To be argued by:
Melissa A. Day
(Time requested: 20 minutes)

APL No. APL-2022-00180
Appellate Division, Third Department Docket No. 532932
Workers' Compensation Board No. G201 8483

Court of Appeals

of the

State of New York

In the Matter of the Claim for Compensation
Under the Workers' Compensation Law Made by
THOMAS LAZALEE,

Claimant-Respondent,

– against –

WEGMANS FOOD MARKETS, INC.,

Self-Insured Employer-Appellant,

– and –

WORKERS' COMPENSATION BOARD,

Respondent.

REPLY BRIEF FOR SELF-INSURED EMPLOYER-APPELLANT

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August 22, 2023

DISCLOSURE STATEMENT PURSUANT TO 22 NYCRR §500.1(f)

Wegmans Food Markets, Inc., Appellant herein, submits the following, as required by 22 NYCRR 500.1(f):

1. This Brief is filed by Wegmans Food Markets, Inc.;
2. Wegmans Food Markets, Inc. has one wholly owned subsidiary, Wegmans Massachusetts, Inc.; and,
3. Wegmans Food Markets, Inc. does not have any parents or affiliates.

STATUS OF ANY RELATED LITIGATION

Not applicable.

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QUESTION PRESENTED

In light of the compelling public policy concerns of conservation of judicial resources and compensating employees who are injured at work, is an employer's request to cross examine an attending physician timely when made at the first hearing under the mandatory language of 12 NYCRR 300.10(c)?

JURISDICTIONAL STATEMENT

This Court has jurisdiction to entertain this appeal pursuant to CPLR 5602(a)(1)(i); Permission to appeal was granted by this Court pursuant to Order decided and entered on December 15, 2022 as is reflected in the Record at p. 122;

Wegmans' exception to the Referee's denial of its request for cross examination was made at a hearing on April 14, 2020 and is in the Record at p. 88;

Wegmans challenged the denial of its request for cross examination of an attending physician by filing an administrative appeal on May 13, 2020 and is reflected in the Record at pp. 100 – 105; and,

Wegmans perfected an appeal to the Third Department and presented two arguments to the Court:

1. The Board erred by denying Wegmans' request for cross-examination of the Claimant's attending physician under 12 NYCRR 300.10(c); and,
2. The Board's interpretation of 12 NYCRR 300.10(c) was against public policy.

See Wegmans' Brief to the New York Supreme Court, Appellate Division - Third Department dated February 23, 2021, pp. 1 – 2.

As the Third Department order affirmed a decision of the Board which finally determined the injured workers' entitlement to an award, the matter meets the finality requirement under CPLR §5602(a)(1)(i).

REPLY

Both Respondent Lazalee and Respondent Workers' Compensation Board's primary argument is that the Board has discretion to determine timeliness of a request for cross examination under 12 NYCRR 300.10 and that the decision below was not an abuse of discretion. This is the crux of the issue before the Court. Wegmans submits that the plain language of rule does not allow for discretion, or alternatively, to the extent that it does, the Workers' Compensation Board abused that discretion.

The plain language of the regulation is not precatory; it is mandatory.

> When the employer…desires to produce for cross-examination an attending physician whose report is on file, *the referee shall grant an adjournment* for such purpose. (Emphasis added).

Respondents must overcome this simple conferment and show that the Board has discretion to determine timeliness of a parties' desire to produce for cross examination an attending physician. If Respondents can successfully show that the Board has that discretion, they must then show that its exercise here to find Wegmans' request untimely was not an abuse of discretion.

The standard previously articulated by the Ferguson Court for timeliness has its genesis in the non-discretionary, mandatory language of the rule itself, whereas the Third Department's finding below that Wegmans' request was untimely goes far

afield of the regulation's text and reads numerous additional requirements into the rule.

In Ferguson v Eallonardo Constr., Inc., 173 A.D.3d 1592, 1595 (3rd Dept. 2019) the Third Department approbated the Board's rule-driven standard for exercising the right conferred on the parties under the regulation:

> …[t]he *only* requirement is that the request for such cross-examination must be timely made at a hearing, prior to the WCLJ's ruling on the merits…" (Emphasis added).

Closely examining the standard so often articulated by the Workers' Compensation Board before the decision in this claim, as ratified by Ferguson, one appreciates that the "standard" is essentially a reiteration of rule itself. The four corners of rule require that the right conferred by the regulation is exercised at a hearing; an *adjournment* can only be granted by a *referee* at a hearing. There is a further requirement that a report of the party to be deposed must be "on file". Lastly, the standard's insistence that the request be made "prior to a decision on the merits" is simply an articulation that the principle of *res judicata*, as applied to a due process right, would require that the party asserting the right exercise it before a decision on the merits.

This latter requirement provides the sole extent to which the Ferguson standard could be read as finding room for the exercise of "discretion" by the Board regarding the timeliness of a request: the Board has the authority to determine if

there has already been a determination on the merits. Any "discretion" should be limited to that.

The rule does not address or reference alternative actions that the parties could take. Both Lazalee and the Workers' Compensation Board spend considerable time in their briefs discussing alternate actions that Wegmans could have taken. Wegmans largely does not dispute what is posited by Respondents regarding alternative actions that could have been taken albeit with some confounding exceptions.

Those hypotheticals are not at issue here. At issue here, is the action that the Workers' Compensation Board took and whether that action was permissible under the rule.

To the extent that this determination depends on examining Wegmans' actions, the inquiry is limited to whether Wegman's desire for cross examination was:

1.) For an attending physician whose report was in the file;

2.) At a hearing; and

3.) Before a decision on the merits.

The Court below, by affirming the Board's decision on timeliness, would require numerous additional actions be taken or that the party desist from taking actions, in order to exercise the right conferred in the rule as described in Wegmans' Brief below. The rule does not make exercising the right to cross examination contingent

upon any action except those articulated above. Hence Respondents' Briefs on all the actions that Wegmans could have taken, are irrelevant.

When one drills down into Ferguson's facts, similar additional requirements were completely extraneous to the Third Department's decision reversing the Board's denial of the right to cross examination under 300.10. In Ferguson, the timeliness of a claimant's request for cross examination of an independent medical examiner was at issue and there were the following facts:

- The employee was notified by the Board that his injury could result in permanency and he should schedule an appointment with his attending physician about a year after his surgery or when no further improvement weas expected;
- In October of 2017 the claimant was examined by a consultant for the carrier who found permanency;
- On November 30, 2017, the Board advised claimant of the existence of the carrier's consultant's report and that he had 60 days to obtain a competing opinion on permanency from his physician or his "opportunity to submit medical evidence on permanency may be deemed waived by the [Workers' Compensation] Board."
- Counsel for claimant acknowledged receipt of the November 2017 notice and represented that the claimant would return to his attending physician for a

permanency evaluation that he was aware that the required form needed to be provided within 60 days;

- Claimant tried unsuccessfully to persuade the carrier reach a stipulated agreement;
- On January 31, 2018 the claimant was reevaluated by his attending physician but the resultant February 13, 2018 report did not contain a permanency opinion;
- The Board scheduled a hearing on permanency and counsel for claimant requested an opportunity to cross-examine the carrier's consultant under Rule 300.10, which the carrier opposed as untimely, and the Board denied as untimely; and
- Claimant's counsel candidly conceded that he did not obtain a competing report on permanency from the attending physician because he felt that he would be able to obtain concessions on the carrier's consultant about his or her misapplication of the permanency guidelines during cross examination.

The Ferguson Court did not find any of the foregoing, including the at least four month delay between when the issue arose and the hearing where cross examination was requested, the notices that permanency was an issue, the failure to request cross examination of the carrier's consultant before the initial hearing, or the failure to

request a hearing on the issue of permanency, relevant in determining that the Board abused its discretion in denying claimant's request for cross examination:

> …claimant's right to cross-examine the carrier's consultant was not predicated upon the filing of a competing report, and counsel voiced his request for cross-examination of the consultant at the first permanency hearing scheduled in this matter. Under these circumstances, we find that the Board abused its discretion in denying as untimely claimant's request to cross-examine the carrier's consultant…(numerous Board Panel decision citations omitted).

Ferguson at 1595.

If the Board wishes to impose additional requirements on a party which desires to cross examine a physician whose report is on file, it is not without the authority to do so. However, it must exercise that authority within rules for promulgating regulations, which it did when it enacted the regulation at issue here.

Just as a court should not legislate by decision, an administrative agency should not regulate by administrative decision.

CONCLUSION

When public policies concerns are fully considered within the framework of the regulation, Wegmans' timeliness argument becomes more compelling and consistent with pre-Lazalee precedent. Wegmans requested cross examination of Dr. Stefanich at the first hearing prior to a decision on the merits. Under the plain language of the regulation, and important public policy concerns of judicial economy and compensating employees who are injured at work, the decision of Third Department and the Workers' Compensation Board should be reversed and Wegmans' request for cross examination should be granted.

Dated: August 22, 2023

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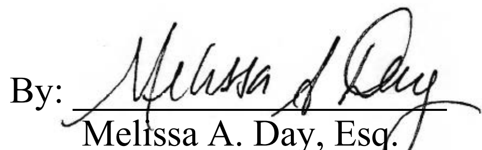
By: 

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.13 that the foregoing brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service certificate of compliance, corporate disclosure statement, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, regulations, etc. is 1614 words.

Dated: August 22, 2023

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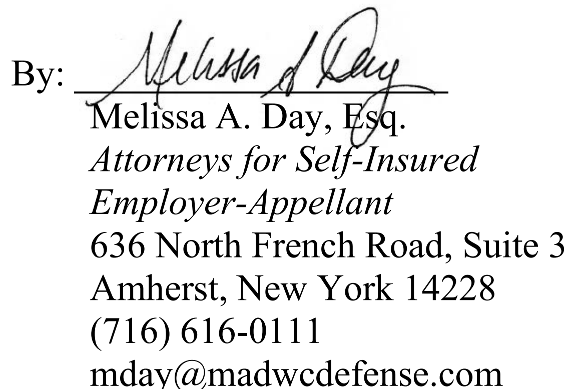
By: 

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STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
	)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK	)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On August 22, 2023

deponent served the within: **REPLY BRIEF FOR SELF-INSURED EMPLOYER-APPELLANT (APL-2022-00180)**

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the address(es) designated by said attorney(s) for that purpose by depositing **3** true copies of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on August 22, 2023

MARIANA BRAYLOVSKIY
Notary Public State of New York
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Qualified in Richmond County
Commission Expires March 30, 2026

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