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.

BRIEF FOR SELF-INSURED EMPLOYER-APPELLANT

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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).

STATEMENT OF FACTS

On June 22, 2018, Respondent Thomas Lazalee, (hereinafter "Lazalee"), a truck driver who had been employed by Appellant Wegmans Food Markets, Inc. (hereinafter "Wegmans") for 19 years at the time, sought treatment for significant pain in his right thumb. (R. 12, 15).[1] Lazalee believed his condition was "due to driving a truck all day" and the physician's assistant who treated him concurred (R. 15, 17). A referral to a hand surgeon was made for the diagnosis of trigger finger in the right thumb and despite the symptoms, Lazalee was found able to perform his job without any limitation which he did. (R. 14).

Unfortunately, this did not continue to be the case; Lazalee stopped working on August 2, 2018 as a result of his right thumb condition. (R. 20). Because its employee was unable to work, Wegmans began voluntarily making payment of workers' compensation benefits at $870.61, the maximum rate payable under New York Workers' Compensation Law §15 ("WCL") based on the claimant's wages of $1,635.59 and a date of disability of June 21, 2018. (R. 20). This is also the rate to which Lazalee would be entitled if New York Workers' Compensation Board ("Workers' Compensation Board" or "Board") determined that Lazalee had a temporary total disability.

[1] References are to the printed Record on Appeal.

Lazalee's symptoms expanded beyond the pain he originally felt in his right thumb to include right carpal tunnel syndrome. (R. 25). On October 10, 2018, Dr. Raymond Stefanich, MD, a hand surgeon, sought approval to perform right trigger thumb and right carpal tunnel releases from Wegmans for his patient Lazalee; Dr. Stefanich also opined that Lazalee had a 100% temporary impairment ostensibly meaning Lazalee was incapable of performing any work, even one handed work, as a result of his right hand complaints. (R. 26, 28 – 29).

A scant two days later, on October 12, 2018, a Wegmans' nurse, employed to review such requests, promptly granted Dr. Stefanich's application for surgical intervention, implicitly accepting the provider's opinion that both invasive procedures were indicated and reasonable, and that the conditions were related to Lazalee's work as a driver for Wegmans even though the original claim was only for the right thumb; Wegmans forewent its option to have Lazalee examined by an independent medical examiner to ascertain if the proposed treatment was appropriate and related to his employment. (R. 29). Wegmans continued making payments to Lazalee at $870.61, the amount reflective of a temporary total disability, voluntarily and without a specific direction by the Workers' Compensation Board. (R. 20, 46).

Less than 10 days after he requested the treatment, Dr. Stefanich performed right trigger thumb and right carpal tunnel releases on October 19, 2018 and found Lazalee to have a 100% temporary impairment following the surgical intervention.

(R. 30 – 35). Following the surgery on Lazalee's right hand, Wegmans continued voluntarily making payments to Lazalee at $870.61, the amount reflective of a temporary total disability, without any specific direction from the Workers' Compensation Board. (R. 20, 46).

Shortly thereafter, Dr. Stefanich evaluated Lazalee for left carpal tunnel syndrome and on November 20, 2018, Dr. Stefanich requested authorization to perform left endoscopic carpal tunnel release. (R. 35 – 36). As had been the case with the right carpal tunnel release, Wegmans did not exercise its right under WCL §13 to have Lazalee evaluated by its own expert, acceding to Dr. Stefanich's position that the surgery was indicated and related to Lazalee's work at Wegmans. (R. 35 – 36). Hence, on November 26, 2018, a scant 6 days after Dr. Stefanich requested surgery, Wegmans' nurse approved performance of the procedure. *Id.*

However, the surgery was not performed right away and at the time of an evaluation on January 24, 2019, Dr. Stefanich noted that Lazalee said that he was "doing well on the right and would like to proceed with the left carpal tunnel release." (R. 39). As had been the case in the past, Dr. Stefanich provided an opinion that Lazalee had a 100% temporary impairment and Wegmans continued voluntarily making payments to Lazalee at $870.61, the amount reflective of a temporary total disability, without any specific direction from the Workers' Compensation Board. (R. 20, 40, 46).

Outpatient endoscopic left carpal tunnel was performed on February 11, 2019 and Lazalee was felt to have a 100% temporary impairment at the time of the procedure. (R. 42 – 44). Wegmans continued its payment without interruption or Board direction. (R. 46).

Recovery went well and approximately two months later, on April 15, 2019, Lazalee returned to work and Wegmans suspended the voluntary payments at a rate reflective of a temporary total disability. (R. 45 – 46). All told, by the time Lazalee returned to work on April 15, 2019, Wegmans made voluntary payments to Lazalee without any direction from the Workers' Compensation Board, from August 2, 2018 to April 13, 2019, a period of 36 weeks or approximately nine months, at the maximum rate to which he could be entitled under the WCL. *Id.*

By September 17, 2019, Lazalee was doing will with respect to his left carpal tunnel release, but he had developed new symptoms in his left thumb and left small finger according to treatment notes from Dr. Stefanich. (R. 49 – 50). Although Dr. Stefanich felt that Lazalee needed outpatient surgical intervention again, he also found that Lazalee had a 0% temporary impairment. (R. 50). As had been the case with the right trigger thumb release, the right carpal tunnel release and the left carpal tunnel release, a Wegmans' nurse expeditiously approved Dr. Stefanich's request for the two surgical procedures for the new injury sites, the left thumb and left small finger, a mere five days after receipt. (R. 51 – 53). Wegmans once again did not

exercise its prerogative to have Lazalee evaluated by its own medical expert electing to authorize the treatment for its employee without challenge. *Id.*

At the time of a follow up evaluation on October 8, 2019, Dr. Stefanich continued to believe that the claimant would benefit from surgery on the left thumb and left small finger and although the surgery had not yet been performed and the claimant was symptomatic in those digits, the doctor opined that that Lazalee had a 0% temporary impairment and could continue working without restriction despite the need for proposed invasive treatment. (R. 55 – 57).

Dr. Stefanich performed the outpatient surgery on October 18, 2019. (R. 58 – 60). Wegmans once again began making a voluntary payment of benefits without a direction from the Workers' Compensation Board at a rate reflective of a temporary total disability when Lazalee began losing time from work again because of the surgery. (R. 91 – 93). There is no opinion regarding Lazalee's degree of impairment in the operative report. *Id.*

Although Lazalee's first post operative visit was scheduled for October 28, 2019, he was seen by Dr. Stefanich's office on October 25, 2019 following an October 22, 2019 fall at Walmart when he injured his left wrist. (R. 61 – 63, 64 – 66). According to the medical note from the evaluation on October 25, Lazalee slipped and tried to catch himself with his outstretched left hand and had immediate

pain and swelling; three days later he had sharp, piercing, throbbing pain with bending, movement and lifting, decreased range of motion, swelling and weakness. (R. 62). He was placed in a brace due to the possibility of a fracture and the physician's assistant who evaluated him noted that Lazalee would be seen for in follow up from his surgery the following week. (R. 63). There is no reference to Lazalee's impairment in this report. (R. 62 – 63). The bill for this treatment was submitted to Wegmans' workers' compensation program. (R. 61).

Dr. Stefanich performed his first post-operative evaluation of Lazalee following release of the left trigger thumb and little finger on October 28, 2019 and the doctor noted that his patient had, "little complaints of pain to the left thumb and left small digit…[but was] localizing pain across the left wrist." (R. 65). Regarding the left wrist which had just been injured in the fall, Dr. Stefanich advised that Lazalee should "continue in his brace and avoid wrist range of motion exercises…[and] heavy lifting, carrying, pushing, pulling with his left upper extremity." (R. 66). Dr. Stefanich also felt that Lazalee should remain out of work with a temporary total disability following the surgical intervention on his left thumb and left small finger and provided an opinion that his patient had a 100% temporary impairment. (R. 66). Wegmans continued voluntarily making payment of benefits to its employee at a rate reflective of a temporary total disability without any direction by the Workers' Compensation Board. (R. 91 – 93).

On November 13, 2019, Lazalee returned to Dr. Stefanich's office for his "left wrist sprain" ostensibly due to the fall at Walmart. (R. 67 – 69). The bill for this treatment was submitted to Wegmans' workers' compensation program. (R. 67). Treatment this day was targeted solely at the left wrist although the provider references Lazalee's inability to work secondary to the trigger finger surgery. (R. 69). Wegmans continued voluntarily making payment of benefits to Lazalee at a rate reflective of a temporary total disability without any direction by the Workers' Compensation Board following this evaluation. (R. 91 – 93).

The Workers' Compensation Board first weighed in on this claim on December 2, 2019 approximately a year and a half after Lazalee's first treatment for pain in his right thumb, when it issued an Administrative Decision establishing compensability. (R. 70 – 72). Administrative Decisions are issued without hearings and the parties are given approximately 30 days after the issuance of a proposed decision to object to the findings. *Id.* The decision reflected the Workers' Compensation Board findings that Lazalee sustained a right trigger thumb injury and was earning $1,635.59 as of June 21, 2018, the date of accident or disability. (R. 70). The Workers' Compensation Board awarded benefits to Lazalee for a "temporary total disability" agreeing that the payments that Wegmans voluntarily made for the first period of time that its employee was unable to work, from August 2, 2018 to April 15, 2019, 36.4 weeks, at the maximum rate for an injury occurring on June 21,

2018, $870.61, were appropriate. (R. 70). No party objected to these findings and as a result, the decision became final after January 2, 2020. (R. 71).

In the meantime, Lazalee returned to Dr. Stefanich on December 3, 2019 to reevaluate his left thumb and small finger, and although he had some discomfort and stiffness, he had minimal limitations in the range of motion in both digits. (R. 73 – 75). Despite recommending that Lazalee could "introduce activity as tolerated," Dr. Stefanich indicated that his patient had a 100% temporary impairment and that his return to work would be discussed at the time of his next visit in three weeks. (R. 75). Wegmans continued voluntarily making payment of benefits to its employee at a rate reflective of a temporary total disability without any direction by the Workers' Compensation Board. (R. 91 – 93).

At the time of that next visit, shortly before the Christmas holiday, Lazalee was doing well post operatively and he was "significantly improved compared to his preoperative state." (R. 78). Despite the fact that Lazalee was "significantly improved from his preoperative state" when he was working with a 0% impairment, Dr. Stefanich curiously found that his patient had a 100% impairment until January 6, 2020, shortly after the New Year, at which time he could return to work without restriction. *Id*. No follow up visit was planned to further evaluate Lazalee before the full duty release to work without restriction became operative.

Lazalee was able to return to work full duty as predicted by Dr. Stefanich on January 6, 2020. (R. 91 – 93). Thus, Wegmans made voluntarily payments of benefits to Lazalee from the date of the October 18, 2019 surgery, throughout his post operative recovery, and treatment for a left wrist pain following a fall at Walmart, up until his return to work full duty, January 6, 2020, at a rate reflective of a temporary total disability without any direction by the Workers' Compensation Board. (R. 91 – 93, 94 – 96).

On January 13, 2020, Lazalee's attorney sent a letter to the Workers' Compensation Board requesting a hearing to "include claimant's left carpal tunnel syndrome" as part of the claim and to address lost time associated with the surgical intervention. (R. 79).

The Workers' Compensation Board held a hearing on April 14, 2020 and Wegmans informed the Workers' Compensation Administrative Law Judge, ("Referee"), that it did not dispute addition of injury sites beyond the right trigger thumb, the only condition for which the claim was originally established by virtue of the December 2, 2019 Administrative Decision: right carpal tunnel syndrome, left carpal tunnel syndrome, left thumb trigger finger and left small finger trigger finger. (R. 70 – 72, 85).

Although it had already paid benefits for the lost time from work at a rate reflective of a total disability, the highest rate to which Lazalee could be entitled, Wegmans, thorough its counsel, sought cross examination of Dr. Stefanich under 12 NYCRR 300.10 on the issue of degree of disability which could affect the value of awards to which Lazalee would be entitled for his inability to work after the surgery performed on October 18, 2019. (R. 85 – 86).[2] Lazalee's counsel objected, not expressly on the basis that the request was untimely, but on the theory that Wegmans did not have any contrary medical evidence and should have obtained such evidence if it wanted to challenge Lazalee's rate. (R. 86).

The Referee denied the request finding that the result would be different, "if the claimant had had excessive periods of lost time, but I think eleven weeks of lost time after such surgery was probably appropriate." (R. 87 – 88). Again, the Referee did not explicitly find that the request was not timely; he found that the period of lost time following the surgery was "appropriate." (R. 88). The Referee awarded Lazalee temporary total disability benefits from October 18, 2019 to January 6, 2020 without affording Wegmans the opportunity to cross examine Dr. Stefanich: this was a legal finding based on the Referee's judgment about the medical without

[2] Obtaining a finding of less than a total disability for a period of time after the surgery on October 18, 2019 could inure to Wegmans' benefit if Lazalee becomes entitled to an award for a permanent partial disability consisting of a schedule loss of use and it is determined that there is a protracted healing period. *See* WCL §15.

development of the record on the issue of degree of disability. *Id.* Wegmans noted its exception to that ruling. (R. 89). The Workers' Compensation Board memorialized the award in a Notice of Decision filed on April 17, 2020. (R. 97 – 99).

Wegmans challenged the denial by filing an administrative appeal on May 13, 2020. (R. 100 – 105). The self-insured, self-administered employer argued that its timely request for cross examination was denied based on the Referee's personal opinion that the duration of temporary total benefits was not excessive which violated its rights under 12 NYCRR 300.10. (R. 103 – 104). Lazalee filed a response. (R. 106 – 112).

The Workers' Compensation Board issued a Memorandum of Board Panel decision filed on July 29, 2020 finding that Wegmans' request for cross examination made after making voluntary payments at a rate reflective of a temporary total impairment "cannot be found to be timely," and that Wegmans, "failed to produce sufficient evidence to warrant the development of the record on degree of disability." (R. 7 – 11, 9). Neither rationale has ever been adopted by any NY court as the standard for adjourning a claim for cross-examination under 12 NYCRR 300.10.

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.

On January 6, 2022, the Third Department upheld the July 29, 2020 decision of the Board finding that Wegmans' request to cross examine Lazalee's attending physician under 12 NYCRR §300.10(c) was not timely as it was made after it voluntarily paid its employee for 11 weeks and was therefore waived. (R. 124 – 127, 126). However, the Third Department did not expressly address the public policy concerns raised by Wegmans' in its Brief other than to summarily indicate, "The employer's remaining contentions have been considered and found to be without merit." (R. 127).

Wegmans filed a Motion for Reargument or for Leave to Appeal to this Court at the Third Department which was denied. Wegmans filed a further Motion for Leave to Appeal with this Court which was granted by Order decided and entered on December 15, 2022 and this appeal follows. (R. 122).

ARGUMENT

POINT I

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

The Workers' Compensation Board, like all administrative agencies, is a creature of statute and has only those powers granted to it by the legislature. *See* Kiriloff v. A. G. W. Wet Wash Laundry, 293 N.Y. 222, 227 (1944). The Board has the authority to promulgate rules and regulations under WCL §117, subject to notice requirements prior to adoption or suspension of a rule; additionally, the rule must be reasonable and consistent with the statute. *See* Matter of Kigin v State of New York Workers' Compensation Bd., 24 N.Y.3d 459, 467 (2014), "The Board is authorized to 'adopt reasonable rules consistent with and supplemental to the [Workers' Compensation Law]" (Workers' Compensation Law § 117[1]).'"

Once an administrative agency has promulgated a rule, it is binding on the agency:

> The rules of an administrative agency, duly promulgated, are binding upon the agency as well as upon any other person who might be affected (see *People ex rel. Doscher v. Sisson*, 222 N.Y. 387, 393–394, 118 N.E. 789).

Frick v Bahou, 56 N.Y.2d 777, 778 (1982). Hence, this Court reversed the Third Department in Matter of Vukel v New York Water & Sewer Mains, Inc., 94 N.Y.2d 494, 496 (2000):

> We hold that, under these circumstances, the Board violated its own rules requiring notice to all parties in interest (12 NYCRR 300.13[a]) and we reverse the order of the Appellate Division affirming the Board's decision.

Therefore, once the Board has promulgated a rule pursuant to its authority as provided by the Legislature in WCL §117, its choice not to follow it constitutes reversible error.

The regulation at issue, 12 NYCRR 300.10, provides as follows:

> 300.10(c) When the employer or its carrier or special fund desires to produce for cross-examination an attending physician whose report is on file, the referee shall grant an adjournment for such purpose.

Nothing in the express language of this rule limits this right except that the report must be in the Board file. In fact, this Court, as opposed to the Third Department, has never read any additional requirements into this rule and interpretation of this regulation is a case of first impression for this Court.

The Third Department has had numerous opportunities to interpret this rule and up until the decision below, used the following standard:

> Notably, "[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…" (*Citations omitted*). Emphasis added.

Ferguson v Eallonardo Constr., Inc., 173 A.D.3d 1592, 1595 (3rd Dept. 2019). Given that the rule references an "adjournment" and "referee," finding a requirement that the request be made at a hearing is logical and supported by the language of the rule. Moreover, requiring that the request be made prior to a decision on the merits as part of timeliness is eminently reasonable as a party should not be able to retroactively challenge evidence once a decision has been rendered. Principles of *res judicata* would prevent requests made after the fact.

Curiously though, under the timeliness standard referenced by the Third Department in the decision below from Ferguson, Wegmans' request in this claim would be timely as it was made at a hearing prior to a referee's determination on the merits.

Apparently when the Third Department said, "only" in Ferguson, it did not mean "only" as its decision in Lazalee greatly abrogates the Ferguson rule.

> Following the October 2019 surgery, the employer accepted liability and voluntarily paid claimant for 11 weeks until Stefanich cleared him to return to work; at no point prior to the April 2020 hearing, three months after claimant's return to work, did the employer seek to suspend benefits, question his degree of disability or request further action. The Board rationally concluded that the employer's belated request to cross-examine Stefanich regarding claimant's postsurgical recovery period was "disingenuous" in that claimant required the use of his hands to perform his job,[3] and Stefanich's uncontroverted

[3] The Third Department and the Board's references to Lazalee's inability to perform *his job* as a result of his hand condition are completely inscrutable as both tribunals and all the parties to this appeal would have to concede, the standard for being awarded temporary total disability benefits in a workers' compensation claim is not whether an employee is incapable of performing *his job*, but whether he is capable of performing *any* work.

> medical reports documenting claimant's loss of range of motion, swelling, tenderness and other factors that supported the finding that he his temporary disability was total.

Lazalee v Wegman's Food Markets, Inc., 201 A.D.3d 1110, 1111-12 (3rd Dept. 2022), *lv to appeal granted*, 39 N.Y.3d 905 (2022). Following Lazalee, therefore, there are several additional mechanisms by which an employer can waive the right to cross examination of an attending physician whose report is in the file despite being completely absent from the language of the rule:

- the employer cannot make voluntary payments before requesting cross examination or it waives the right;
- the employer must seek to suspend benefits before requesting cross examination or it waives the right;
- the employer must question the claimant's degree of disability before requesting cross examination or it waives the right;
- the employer must request a hearing or further action before requesting cross examination or it waives the right; and, most perplexing of all,
- the employer's request for cross examination cannot be "disingenuous" or it waives the right.

These additional "timeliness" requirements creates a dilemma for Wegmans: stop payment of voluntary benefits to its employees, litigate issues it currently does

not or face higher workers' compensation costs. It has not yet made a decision what it will do. Thus, as this Court can appreciate, the Board's decision as affirmed by the Third Department is against public policy because it:

- Needlessly increases litigation as it requires an employer to challenge medical evidence that it may have been content to disregard;
- Potentially leads to lowered payments to employees in situations where the employer would have been willing to pay higher benefits voluntarily; or, alternatively,
- Potentially penalizes an employer which is willing to pay a valued employee a living wage while out of work albeit not at rate necessarily reflective of the employee's ability to work.

Wegmans is one of the largest private employers in the country employing approximately 53,000 people nationwide and in excess of 25,500 in NY alone. Wegmans has been honored to be on FORTUNE Magazine's list of the 100 Best Companies to Work For every year since Forbes began ranking employers in 1998, ranking 3rd in 2022.[4]

Wegmans meets its NY workers' compensation responsibilities as a self-insured, self-administered employer and as such is directly responsible for

[4] https://www.wegmans.com/about-us/company-overview/#:~:text=It%20is%20one%20of%20the,in%202022%20of%20%2412%20billion, "Wegmans, Company Overview."

administering the benefits it directly pays to its employees. Simply put, Wegmans' employees administer the workers' compensation benefits paid to co-employees following a work-related injury and Wegmans is directly liable for payments of those benefits.

Consistently with its hard-earned perennial accolades of being among, if not the best, workplaces, Wegmans frequently voluntarily pays its employees the maximum benefits to which he, she or they might be entitled, without inviting litigation, even though that amount might exceed the amount that it might be required to pay based on the medical evidence. It did that in this case. This ensures that the injured Wegmans' employee receives the maximum amount permissible under the statute without regard to whether Wegmans could pay the employee less money if it challenged the sufficiency of the evidence. This practice provides Wegmans' employee weekly benefits as close as possible to the wages that they were earning at the time of the injury regardless of whether the medical evidence would permit payment at a lower percentage of the maximum amount allowable under the law.

This is not completely altruistic on Wegmans' part although certainly providing its injured workers a living wage is a priority for one of FORTUNE's "Best Companies to Work For". Wegmans fosters the good will of its employees without negative repercussion, as long as Wegmans is permitted to challenge

protracted periods of temporary total disability in the limited circumstances when such a finding could prejudice it with a possible schedule loss of use award.

This was the case here. Wegmans was presented with a claim for a right thumb injury. Medical was submitted which referenced a right carpal tunnel syndrome. Wegmans could have challenged this new diagnosis; it didn't. Wegmans could have obtained its own medical examination to obtain an opinion on whether the claimant was disabled from *all* work as a result of this right hand condition, as opposed to just his work; it didn't. After Lazalee was treated on the right, Wegmans received medical which referenced left carpal tunnel syndrome. Wegmans could have challenged this new diagnosis; it didn't. Wegmans could have obtained its own medical examination to obtain an opinion on whether the claimant was disabled from *all* work, as opposed to just his work; it didn't. Wegmans received medical evidence indicating a new problem relating to the left thumb and left small finger. Wegmans could have challenged these new diagnoses; it didn't. Wegmans could have obtained its own medical examination to obtain an opinion on whether the claimant was disabled from *all* work, as opposed to just his work because of his left hand issues; it didn't. Wegmans received evidence of a non-occupational injury – the fall at Walmart – and Wegmans could have challenged this non-occupational injury; it didn't. Wegmans could have challenged medical from the attending physician indicating that the claimant was 100% impaired although he was doing better than

he had been before the left thumb and left small finger surgery, when the claimant was working and had a 0% impairment; it didn't.

It was at the first hearing, prior to a determination on the merits, on April 14, 2020 hearing, that Wegmans faced protracted awards at temporary total and requested cross examination. There was nothing "disingenuous" about the request. Wegmans had legitimate questions about whether Lazalee was disabled from *all work*, not just his work, which is the standard for being entitled to temporary total benefits notwithstanding the Board's and Third Department's conflation of the inability to do the at injury job with temporary total disability. Wegmans is absolutely confident that if confronted with this error, both tribunals would concede that the inability to do the at injury work is not the standard for awarding temporary total benefits. Moreover, because Lazalee had already been awarded 36.2 weeks of benefits at the temporary total rate which exceeds the protracted healing period in this claim, Wegmans had a genuine concern about limiting further awards at total.[5] Each additional week awarded at total could increase Wegmans' liability for a schedule loss of use award which will undoubtedly be found when permanency is assessed.

Wegmans was not seeking to claw back any benefits that it had already paid to Lazalee as those benefits will become a credit against a schedule loss of use award.

[5] The protracted healing period in this claim will be the period for one hand which is 32 weeks.

It was not seeking to delay benefits to Lazalee; they had already been paid at the time it requested cross examination. Wegmans was simply requesting an opportunity to cross examine Dr. Stefanich about Lazalee's degree of disability to see if it would be appropriate for some of the weeks after the October 18, 2019 surgery to be awarded at a partial rate thus potentially reducing Wegmans' liability for a schedule loss of use award.

Now, following the Board's decision as affirmed by the Third Department, Wegmans will have to choose between two possibilities which are against public policy:

1. Wegmans will either need to litigate claims to pay reduced benefits that it was previously content to pay voluntarily at the most favorable rate for its employee; or,
2. Potentially be prejudiced for paying its employees the higher rate.

Wegmans submits that either scenario is against public policy of conserving judicial resources by discouraging litigation and paying injured workers benefits while they recuperate which will not adversely impact their standard of living.

Consider the chilling effect of this decision; an employer can no longer give its employee the benefit of the doubt on a medical issue as its tacit acquiescence will be used as a sword against it when it eventually requests cross examination of the physician. Employers will have to challenge benefits at the earliest possible time

thus exponentially increasing litigation, potentially delaying benefits to injured workers.

For example, in a claim like this in the future, Wegmans may elect to challenge its employee's degree of impairment, may request a hearing, may pay lower benefits or refuse to pay benefits before a direction from the Board, may seek its own opinion from a doctor on causally related diagnoses, or may request a hearing rather than running the risk of not being able to request cross examination of an attending physician whose report is on file. It may have to. Wegmans' alternative may be to pay higher awards for permanency in a state which in 2022 has the 4th highest workers' compensation costs in the country.[6]

[6] https://www.oregon.gov/dcbs/cost/Pages/premium-index-rates.aspx, "2022 Workers' compensation premium index rates."

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: March 2, 2023

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

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