No. APL-2018-00101

To be argued by:
SCOTT A. EISMAN
10 minutes requested

State of New York
Court of Appeals

In the Matter of the Application of

WAYNE SEON,

Petitioner-Respondent,

For an Order Pursuant to Article 78 of
the Civil Practice Law & Rules

v.

THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,
THERESA L. EGAN, as Executrix Deputy Commissioner of
NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES TRAFFIC
VIOLATIONS BUREAU, THE NEW YORK STATE DEPARTMENT OF
MOTOR VEHICLES ADMINISTRATIVE ADJUDICATIONS BUREAU, and
THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES APPEALS BOARD,

Respondents-Appellants.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES...iii

PRELIMINARY STATEMENT...1

ARGUMENT...2

POINT I

SUBSTANTIAL EVIDENCE SUPPORTS THE DEPARTMENT OF MOTOR VEHICLES' (DMV'S) DETERMINATION THAT MENDEZ SUFFERED SERIOUS PHYSICAL INJURY...2

A. Ample Evidence Demonstrates That Mendez Suffered Protracted Impairment of Health from Being Run over by a Bus. 3

1. The proceedings below addressed Mendez's protracted impairment of health. 3

a. DMV found that Seon caused Mendez protracted impairment of health...3

b. DMV preserved its argument on protracted impairment of health by raising it in its answer. 8

2. Substantial evidence demonstrates that Mendez suffered protracted impairment of health. 10

B. Substantial Evidence Demonstrates That Mendez Suffered Not Only Substantial Injury But Also Death from Being Hit by Seon's Bus. 17

Page

POINT II

SUBSTANTIAL EVIDENCE SUPPORTS DMV'S DETERMINATION THAT MENDEZ FAILED TO EXERCISE DUE CARE........................... 22

CONCLUSION 27

TABLE OF AUTHORITIES

Cases **Page(s)**

Bradley v. State,
193 A.3d 734 (Del. 2018) 12

Matter of Bottom v. Annucci,
26 N.Y.3d 983 (2015) 9

Matter of Haug v. State Univ. of N.Y. at Potsdam,
32 N.Y.3d 1044 (2018) 13, 18, 20

Matter of Jonah B. (Ferida B.),
165 A.D.3d 787 (2d Dep't 2018) 12

Matter of Kelly v. DiNapoli,
30 N.Y.3d 674 (2018) 19, 20

Matter of Marine Holdings, LLC v. New York City Commn. on Human Rights,
31 N.Y.3d 1045 (2018) 19, 26

Matter of MNORX, Inc. (Ross),
46 N.Y.2d 985 (1979) 24, 25

Matter of National Fuel Gas Distrib. Corp. v. Public Serv. Commn. of the State of N.Y.,
16 N.Y.3d 360 (2011) 4

Matter of Russell v. Adduci,
140 A.D.2d 844 (3d Dep't 1988) 26

Matter of State Div. of Human Rights (Granelle),
70 N.Y.2d 100 (1987) 24

Matter of State of New York v. Floyd Y.,
30 N.Y.3d 963 (2017) 14

Matter of Stork Rest. v. Boland,
282 N.Y. 256 (1940) 14

Cases **Page(s)**

People ex rel. Matthews v. New York State Div. of Parole,
95 N.Y.2d 640 (2001) 8

People v. Askerneese,
256 A.D.2d 34 (1st Dep't 1998) 6

People v. Danielson,
9 N.Y.3d 348 (2007) 15

People v. Garland,
32 N.Y.3d 1094 (2018) 12

People v. Griffin,
80 N.Y.2d 723 (1993) 21

People v. Heyliger,
126 A.D.3d 1117 (3d Dep't 2015) 16

People v. Kane,
213 N.Y. 260 (1915) 21

People v. Marquez,
49 A.D.3d 451 (1st Dep't 2008) 15

People v. Marshall,
162 A.D.3d 1110 (3d Dep't 2018) 14, 15

People v. Messam,
101 A.D.3d 407 (1st Dep't 2012) 6

People v. Mohammed,
162 A.D.2d 367 (1st Dep't 1990) 12

People v. Wilson,
32 N.Y.3d 1 (2018) 6

People v. Wong,
165 A.D.3d 468 (1st Dep't 2018) 16

Cases **Page(s)**

Scantlebury v. Lehman,
305 N.Y. 713 (1953) 23

Soto v. New York City Tr. Auth.,
6 N.Y.3d 487 (2006) 23

State v. Dorrance,
165 N.H. 162 (2013) 12

State v. Meyers,
112 Haw. 278 (Ct. App. 2006) 12

Laws

Penal Law § 10.00 .... 2, 6

Vehicle and Traffic Law
§ 503 8
§ 510 7
§ 530 7
§ 1111 24
§ 1146 2

15 N.Y.C.R.R. § 135.7 7

PRELIMINARY STATEMENT

Substantial evidence supports the Department of Motor Vehicles' (DMV's) determination that Wayne Seon caused serious physical injury to Julian Mendez by running over Mendez's legs with a bus, in violation of Vehicle and Traffic Law (VTL) § 1146(c). In particular, the hearing evidence showed that the collision caused Mendez to suffer severe leg injuries that required his immediate hospitalization and caused his death. As DMV's opening brief explained, the Appellate Division, First Department, fundamentally erred here by reweighing the evidence and substituting its own judgment for DMV's.

Seon echoes the Appellate Division's mistake in arguing that the Court may consider only whether the collision caused Mendez's death, and not whether the collision also caused Mendez protracted impairment of health before he died. In any event, substantial evidence demonstrates that the collision caused Mendez to suffer both protracted impairment of health and death. Seon's arguments to the contrary boil down to the untenable assertion that DMV was required to credit his version of events. But DMV was entitled to

credit the version of events set forth by the investigating officer and police reports, which made clear that Mendez suffered severe leg injuries from the crash and died from those injuries a month later and that Seon failed to exercise due care when he struck Mendez with his bus.

ARGUMENT

POINT I

SUBSTANTIAL EVIDENCE SUPPORTS THE DEPARTMENT OF MOTOR VEHICLES' (DMV'S) DETERMINATION THAT MENDEZ SUFFERED SERIOUS PHYSICAL INJURY

As DMV explained in its opening brief, substantial evidence supports the administrative law judge's (ALJ's) determination that Seon's lack of due care caused Mendez "serious physical injury" and thus violated VTL § 1146(c). Serious physical injury includes physical injury that causes, among other things, either "protracted impairment of health" or death. Penal Law § 10.00(10); *see* VTL § 1146(c). Here, the record contained substantial evidence that Seon caused Mendez to suffer both protracted impairment of health and death when Seon ran over Mendez's legs with a New York City bus. The Court should therefore reinstate the ALJ's determination

that Seon violated VTL § 1146(c). Seon's arguments to the contrary lack merit.

A. Ample Evidence Demonstrates That Mendez Suffered Protracted Impairment of Health from Being Run over by a Bus.

1. The proceedings below addressed Mendez's protracted impairment of health.

Seon argues (Br. for Pet'r-Resp't (Resp. Br.) at 44–46, 51–53) that the Court cannot consider whether Mendez suffered a protracted impairment of health, because (1) the administrative proceedings addressed only whether Mendez died from being struck by Seon's bus, and not whether he suffered a protracted impairment of health; and (2) DMV did not preserve in the Appellate Division its argument that the administrative proceedings addressed Mendez's protracted impairment of health. Each argument is incorrect.

a. DMV found that Seon caused Mendez protracted impairment of health.

The administrative proceedings addressed both Mendez's protracted impairment of health and his subsequent death, and the ALJ's determination that Seon violated VTL § 1146(c) embraced both theories. Mendez's protracted impairment of health is thus one

of "the grounds invoked by the agency" in finding that Seon caused Mendez serious physical injury, and this Court should consider it. *See Matter of National Fuel Gas Distrib. Corp. v. Public Serv. Commn. of the State of N.Y.*, 16 N.Y.3d 360, 368 (2011) (quotation marks omitted).

As DMV's opening brief explained (at 16–20), the summons, hearing, and administrative findings each concerned whether Seon violated § 1146(c) "as a whole" by causing Mendez any serious physical injury cognizable under the statute. (Record on Appeal (R.) 356.) Indeed, nothing in the summons, hearing, or administrative findings limited the scope of the administrative proceedings to a single theory of serious physical injury. (*See* R. 46 (summons alleging violation of VTL § 1146(c)), 76 (ALJ determination finding violation of VTL § 1146(c)).) Seon does not dispute these basic facts about the scope of the proceedings.

Seon incorrectly contends (Resp. Br. at 44–45) that Officer Viera unilaterally limited the administrative proceedings to focus solely on Mendez's death by testifying that the summons issued after an "investigation of a fatal accident" (R. 51). That testimony

showed merely that Mendez died and that his death prompted the police to investigate. It did not remotely suggest that the police limited their investigation, findings, or summons solely to Mendez's death. See Br. for Appellants (App. Br.) at 18–19. To the contrary, Officer Viera's investigation, findings, and testimony covered the protracted impairment of health that eventually led to Mendez's death—including Mendez's "severe leg injuries" that required a month-long hospitalization. (R. 261–262; *see* R. 50–62.) Indeed, it would have made little sense for Office Viera to have prematurely limited his investigation to focus solely on Mendez's death before conducting the investigation to learn the circumstances surrounding the collision and the extent of Mendez's resulting injuries.

Such an undue limitation on the investigation and its findings would also have contravened the governing statutory provisions and case law, which contemplate that a victim may suffer more than one type of serious physical injury at once. The statutory definition of "serious physical injury" includes physical injury that creates a substantial risk of death, *or* that "causes death *or* . . . protracted impairment of health," *or* the loss of the function of an organ, *or*

serious disfigurement. Penal Law § 10.00(10) (emphasis added). And courts have repeatedly recognized that a victim's serious physical injury may satisfy more than one prong of the statutory definition. *See, e.g.*, *People v. Messam*, 101 A.D.3d 407, 408 (1st Dep't 2012) (protracted impairment of bodily organ and protracted impairment of health); *People v. Askerneese*, 256 A.D.2d 34, 34 (1st Dep't 1998) (protracted disfigurement and protracted impairment of health), *aff'd*, 93 N.Y.2d 884 (1999).[1] Here, substantial evidence shows that Seon caused Mendez two types of serious physical injury—death and protracted impairment of health—regardless of what led the police to open an investigation.

Seon fares no better in relying (Resp. Br. at 45) on statements in the ALJ's findings and the license-suspension notice that the collision caused "a death" (R. 78) or "involve[d] a fatal accident" (R. 81, 108). Both references to Mendez's death addressed solely the *penalty* for Seon's violation of VTL § 1146(c), without limiting the

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[1] *See also People v. Wilson*, 32 N.Y.3d 1, 11 (2018) (recognizing that a person may suffer multiple types of serious physical injury at once).

serious physical injuries that supported the violation that the ALJ had already found (R. 76). As Seon concedes (Resp. Br. at 45), Mendez's death had independent significance for the penalty phase because a fatality triggers certain penalties under the VTL that are not imposed for nonfatal violations. For example, as the license-suspension notice makes clear (R. 81, 108), Mendez's death precluded Seon from receiving a restricted-use license, which would have allowed him to drive his bus for work while his license was suspended, *see* VTL § 530(1); 15 N.Y.C.R.R. § 135.7(a)(13).[2]

Given this specific legal consequence that flowed from Mendez's fatality, it makes perfect sense that the ALJ and license-suspension notice mentioned Mendez's death in discussing the applicable

[2] The ALJ also suggested that Seon's license might be suspended for seventy-five days (R. 78)—an implicit reference to a statutory provision that requires a seventy-five-day license suspension for certain fatal accidents, *see* VTL § 510(b)(xv). The ALJ's suggestion was incorrect because a more specific provision, VTL § 510(2)(b)(xiv), required a six-month suspension for Seon's violation of VTL § 1146(c). But this reference to a fatality-specific penalty provision underscores that the ALJ correctly understood Mendez's death to be important for discerning the proper penalty. It does not suggest that the underlying summons, hearing, and substantive violation were limited to Mendez's death.

penalties. By contrast, there was no reason for the ALJ to mention Mendez's protracted impairment of health during the penalty phase.[3]

b. DMV preserved its argument on protracted impairment of health by raising it in its answer.

Contrary to Seon's repeated contention (*e.g.*, Resp. Br. at 53), DMV preserved its argument that Mendez suffered not only death but also protracted impairment of health as a result of Seon's negligent conduct.

As this Court has held, a party preserves an argument for Court of Appeals review by raising it in Supreme Court, even if it does not raise the issue in the Appellate Division. *See, e.g.*, *People ex rel. Matthews v. New York State Div. of Parole*, 95 N.Y.2d 640, 644 n.2 (2001). Consistent with that principle, this Court has ruled that parties to article 78 proceedings must raise issues in their

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[3] Seon is wrong (Resp. Br. at 26) that his penalty is "unconstitutionally vague" and "indeterminate." The penalty is for "*at least* 177 days" (R. 108 (emphasis added)) because it may be suspended for longer than 177 days if Seon fails to pay a suspension-termination fee. *See* VTL § 503(2)(j). In any case, the Appellate Division did not reach this argument, and Seon does not raise it as an alternative ground for affirmance.

pleadings to preserve them for Court of Appeals review. *See Matter of Bottom v. Annucci*, 26 N.Y.3d 983, 985 (2015) (issue unpreserved because petitioner failed to raise it in article 78 petition).

DMV's pleading here preserved protracted impairment of health for this Court's review. In its answer to Seon's article 78 petition, DMV included as a defense the ground that its determination was supported by substantial evidence. (R. 146–151.) In support of that defense, DMV explained that the ALJ's determination that Seon "violated [§ 1146(c)] of the Vehicle and Traffic Law" (R. 149 (¶ 80) (quotation marks omitted)) "had a rational basis," including Officer Viera's testimony and the reports he submitted (R. 150 (¶ 85)). DMV's answer also specified that Seon caused Mendez "serious physical injury which eventually led to his death" (R. 152–153 (¶ 93)), thereby making clear that death was not Mendez's sole serious physical injury.

Moreover, in the Appellate Division, DMV expressly relied on protracted impairment of health short of death, reflecting that the theory of serious physical injury that DMV pleaded in its answer covers more than just Mendez's death. Its brief explained that Mendez "suffered a 'severe leg injury'" after "being 'pinned' under

the bus's front tire." App. Div. Br. for DMV at 6. And DMV argued that even if the collision had not caused Seon's death, substantial "evidence established that the accident caused severe physical injuries to Mendez's legs—injuries which are alone sufficient to support the finding that Mendez violated VTL § 1146." *Id.* at 14. Indeed, the justices in both the majority and the dissent below discussed the argument that Seon's lack of due care caused Mendez protracted impairment of health (R. 351–352 (majority), 360–362 (dissent)), without remotely suggesting that DMV had not properly preserved the issue in Supreme Court. The Court should thus consider DMV's argument that substantial evidence demonstrates that Seon caused Mendez protracted impairment of health.

2. Substantial evidence demonstrates that Mendez suffered protracted impairment of health.

As DMV explained in its opening brief (at 20–22), the ALJ had before him enough evidence to rationally conclude that Seon caused Mendez protracted impairment of health when Seon struck Mendez with his bus. That evidence included the accident report as well as Officer Viera's testimony and investigative report, which together

showed that Mendez was "pinned under" the bus "behind the front wheel" (R. 263–264), suffered "severe leg injuries" (R. 54, 262), and was rushed to the hospital, where he remained until he died, nearly a month later (R. 54, 60–61, 261–264). And the evidence also included Seon's own testimony, in which he admitted that his bus's striking Mendez produced a noise loud enough to cause him to stop the bus (R. 66) and that, upon exiting, he saw Mendez lying "just behind the tire" (R. 67), making "a grave noise" (R. 56). No more evidence is needed to support the finding that Mendez suffered a protracted impairment of health.[4] See App. Br. at 21.

Seon is incorrect in contending (Resp. Br. at 54–59) that Mendez's injuries were not sufficiently "protracted" on the ground that Mendez died nearly a month after the collision rather than suffering for many months or years. Courts do not impose any strict

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[4] Seon is incorrect to suggest (Resp. Br. at 49) that the accident report is unclear about whether Mendez was pinned under the bus. The Appellate Division majority noted that the report's handwritten notation was unclear about which part of the bus pinned Mendez—the passenger side body or the passenger side door. (R. 351 n.1; *see* R. 263–264.) But the majority never questioned whether the report used the word "pinned," which it plainly does (R. 263; *see* R. 358).

temporal requirement for an injury to become sufficiently "protracted." Instead, courts find protracted impairment of health based on a fact-bound determination that the victim failed to recover despite treatment and the passage of time. *See, e.g.*, *People v. Garland*, 32 N.Y.3d 1094, 1096 (2018) (injury required victim to use crutches for two months and left bullet fragments in his leg that continued to "disturb[] him" (quotation marks omitted)).

Courts have recognized that failing to recover after merely a two-week period "is sufficient to establish a protracted impairment of health." *Matter of Jonah B. (Ferida B.)*, 165 A.D.3d 787, 789 (2d Dep't 2018); *see People v. Mohammed*, 162 A.D.2d 367, 367 (1st Dep't 1990) (protracted impairment of health based on "several weeks of immobilization").[5] As in those cases, substantial evidence supports

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[5] Other state courts applying statutes that define "serious physical injury" to include "protracted impairment of health" (or "prolonged impairment of health") have also held that impairment for several weeks can be protracted. *See, e.g.*, *Bradley v. State*, 193 A.3d 734, 739 (Del. 2018) ("nausea and diarrhea from treatment [for bite wound] for 28 days"); *State v. Dorrance*, 165 N.H. 162, 165 (2013) ("consistently impaired vision for up to nineteen days and, for at least some time thereafter, intermittently impaired vision"); *see also State v. Meyers*, 112 Haw. 278, 287 (Ct. App. 2006) (pain

the determination that Mendez suffered a protracted impairment of health here. As the dissent below explained, Mendez was "admitted to the hospital for a month based on injuries sustained after being run over and pinned under a bus." (R. 361.) And far from recovering, Mendez spent the rest of his life—nearly a month, all told—in the hospital, where he ultimately "succumbed to his injuries." (R. 261.)

To be sure, individual fact-finders may rationally reach different conclusions about whether the evidence in a given case constitutes protracted impairment. But the only question on substantial-evidence review is whether the agency's decision was rational—"even if the court would have decided the matter differently." *Matter of Haug v. State Univ. of N.Y. at Potsdam*, 32 N.Y.3d 1044, 1046 (2018). Here, a rational fact-finder could conclude that an octogenarian experiences a protracted impairment of health when his legs are run over by a bus, causing him to languish in the hospital for nearly a month before dying. (*See* R. 361–362.)

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from rib fracture for four to six weeks constituted "protracted . . . impairment of the function of a bodily member or organ").

Seon thus errs in his repeated requests that this Court substitute its judgment for the ALJ's, just as the Appellate Division majority did (*see* R. 351–353), and decide for itself whether the evidence of Mendez's injuries constituted clear and convincing evidence of protracted impairment of health. *See* Resp. Br. at 39–41, 59. As DMV explained in its opening brief (at 31–34), a court conducting substantial-evidence review—unlike a court conducting weight-of-the-evidence review—does not determine whether it finds the evidence clear and convincing. Instead, like a court conducting legal-sufficiency review, a court conducting substantial-evidence review asks only whether any rational fact-finder "could have found" the evidence clear and convincing. *Matter of State of New York v. Floyd Y.*, 30 N.Y.3d 963, 965 (2017); *see Matter of Stork Rest. v. Boland*, 282 N.Y. 256, 274 (1940) (substantial-evidence review mirrors legal-sufficiency standard).

For that reason, Seon misplaces reliance (Resp. Br. at 54–55) on *People v. Marshall*, 162 A.D.3d 1110 (3d Dep't), *lv. denied*, 31 N.Y.3d 1150 (2018). The court there reversed a finding of protracted impairment of health while conducting weight-of-the-

evidence review, *see id.* at 1113–14, and so was "[e]ssentially . . . sit[ting] as a thirteenth juror" rather than deciding whether "a jury could logically" render the verdict below, *People v. Danielson*, 9 N.Y.3d 348, 348–49 (2007). *Marshall* is distinguishable in any event because the victim there quickly recovered. He experienced no "long-term effects": his pain from a gunshot wound "subsided" after surgery, and he testified that he might still be able to play arena football—a full-contact sport—despite the injury.[6] 162 A.D.3d at 1114. Mendez, by contrast, never recovered. Far from resuming his pre-accident activities, he spent nearly a month in the hospital. And his impairment of health might have lasted even longer had he not died before recovering from his injuries.

Seon also misses the mark in asserting (Resp. Br. at 59) that because Mendez's injuries were not initially considered life-threatening, his impairment of health was not protracted.

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[6] Seon likewise misplaces reliance (Resp. Br. at 57–59) on other cases in which courts found a protracted impairment of health based on the victim's failure to recover, without suggesting that an impairment must persist for any set period of time to be "protracted." *See, e.g.*, *People v. Marquez*, 49 A.D.3d 451, 451 (1st Dep't 2008) (fractured foot bones "failed to heal properly").

Regardless of the initial prognosis, a rational fact-finder is entitled to conclude that a person suffers protracted impairment of health when he is hospitalized for nearly a month after being struck by and pinned under a bus—circumstances under which "[i]t would be a miracle even for a young, healthy person not to sustain a serious injury" (R. 361). At any rate, as DMV has explained (App. Br. at 21–22 & n.1), courts routinely find a protracted impairment of health when the injury was never life-threatening. *See, e.g.*, *People v. Wong*, 165 A.D.3d 468, 468 (1st Dep't) (shattered kneecap), *lv. denied*, 32 N.Y.3d 1116 (2018); *People v. Heyliger*, 126 A.D.3d 1117, 1119 (3d Dep't 2015) (leg wound that "initially appeared to be superficial").

Nor is there merit to Seon's assertion (*see* Resp. Br. at 59) that medical evidence or other specifics about Mendez's injury were required to support the ALJ's finding of protracted impairment of health. Officer Viera's testimony and the written reports he submitted explained that Mendez, an eighty-eight-year-old pedestrian, suffered severe leg injuries after a "city bus carrying 30 to 35 passengers struck him and ran over his legs." (R. 361.) That evidence amply

supports the ALJ's finding given that administrative fact-finders need not rely on expert or medical evidence, and may rely instead on common sense and plausible factual inferences drawn from the evidence. See App. Br. at 22–24.

B. Substantial Evidence Demonstrates That Mendez Suffered Not Only Substantial Injury But Also Death from Being Hit by Seon's Bus.

Substantial evidence demonstrates that Seon's lack of due care also caused Mendez's death. As DMV's opening brief explained (at 26–27), the evidence described the nature of the "horrific accident" (R. 361) that caused Mendez severe leg injuries requiring immediate hospitalization (*e.g.*, R. 54). The evidence also contained Officer Viera's investigative report, which explained that Mendez never left the hospital and that a hospital physician pronounced that Mendez "died as a result of his injuries." (R. 262.) And Officer Viera's report and testimony further confirmed that Mendez "succumbed to his injuries" (R. 261; *see* R. 216), meaning that he died from "complication[s] from the collision" (R. 60).

Seon repeats a fundamental error of the Appellate Division in contending (Resp. Br. at 46) that the evidence was insufficient on

the ground that it consisted of hearsay—such as testimony and accident reports relaying statements from eyewitnesses and medical personnel—rather than expert medical evidence. This Court's precedent squarely forecloses that argument. As the Court recently reemphasized, hearsay alone "may constitute substantial evidence" if "sufficiently relevant and probative." *Matter of Haug*, 32 N.Y.3d at 1046. Here, the hearsay evidence was sufficiently relevant and probative because it went to the heart of the issue before the ALJ—whether Seon caused Mendez serious physical injury. And the hearsay statements that Officer Viera relayed, including a statement from the doctor who pronounced Mendez dead, were conveyed to him in the course of his months-long investigation of the accident. (*See* R. 55, 58, 261–262.) The lack of expert medical evidence was thus inconsequential given the hearing testimony and police reports demonstrating that Seon caused Mendez's death. (R. 357.)

Seon also misplaces his reliance on selected portions of Officer Viera's testimony (Resp. Br. at 16–17, 47), in which Officer Viera did not describe Mendez's leg injuries or cause of death using detailed language or medical terminology. But that testimony and

the record, when properly read "as a whole," *Matter of Kelly v. DiNapoli*, 30 N.Y.3d 674, 684 (2018), show that Officer Viera concluded that Mendez sustained severe injuries to his legs that ultimately led to his death. (R. 54, 60, 261–262.) And a rational fact-finder could reasonably find that Officer Viera based his conclusion on not only the nature of the collision and Mendez's hospitalization, but also information from the physician who pronounced Mendez dead as "a result of his injuries." (R. 262.) Officer Viera's inability to provide further anatomical and medical specifics—which he did not have to do at an administrative hearing (App. Br. at 22–23, 28)—does not negate that conclusion.

Equally unavailing is Seon's speculation that the bus may have run over Mendez's foot, rather than his legs, and that Mendez thus died from something other than getting hit by a bus. *See* Resp. Br. at 46–48. The ALJ was not required to credit Seon's version of events, and was instead entitled to credit Officer Viera's testimony and report that Mendez died from severe leg injuries sustained in the crash. (R. 54, 60, 261–262); *see Matter of Marine Holdings, LLC v. New York City Commn. on Human Rights*, 31 N.Y.3d 1045, 1047

(2018). The Appellate Division majority concluded otherwise only by improperly substituting its view of witnesses' credibility and the weight of evidence for that of the ALJ. *See Matter of Haug*, 32 N.Y.3d at 1046; App. Br. at 29–30.

In any event, a rational fact-finder could have found that Seon caused Mendez's death even if Seon's bus merely ran over Mendez's foot. As DMV has explained (App. Br. at 30 & n.5), common sense and everyday experience teach that injuries not initially considered life-threatening—including foot injuries—may prove fatal. The evidence here allowed the ALJ to reasonably infer that Mendez died from the injuries sustained when a bus ran over him—especially since the officer who investigated the accident said that this is precisely what happened (R. 60, 261–262). *See, e.g.*, *Matter of Kelly*, 30 N.Y.3d at 684. Seon offers no response to this point.

Finally, Seon's conjecture that Mendez died from "other medical complications" (Resp. Br. at 47 (quotation marks omitted)), even if true, would not mean that he did not cause Mendez's death. On the contrary, this Court has consistently held that wrongdoers cause the death of people they injure even when the more

immediate cause of death is a medical complication from the injury, so long as the death is not "solely attributable" to a third party. *People v. Kane*, 213 N.Y. 260, 270 (1915); *accord People v. Griffin*, 80 N.Y.2d 723, 727 (1993). For instance, the Court has held that a person who shot a pregnant woman caused her death even though the immediate cause of her death was not the gunshot but an infection from a miscarriage that the shooting induced, and even though hospital employees were partially to blame for the infection. *See Kane*, 213 N.Y. at 270–71, 278.

These cases confirm that Seon caused Mendez's death even if medical complications also contributed to his demise. As Officer Viera testified, the "complication" that caused Mendez's death was "from the collision" with Seon's bus. (R. 60.) Because that testimony confirms that the complication was not "solely attributable" to a third party, *see Kane*, 213 N.Y. at 270, substantial evidence supports the ALJ's determination that Seon caused Mendez's death.

POINT II

SUBSTANTIAL EVIDENCE SUPPORTS DMV'S DETERMINATION THAT MENDEZ FAILED TO EXERCISE DUE CARE

This Court should conclude, as did all five justices below, that substantial evidence supports DMV's determination that Seon failed to exercise due care when he struck Mendez with a bus. (*See* R. 349 (majority), 354 (dissent).) Seon's request (Resp. Br. at 60–66) that this Court conclude otherwise and affirm on that alternative ground is unavailing. Accordingly, the Court should reinstate the ALJ's determination that Seon violated VTL § 1146(c)(1).

The undisputed evidence before the ALJ showed that Seon should have seen Mendez as he turned his bus onto Vyse Avenue. According to the report prepared by the officer who responded to the accident, Mendez "was crossing Vyse Avenue in the marked crosswalk" and "had a walk signal" in his favor when Seon's bus hit him. (R. 53, 261–263.) Although none of the witnesses who called 911 recalled whether Mendez had the walk signal in his favor (*see* Resp. Br. at 2), none said that he did not—leaving the responding officer's account uncontested (R. 55, 349). Moreover, Officer Viera—an accident-reconstruction specialist (R. 70; *see* R. 57–58)—testified

that Mendez was crossing the street with the signal "in his favor" and had already reached the middle of the crosswalk when he was hit. (R. 53, 76.) Based on these facts, Officer Viera concluded that Seon should have been able to see Mendez through the "big doors on the side" of his bus while "making the turn." (R. 70–71.)

This evidence amply supports the ALJ's conclusion that Seon failed to exercise due care. (R. 349.) As this Court has recognized, a person fails to exercise due care when he hits a pedestrian he should have seen and avoided. *See, e.g.*, *Soto v. New York City Tr. Auth.*, 6 N.Y.3d 487, 493 (2006); *Scantlebury v. Lehman*, 305 N.Y. 713, 714–15 (1953). So it is here, where Seon should have seen Mendez in the pedestrian crosswalk but did not notice anything until he "heard a thump" and exited the bus. (R. 65–66.) And Seon likely could have avoided Mendez if he had seen him, given that the bus was traveling at "less than 1 mile per hour" while making the turn (R. 57).

Seon's main argument to the contrary rests on an alternative account of events—that the accident occurred solely because Mendez purportedly walked into Seon's bus. Resp. Br. at 60. But this Court may not second-guess the ALJ's choice "between . . . alternative

factual versions" of events. *Matter of MNORX, Inc. (Ross)*, 46 N.Y.2d 985, 986 (1979). As explained, the ALJ reasonably determined based on the evidence presented that Seon struck Mendez rather than the other way around. The Court should confirm that rational determination. *See Matter of State Div. of Human Rights (Granelle)*, 70 N.Y.2d 100, 106 (1987).

Seon's account is implausible at any rate. Because Seon was turning right, it was his responsibility as the driver to yield to a pedestrian walking lawfully through a crosswalk—not Mendez's responsibility to yield to the bus. *See* VTL § 1111(a)(1) (vehicles turning right at a green signal must "yield the right of way to other traffic lawfully within the intersection or an adjacent crosswalk"). And although Officer Viera acknowledged the hypothetical possibility that a pedestrian could walk into a bus (*see* Resp. Br. at 65–66 (discussing R. 62)), he definitively concluded that Mendez did not do so here (R. 71 ("I believe the bus struck the . . . pedestrian")).[7]

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[7] Seon improperly minimizes Officer Viera's conclusions as reflecting a subjective "belief" (Resp. Br. at 22 (emphasis omitted)) about who struck whom. But context makes clear that Officer Viera reached the firm conclusion that Seon's bus struck Mendez, based

Moreover, even if Mendez had walked into the bus, Seon would be incorrect in arguing (Resp. Br. at 66) that he was entirely free from fault. Given the evidence presented, a reasonable fact-finder could conclude that both Mendez and the bus were moving and that they "both hit each other." (R. 71.) Even under that scenario, Seon would still have struck Mendez despite being able to see him and avoid hitting him. (R. 71, 349.)

Seon also contends (Resp. Br. at 11, 65) that he exercised due care because the rainy conditions and Mendez's dark clothing made him difficult to see. But that argument improperly asks this Court to substitute its judgment for that of the ALJ, who had before him evidence about the weather, time of day, and Mendez's clothing. (R. 58–59, 67; *see also* R. 69 (Seon's counsel arguing that Mendez was difficult to see given conditions), 90.) The ALJ was free to reject Seon's version of events in favor of Officer Viera's account. *See Matter of MNORX*, 46 N.Y.2d at 986. Indeed, Officer Viera

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on his "review of the facts," "reports," and witness statements. (R. 71.) This conclusion "of an experienced accident reconstruction specialist" adequately supported the ALJ's determination, as the Appellate Division rightly recognized. (R. 349.)

acknowledged the rainy conditions and Mendez's dark clothing (R. 59), and nonetheless opined that Seon should have seen Mendez in the crosswalk (R. 70–71).

Seon thus errs (Resp. Br. at 64–65) in likening this case to *Matter of Russell v. Adduci*, 140 A.D.2d 844 (3d Dep't 1988). There, the undisputed evidence showed that the driver could not have seen the pedestrian he hit—not only because the sun obscured the driver's vision, but also because the driver's "prudent act of looking well ahead of his car at the road on which he was traveling left the [victim] out of his field of vision." *Id.* at 846. Here, however, the record contains the opinion of an experienced accident-reconstruction specialist that Seon could have—and should have—seen Mendez through the bus's large glass doors despite the surrounding conditions. (R. 70–71.) Because that opinion provides "a rational basis for the conclusion" that Seon failed to exercise due care, DMV's determination should stand. *Matter of Marine Holdings*, 31 N.Y.3d at 1047 (quotation marks omitted).

CONCLUSION

For these reasons, the Court should reverse the Appellate Division's decision.

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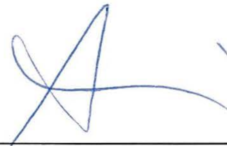
AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Scott A. Eisman, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,101 words, which complies with the limitations stated in § 500.13(c)(1).



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