was the asbestosis. Therefore - -  
11 -

12 MS. ETLINGER: There can - - - yes - - -

13 JUDGE PIGOTT: - - - he gets one hundred  
14 percent.

15 MS. ETLINGER: Yes, there can be more than  
16 one cause of death, but there's no apportionment - -  
17 - there's no reduction of the death benefit in  
18 proportion to the causes of death.

19 JUDGE PIGOTT: So there's apportionment in  
20 your definition, but there's no apportionment in the  
21 statute.

22 MS. ETLINGER: There's no apportionment of  
23 the death benefit. There are more than one - - -  
24 there can be more than one cause, but no portioning  
25 out and reducing the death benefit.

1 JUDGE PIGOTT: So one percent wins?

2 MS. ETLINGER: If there was - - - if one  
3 percent is found to be the ca - - - a cause of the  
4 death, if that meets the causation standard, there's  
5 no apportionment.

6 JUDGE SMITH: Wait, what happened to your  
7 de minimis theory?

8 MS. ETLINGER: Well, if that - - - if the  
9 court said causation requires de minimis, and one  
10 percent did not meet the de minimis, then there are  
11 no benefits.

12 JUDGE ABDUS-SALAAM: Is that something the  
13 court should be saying, or is this something the  
14 legislature should be saying?

15 MS. ETLINGER: Well, the legislature uses  
16 the terms if the work-related injury causes the  
17 death.

18 JUDGE PIGOTT: Right.

19 MS. ETLINGER: We're saying the court could  
20 be, in interpreting the word "cause", define  
21 causation to mean more than de minimis.

22 JUDGE PIGOTT: Or primarily.

23 MS. ETLINGER: Or primarily, when the issue  
24 of causation is before the court.

25 JUDGE ABDUS-SALAAM: But it's not - - -

1                   JUDGE RIVERA: Why should we be able to  
2 read in "primarily"? What's the basis for that?

3                   MS. ETLINGER: I don't - - -

4                   JUDGE RIVERA: If the plain language is  
5 clear, why would we be able to do that? Why isn't  
6 that beyond the scope of what we can do?

7                   MS. ETLINGER: Well, I don't - - - I think  
8 it's difficult to say that - - - to interpret  
9 causation to mean primarily causes, but I'm saying if  
10 it was going to be done, it would have to be done in  
11 context of the - - -

12                   JUDGE SMITH: What's - - - what's - - -  
13 what's - - -

14                   JUDGE GRAFFEO: Is there any po - - - is  
15 there any policy reason that you can think of why the  
16 legislature would not have asserted - - -

17                   MS. ETLINGER: Yes.

18                   JUDGE GRAFFEO: - - - expressed  
19 apportionment language in Section 16?

20                   MS. ETLINGER: I think the legislature  
21 didn't want apportionment, because it put a value on  
22 the loss of life in a different way that it did on  
23 disability injuries. Spouses and children receive a  
24 death benefit regardless of whether they were  
25 actually dependent on the employee's wages. They're

1 presumed dependent. Other relatives have to prove  
2 it.

3 But the legislature said, you know, it's so  
4 significant when someone loses their life due to a  
5 work-related injury that we're going to make the  
6 employer pay a death benefit, even if there was no  
7 financial loss. And indeed, if there are no  
8 appropriate dependents at all, the 50,000 - - -

9 JUDGE GRAFFEO: They still get 50,000 - - -

10 MS. ETLINGER: - - - dollar death benefits  
11 still must be paid. The legislature made it a policy  
12 decision that death benefits are different and  
13 deserve different rules than disabilities.

14 JUDGE GRAFFEO: Your rebuttal, sir?

15 MR. FABER: That 50,000-dollar no-  
16 dependency death award, Your Honor, was specifically  
17 enacted based upon case law - - -

18 JUDGE PIGOTT: I'm sorry; I didn't hear the  
19 first part of your sentence.

20 MR. FABER: Forgive me. That 50,000-dollar  
21 no-dependency death award that was enacted - - -

22 JUDGE PIGOTT: The 50,000 dollar - - -

23 MR. FABER: No-dependency - - -

24 JUDGE PIGOTT: - - - no-dependency death  
25 award, okay.

1                   MR. FABER: - - - death award that was  
2                   enacted by the legislature in 1990. The case was a  
3                   Matter of the Estate of Allen v. Colgan. That was  
4                   enacted to avoid discrimination against employees who  
5                   die without surviving benefits - - - forgive me - - -  
6                   without surviving dependents. Every other death  
7                   benefit award is based upon loss of wage or earning  
8                   capacity. There's absolutely no rational basis to  
9                   increase a death benefit award when the sole or the  
10                  primarily cause of death was a nonwork-related  
11                  disability.

12                 JUDGE RIVERA: Well, if - - - but it's  
13                 about the plain reading of the statute. Isn't your  
14                 argument - - - and I understand your argument and I  
15                 appreciate the employer's concern, especially if it's  
16                 even lower than twenty, getting close to one - - -  
17                 isn't your argument, aren't your concerns better  
18                 lodged with the legislature and not this court? The  
19                 plain language strikes me as very clear.

20                 MR. FABER: Your Honor, the Workers'  
21                 Compensation Board routinely applies apportionment  
22                 principles to work-related disabilities when dealing  
23                 with a later work - - - compensable death claim.  
24                 There's absolutely nothing in the statute that says  
25                 they're allowed to apportion to a work-related

1 disability, but have to discriminate against a  
2 nonwork-related disability. The Workers'  
3 Compensation Board - - -

4 JUDGE ABDUS-SALAAM: That statute itself  
5 says that, doesn't it?

6 MR. FABER: I don't believe so, ma'am.  
7 Workers' Compensation Law 16 is silent on the issue  
8 of apportionment, but we submit that the authority  
9 for apportionment stems from 15(7) and Section 10.

10 JUDGE RIVERA: But 15(7) is very clear - -  
11 -

12 JUDGE ABDUS-SALAAM: You - - - yeah.

13 JUDGE RIVERA: - - - that it doesn't  
14 mention death benefits when it's addressing  
15 apportionment.

16 MR. FABER: I respectfully disagree, ma'am.  
17 I think if you look at the statute - - - I'm not  
18 arguing that it's - - - it's a model of clarity; it's  
19 not. But I submit that any ambiguity in the statute  
20 should be read consistent with apportionment.

21 JUDGE ABDUS-SALAAM: But in this case - - -

22 JUDGE SMITH: Well, the words - - - the  
23 word - - - the word "death" is in 15(7), but you're  
24 not arguing that 15(7) applies here, are you? Its  
25 terms?

1 MR. FABER: I'm arguing that the general  
2 thrust of the statute, including Section 15(7) and  
3 Section 10, is this - - - this issue of apportionment  
4 for both disability and death benefit claims is  
5 embedded in the statute and must be taken into  
6 consideration by the board when they award benefits,  
7 whether disability or death benefits.

8 JUDGE ABDUS-SALAAM: Even - - - even though  
9 the title of 15(7) is "previous disability", and  
10 this, of course, is a subsequent - - -

11 MR. FABER: Correct.

12 JUDGE ABDUS-SALAAM: - - - illness that has  
13 nothing to do with the previous disability.

14 MR. FABER: It's not limited just to 6 - -  
15 - 15(7), ma'am. Also Section 10 of the Workers'  
16 Compensation Law which applies equally to workers'  
17 compensation - - -

18 JUDGE SMITH: But you can - - - isn't - - -  
19 isn't the guts of your argument that cause in Section  
20 10 means primary cause?

21 MR. FABER: I believe so, Your Honor, yes.

22 JUDGE RIVERA: But - - - but what's the  
23 basis for that? Why would we read that word in?

24 MR. FABER: Because the board routinely  
25 apportions benefits that would not be consistent with

1 Section 15(7).

2 JUDGE RIVERA: But we're talking about the  
3 legislative intent, and the statute, the plain  
4 language of the statute.

5 MR. FABER: The legislative inten - - -  
6 intent with regard to Section 10, ma'am?

7 JUDGE RIVERA: Yes.

8 MR. FABER: That applies equally to both  
9 disability and death benefits. The Engle said it,  
10 which was affirmed by this court in 1959. The board  
11 routinely uses Section 10 to make apportionment  
12 arguments that are - - - is inconsistent with 15(7).  
13 That is not a previous disability, where they'll  
14 apportion a work-related disability to a subsequent  
15 nonwork-related disability. That's not 15(7).

16 That's Section 10 and this - - - this  
17 general thrust in the statute that liability should  
18 be apportioned in proportion to causation. To have a  
19 one percent causative factor and a hundred percent  
20 liability is not rational. If the legislature wanted  
21 that to happen, they would have specifically said  
22 that. If they wanted such an extreme result based  
23 upon a one-percent causation to a work-related death  
24 claim.

25 If I - - - I know I'm done, but if I can

1 just make one final point.

2 JUDGE GRAFFEO: Very, very briefly.

3 MR. FABER: Yes. The low threshold, Your  
4 Honor, to establish a work-related disability or  
5 death claim, we respectfully contend as ex - - - as  
6 why the legislature as expressed in Section 15(7) and  
7 Section then - - - and Section 10 generally, granted  
8 the Board the authority to address apportionment of  
9 causation.

10 JUDGE GRAFFEO: Okay, thank you, counsel.

11 MR. FABER: Thank you very much.

12 JUDGE GRAFFEO: Thank you very much.

13 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Hroncich v. Con Edison, No. 145 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 700 West 192nd Street  
Suite # 607  
New York, NY 10040

Date: September 17, 2013