To be argued by:
Gregory R. Connors
(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 CLAIMANT-RESPONDENT

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April 20, 2023

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1. 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 regarding voluntary temporary disability payments deemed timely four months after receipt of the medical evidence and payment of the temporary total disability benefits?

NO: it is timely when done contemporaneously and within a reasonable time of the receipt of the medical evidence and payment of temporary total disability benefits. The determination of timelines begins to run when the issue becomes ripe so the injured worker is not precluded or forfeit their rights or options based upon the issue being untimely raised by the employer/carrier.

It is unequivocally untimely when there is a delay of more than four (4) months from the receipt of the medical evidence and the payment of temporary total disability benefits as well as more than three (3) months after Mr. Lazalee returned to work with the SIE-Appellant. The delayed retroactive controversy of Mr. Lazalee's temporary disability payments denies and precludes Mr. Lazalee rights, options and benefits he would have otherwise been eligible for had the issue been raised in a reasonable time of the employer/carrier's receipt of the medical evidence and payment of temporary total disability benefits.

PRELIMINARY STATEMENT

This is a response by Claimant – Respondent, Mr. Thomas Lazalee, through his attorneys, Connors and Ferris, LLP, to the SIE-Appellant's appeal from the Third Department's January 6, 2022 affirmance of the Board Panel Decision filed on July 29, 2020, affirming a Worker's Compensation Law Judge ("WCLJ") decision filed April 17, 2020, as it was within the discretion of the WCLJ to deny the Self-Insured Employer's ("SIE-Appellant") request to cross-examine Dr. Stefanich as the request was untimely. (R. 123-128).

The Third Department and Board properly and consistent with the intention as well as the objective of the Workers' Compensation Law affirmed the WCLJ decision finding the SIE-Appellant voluntarily made payments at the temporary total rate while contemporaneously receiving the uncontroverted medical evidence during the period at issue, then over four months after receiving the medical evidence and paying temporary total disability benefits as well as three months after Mr. Lazalee returned to work with the SIE-Appellant, their ad hoc contracted counsel raised the issue as to the proper rate of payments or Mr. Lazalee's degree of disability for the first time at a hearing on April 14, 2020, which hearing was not even requested by the SIE-Appellant or their counsel rather was requested by Mr. Lazalee's counsel on January 13, 2020 so to include his left carpal tunnel syndrome. (R. 7-11 & 123-128).

As properly found by the Third Department and Board Panel, the SIE-Appellant's ad hoc contracted counsel request to cross-examine treating surgeon, Dr. Stefanich, more than four months after the SIE-Appellant received the uncontroverted medical evidence and paid temporary total benefits to Mr. Lazalee as well as over three months after he returned to work for the SIE-Appellant to be untimely. It is important to note and extremely relevant that the delayed retroactive controversy of Mr. Lazalee's temporary disability payments denies and precludes Mr. Lazalee rights, options and benefits he would have otherwise been eligible had the issue been raised in a reasonable time of the SIE-Appellant employer/carrier's receipt of the medical evidence and payment of temporary total disability benefits. For the reasons set forth below, the Third Department and Board Panel's decisions should be affirmed.

STATEMENT OF FACTS

Mr. Lazalee's Workers' Compensation claim is established as an occupational disease for bilateral carpal tunnel syndrome, bilateral trigger thumbs, and left small trigger finger with a June 21, 2018 date of disablement. (R. 70-72; 97-99).

Mr. Lazalee had three surgeries due to his work-related injuries, all performed by Dr. Stefanich, for which he came out of work on 08/02/18 whereupon the SIE-Appellant began voluntary payments consistent with WCL §25(1) and 12 NYCRR §300.22 which continued after he had right carpal tunnel release and right thumb surgery on 10/19/18 as well as his left carpal tunnel release on 02/01/19 until his return to work at the SIE-Appellant on 04/15/19. (R. 19-22; 30-34; 42-44 & 45-47).

Mr. Lazalee most recently underwent a left thumb trigger release and left little finger trigger release on 10/18/19 whereupon the SIE-Appellant again picked up the bi-weekly payments voluntarily at the temporary total disability rate upon the receipt and review of treating surgeon, Raymond Stefanich, M.D., reports providing same without raising any issue, objection, or controversy as to the degree of disability opinion as required by WCL §25(1) and 12 NYCRR §300.22 without direction from the WCB. (R. 58-60; 91-93).

On 10/25/19, Mr. Lazalee went in to see Dr. Stefanich unexpectedly following a slipping incident while walking into Walmart when he tried to catch himself with his left outstretched hand. (R. 61-63). Importantly, Dr. Stefanich contemporaneously

submitted said report and bill to the SIE-Appellant so it was fully disclosed allowing the SIE-Appellant the opportunity to decide how they wished to proceed as their decision would dictate the rights and options Mr. Lazalee would have moving forward. Id.

Mr. Lazalee then followed up again with Dr. Stefanich on 10/28/19 wherein he performed a post-operative examination of Mr. Lazalee and noted pain in the left wrist, as well as swelling around the incisional areas. (R. 64-66). Dr. Stefanich advised Mr. Lazalee to perform range of motion exercises for the fingers, but to avoid wrist range of motion exercises, and avoid heavy lifting, carrying, pushing, and pulling. Id. Dr. Stefanich reported Mr. Lazalee would remain out of work on temporary total disability. Id.

Mr. Lazalee was examined again by Dr. Stefanich on 11/13/19. (R. 67-69). Dr. Stefanich's report notes Mr. Lazalee's pain was improving slowly and he had deficits in range of motion of the wrist. Id. Mr. Lazalee was advised he could slowly wean out of the thumb brace as tolerated. Id.

The WCB then issued an Administrative Decision dated 12/02/19 establishing the claim with the date of accident (hereinafter "DOA") of 06/21/18 for the right trigger thumb along with setting the average weekly wage at $1,635.59, without prejudice, along with the award of lost time from 08/02/18 – 04/15/19 @ $870.61, TT (providing the SIE-Appellant and/or their counsel an opportunity to object to any

of the findings and award of lost time for any reason before 01/02/20 for which both did not object). (R. 70-72).

Then at the 12/03/19 follow-up examination, Dr. Stefanich reported there was continued discomfort and stiffness in Mr. Lazalee's small digit along with some range of motion deficits with the thumb. (R. 73-75). Dr. Stefanich advised Mr. Lazalee to continue digit range of motion exercises and to introduce activity as tolerated. Id. Dr. Stefanich again reported Mr. Lazalee remained at 100% temporary total disability because of his recent surgery. Id.

At the 12/23/19 visit with Dr. Stefanich, Mr. Lazalee reported tightness, discomfort, and continued pain in his thumb. (R. 76-78). Dr. Stefanich reported improvement compared to his preoperative complaints. Therein, Dr. Stefanich opined Mr. Lazalee would remain 100% temporary total disability until 01/06/20 when he was released to return to work without restriction. Id.

After Mr. Lazalee's return to work at the SIE-Appellant, Mr. Lazalee through the undersigned, requested a hearing on 01/13/20 to modify this claim to included left carpal tunnel syndrome as same had been separately filed to be established under a different claim number with a different DOA but agreed with the SIE-Appellant claims manager to amend this claim herein even though the different DOA would be associated with a higher average weekly wage as well as a greater weekly maximum temporary total benefit rate under the separate claim. (R. 79).

Thereafter, the WCB scheduled a hearing which took place on 04/14/20. (R. 83-90). For the first time more than 4 months after the SIE-Appellant's receipt of the medical reports from Dr. Stefanich and payment of temporary total disability benefits to Mr. Lazalee did the SIE-Appellant through their ad hoc contracted counsel raise an issue about Dr. Stefanich's opinion of disability or their previous payment of benefits at the temporary total rate. Id. In fact, it was not until the hearing on April 14, 2020 when the SIE-Appellant's counsel got involved, which was also over three months after Mr. Lazalee returned to work at the SIE-Appellant. Id.

At hearing on 04/14/20, the WCLJ after hearing the positions of the parties and review of the record, directed awards following the surgery at the temporary total disability rate from 10/18/19 to 01/06/20 consistent with the uncontroverted medical evidence of Dr. Stefanich the same as the contemporaneous payments made by the SIE-Appellant. Id. Therein, the WCLJ also denied the afterthought request for cross-examination by counsel as untimely, given it was four (4) months after the SIE-Appellant's contemporaneous receipt of the medical evidence and payment of temporary total benefits to Mr. Lazalee. Id.

Therein, the WCLJ reasoned the denial of the SIE-Appellant counsel's request to cross-examine Dr. Stefanich on degree of disability to be untimely given it was four months after the receipt of the medical evidence and payment of temporary total benefits along with the fact there was no contemporaneous request by the SIE-

Appellant to address the issue back in October, November or December 2019 when they received the medical reports and made voluntary payments; in addition to the fact the SIE-Appellant chose not to have Mr. Lazalee examined by their in-house physician or hire an IME. Id. So, given there was no contemporaneous objection by the SIE-Appellant or contradicting medical evidence along with the fact the SIE-Appellant had already paid Mr. Lazalee the temporary total rate for said period the WCLJ properly concluded within the power of judicial discretion to deny the request for cross-examination as untimely four (4) months after the fact. Id.

Thereafter, the SIE-Appellant appealed the 04/17/20 Notice of Decision in an Application for Board Review filed 05/13/20, alleging it was entitled with the unfettered right to depose Dr. Stefanich regarding his opinion on Mr. Lazalee's temporary degree of disability regardless of when they requested it without limitation even if the hearing were held months, a year or more later, as long as it was at the first hearing. (R. 100-105). A timely Rebuttal was filed on behalf of Mr. Lazalee submitting the WCLJ's 04/17/20 Notice of Decision contained no errors of fact or law, was supported by the record and should be affirmed. (R. 106-112).

In the 07/29/20 Memorandum of Board Panel Decision, the 04/17/20 Notice of Decision was affirmed in its entirety. (R. 7-11). Specifically, the Board Panel stated the SIE-Appellant's counsel request to cross-examine Dr. Stefanich to be untimely in the absence of contemporaneous objection by the SIE-Appellant along

with the fact it was not raised until more than four (4) months after they received the uncontroverted medical evidence and paid temporary total disability benefits along with the fact it was three (3) months after Mr. Lazalee returned to work with the SIE-Appellant coupled with the fact it was obviously based upon a disingenuous afterthought by SIE-Appellant's ad hoc contract counsel's personal interpretation of Dr. Stefanich's reports more than four months after their receipt and without any contrary medical evidence. Id.

ARGUMENT

POINT 1

THE MOST COMPELLING PUBLIC POLICY THIS COURT SHOULD FURTHER IS THE LOGICAL AND COMMON SENSE RESPONSIBILITIES FOR EMPLOYERS AND CARRIERS TO RAISE THEIR ISSUES COMTEMPORANEOUS TO RECEIVING THE MEDICAL EVIDENCE AND PAYING TEMPORARY TOTAL DISABILITY BENEFITS WHEN THE ISSUE BECOMES RIPE, SO INJURED WORKERS ARE NOT PRECLUDED AND DENIED THEIR RIGHTS AND OPTIONS BECAUSE OF THE AFTERTHOUGHT, PERSONAL OPINION AND RETROACTIVE REQUEST BY COUNSEL AT A HEARING THAT MAY OCCUR MONTHS LATER THEREBY FORFEITING AND ELIMINATING MR. LAZALEE'S RIGHTS AND OPTIONS FLOWING FROM THE EMPLOYER/CARRIER'S UNTIMELY REQUEST.

The Third Department and Board Panel's decision is not a new interpretation of 12 NYCRR 300.10(c), as there is no indication in the decision it is adopting a new interpretation. The regulation, as interpreted and applied through the case law, does not grant and should not grant a party an unencumbered right to cross-examine any doctor at the first hearing on the issue of temporary degree of disability given there

can be a delay of months if not years for the first hearing to occur from when an issue becomes ripe based upon the employer/carrier's receipt of the medical evidence and payment of benefits thereby precluding and denying the rights and options of injured workers like Mr. Lazalee when it involves periods of lost time for temporary degree of disability.

The WCLJ decision to deny the SIE-Appellant counsel's request to cross-examine Dr. Stefanich as untimely is grounded and well supported by the record given it was done as an afterthought by counsel four months after the SIE-Appellant's contemporaneous receipt of the medical reports along with their voluntary payment of temporary total benefits. The WCLJ's consideration of the fact the SIE-Appellant had received the medical evidence and contemporaneously voluntarily paid the temporary total rate to Mr. Lazalee based on Dr. Stefanich's reports as well as the fact the SIE-Appellant did not controvert, object or raise any objection contesting the medical record or request a hearing at the time benefits were voluntarily paid is compelling facts to affirm the decision as it contains no errors of fact or law and is supported by the record especially in light of WCL § 25(1) and 12 NYCRR § 300.22.

It is also compelling to affirm the Third Department's Decision in furtherance of the public policy for accountability of properly administering the claim contemporaneously upon the acceptance and reliance on the medical evidence while

voluntarily paying temporary total disability benefits which has a tremendous impact upon the rights and options Mr. Lazalee and all injured workers have in their ability to pay their bills and take care of their families. It was also relevant, the SIE-Appellant did not obtain any contemporaneous evidence contrary to Dr. Stefanich's opinion of temporary total disability.

Appellant cites Ferguson v. Eallonardo Construction, Inc., 173 A.D.3d 1592 (3rd Dep't. 2019) as the most recent time this Court addressed the right of a party to cross-examine an opposing doctor. The Court in Ferguson, citing previous Board Panel decisions, held: "[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." Id. (emphasis added).

The Court's decision in Ferguson illustrates two important factors regarding a carrier's request to cross-examine a treating physician; first, the request must be timely made; second, the Board has discretion in deciding whether a request is timely. The timeliness of a request for cross-examination is determined by the totality of the facts and circumstances in each individual case. As provided in Ferguson, the Board has discretion in determining whether a request is timely, and upon appeal, the Courts may decide whether the Board abused their discretion which we submit it did not herein.

In Mr. Lazalee's case, the Third Department and Board Panel did not abuse their discretion in denying the SIE-Appellant's request to cross-examine Dr. Stefanich as untimely given the facts and circumstances herein. It is very important to note in Ferguson, the issue at hand was the determination of permanency and not the temporary degree of disability as in Lazalee herein.

The facts in Ferguson involve the claimant being examined by a carrier's consultant, then his own physician, followed by a hearing held shortly thereafter to address the issue of permanency, which is when counsel therein made a request for cross-examination.

Here, in Mr. Lazalee's case, the timeline is not as linear as it was in Ferguson as the issue herein involves Mr. Lazalee's temporary degree of disability which has a heightened sensitivity to the timelines of the SIE-Appellant employer/carrier raising issues contrary to the voluntary payment of temporary total degree of disability because the delay has a significant and drastic impact on the rights and options injured workers have as opposed to the determination of permanency in Ferguson.

For example, the SIE-Appellant herein received medical reports from Dr. Stefanich in October, November and December 2019 providing uncontroverted medical evidence Mr. Lazalee was temporarily totally disabled whereupon the SIE-Appellant voluntarily paid Mr. Lazalee at the temporary total disability rate

consistent with WCL § 25(1) and 12 NYCRR § 300.22 with no issue, indication they questioned same or any contrary medical evidence from their own in-house doctor or hired IME offering a different opinion to Dr. Stefanich's opinion of temporary total disability for the entire time of Mr. Lazalee's post-surgical recovery.

If the SIE-Appellant genuinely disagreed with Dr. Stefanich's opinion on degree of disability, they had the right and opportunity to raise the issue at any time by changing the payment and filing the appropriate SROI form with the WCB, simply have him see their own in-house doctor, have Mr. Lazalee see a hired IME or merely by requesting a hearing via a RFA-2; for which Mr. Lazalee hopes you appreciate all the options and decisions referenced above regarding the payment of voluntary temporary benefits are based upon the SIE-Appellant employer/carrier as they have the absolute control over decisions which then dictate the path of rights and options for the injured worker.

More specifically, in response to the SIE-Appellant's contentions in their 03/02/23 brief to this Court, the 01/06/22 Third Department Decision in Lazalee does not provide more mechanisms by which an employer can waive the right to cross-examine an attending physician on temporary degree of disability whose report is received by the employer/carrier and WCB. In direct response to the SIE-Appellant's assertions, Mr. Lazalee provides the following reply: (*the SIE-Appellant's assertions from the 03/02/23 brief, page 19 are in italics*)

- *The employer cannot make voluntary payments before requesting cross-examination or waives the right;*

  Absolutely not accurate as WCL § 25(1) and 12 NYCRR § 300.22 requires voluntary payment when the evidence supports same. If the employer has an issue with or contests the medical evidence they have the right and freedom to voluntarily reduce or suspend the payment while filing the appropriate paperwork with the WCB (i.e. SROI, RFA-2) with accompanying documentation so the WCB protocols and process for paying temporary disability benefits can be initiated which allows for the development of the record with deposition of medical witnesses without even needing a hearing.

- *The employer must seek to suspend benefits before requesting cross-examination or waives the right;*

  Absolutely not true or accurate, as the SIE-Appellant can reduce payments or suspend by filing the appropriate Board form SROI or RFA-2 with accompanying documentation and take the cross-examination of medical witnesses at any point in time when an issue or controversy exists. There is absolutely no statute, regulation or rule requiring a hearing before cross-examination of a medical witness when there is a controversy with regard to temporary disability benefits as well as permanency which occurs regularly.

- *The employer must question the claimant's degree of disability before requesting cross-examination or they waive the right;*

  Yes, and that should already be the expectation as well as the practical and logical way to identify an issue or controversy to put the injured worker on notice so they can protect and preserve their rights and options as well as to initiate the WCB process and protocol for the issue to be

resolved. In fact, if the employer does not question the claimant's temporary degree of disability contemporaneous to the receipt of the medical documentation, they should be precluded and deemed to have waived their right as this delay has significant prejudice to the injured work as their rights and options are solely dictated and controlled by the decisions the employer/carrier makes in regard to the payment of their temporary disability benefits.

- For example, if the employer/carrier contests the temporary degree of disability provided by the treating physician asserting the claimant is not totally disabled and can return to work, it initiates a protocol and process for the WCB as well as triggers certain rights and options for the injured worker as follows:

  a) If the injured work is deemed to be capable of working, they then have the right and option to return to the employer to see if the employer can provide work within their restrictions or limitations. If the employer can accommodate the injured worker's return to work within the restrictions or limitations at the same wage, that is wonderful as the injured employee's weekly wage is significantly more than the temporary total rate and would have been great for Mr. Lazalee as all other injured workers.

  b) If the employer can accommodate the injured worker's return to work within the restrictions or limitations, but the injured worker is not able to make the same weekly wage because of these restrictions or limitations, they would be eligible to receive reduced earnings (WCL § 15(5)) which is 2/3 of the difference between their average weekly wage when they got hurt and their current weekly wage. The combination of their current wage plus their reduced earnings would also be more than their temporary total rate which would benefit everyone; Mr. Lazalee, injured workers and the employer.

  c) If the employer is unable to accommodate the injured worker's return to work within the restrictions or

> limitations, the injured worker would then be eligible for a reduced temporary partial benefit determined by the degree of disability as well as be eligible to apply for unemployment benefits - injured workers can receive both partial Workers' Compensation benefits and unemployment benefits if the employer cannot accommodate the restrictions or limitations. The combination of reduced temporary partial disability payments in Workers' Comp in addition to the unemployment benefits would also be greater than the temporary total rate which again is an increased benefit for Mr. Lazalee and injured workers.

As Mr. Lazalee hopes you can appreciate based upon the above his rights and options with regard to the payment of Workers' Compensation temporary disability payments is solely and unequivocally dictated as well as controlled by the decisions made by the SIE-Appellant employer/carrier. If these decisions are allowed to be delayed weeks and months after they are ripe, Mr. Lazalee and all injured employees are ineligible for these rights and options retroactively as their ability to apply for these options are precluded and forfeited because they are time sensitive applications and cannot be done retroactively.

- *The employer must request a hearing or further action before requesting cross examination or it waives the right; and, most perplexing of all;*

> True and the only logical way to initiate the process and alert the injured worker as well as the WCB there is an issue or controversy for the injured worker to timely exercise their rights and options as referenced hereinabove as well as for a Judge to render a Decision. The SIE-Appellant's failure to alert Mr. Lazalee, injured workers or the WCB on the controversy, would not initiate the protocol or process by the WCB to allow for the timely adjudication by the Judge. Also,

the SIE-Appellant employer/carrier's failure to alert Mr. Lazalee and injured workers in a reasonable timely manner would preclude and prevent Mr. Lazalee and injured workers from the opportunity to protect, preserve and exercise their rights and options as an untimely request unwittingly and unknowingly imposes a tremendous prejudice upon them precluding their rights and options they would otherwise have if the SIE-Appellant had done so timely which in turn should also preclude the SIE-Appellant and employer/carrier from their option of cross-examining the doctor.

Additional benefits to raising these issues in a timely manner is it can prevent and mitigate the carrier overpaying an injured worker. Although the employer is not necessarily prejudiced by the overpayment as it can always recover an overpayment at the time of a schedule loss of use, from future benefits or they can also reduce an overpayment to a judgement and collect it directly from an injured worker.

Keep in mind, if an overpayment occurs, it creates an additional financial burden upon an already financially stressful situation for the injured worker by creating the overpayment which is always recouped out of future Workers' Compensation benefits they would have otherwise received or it is reduced to a judgement and then collected from proceeds other than Workers' Compensation benefits.

Also keep in mind the injured worker has been denied and forfeited their rights and options to collect other benefits as referenced above in a, b and c which effectively operates as a double penalty upon the injured worker solely because the carrier was untimely in their request to raise the issue of contention as to temporary degree of total disability.

As you can see, the employer/carrier is not prejudiced by the delay and has no real incentive to raise the issue in a timely manner because they will always be able to recoup their overpayment from the injured worker, but the injured worker forever loses their right and option if the issue is not timely raised which only operates to wreak havoc, uncertainty and

> significant stress upon already financially stressed injured workers.

- *The employer's request for cross-examination could not be "disingenuous" or it waives the right;*

> I think we can all agree no one wants a party to raise a "disingenuous" issue as all it does is waste the WCB, the Court and opposing party's time, energy, resources and increases costs. This should operate as a deterrent to the tactic requesting cross-examination to intimidate and bully the other party. Therefore, if the Court in their discretion believes an issue is raised disingenuously, it should be precluded and waived.

It appears the SIE-Appellant is attempting to influence or ingratiate themselves with the Court by discussing its self-proclaimed gracious actions in "permitting" a trigger thumb case to be expanded into four additional conditions and granting surgery for each without an IME when the real public policy concern should be focused on protecting and preserving the rights and options for employers and injured workers.

In fact, the SIE-Appellant conveniently failed to mention it was their request and decision to combine Mr. Lazalee's injuries into one case for their own convenience and administration rather than creating a new case for all of the injuries herein. The SIE-Appellant also disingenuously portrayed itself as somehow forfeiting their right or options in this claim by properly granting treatment to an injured worker, when it is now the SIE-Appellant who is requesting the ability to

retroactively reduce that very same injured workers' benefit they voluntarily paid based upon their acceptance of the uncontroverted medical evidence from Dr. Stefanich which granting their untimely request for cross-examination would now create a significant denial of rights and options to Mr. Lazalee.

Mr. Lazalee also submits it should be clearly noted contrary to the SIE-Appellant's assertion there really is no additional timeline requirements imposed herein by the Third Department and the Board Panel Decisions which means there really should not create any dilemma the SIE-Appellant does not currently have or does not currently already exist in their decision making. Right now, the statute requires all employers including Wegmans to make voluntary payments to their employees when there is no dispute as to the causal relationship of the injury as well as medical evidence providing disability consistent with WCL § 25(1) and 12 NYCRR § 300.22.

Accordingly, if Wegmans or any other employer contests the compensability of an injury, they are required to file specific forms with the WCB (i.e. FROI and SROI) which triggers a WCB protocol and process to resolve same. This also already exists if Wegmans or any other employer or carrier has an issue or contests the WCB directed payment of a temporary degree of disability. Therefore, there is no additional cost or increase in Workers' Compensation expenses for the employer/carrier to contemporaneously raise the issue of compensability or

temporary degree of disability when compared to it being raised four months later as an afterthought, given in either instance the issue or contention will require litigation whether raised contemporaneously to the receipt of the medical reports or months later by its very nature of being an issue of contention as the process to resolve the issue is the same but the rights and options for the injured workers are vastly different while being drastically affected.

In fact, it could be credibly submitted this would probably eliminate some litigation rather than increase same when it is clearly and unequivocally known issues of legitimate contention and not afterthoughts need to be raised contemporaneously and within a reasonable period of time from the receipt of the medical evidence to avoid employers/carriers from generating an overpayment as well as because the injured workers have additional rights and options when the issue is timely raised whereas the injured workers' rights and options are forfeited and precluded when there is an unreasonable delay in raising the issue.

In further reply to the 03/02/23 SIE-Appellant brief specifically the page 20 assertion "…as this Court can appreciate, the Board's decision as affirmed by the Third Department is against public policy because it:" (*SIE-Appellant assertions in italics*)

- *Needlessly increases litigation as it requires an employer to challenge medical evidence that it may have been intent to disregard;*

> This is absolutely not true as referenced above and in Mr. Lazalee's case in point provides the increase in litigation costs to the employer herein has occurred solely because of the delay and untimely request by their counsel as had the issue been raised contemporaneously in October, November or December 2019, Mr. Lazalee would have had the rights and options to return to the employer at his full wage making more than his temporary total rate; could have returned to work and if at a reduced wage received reduced earnings which cumulatively would have been greater than his temporary total rate; or if the employer could not accommodate his return, received a reduced partial disability payments plus unemployment benefits which cumulatively would have been greater than his temporary total rate; thereby eliminating the need for any of the possible litigation but now that the issue has been raised so untimely these rights and options have been precluded and unwittingly waived through no fault of his own. There is no possibility at all of being able to retroactively exercise any of those rights or options. It also could have eliminated the need to have this scenario that may develop an overpayment by potentially the SIE-Appellant to the injured worker which exists solely because of the untimely request by the SIE-Appellant's to litigate the issue of temporary degree of disability.

- *Potentially leads to lowered payments to employees in situations where the employer would have been willing to pay higher benefits voluntarily; or, alternatively*;

> This assertion is completely without merit and misleading as articulated and explained above.

- *Potentially penalizes an employer which is willing to pay a valued employee a living wage while out of work albeit not at rates necessarily reflective of the employee's ability to work*;

> The SIE-Appellant or their counsel have provided no example as to how the SIE-Appellant or an employer/carrier is penalized in the scenario that forms the basis of this appeal and litigation. In fact, the only party that is penalized is the injured worker based upon the SIE-Appellant's delay as opposed to their contemporaneously raising the issue as to the payment of the temporary degree of disability as: 1) it would possibly generate a retroactive overpayment for which the employer can always recoup at any time including the time of permanency in a schedule loss of use, or the award of future benefits which then lowers their receipt of future benefits or the resulting overpayment can be reduced to a judgement and then collect it personally outside the Workers' Compensation system from the injured worker.
>
> However, Mr. Lazalee and other injured workers are penalized twice based on the delay and untimely request by the employer/carrier in addition to the potential overpayment they also 2) lose the opportunity to receive the benefits from the other rights and options they would otherwise have as they are constrained and precluded from retroactively exercising these rights and options as enumerated above and thereby forfeiting the opportunity to get their full wage, reduced earnings or a combination of a temporary partial disability rate and unemployment benefits.

The SIE-Appellant further goes on to profess in their 03/02/23 brief, page 23-24 "[W]egmans is not seeking to claw back any benefits it has already paid to Lazalee…" and "[I]t was not seeking to delay benefits to Mr. Lazalee…" (*see* SIE-Appellant's Brief, p. 23-24) but that is exactly what they are doing. As the untimely request to cross-examine the doctor more than four months after the receipt of the uncontroverted medical evidence and payment of benefits

precludes, prevents and delays Mr. Lazalee's receipt of other rights and options he would otherwise had to other benefits had the SIE-Appellant Wegmans made the decision contemporaneously upon receiving the medical evidence to contest the temporary degree of disability in addition to the possible recouping a potential overpayment from future Workers' Compensation benefits which by its very application is delaying and clawing back benefits they have already paid Mr. Lazalee.

Now in response to the SIE-Appellant's assertion in their 03/02/23 brief page 24 that "…following the Board's decision as affirmed by the Third Department, Wegmans will have to choose between two possibilities which are against public policy:" is without merit and catastrophizing circumstances that are not true or accurately reflects their employees' rights and options. (*SIE-Appellant assertions in italics*)

- *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,

  Not true or accurate as referenced hereinabove in a, b and c.

- *Potentially be prejudiced by paying its employees the higher rate;*

  Not true as referenced hereinabove as the SIE-Appellant's rights and options remain unchanged and can always recoup an overpayment from permanency, future benefits

> or reduce it to a judgement for collection as provided above.

As acknowledged hereinabove, Mr. Lazalee submits the appropriate public policy this Court should further is for the SIE-Appellant and carriers to properly administer their injured employees and workers claims consistent with the existing law so their employees who are injured have their rights and options preserved allowing them the ability to choose their options the law provides; rather than Wegmans or their counsel randomly making personal decisions as an afterthought months later dictating and controlling when and if they follow the law like when an ad hoc contract attorney shows up at a hearing and personally disagrees with a medical report from more than four months earlier after the employer/carrier has made payments already whereupon Mr. Lazalee and injured workers have relied upon but now unwittingly and unknowingly through no fault of their own have forfeited and waived their rights as well as options which are now precluded and denied because they cannot be applied for retroactively. The retroactive afterthought litigation is what should be 100% against the public policy this Court stands for and furthers.

Lastly, the true chilling effect if this Court were to modify the Third Department's Decision would be felt by Mr. Lazalee and injured workers throughout New York State flowing from the proliferation of employer/carriers' counsel

requesting the cross-examination of the doctors at the first hearing after the employer/carrier voluntarily pays temporary disability weekly benefits - which could be weeks, months or years later - raising an issue as to the degree of disability as an afterthought based upon their own personal opinion without any repercussions or safeguards as they would be emboldened and empowered based upon the Court's reversal of the Third Department Decision herein, which narrowly reinforced the WCLJ's discretion to consider the timeliness of the SIE-Appellant counsel's request for litigation of voluntary temporary disability payments.

Removing the WCLJ and Courts discretion in determining the timelines of said request for litigation would otherwise unleash an unencumbered and unregulated freedom for employer/carriers' attorneys to claw back and retroactively reduce payments already voluntarily and intentionally made by the employer/carrier creating overpayments. These potential windfall savings to carriers in New York who have already enjoyed an upward of $500,000,000.00 reduction of payments made to injured workers from 2018 to 2020 and no doubt even more savings in the last two years is in stark contrast to the injured workers' outlook who will be denied and precluded from exercising their rights and options they would otherwise have thereby shouldering and burdened by these potentially significant overpayments that will undoubtedly happen and ultimately be recouped from the injured workers by the carriers. (*see* Griffin T. Murphy & Jennifer Wolf, *Workers' Compensation:*

Benefits, Costs, and Coverage (2020 data), NASI, Nov. 2022, https://www.nasi.org/wp-content/uploads/2022/22/2022-Workers-Compensation-Report-2020-Data.pdf.).

The practical reality of this Court's reversal of the Third Department will also send a clear message to employer/carrier's counsel they can enjoy an unfettered undeniable right to take the cross-examination of the doctor on the issue of degree of disability following voluntary payments already made by the employer/carrier at any time without any checks and balances by a WCLJ or judicial analysis of whether it is timely requested considering the facts and circumstances. This will only incentivize them to do so as they will have no consequences or anything to lose and everything to gain. This will undoubtedly send a chilling wave throughout New York State of injured workers losing their rights and options because of the delay and untimely afterthought retroactive requests by the employer/carriers' attorneys at the first hearing following the voluntary payment of temporary benefits regardless of how long after the issue became ripe while also generating retroactive overpayments.

Another important reality of this Court's reversal of the Third Department's decision herein will be the clawing back of weekly benefits initially intended to be rightfully paid and relied upon by injured employees to pay their bills and take care of their families creating uncertainty for them when the employer/carrier makes voluntarily payments for temporary benefits as injured workers will be constantly

looking over their shoulder as they will never be free or safe from the threat of their benefit being retroactively reduced or eliminated through no fault of their own further eroding and eliminating any predictability and certainty in their ability to pay their bills and take care of their families.

On the other hand this Court's affirmance of the Third Department will reinforce as well as preserve the discretion of the WCLJ and Courts to review the facts and circumstances of the timeliness of the employer/carrier counsel's request to develop the record following the voluntary payments of temporary disability payments.

CONCLUSION

WHEREFORE, Mr. Lazalee respectfully submits the 01/06/22 Third Department Decision properly affirmed the 07/29/20 Board Panel Decision which also properly affirmed the WCLJ's 04/17/20 Notice of Decision which properly and correctly denied the SIE-Appellant's request to cross-examine Dr. Stefanich as untimely because it was not made until over four months after receipt of the uncontroverted medical evidence and payment of temporary total benefits by the SIE-Appellant as well as three months after Mr. Lazalee had returned to work at the SIE-Appellant, at the hearing which was not even requested by the SIE-Appellant but rather Mr. Lazalee to include his left carpal tunnel syndrome.

As such, Mr. Lazalee submits, based on the totality of the credible evidence and record as well as in furtherance of the public policy to allow and preserve the judicial discretion over the determination of whether the employer/carrier timely requests the cross-examination of the treating doctor following the voluntary payment of temporary disability payments as set forth in the 04/17/20 Notice of Decision, 07/29/20 Memorandum of Board Panel Decision and 01/06/22 Third Department Decision which contain no errors of fact or law, is supported by the record, and be affirmed.

Dated: April 20, 2023

Respectfully submitted,

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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.

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Dated: April 20, 2023

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Sworn to before me on April 20, 2023

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