APL 2022-00180

To be argued by:
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Time requested:
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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,

v.

WEGMANS FOOD MARKETS, INC.,
Self-Insured Employer-Appellant,

and

WORKERS' COMPENSATION BOARD,
Respondent.

BRIEF FOR RESPONDENT WORKERS' COMPENSATION BOARD

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Workers' Compensation Board No. G201 8483; Third Dep't No. 532932

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PRELIMINARY STATEMENT

At issue in this appeal is whether respondent Workers' Compensation Board (the "Board") acted within its discretion when it denied as untimely the request by the self-insured employer, Wegmans Food Markets, Inc.'s ("Wegmans"), to cross-examine claimant's doctor, who had provided a written opinion on the degree of claimant's disability.

Until a workers' compensation hearing was convened to address an unrelated issue, Wegmans had never signaled an intention to challenge that opinion. To the contrary, it had voluntarily paid clamant at the highest temporary disability rate throughout two periods in which claimant remained out of work without ever questioning the degree of claimant's disability. Indeed, Wegmans had remained silent even when a workers' compensation hearing was requested and then scheduled to address the unrelated issue. It was only months later, when that hearing actually commenced, that Wegmans for the first time sought to have claimant's doctor made available for cross-examination. And Wegmans' belated request prejudiced claimant. As claimant argued before the Board, had Wegmans disputed his degree of disability in a timely manner, claimant could have taken steps to protect himself, including by

applying for light-duty work consistent with his disability or by applying for unemployment benefits. Claimant lost the opportunity to take such steps as a result of Wegmans' unreasonable delay.

Accordingly, the Board found Wegmans' request untimely, and the Third Department properly upheld the Board's decision as a reasonable exercise of its discretion. This Court should thus affirm.

QUESTION PRESENTED

Did the Board act within its discretion when it denied as untimely Wegmans' request to cross-examine claimant's doctor on the degree of claimant's disability?

STATEMENT OF THE CASE

A. Statutory Background

When a worker is injured in the course of employment, the worker is required to provide written notice to the employer within 30 days of the injury, and to file a claim with the Board within two years of the injury. *See* Workers' Compensation Law ("WCL") §§ 18, 28. The notice to the employer must include the time, place, nature, and cause of the injury, information that gives the employer a sufficient basis to

investigate the potential claim. *See* WCL § 18. A physician may also report an injury on a claimant's behalf by filing a narrative report with the Board and the employer detailing the worker's injury.[1] If the injury has caused or will cause a loss of time from regular duties beyond a single day or shift, the employer must file a report of injury with the Board and, unless the employer is self-insured, its insurance carrier. *See* WCL § 110(1); *see also* 12 N.Y.C.R.R. § 300.22(b). Upon receiving any document or notice regarding a claim or potential claim, the Board assigns a case number and creates a case file for the claim. *See* 12 N.Y.C.R.R. § 300.37.

Thereafter, the self-insured employer or insurance carrier (the "employer/carrier") makes wage-loss payments to the worker to compensate for time that the worker is unable, or restricted in ability, to work, and the employer/carrier does so even before the Board renders a determination on the worker's claim. Thus, for example, if a work-related accident causes an injury that keeps the worker out of work for more than seven days and the employer does not controvert the worker's right to compensation, the employer/carrier begins making wage-loss payments

[1] An example of this form can be found on pages 12-14 of the Record on Appeal ("R").

within the later of (i) 18 days of the injury or (ii) 10 days from when the employer learns of the injury, and the employer/carrier also notifies the Board that such payments have commenced. *See* WCL § 25(1)(b), (c); *see also* 12 N.Y.C.R.R. § 300.22(c)(2). If, however, the employer/carrier controverts the worker's right to workers' compensation benefits—including on the ground that the worker was not injured to the degree claimed—the employer/carrier may elect not to start making wage-loss payments, provided it files a notice with the Board explaining why compensation is not being paid. *See* WCL § 25(2); 12 N.Y.C.R.R. § 300.22(c)(1). If the employer/carrier is uncertain about whether to contest the injury, the employer/carrier can make temporary wage loss payments without admitting liability. *See* WCL § 21-a; 12 N.Y.C.R.R. § 300.22(e).

Wage-loss benefits fall into four categories based on the worker's degree of disability: (1) temporary partial disability; (2) temporary total disability; (3) permanent partial disability; and (4) permanent total disability. A temporary disability means that the worker's wage-earning capacity has been temporarily lost, while a permanent disability means the worker's wage-earning capability is permanently lost. A worker who

is “totally” disabled cannot work or earn wages, while a worker who is “partially” disabled has lost some ability to work and earn full wages but may be able to return to work and perform some work consistent with the injury. *See* WCL § 15; *see also Matter of Estate of Youngjohn v. Berry Plastics Corp.*, 36 N.Y.3d 595, 599 (2021) (describing these categories). A worker's degree of disability affects the amount of compensation to which the worker is entitled. A worker who is temporarily totally disabled is entitled to two-thirds of the worker's average weekly wage. A worker who is temporarily partially disabled is entitled to two-thirds of the difference between the worker's average weekly wage and the worker's wage-earning capacity after the injury. *See* WCL § 15(2), (5).

Although an employer/carrier is generally required to begin making temporary payments shortly after the injury, it may reduce or suspend temporary payments to a claimant when it has reason to question those payments. *See* 12 N.Y.C.R.R. §§ 300.22(f), 300.23(1). This is done by filing a notice with the Board that includes a justification for the reduced or suspended payments, such as a medical report from another physician. *See* 12 N.Y.C.R.R. §§ 300.22(f), 300.23(1). If an employer/carrier seeks to dispute some aspect of a claim or injury, including the asserted degree of

disability, the carrier can request that the claimant undergo an independent medical examination to get a second medical opinion. *See* WCL §§ 13-a(4)(b), 137; *see also* 12 N.Y.C.R.R. § 300.2. And if the independent medical examination results in a finding different from that asserted by the claimant, a hearing may be required to resolve the contested issue. Further, an employer/carrier can specifically request a hearing to dispute an aspect of a claim, including by seeking to cross-examine the claimant's attending physician. *See* WCL § 20(1). To do so, the employer/carrier files a Request for Further Action ("RFA") form with the Board that explains the issue disputed.[2] At a hearing, the parties may present testimony or documentary evidence, and a Workers' Compensation Law Judge ("WCLJ") renders a decision on the contested issue. *See* WCL §§ 20(1), 25(2-a); 12 N.Y.C.R.R. §§ 300.7, 300.8, 300.9, 300.33.[3]

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[2] For a sample Request for Further Action form, see https://www.wcb.ny.gov/content/main/forms/rfa-2.pdf.

[3] Controverted cases also require pre-hearing conferences to identify issues and relevant evidence, and to permit the parties to assess the case and resolve outstanding issues before a formal hearing is scheduled. *See* WCL § 25(2-a); *see also* 12 N.Y.C.R.R. § 300.33.

A hearing is not required in all workers' compensation cases. The Board resolves uncontroverted claims involving minor issues, uncontested issues within claims, and certain penalties by way of administrative determination processing. *See* 12 N.Y.C.R.R. § 313.1 through 313.3. When the Board determines that a case is suitable for such processing, a proposed decision is prepared and transmitted to the claimant, the employer/carrier, and any other party in interest. *See id.* at § 313.3. Any party may object to the proposed decision within 30 days. *Id.* An objection may trigger a hearing or result in a modification of the proposed decision. *Id.* All proposed decisions are reviewed for approval by a WCLJ. *Id.*

Once a WCLJ finalizes a decision, whether after a hearing or pursuant to administrative processing, either party may request administrative review of the WCLJ's decision. *See* WCL § 23. Administrative appeals are reviewed by three-member Board panels, and an aggrieved party may thereafter request full Board review. *See* WCL § 23.

B. Claimant's Cumulative Injury to His Hands

Claimant Thomas Lazalee worked as a truck driver for Wegmans for nineteen years before developing work-related injuries to his hands that resulted in his inability to work for two separate periods of time.

First, claimant remained out of work from August 2, 2018, to April 15, 2019, due to a condition called "trigger finger" affecting his right thumb that required surgery.[4] (R. 12-18, 23-34.) Claimant's hand surgeon, Dr. Stefanich, submitted contemporaneous medical reports to both the Board and Wegmans, a self-insured carrier, opining that claimant's right trigger thumb was caused by his work as a truck driver and rendered him temporarily totally disabled. (R. 12-18.) Upon receiving this information, the Board assigned a case number and created a case file for the claim.

While claimant was out of work for right trigger thumb, Dr. Stefanich additionally diagnosed him with carpal tunnel syndrome in

[4] "Trigger finger" is a condition affecting the tendons that flex the fingers and thumb and typically results in a sensation of locking or catching when one seeks to bend or straighten the fingers affected. *See* Ortho Info, American Academy of Orthopaedic Surgeons (available at https://orthoinfo.aaos.org/en/diseases--conditions/trigger-finger/).

both hands, requiring surgical release. (R. 23-44.) As he had for claimant's right trigger thumb, Dr. Stefanich submitted contemporaneous medical reports to both the Board and Wegmans, opining that claimant's carpal tunnel syndrome was caused by his work as a truck driver and that claimant remained temporarily totally disabled. (R. 23-44.)

Wegmans never questioned Dr. Stefanich's opinions and never requested an independent medical evaluation. Wegmans simply approved the surgeries, conceded liability for workers' compensation benefits, and made wage-loss payments to claimant on a voluntary basis at the temporary total disability rate during the entire period of this first period of absence from work. (R. 28-29, 35-36, 45-47.) On April 15, 2019, claimant returned to work full-time without restrictions, and Wegmans suspended ongoing payments. (R. 45-47.)

Because the right trigger thumb claim was uncontroverted and involved no contested issues, the Board issued an administrative determination on December 2, 2019, finding on the basis of the information provided that claimant had established entitlement to

workers' compensation benefits for that work-related injury.[5] (R. 70-71.) The decision directed Wegmans to pay claimant workers' compensation benefits at the temporary total disability rate for the 36.4-week period from August 2, 2018, to April 15, 2019. (R. 70.) Neither party objected to the decision, which thus became final on January 2, 2020. (R. 70-72.)

By that time, claimant had been rendered disabled from work a second time. In September 2019, he was diagnosed with trigger finger in his left thumb and pinky by Dr. Stefanich, who requested and obtained authorization from Wegmans to perform surgery. (R. 48-53.) Claimant underwent that surgery on October 18, 2019, and ultimately remained out of work until January 6, 2020. (R. 58-60, 78.)

Throughout this second period of absence, Dr. Stefanich provided Wegmans and the Board with reports of claimant's progress. The reports establish that, following the surgery, claimant was seen on October 28, 2019, November 13, 2019, and December 3, 2019; each time Dr. Stefanich directed claimant to remain out of work. (R. 65-66, 68-69, 74-75.) At the

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[5] As discussed *infra*, at pp. 12-13, the parties subsequently agreed to modify claimant's established claim to add, among other additional injuries, claimant's carpal tunnel syndrome.

December 3, 2019, appointment, Dr. Stefanich noted that, while claimant was continuing to heal, he still had discomfort, stiffness, and tenderness, and he was unable to fully flex his pinky finger, and thus that he remained temporarily totally disabled. (R. 74-75.) By December 23, 2019, Dr. Stefanich noted that claimant still had "some pain" in his fingers and may have continued swelling and tendinitis. (R. 77-78). While Dr. Stefanich opined that claimant remained temporarily totally disabled on that date, he cleared claimant to return to work without restriction on January 6, 2020. (R. 78.)

Throughout this second period of absence, Wegmans voluntarily made wage-loss payments to claimant at the temporary total disability rate, without any direction from the Board, and Wegmans later conceded liability for claimant's injuries. (R. 91-93.) While Wegmans never expressly conceded for this second period of absence that claimant's injuries resulted in a temporary total (rather than partial) disability, it also did nothing to signal it might challenge Dr. Stefanich's opinion on that issue. Instead, it simply paid claimant workers' compensation benefits at the temporary total disability rate for the full period of this

second absence, from October 18, 2019, the date of his left-hand surgery, to January 6, 2020, when claimant returned to work. (R. 91-93).

C. Claimant's Request to Modify his Established Claim and the Subsequent Hearing

On January 13, 2020, claimant submitted a written request to modify his established claim to include his left carpal tunnel syndrome based on the medical information in the record, the causally related surgery, and the associated lost time. (R. 79). It is unclear why claimant made that request, given that claimant's workers' compensation award for his first period of absence had by then already been rendered final. Nonetheless, as a result of claimant's request, a notice of hearing was issued to the parties on March 31, 2020, and a hearing was convened on April 14, 2020.[6] (R. 83-90.) At the hearing, the parties explained that they

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[6] The Board actually issued two documents in response to claimant's request: (1) on January 23, 2020, it sent a letter to the parties indicating that further action would be taken to consider claimant's request to add the additional injury site to his claim and that a hearing would be scheduled, and (2) on March 31, 2020, it issued a formal notice of hearing. Although neither of these documents are included in the record, the Court may judicially notice them, *see Board of Educ. of Belmont Cent. School Dist. v. Gootnick*, 49 N.Y.2d 683, 687 (1980) (noting that appellate courts may take judicial notice of official documents), and the Board stands ready to provide copies of them upon the Court's request.

had reached an agreement to modify the established claim for claimant's right trigger thumb to include not only claimant's bilateral carpal tunnel syndrome but also his two left trigger fingers (thumb and pinky) (R. 84-85), the condition that caused his second period of absence.

It was only at that hearing that Wegmans, for the first time, stated that it wished to contest claimant's degree of disability following his October 2019 left trigger release surgery, the surgery that resulted in claimant's second period of absence. (R. 85-86.) Specifically, Wegmans sought to cross-examine Dr. Stefanich, pursuant to 12 N.Y.C.R.R. § 300.10, about the opinions he provided in his medical reports. (R. 86.) Under that regulation, "[w]hen 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."[7]

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[7] 12 N.Y.C.R.R. 300.10(c) reads in full as follows:

> 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. If the physician is not produced at such adjourned hearing, a further adjournment shall be granted only when the referee finds there is sufficient excuse for the physician's nonappearance, which excuse shall be noted on the record and conditioned upon the resort by the

(footnote continues on next page)

Claimant's attorney objected, noting that all of Dr. Stefanich's reports following claimant's October 2019 surgery had opined that claimant had a temporary total disability and Wegmans had never obtained medical evidence to controvert those opinions or otherwise signaled an intent to controvert those opinions. (R. 86.) Claimant had accordingly not arranged to make Dr. Stefanich available at the hearing. If Wegmans believed that the medical evidence did not support keeping the claimant out of work, then it should have "returned him to work" or directed an independent medical examination to obtain medical evidence. (R. 87.) Because Wegmans had not taken any such measures, claimant argued its request should be denied. (R. 87.)

The WCLJ agreed and denied Wegmans' request to cross-examine Dr. Stefanich. (R. 88.) The WCLJ also found that eleven weeks of lost wages after surgery was appropriate, especially because claimant did not

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employer or its carrier, or special fund to a subpoena for the next hearing. If such adjournment is granted and the physician does not appear, unless extraordinary circumstances are shown, the referee shall proceed to determine the claim upon the evidence in the record. The obligation to invoke court action for the enforcement of the subpoena shall be that of the employer or its carrier or special fund.

have prior excessive periods of lost time and had returned to work full time. (R. 87-88.) Thereafter, Wegmans filed forms conceding liability and noting its voluntary payments to claimant at the temporary total disability rate from October 18, 2019, to January 6, 2020. (R. 91-95.)

The WCLJ amended the claim as agreed upon to include bilateral carpal tunnel syndrome and left trigger fingers for the thumb and little finger. (R. 97.) The decision directed Wegmans to award benefits at a temporary total disability rate for the period October 18, 2019, to January 6, 2020. (R. 97.)

D. Wegmans' Administrative Appeal of the WCLJ Decision

Wegmans sought Board review, arguing that the WCLJ should not have decided the degree of claimant's disability without allowing it to cross-examine Dr. Stefanich. (R. 100-104.) Although Wegmans conceded that a request for cross-examination under 12 N.Y.C.R.R. § 300.10(c) "must be timely," it argued that its request was timely because it was requested at the first hearing convened—a hearing convened at claimant's request—after claimant lost time on account of his left-hand trigger fingers. (R. 100, 103-104.) Claimant opposed Wegmans' administrative appeal, arguing that Wegmans' request for cross-

examination was untimely and that granting the request would unduly prejudice claimant. (R. 106-112.)

The Board affirmed the WCLJ's decision. (R. 7-11). The Board noted Wegmans' apparent agreement all along that the evidence supported a claim for temporary total disability, and the Board reiterated that a request to cross-examine an attending physician pursuant to 12 N.Y.C.R.R. § 300.10(c) must be "timely." (R. 9.) It concluded that Wegmans' request was untimely because Wegmans had waited three months after claimant's return to work to seek to challenge, through cross-examination rather than independent medical evidence, the opinion of Dr. Stefanich that claimant was totally disabled throughout his second period of absence. Indeed, Wegmans had failed to flag the issue even upon the scheduling of the hearing, and instead had waited until the parties appeared before a WCLJ for the hearing itself.

Having determined that Wegmans' request was untimely, the Board went on to determine that the record supported the temporary total disability awards and that Wegmans had "failed to produce sufficient evidence to warrant the development of the record on the issue of the degree of disability." (R. 9).

E. This Proceeding and the Decision Below

On Wegmans' direct appeal under Workers' Compensation Law § 23, the Third Department unanimously affirmed. (R. 124-127.) The court explained that it has long held that the right to cross-examination, including the specific right to cross-examination of an attending physician provided by 12 N.Y.C.R.R. § 300.10(c), is waived if not asserted in a timely matter. (R. 126.) And the court concluded that the Board acted well within its discretion in determining that Wegmans failed to timely assert that right here. To the contrary, Wegmans had accepted liability and voluntarily paid claimant for 11 weeks after his October 2019 surgery, until his 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." (R. 126.) Accordingly, the Third Department held that 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" and found no basis on these facts to disturb the Board's

finding that the request was untimely, waiving the right to cross-examination. (R. 126.)

This Court granted Wegmans' motion for leave to appeal.

ARGUMENT

THE BOARD ACTED WITHIN ITS DISCRETION WHEN IT DENIED WEGMANS' REQUEST FOR CROSS-EXAMINATION AS UNTIMELY

A party to a workers' compensation hearing has a right to cross-examine medical experts, which, as the courts and the Board have long recognized, is "permitted under tenets of due process." *See Matter of Ferguson v. Eallonardo Constr., Inc.*, 173 A.D.3d 1592, 1594 (3d Dep't 2019); *Employer: Queens Medallion Leasing, Inc.*, 2015 WL 1388387, *3, (WCB No. G025 6616, Mar. 19, 2015). Indeed, the Board's regulations expressly recognize the right of an employer/carrier to cross-examine a claimant's attending physician; under the Board's regulations, a WCLJ "shall" grant a hearing adjournment to an employer/carrier that requests cross-examination of an attending physician whose report is on file, to allow time to produce that physician. 12 N.Y.C.R.R. § 300.10(c). While the regulation thus uses mandatory language, the Third Department has long upheld the Board's view that the failure to exercise the right in a

timely manner results in a waiver of the right. *See Matter of Floyd v. Millard Fillmore Hosp.*, 299 A.D.2d 610, 611 (3d Dep't 2002); *Matter of Brown v. Clifton Recycling*, 1 A.D.3d 735, 736 (3d Dep't 2003).[8] Judicial review should thus be limited to whether the Board abused its discretion in finding a request for cross-examination untimely. *See, e.g., Matter of Ferguson*, 173 A.D.3d at 1595 (applying that standard to such a request); *cf. Matter of Rusyniak v. Syracuse Flying School*, 37 N.Y.2d 384, 387-88, 390-91 (1975) (applying abuse of discretion standard to the Board's determination not to reopen a claimant's case); *Matter of Abdur-Raheem v. Mann*, 85 N.Y.2d 113, 124 (1995) (finding no abuse of discretion in the hearing officer's decision to deny an incarcerated individual's request for an adjournment to prepare for his disciplinary hearing).

Throughout the administrative process and in its papers to the Third Department, Wegmans never disputed that only a timely request for cross-examination triggers the requirement to adjourn the hearing.

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[8] Since a waiver requires a knowing and intentional relinquishment of a right, the loss of the right for failure to timely assert it may be more properly be characterized as a forfeiture. *Compare, Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 968 (1988) (requirements for a waiver), *with Henry v. New Jersey Tr. Corp.*, 39 N.Y.3d 361, 371 (2023) (requirements for a forfeiture).

(*See e.g.*, R. 100-105; Wegmans' 3d Dep't Br. at 10-18.) Wegmans argued only that its request *was* timely because it was made at the opening of the first hearing convened in this proceeding, and prior to a decision. Thus, to the extent Wegmans now argues that this Court should decline to defer to the Board's adoption of a timeliness limitation on the right to cross-examine claimant's physician (*see* Br. at 17), the argument is unpreserved for this Court's review. *See Matter of Estate of Youngjohn*, 36 N.Y.3d at 605 n.5; *Boles v. Dormer Giant, Inc.*, 4 N.Y.3d 235, 238 n.1 (2005).

As to Wegmans' argument that *any* request for cross-examination is timely as long as it is made at a hearing before a decision is rendered on the merits, Wegmans is mistaken. The facts and circumstances surrounding a party's request for cross-examination are crucial to determining whether the request is timely or rather whether the party waived its right to cross-examination. Indeed, the facts of this case show precisely why Wegmans' view of the rule should be rejected.

As an initial matter, a hearing is not required for all workers' compensation claims. Determinations can be made pursuant to the Board's administrative determination process for uncontroverted claims

involving minor issues, uncontested issues within claims, and certain penalties. *See* 12 N.Y.C.R.R. § 313.1 through 313.3. Claimant's initial claim for temporary total disability on the basis of his right-hand trigger finger claim was resolved through that process: Wegmans conceded liability for claimant's injury and voluntarily paid claimant at the temporary total disability rate that was supported by claimant's medical evidence. Consequently, no hearing was requested or required for the Board to make findings and awards with respect to the claim. (*See* R. 70-71.)

When, however, a party disputes an aspect of a workers' compensation claim, the party is expected to act with reasonable promptness to notify the Board and the claimant of the disputed issue so that a record can be developed on the issue. The Board provides parties with four different mechanisms to provide that notice.

First, *either* party can request a hearing before the Board to dispute some aspect of the claim by filing an RFA with the Board. *See* WCL § 20. Thus, it is simply incorrect—as Wegmans appears to suggest (Br. at 23)—that the hearing requested by claimant in April 2020, three months after claimant returned to work, constituted Wegmans' only opportunity to

make its cross-examination request. Wegmans could have asked for a hearing upon receiving Dr. Stefanich's reports regarding claimant's degree of disability and requested cross-examination at that time.

Second, an employer/carrier can request an independent medical examination to get a second medical opinion, which may trigger the need for a hearing. *See* WCL §§ 13-a(4)(b), 137; *see also* 12 N.Y.C.R.R. § 300.2. Indeed, the Board's regulations specifically contemplate an independent medical examination to confirm a claimant's asserted degree of disability. *See, e.g.*, 12 N.Y.C.R.R. § 300.2(b)(4). Wegmans admits as much in its brief, but claims it voluntarily chose to forgo a second opinion, even though it ultimately sought to question Dr. Stefanich's opinion. (*See* Br. at 6, 7-8, 22-23.)

Third, an employer/carrier, on notice to the claimant and the Board, can seek to depose the claimant's doctor prior to a scheduled hearing. Wegmans had ample time to seek to depose Dr. Stefanich, given that three months elapsed from January 13, 2020, when claimant submitted a request to modify his claim, until April 14, 2020, when the hearing was convened on that issue. And Wegmans knew that claimant's injuries from his second period of absence would be at issue at the hearing because

claimant and Wegmans had agreed to include the injuries that resulted in that second period of absence in the modified claim. (R. 79, 84-85.) Wegmans thus could have attempted to depose Dr. Stefanich or, at the very least, notified claimant and the Board that it wished to have the surgeon produced at the hearing so that it could cross-examine him. *See, e.g.*, *Matter of Roselli v. Middletown School Dist.*, 144 A.D.2d 223, 224-25 (3d Dep't 1988). Instead, Wegmans waited not only until after the hearing was scheduled, but until the WCLJ convened that hearing before raising the issue for the first time.

Fourth, an employer/carrier may reduce or suspend temporary payments to a claimant. *See* 12 N.Y.C.R.R. §§ 300.22(f), 300.23(1). Wegmans is thus wrong to argue that if its request for cross-examination is deemed untimely, an "employer cannot make voluntary payments before requesting cross-examination or it waives the right." (Br. at 19.) In fact, both the Workers' Compensation Law and the Board's regulations require that when, as here, an employer/carrier does not controvert a claim as a whole, but rather disputes only an aspect of a claim such as the degree of disability, it must begin making temporary payments within the later of 18 days of the claimant's injury or 10 days from when

the employer first learned of the injury. *See* WCL § 25(1); 12 N.Y.C.R.R. § 300.22(c)(2). And even after commencing voluntary payments, an employer/carrier can suspend or reduce those payments if it subsequently obtains medical evidence supporting its decision to do so. *See* 12 N.Y.C.R.R. §§ 300.22(f), 300.23(1).

Wegmans did none of these things. Instead, Wegmans waited to raise any issue regarding claimant's degree of disability until three months after claimant had returned to work, at a hearing requested by claimant to amend his claim to include additional injury sites that, according to the hearing transcript, Wegmans had agreed to include. (R. 91-97). By that time, Wegmans had: accepted liability and paid claimant at the temporary total disability rate for his first period of absence without dispute; offered no objection to the Board's administrative determination directing Wegmans to pay wage loss benefits at the temporary total disability rate for that injury; approved claimant's October 2019 surgery for a similar injury; paid claimant at the same temporary total disability rate for petitioner's second period of absence; never requested an independent medical examination or obtained other medical evidence on which it could base a decision to

suspend or reduce those payments; and did not even ask for Dr. Stefanich to be made available for cross-examination once a hearing was scheduled for other purposes. (R. 45-47; 70-71; 51-52; 91-92; 94-95.)

Moreover, Wegmans offered no excuse for its undue delay in making its cross-examination request, and its unexcused delay prejudiced claimant. Had Wegmans disputed the degree of claimant's disability sooner, claimant could have taken steps to protect his interests. For example, if Wegmans had disputed claimant's degree of disability from the outset, a hearing might have been convened sooner and additional medical evidence might have been obtained to resolve the dispute. If as a result of any such hearing and/or additional evidence, the Board had determined that claimant was only partially disabled, claimant could have sought to negotiate a return to work with a light-duty assignment consistent with that determination. Compensation for any such work could well have exceeded claimant's temporary total disability award. *See* WCL § 15 (providing the different schedules of payments for temporary total and partial disability). And had Wegmans been unable to provide light-duty work consistent with claimant's injury, claimant might have been eligible for unemployment benefits in addition

to his workers' compensation benefits. *See, e.g.*, Labor Law § 527; *see also* Labor Law § 591(2), (5).

Furthermore, the Workers' Compensation Law requires a claimant with a partial disability to perform a meaningful, diligent, and persistent search for work. *See Matter of Bacci v. Staten Is. Univ. Hosp.*, 32 A.D.3d 582, 583-84 (3d Dep't 2006). Because claimant had already returned to work by the time that Wegmans indicated its intent to challenge the degree of claimant's disability, however, claimant was no longer in a position to comply with that requirement.[9]

The Board recognized these issues when, in response to claimant's arguments that he was prejudiced by Wegmans' delayed request, it noted that Wegmans "voluntarily picked up payments at the temporary total rate, when they were under no direction to do so" and "waited three months after the claimant returned to work to raise this issue and seek to retroactively argue that the claimant was not totally disabled." (R. 9.)

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[9] If claimant were found after a hearing to be only partially rather than totally disabled during his second period of absence, Wegmans would not be able to recoup payments already made at the total disability rate. It might, however, be granted a discretionary credit against future workers' compensation benefits. *See* WCL § 22.

Accordingly, the Board reasonably exercised its discretion when it denied Wegmans' request as untimely.

In arguing to the contrary, Wegmans makes three additional arguments, none of which has merit.

First, Wegmans argues (Br. at 19-20) that the Third Department's decision identifies new conditions that must be satisfied for a request for cross-examination to be deemed timely made.[10] Wegmans calls these conditions new "timeliness requirements." (Br. at 19.) What Wegmans characterizes as new timeliness requirements are nothing more than the particular facts and circumstances of this case that led the Board to conclude that Wegmans' request was untimely.

Second, Wegmans argues (Br. at 23) that, if not permitted to challenge the degree of claimant's disability now through cross-examination of claimant's physician, Wegmans will risk increased liability for a possible future schedule loss of use award. More particularly, if claimant were subsequently rendered permanently disabled by the injuries that caused his two periods of absence, he would

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[10] As noted *supra* at 19-20, Wegmans waived any challenge to the existence of a timeliness requirement.

become entitled to a schedule loss of use award for his hands. And if claimant's degree of disability for his second period of absence were fixed now as a total disability, then Wegmans would not be entitled to receive a discretionary credit against any such future workers' compensation benefits for what would otherwise be overpayments made at the temporary total disability rate. *See supra* at 26, n.9. Additionally, Wegmans could face an argument that the amount of any such future schedule award should be increased for each week that claimant was deemed totally disabled during his second period of absence. *See* WCL § 15(4-a).[11]

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[11] Under WCL § 15(4-a), if a temporary total disability continues for a period longer than the number of weeks set forth in the schedule provided (a schedule that provides what is referred to the "healing period"), then those weeks are added to the compensation period for the schedule loss of use award. By the end of his first period of absence, claimant had already exceeded the protracted healing period of 32 weeks for a hand. (*See* R. 70; WCL § 15[4-a].) Thus, should claimant become entitled to a schedule loss of use award, and should it be determined that claimants' two periods of absences stemmed from the same injury, then the compensation period for any such future award would be increased by the number of weeks that claimant's two periods of absences combined exceeded a single 32-week healing period, an issue Wegmans appears to concede (*see* Br. at 23, n.5).

Wegmans either was or should have been aware of these risks when it received Dr. Stefanich's reports. It nonetheless took no action to contest claimant's degree of disability. If Wegmans wished to avoid these risks, it simply needed to make a timely request to cross-examine Dr. Stefanich, and it failed to do so.

Third, Wegmans argues (Br. at 18-19) that the Third Department's decision conflicts with its decision in *Matter of Ferguson*, 173 A.D.3d 1592. Wegmans is mistaken. While the *Ferguson* claimant similarly made its formal request to cross-examine the employer's physician at the hearing itself, the parties understood in advance of the hearing that the degree of permanency was in dispute: the carrier had already obtained an independent medical examination and its physician had rendered an opinion. Although the claimant's doctor had not opined on the issue, the claimant had disputed the degree of permanency prior to the hearing. Thus, no one was prejudiced by the claimant's formal request to cross-examine the employer's physician. Here, in contrast, Wegmans' request came as a complete surprise and prejudiced the claimant. Wegmans had paid the claimant at the temporary total disability rate for both the first period he was out of work (August 2018 – April 2019) and then again

during the second period (October 2019 – January 2020). There was no notice that Wegmans disputed the degree of claimant's disability while claimant was out of work or during the three months following his return—even though Wegmans knew that a hearing on the issue would be scheduled at that time. As a result of Wegmans' actions, claimant lost the opportunity to request light-duty work or to potentially apply for unemployment benefits—factors that were not present in *Ferguson*.

In sum, Wegmans' unjustified and prejudicial delay in requesting cross-examination does not advance the "economic and humanitarian objects" of the Workers' Compensation Law. *Matter of Smith v. Tompkins Cty. Courthouse*, 60 N.Y.2d 939, 941 (1983). It does just the opposite, placing an undue burden on injured workers to guess whether they should try to return to work, notwithstanding medical advice to the contrary and their employer's apparent agreement with that evidence. Allowing cross-examination at such a late date—long after Wegmans had paid claimant at the temporary total disability rate, failed to request an independent medical examination or a hearing to dispute the degree of disability, and without providing any warning that it disagreed with the rate—would prejudice claimants and undermine the objectives of the

Workers' Compensation Law. If Wegmans had genuine concerns about claimant's degree of disability, it had several options it could have—and *should have*—taken far earlier in the process. Accordingly, this Court should affirm the Third Department's order.

CONCLUSION

The Court should affirm the Third Department's order, with costs.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the body of the foregoing Brief for Appellants contains 6,070 words and thus complies with the word limit set by 22 N.Y.C.R.R. § 500.13(c)(1).

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