To be argued by**: Wayne J. Schaefer**
Time Requested for Argument: 15 Minutes

State of New York Court of Appeals Case No.:

APL-2023-00140

New York State Court of Appeals

In the Matter of the Application of

ROBERT BODENMILLER,

Petitioner,

For an order Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

THOMAS P. DiNAPOLI, in his capacity as Comptroller of the State of New York and Administrator of the New York State and Local Police and Fire Retirement System,

Respondent.

PETITIONER'S BRIEF

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Appellate Division, Third Department Case No,. 534821

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

Treatises

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

----------X

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STATEMENT PURSUANT TO CPLR § 5531

1. The index number of the case in the Court below is 910065/2021.

2. The full names of the original parties to this proceeding are set forth in the caption above. There has been no change.

3. This Article 78 proceeding was commenced in the Supreme Court, Albany County.

4. This proceeding was initiated by the filing of a Notice of Petition and Verified Petition, on or about December 6, 2021. Issue was joined by service of a Verified Answer, on or about January 18, 2022.

5. This is an Article 78 proceeding which seeks to vacate and reverse the respondent's August 9, 2021 Final Determination.

6. This proceeding was transferred to the Appellate Division: Third Department by Order of the Supreme Court, Albany County, dated February 7, 2022 and entered on February 10, 2022.

7. This proceeding is being prosecuted on a fully reproduced record on review.

BASIS FOR JURISDICTION IN THE COURT OF APPEALS

The Court of Appeals has jurisdiction over this appeal, pursuant to CPLR § 5602 (a) (1) (i), as it is an appeal, by permission of the appellate division pursuant to an order, dated September 15, 2023, from the April 13, 2023 Opinion and Judgment of the appellate division which finally determined the action and from which there is no appeal as of right.

PRELIMINARY STATEMENT

This is an Article 78 proceeding challenging the determination of respondent, Thomas DiNapoli ("respondent"), in his capacity as Comptroller of the State of New York and administrator of the New York State and Local Police and Fire Retirement System ("Retirement System"), denying the application of Suffolk County Police Officer, Robert Bodenmiller (hereinafter "petitioner" or "Officer Bodenmiller") for an Accidental Disability Retirement benefit, pursuant to § 363 of the Retirement and Social Security Law ("RSSL"). The Retirement System denied the application based on an initial determination that the events of June 12, 2019 alleged in the application did constitute an "accident" within the meaning of RSSL § 363. (124).[1]

A redetermination hearing was convened on January 22, 2021 before Hearing Officer, Arthur J. Cooperman. The applicant was the sole witness. At the hearing, Officer Bodenmiller testified that, while working a restricted assignment at a desk other than his usual work location, he began to roll backwards to get up when the chair he was sitting in stopped rolling and started to tip over backwards. To keep from falling, Officer Bodenmiller grabbed a desk drawer and managed to

[1] Parenthetical references contacting Arabic numerals only are to the pages of the Record on Review.

right himself. It was later determined that the chair became stuck when a chair roller became lodged in a hole in one of the floor tiles beneath the chair.

Pursuant to a four-page decision, dated April 1, 2021, Hearing Officer Cooperman found that the petitioner had not sustained his burden of establishing that the events of June 12, 2019 constituted an accident. (44-47). In reaching this conclusion, the Hearing Officer determined, in the first instance, that a finding of "accident" was unwarranted because petitioner should have anticipated the specific hazard of injury resulting from a chair wheel potentially getting stuck in the floor. The Hearing Officer also opined that "[t]he incident was the result of the applicant's inattention where it constituted a risk inherent in the performance of his ordinary job duties." (46).

Pursuant to a final determination, dated August 9, 2021, the Retirement System adopted Hearing Officer Cooperman's decision in its entirety and upheld the denial of the application. (43).

Petitioner commenced an Article 78 proceeding in Albany County Supreme Court challenging the final determination. Following a transfer, pursuant to CPLR § 7804 (g), to the appellate division, the Third Department, in an Opinion and Judgment, dated April 13, 2023, confirmed respondent's denial of the application. *Matter of Bodenmiller v. DiNapoli*, 215 A.D.3d 96, 188 N.Y.S.3d 288 (3rd Dept. 2023) (165-171).

For the reasons set forth below, substantial evidence compels a finding that the events of June 12, 2019 constituted an "accident" within the meaning of the Retirement and Social Security Law. Accordingly, the Opinion and Judgment of the Third Department should be reversed; respondent's determination should be annulled and the matter remitted to the Retirement System for further proceedings in accordance with the Order of this Court.

QUESTION PRESENTED

1. QUESTION: Did the Court below err in holding that substantial evidence supported respondent's denial of petitioner's application for an accidental disability retirement benefit based on a finding that petitioner should have "reasonably anticipated" the hazard resulting in his injury where the record otherwise fails to demonstrate that the hazard was an inherent risk of petitioner's job or that petitioner had direct or actual knowledge of the hazard?

   ANSWER: Yes. Given that the respondent determined, and the Court below confirmed, that petitioner was not injured as a result of a risk inherent in his ordinary job duties, and, also, because the respondent never contended, either at the administrative stage, or in the Court below, that petitioner had direct knowledge of the hazard, the denial of petitioner's application is not supported by substantial evidence.

Matter of McCambridge v McGuire, 62 NY2d 563, 468 N.E.2d 9, 479 N.Y.S.2d 171 (1984); *Scherbyn v. Wayne-Fingerlakes Bd. of Coop. Educational Services,* 77 N.Y.2d 753 (1991). An after-the-fact determination, in hindsight, that petitioner should have "reasonably anticipated" the hazard does not constitute a sound basis, in fact or law, for determining that the injury did not result from a "'sudden, fortuitous, out of the ordinary and unexpected event" (*Matter of Lichtenstein v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art II,* 57 NY2d 1010, 1012, 443 N.E.2d 946, 457 N.Y.S.2d 472 (1982)); see also, *Kelly v. DiNapoli*, 30 N.Y.3d 674, 684, 70 N.Y.S.3d 881, 94 N.E.3d 444 (2018).

BACKROUND OF THE CASE

a. Officer Bodenmiller's June 12, 2019 Injury

Officer Bodenmiller became employed by the County of Suffolk as a police officer on December 1, 1986. (70).

In February, 2019, petitioner was assigned to a limited desk duty assignment in the wake of a prior injury. (71). During his limited duty assignment, petitioner worked a two-tour schedule; i.e., five-day shifts followed by two days off, then five afternoon shifts followed by three days off. His duties consisted of handling

walk-in complaints, monitoring and feeding prisoners, answering phones, and processing paperwork as well as miscellaneous administrative duties. (72).

Petitioner's work location was the front desk area of the First Precinct. (id.) Officers working the desk accessed the area from a door leading from the precinct's administrative offices in the back of the building. (Resp. Ex. J) (138-139).[2] Other than the front counter, there were two desks available for officers to use; one directly adjacent to the doorway (Resp. Ex. M) (144-145) and the other to the extreme left at the other end of the room. (Resp. Ex. N) (146-147).

The desk to the extreme left was Officer Bodenmiller's preferred work location since if afforded a degree of privacy in contrast to the other desk which was readily observable by anyone in the back office who happened to be walking past the door. (80, 83). Consequently, Officer Bodenmiller routinely worked at the far desk, and, prior to his injury, only worked at the desk adjacent to the doorway on three or four occasions. (106).

On June 12, 2019 at approximately 1:30 P.M. Officer Bodenmiller was seated at a desk while working his limited duty assignment. (102) The desk he was seated at was not the desk to the far left where he customarily worked, but the desk immediately adjacent to the room entrance. (98) (Resp. Ex. M) (144-145). The

[2] Parenthetical references to "Resp. Ex." followed by an uppercase letter are to the corresponding exhibits attached to respondent's verified answer and return (29-38).

chair he was sitting in was a five-wheeled pedestal chair. (91). Officer Bodenmiller began to roll backwards in the chair to get up when the chair stopped rolling and started to tip over backwards. (90). In order to keep from falling, Officer Bodenmiller grabbed a desk drawer and, while pulling it open, managed to right himself, injuring his shoulder in the process. (id). At first, Officer Bodenmiller suspected that the chair broke, however, a subsequent inspection of the floor confirmed that one of the chair rollers had gotten stuck in one of two holes (the far hole, further from the desk) in the floor tiles underneath where was sitting. (91-92) (Resp. Ex. G) (129-130) (Resp. Ex. H) (131-132). Neither hole was observable from a seated position at the desk where Officer Bodenmiller was working. (107, 110).

At the time of his accident, Officer Bodenmiller was unaware of any previous accidents or incidents at the work location where he was injured. (97). At the time he was injured Officer Bodenmiller; by virtue of routinely surveilling the room at the beginning of his shift, had a general awareness of the overall condition of the floor; i.e., that it was aged and had holes, but was not aware of the hazard presented by the condition of the floor at the location where he was injured. (104). In particular, he was not aware of the severity of the depleted condition of the floor where he had been sitting (104, 106), including the depth of the hole in which the chair wheel became stuck. (103).

b. Officer Bodenmiller's Application for Accidental Disability Retirement

In accordance with RSSL § 363, Officer Bodenmiller applied for an accidental disability retirement benefit based on the injury he sustained on June 12, 2019. (121-122). Pursuant to an initial determination, dated June 17, 2020, the application was denied on the basis that "the incident alleged to have occurred on 6/12/19 does not constitute an 'accident' as this term is used in Section 363 of the Retirement and Social Security Law." (124).

Officer Bodenmiller requested a redetermination of his application and a redetermination hearing was convened on January 22, 2021, before Arthur J. Cooperman, Hearing Officer. Officer Bodenmiller was the only witness.

Among the exhibits introduced by petitioner were seven photographs of the front desk area where he was injured; i.e., two photographs of the two holes in the floor beneath where he was sitting when he was injured (Resp. Ex. G) (129-130) (Resp. Ex. H) (131-132), a photograph of the center of the front desk taken from the public, or lobby, side of the counter (Resp. Ex. J) (138-139), a photograph of the right side of the front desk taken from the lobby (Resp. Ex. K) (140-141), a photograph of the left side of the front desk taken from the lobby (Resp. Ex. L) (142-143), a photograph of the desk Officer Bodenmiller was sitting at when he was injured, taken from the entrance to the front desk from the administrative offices in the back of the building (Resp. Ex. M) (144-145), and a photograph of

the left side of the front desk counter taken from the restricted side of the counter and behind it, the desk where Officer Bodenmiller ordinarily worked. (Resp. Ex. N) (146-147).[3]

Following the conclusion of Officer Bodenmiller's testimony, the hearing was closed. Both sides submitted post hearing memoranda. (148-159).

In an ensuing four-page report, the Hearing Officer noted that petitioner had worked four months at his restricted assignment at the First Precinct. (46). With regard to the day in question, he noted that petitioner had been working at his desk for approximately six hours and had risen from his seat and returned to it more than five times. (id.) Despite the above, the hearing officer made a factual finding that Officer Bodenmiller was not aware of the hazardous condition which caused his injury prior to his accident. Specifically, he found that with regard to the hole which brought petitioner's chair to an abrupt stop; that while petitioner may have been "aware of its' presence" he was not aware of "the severity of it." (id.)

Those findings notwithstanding, the Hearing Officer determined that the application was properly denied because "[u]nder the circumstances, the hazard reasonably could have been anticipated." (citing Matter of *Parry v New York State Comptroller*, 187 A.D. 3d 1303 (3d Dept. 2020). Have rendered a legal conclusion

[3] Respondent's Exhibits G through N attached to his verified answer and return are copies of Applicant's Exhibits A through H introduced at the redetermination hearing.

that effectively disposed of the case, the Hearing Officer then elliptically added his observation that "[t]he incident was the result of the applicant's inattention where it constituted a risk inherent in the performance of his ordinary job duties." (id.)

By letter of Colleen C. Gardner, Executive Comptroller to Officer Bodenmiller, dated August 9, 2021, the Retirement System forwarded its final determination. (40-41). That one-page determination, also dated August 9, 2021, states that the Executive Deputy Comptroller "accepts the attached Findings of Fact and Conclusions of Law of the Hearing Officer" and that, based thereon, the application was denied. (43).

c. The Opinion and Judgment of the Third Department

Petitioner commenced an Article 78 proceeding in Albany County Supreme Court challenging the final determination. Following a transfer, pursuant to CPLR § 7804 (g), to the appellate division, the Third Department, in an Opinion and Judgment, dated April 13, 2023, confirmed respondent's denial of the application. *Matter of Bodenmiller v. DiNapoli*, 215 A.D.3d 96, 188 N.Y.S.3d 288 (3rd Dept. 2023) (165-171).

Specifically, the court below held, with one Justice dissenting, that while petitioner's injury, concededly, did not result from a risk inherent in his ordinary job duties, respondent was not foreclosed, as matter of law, from determining that the injury did not result from an "accident" because petitioner should have reasonably

anticipated the prospect that the wheels on the chair he was sitting in would get stuck in floor ruts and cause the chair to tip over.

Conversely, the Court rejected petitioner's argument, on brief, that resort to the "reasonably anticipated" standard was foreclosed by *Matter of Kelly v. DiNapoli*, 30 N.Y.3d 674, 70 N.Y.S.3d 881, 94 N.E.3d 444 (2018), in which this Court opined that an applicant for an accidental disability retirement is not required to demonstrate that the condition resulting in injury was not "readily observable" in order to establish an accident within the meaning of the RSSL.

In concluding that the two standards are, in fact, distinguishable, the Third Department drew a distinction between underlying "conditions" and "precipitating events" resulting in injury. The Court maintained that while *Matter of Kelly* may have precluded a finding of "no accident" based on a finding that the "condition" which ultimately results in injury was "readily observable", a denial can still be premised, alternatively, on a determination that the "precipitating event" was "reasonably anticipated."

ARGUMENT

POINT ONE:

BECAUSE PETITIONER'S INJURY RESULTED FROM AN EVENT THAT WAS NOT A RISK INHERENT IN POLICE EMPLOYMENT, RESPONDENT'S DETERMINATION DENYING HIS APPLICATION WAS NOT BASED ON SUBSTANTIAL EVIDENCE

In a Retirement System redetermination proceeding, the petitioner has the burden of establishing that the evidence introduced at the hearing, in light of applicable law, warrants the granting of the relief requested. *Garceau-Scopelitis v. New York State Comptroller*, 24 A.D.3d 934, 805 N.Y.S.2d 446 (3d Dept. 2005). The hearing officer determines the issues *de novo*; i.e., with no deference to the Retirement System's initial determination. *Foresta v. New York State Policeman's and Fireman's Retirement System*, 95 A.D.2d 893, 463 N.Y.S.2d 880 (3d Dept. 1983).

In determining whether the resulting final determination was arbitrary and capricious, as well as affected by error of law, the Court, generally, looks first to see whether there was a rational basis for respondent's conclusion. *Matter of Hughes v. Doherty*, 5 N.Y.3d 100, 105 (2005). In contrast, "[a]rbitrary action is without sound basis in reason and is generally taken without regard to the facts." (*Matter of Pell v. Bd. of Education*, 34 N.Y.2d 222, 231 (1974)). "Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and

capricious standard." (*Pell*, 34 N.Y.2d at 231; citing, *Matter of 125 Bar Corp. v. State Liq. Auth.*, 24 N.Y.2d 174, 178, 299 N.Y.S.2d 194, 197-198, 247 N.E.2d 157, 158-159; 1 N.Y. Jur., Administrative Law, s 184).

A petitioner seeking to annul a determination of "no accident" has the burden of proving that the underlying incident constituted a " 'sudden, fortuitous, out of the ordinary and unexpected event that does not result from an activity undertaken in the performance of regular or routine employment duties' " (*Matter of Ashley v. DiNapoli*, 97 A.D.3d 1057, 1058, 949 N.Y.S.2d 526 (2012), quoting *Matter of Carroll v. DiNapoli*, 95 A.D.3d 1498, 1499, 945 N.Y.S.2d 428 (2012); *see Matter of Murphy v. New York State Comptroller*, 92 A.D.3d 1022, 1022, 937 N.Y.S.2d 721 (2012); see also, *Matter of Lichtenstein v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art II,* 57 NY2d 1010, 1012, 443 N.E.2d 946, 457 N.Y.S.2d 472 (1982).

In addressing whether the denial is based on substantial evidence, the focus of the determination must be on "the precipitating cause of injury," rather than on "the petitioner's job assignment" (*Matter of McCambridge v McGuire*, 62 NY2d 563.567, 468 NE2d 9, 479 NYS2d 171 (1984)). In determining, in turn, whether such a precipitating cause is a sudden, fortuitous, out of the ordinary and unexpected event; i.e., an accident, "the dispositive question is whether injury was caused by " 'a precipitating accidental event . . . *which was not a risk of the work*

performed' " "(*Matter of Kelly v. DiNapoli*, 30 N.Y.3d 674, 684, 70 N.Y.S.3d 881, 94 N.E.3d 444 (2018); quoting *Matter of Starnella v Bratton* 92 NY2d 836, 839, 699 NE2d 421, 677 NYS2d 62 (1998), quoting *McCambridge*, 62 NY2d at 568 (emphasis supplied).

a. An injury which results from a risk of the work performed is an accidental injury regardless of whether, in hindsight, the condition giving rise to the risk was "readily observable" or "reasonably anticipated"

In *Matter of Kelly v. DiNapoli*, 30 N.Y.3d 674, 70 N.Y.S.3d 881, 94 N.E.3d 444 (2018), this Court expressly rejected the Third Department's holding in *Matter of Manning v DiNapoli*, 150 A.D.3d 1382, 1383, 54 N.Y.S.2d 216 (3d Dept. 2017) which required a petitioner to demonstrate that a hazard was not "readily observable" to prove an accident within the meaning of the law; see, *Matter of Kelly*, 30 N.Y.3d at 685, n. 3.

The companion case brought up for review in *Kelly*; i.e., *Matter of Sica v. DiNapoli*, 141 A.D.3d 799, 36 N.Y.S.3d 259 (3d Dept. 2016) was an appeal of the Third Department's holding that the Retirement System's finding of no accident could not be sustained. In *Sica*, the Third Department initially concluded that any risk of inhaling toxic gases and fumes was not encountered in the course of fighting a fire and therefore was not an inherent risk of firefighter employment; see, *Matter of Sica*, 141 A.D. 3d at 800. In addition, the Third Department noted that the petitioner was not aware that the air in the supermarket was toxic "nor did

he have any information that could reasonably have led him to anticipate, expect or foresee the precise hazard when responding to the medical emergency at the supermarket." (id.) (citations omitted).

In reversing, this Court rejected the position that encountering toxic air while responding to the emergency call; even without the attendant circumstance of a fire, was not an inherent risk of the petitioner's job duties; see, *Matter of Kelly*, 30 N.Y.3d at 685. Crucially, this Court further opined that the extent to which petitioner did or did not have actual knowledge of facts which would have led him to reasonably suspect the hazard was irrelevant.[4]

In short, this Court, in *Kelly*, reiterated and confirmed that in determining whether the factual record demonstrates accidental injury, the focus is on "whether injury was caused by 'a precipitating accidental event… *which was not a risk of the work performed*' " (*Matter of Kelly*, 30 N.Y.3d at 684, (emphasis supplied) quoting, *Matter of Starnella v. Bratton*, 92 N.Y.2d 836, 839, 699 N.E.2d 421, 677

[4] "We note that the Appellate Division focused on whether evidence in the record supported a finding that, given his training, Sica 'could [ ]or should have recognized the danger posed in the circumstances presented' because the problem with the air quality at the scene was readily observable (*141 AD3d at 801*; *see 141 AD3d at 804 n 3* [McCarthy, J., dissenting] [citations omitted]… Respondent did not consider whether Sica was, or should have been, aware of the toxic fumes that injured him [citation omitted]. *In any event, the requirement that a petitioner demonstrate that a condition was not readily observable in order to demonstrate an "accident" is inconsistent with our prior case law* [citations omitted] (emphasis added).

N.Y.S.2d 62 (1998); quoting, *McCambridge v. McGuire*, 62 N.Y.2d 563, 568, 468 N.E.2d 9, 479 N.Y.S.2d 171 (1984).

In the wake of *Kelly*, the Third Department in *Matter of Stancarone v. DiNapoli*, 161 A.D.3d 144, 76 N.Y.S.3d 238 (3d Dept 2018) acknowledged that an applicant could no longer be required to demonstrate that the precipitating condition was not readily observable in order to show that the injury arose from something sudden, unexpected and not a risk of the work ordinarily performed; see, *Stancarone*, 161 A.D.3d at 147. However, in an attempt to delineate the outer parameters of what might constitute an "accident", the Court then opined that where the record sufficiently supports either a finding that (1) an individual either had direct knowledge of a hazard or (2) the hazard was one that could have been "reasonably anticipated", a finding of no accident will still lie; see, *Stancarone*, 161 A.D.3d at 148-149.

In support of the assertion that denial of a finding of accident is warranted where the factual record supports a finding that the applicant had direct knowledge of the hazard, *Stancarone*, cites two Court of Appeals cases; *Matter of Lang v. Kelly*, 21 N.Y.3d 972, 973, 970 N.Y.S.2d 742, 992 N.E.2d 1085 (2013) and *Matter of Kenny v. DiNapoli*, 11 N.Y.3d 875, 874 N.Y.S.2d 399, 902 N.E.2d 952 (2008); see, *Stancarone*, 161 A.D.3d at 148.

In contrast, no Court of Appeals authority is cited in support of the additional claim that "[s]imilarly, an injury may be expected and, therefore, not accidental, 'where the hazard presented was one that the [injured person] could have reasonably anticipated, even if he or she did not actually see it until after sustaining his or her injury' " (id.) (citations omitted). Instead, the sole case law authority cited in support of this latter contention are four holdings issuing from the Third Dep't; all of which were decided before this Court's decision in *Kelly*.[5]

This dearth of supporting Court of Appeals authority is readily explained by taking account of decisions of this Court which have found an "accident" so long as the injury was shown not to result from an inherent risk of police employment; *regardless of whether the underlying hazard was either readily observable or could have been reasonably anticipated.* Specifically, as the partial dissent in *Stancarone* makes clear, there is no apparent basis in Court of Appeals precedent, as construed in *Kelly*, for treating hazards which are "readily observable" from those which are "reasonably anticipated." As the partial dissent in *Stancarone* notes, the Court of Appeals has, on more than one occasion, found an accident where the precipitating event leading to injury was not a risk of the work

[5] See, *Stancarone*, 161 A.D.3d at 148-149, citing, *Matter of Bleeker v. New York State Comptroller*, 84 A.D.3d 1683, 1684, 923 N.Y.S.2d 788 (3d Dept. 2011) [internal quotation marks, brackets and citation omitted], *lv denied* 17 N.Y.3d 709, 930 N.Y.S.2d 553, 954 N.E.2d 1179 (2011); *Matter of Martins v. DiNapoli*, 156 A.D.3d 1031, 1032, 66 N.Y.S.3d 366 (3d Dept. 2017); *Matter of Butrico v. New York State Comptroller*, 97 A.D.3d 1033, 1034, 949 N.Y.S.2d 239 (3d Dept. 2012); *Matter of Avery v. McCall*, 308 A.D.2d 677, 678, 764 N.Y.S.2d 658 (3d Dept. 2003).

performed, even though the factual record otherwise indicated that the condition leading to the injury could have been reasonably anticipated; see, *Stancarone*, 161, A.D.3d 144, 153 [Lynch, J., concurring in part and dissenting in part; citing, *Matter of Starnella v. Bratton*, 92 N.Y.2d at 838 839, 677 N.Y.S.2d 62, 699 N.E.2d 421; *Matter of McCambridge v. McGuire*, 62 N.Y.2d at 567, 479 N.Y.S.2d 171, 468 N.E.2d 9].

Turning to the case at bar, it is axiomatic that respondent's determination that the events of June 12, 2019 did not result from an accident rests on the Hearing Officer's finding that "[u]nder the circumstances, the hazard reasonably could have been anticipated." (46) (citation omitted).[6] However, for reasons stated above, that finding, standing alone, does not amount to substantial evidence supporting a determination that the sequala of events culminating in petitioner's

[6] As noted above, the Hearing Officer's report, in a stand-alone paragraph, also asserts that "[t]he incident was the result of the applicant's inattention where it constituted a risk inherent in the performance of job duties." (46). This assertion, bereft as it is of context or further explanation, raises more questions than it provides answers. If, on the one hand, the Hearing Officer is asserting that the inattention which caused petitioner's injury resulted from his own misstep, the finding is unsupported by substantial evidence; see, *Matter of Starnella v. Bratton*, 92 N.Y.2d 836, 677 N.Y.S.2d 62, 699 N.E.2d 421 (1998). (fall down the stairs as a result of one's own misstep, without more, is not accidental). Here, the Hearing Officer clearly determined that petitioner's injury was not occasioned by his own misstep "without more" but was inextricably linked to the chair wheel getting stuck in the floor. (45). In contrast, a more plausible explanation is that he concluded that the sequence of events culminating in the chair getting stuck resulted from petitioner's inattention in so far as he failed to observe the condition of the floor. However, such a finding, in fact, would weigh in favor of a finding that the resulting injury was accidental. As the Third Department observed in *Stancarone*, "if the inattention resulted in the person failing to notice a slippery substance, which substance caused the fall, the inattention would be similar to a failure to recognize a condition that was readily observable… where an injury is caused by the [this] type of inattention… the injury may constitute an accident." (*Stancarone*, 161, A.D.3d at 148; citing, *Matter of Kelly v. DiNapoli*, 30 N.Y.3d at 385, n.3, 70 N.Y.S.3d 881, 94 N.E.3d 444.)

injury; which, as demonstrated above, did not result from a risk inherent in petitioner's employment, did not constitute an accident within the meaning of the law. Pursuant to the standard set forth in *Kelly*, the penultimate question is always whether injury resulted from a precipitating event which was not a risk of the work performed and, hence, is properly deemed to have resulted from a "sudden, fortuitous, mischance, unexpected, out of the ordinary, and injurious in impact" (*Matter of Lichtenstein v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art II*, 57 NY2d 1010, 1012, 443 N.E.2d 946, 457 N.Y.S.2d 472 (1982) (quoting, *Johnson Corp. v Indemnity Ins. Co. of North Amer.*, 6 AD2d 97, 100 (1st Dept. 1958), affd 7 NY2d 222 (1959). If that standard is met, there is no basis under applicable law for discounting the accidental nature of the injury merely because, in hindsight, the causative agent, might have also, arguably, been readily observable or reasonably anticipated.

At most, the inference otherwise properly drawn of accidental injury may be rebutted by, as noted above, evidence of actual, direct knowledge of the hazard; see, *Matter of Lang v. Kelly*, 21 N.Y.3d 972, 973, 970 N.Y.S.2d 742, 992 N.E.2d 1085 (2013) and *Matter of Kenny v. DiNapoli*; *see also, Matter of Rizzo v. DiNapoli*, 39 N.Y.3d 991, 2022 N.Y. LEXIS 2093, 182 N.Y.S.3d 1, 2022 NY Slip Op 06027, 202 N.E.3d 559, 2022 WL 14915475 (2022).

However, as demonstrated in Point One (c) below and acknowledged by this Court in *Matter of Rizzo*, evidence of actual knowledge of a hazard is clearly distinguishable from the fictional knowledge imputed by resort to a "reasonably anticipated" standard. In the first case, a sufficient nexus can be demonstrated, as a matter of fact, between direct knowledge of a hazard and a finding that the resulting injury, while not the result of a risk inherent in police employment, was, by virtue of such actual knowledge, not the result of something " 'sudden, fortuitous, out of the ordinary and unexpected.". In contrast, no such argument can be reasonably maintained in the second case; i.e., where the record, while arguably supporting an after-the-fact opinion that a police office *should* have perceived the risk, fails to support a finding of fact that he or she actually did so. Fidelity to the lodestar standard set forth in *Matter of Lichtenstein* and its progeny will not countenance such as result for the simple reason that an event demonstrated to be sudden, fortuitous, out of the ordinary and unexpected is not rendered less so merely by the expedient of being able to subsequently characterize it as one which should have been "reasonably" anticipated."

b. The Third Department's continued embrace of a "reasonably anticipated" standard is based on a misreading of *Matter of Kelly v DiNapoli*

As noted above, in rendering the Opinion and Judgment at issue, the Third Department, as in *Matter of Stancarone*, chose to characterize, as limited in scope,

Matter of Kelly's assertion that an applicant's failure to demonstrate that a condition was not "readily observable" will not warrant denial of an application. Specifically, the Court below maintained the above assertion in *Matter of Kelly* did not speak to the possibility that a condition which is not "readily observable" nonetheless, may not be an accident where the "precipitating event" resulting in injury should have been "reasonably anticipated.";

> However, within the broad universe of "reasonable anticipation" sometimes the patent nature of the condition and the petitioner's awareness of same can support a determination, by substantial evidence, that the precipitating event was reasonably anticipated (see *Matter of Rizzo v DiNapoli*, 201 AD3d at 1100) As such, here, respondent did not commit an error of law in applying said [reasonable anticipation] standard *(Bodenmiller*, 215 A.D.3d at 100) (165-171)
> Reduced to its essence, the "reasonably anticipated" standard thus

contemplates an initial factual finding of awareness of an underlying condition from which a petitioner can be charged with constructive knowledge of a resulting hazard from the "vast and inclusive universe of what can be reasonably anticipated" – despite the fact record otherwise fails to demonstrate actual awareness on the part of the police officer. (id.).

In continuing to press the standard first invoked in *Matter of Stancarone*, the above cited excerpt conspicuously omits any reference to supporting case law authority from this Court and, instead, as noted, invokes another Third Department case; *Matter of Rizzo v DiNapoli*. However, subsequent to the decision at bar, this Court entertained an appeal of the Third Department's decision in *Matter of Rizzo*.

In that appeal, this Court pointedly declined to embrace the opportunity to uphold the "reasonably anticipated" standard and, instead, chose to uphold respondent's denial of the application on an alternative ground; i.e., that the petitioner had actual knowledge of the hazard which caused her injury.[7]

Accordingly, this Court opined that "[a]ny substantive distinction - *if there is one* – between the 'reasonably anticipated' standard applied below and the standard we applied in *Matter of Kelly* is irrelevant here." (id.) (emphasis added); see also, *Matter of Rizzo*, 39 N.Y.3d at 992 (Wilson, J., dissenting) (noting that the Appellate Division rejected petitioner's claim by resort to the "reasonably anticipated" doctrine; that the majority explicitly did not reach this test and that, consequently, "the issue is left open here (and perhaps in the Third Department as well)".

Moreover, it is not the mere absence of supporting Court of Appeals authority directly on point which undercuts the "reasonably anticipated" standard. A close review of the facts before the this Court in *Matter of Kelly* confirms that the resulting holding simply provides no basis for the essential legal premise underlying the decisions of the Third Department in first *Matter of Stancarone* and, later, *Matter of Rizzo* and this case; namely, that this Court's rejection of previous

[7] "Petitioner conceded that she knew that the heavy metal door slammed automatically and that on the day of the injury her movements were intended to avoid that quick and forceful closure" (id.).

caselaw holding that a petitioner was required to demonstrate that a condition was not "readily observable" nonetheless, left open the question of whether a denial could still be based on a failure to demonstrate that the condition could not be "reasonably anticipated".

In fact, this characterization overlooks and ignores the facts which were before this Court in *Matter of Sica v. DiNapoli*, 141 A.D.3d 799, 36 N.Y.S.3d 259 (3d Dept. 2016), which, as previously noted, was the companion case brought up for review in *Matter of Kelly*. *In Matter of Sica* the Third Department initially concluded that any risk of inhaling toxic gases and fumes was not encountered in the course of fighting a fire and therefore was not an inherent risk of firefighter employment; see, *Matter of Sica*, 141 A.D. 3d at 800. In addition, the Third Department noted that the petitioner was not aware that the air in the supermarket was toxic "nor did he have any information that could *reasonably have led him to anticipate, expect or foresee the precise hazard* when responding to the medical emergency at the supermarket." (id.) (citations omitted) (emphasis added). In light of the above, the Court held that the Retirement System's finding of "no accident" could not be sustained.

In dissent, two Justices cited extensively to the record to argue that substantial evidence supported denial of the petition. Specifically, the dissent argued that the evidence of record was sufficient to allow the Retirement System to

credibly determine that (1) petitioner's job description noted that "the environmental conditions in which petitioner was expected to work included 'exposure to… toxic materials [and] chemicals' "; (2) petitioner "specifically received training in providing emergency aid and in 'chemical exposure' "; (3) petitioner regularly responded to medical emergencies and testified that he "may have" responded to chemical spill and chemical exposure emergencies in the past; (4) petitioner was called to the scene after receiving an emergency call reporting a person experiencing trouble breathing in a supermarket; and (5) upon arrival, petitioner observed two unconscious persons in close proximity to one another with no signs of external trauma; see, *Matter of Sica*, 141 A.D.3d at 803.

Based on the above, the dissent argued that the absence of "any plausible explanation of a potential cause of the conditions of the two people that was not related to air quality" warranted deference, as a matter of law, to a determination that "a person with petitioner's training *could have reasonably anticipated*" the hazard; see, *Matter of Sica*, 141 A.D.3d at 804, n.3. (emphasis added)

A review of *Matter of Kelly* confirms that it was in response to this detailed, broad-based circumstantial argument, with its repeated references to what should or should not have been "reasonably anticipated", that this Court opined that "the requirement that a petitioner demonstrate that a condition was not readily

observable in order to demonstrate an 'accident' is inconsistent with our prior case law." *Matter of Kelly*, 30 N.Y.3d at 685, n.3.

In contrast, there is nothing in the fact pattern presented in *Matter of Sica*, and subsequently addressed in *Matter of Kelly*, which supports the interpretive gloss adopted by the Third Department in this case. Specifically, there is nothing in *Matter of Kelly* which reflects an intention by the Court of Appeals to distinguish "conditions" which are not "readily observable" from "precipitating events" which, if "reasonably anticipated" may still warrant a finding that the injury was not accidental. To the contrary, the questions of fact addressed in *Matter of Kelly* in the context of discounting resort to a "readily observable" standard were the same as those addressed by both the majority and the dissent in *Matter of Sica* in arguing whether hazard was "reasonably anticipated."

That being the case, the attempt of the Court below to parse a distinction between a "precipitating event" which "was or was not readily observable" form one which is "*otherwise* reasonably anticipated" (*(Bodenmiller*, 215 A.D.3d at 100) (165-171) (emphasis supplied) rests on a fundamentally flawed reading of the factual record before this Court in *Matter of Kelly* and, consequently, should be rejected.

c. Rejection of the "reasonably anticipated" standard is not foreclosed by this Court's holding in *Matter of Rizzo v DiNapoli* that evidence of direct knowledge of the actual risk precludes a finding of accidental injury

As noted above, this Court, in *Matter of Rizzo*, having before it a factual record which allowed it to adjudicate a result on the basis of whether there was actual, direct knowledge of the hazard resulting in injury, declined to reach the issue of whether the "reasonably anticipated" standard is precluded by *Matter of Kelly*. In contrast, the facts of this case mandate that the question left open in *Matter of Rizzo* be addressed and that, for the reasons set forth above, the "reasonably anticipated" standard be abandoned.[8]

Moreover, rejection of the "reasonably anticipated" standard is consistent with this Court's holding in *Matter of Rizzo* and will streamline and bring clarity to an application process which to this point, has been wrought by confusion and uncertainty. In contrast, elimination of the "reasonably anticipated" standard will

[8] As previously noted, in the instant case the Hearing Officer ultimately determined that with regard to the hole which brought petitioner's chair to an abrupt stop, while petitioner may have been "aware of its' presence" he was not aware of "the severity of it." (46). It was on the basis of that finding that the Hearing Officer determined that the application was properly denied because "[u]nder the circumstances, the hazard reasonably could have been anticipated." (id.) (citation omitted). Moreover, since respondent, at the administrative stage, never argued actual knowledge on the part of petitioner as a basis for denying the petition, it is precluded from doing so in an ensuing Article 78 proceeding; see, *Scherbyn v. Wayne-Fingerlakes Bd. of Coop. Educational Services,* 77 N.Y.2d 753 (1991) (in Article 78 proceeding brought to determine whether an administrative determination is either arbitrary and capricious or not based on substantial evidence, judicial review is limited solely to the grounds invoked by the agency).

not conflict with this Court's holding in *Matter of Rizzo* since the respective standards resolve different issues in different ways.

On the one hand, the "reasonably anticipated" standard is nothing less than an attempt to erect a purportedly objective body of law from which applicants are charged with constructive knowledge of hazards resulting in injury, and from which an inference is then drawn that, the actual facts in a given case notwithstanding, the resulting injury, at least in an abstract sense, was not the result of "sudden, fortuitous, mischance, unexpected, out of the ordinary, and injurious in impact." (*Matter of Lichtenstein,* 57 NY2d at 1012). It is a process which, by design, excludes any consideration of the impact of a given set of exigent circumstances on police officers repeatedly called upon to access and evaluate such circumstances in the pressurized environment that is law enforcement. It substitutes the prospective of the police officer with the that of the so-called objective observer who, as matter of course, is afforded the benefit of hindsight, offered in the context of a decision-making process unencumbered by the practical constraints faced by applicants actually charged with evaluating the degree of potential risk to life and limb in real time. It is a process which, while ostensibly offered as an objective, uniform standard, is bound to lead to inconsistent results.

In contrast, the "known condition" condition standard acknowledged in *Matter of Rizzo* calls for an individualized assessment of the actual awareness or

"direct knowledge" of the applicant of the risk presented by a given set of circumstances. Thus, the question presented is not resolved by resort to after-the-fact pronouncements of what may have been "reasonably anticipated" but, rather, by findings of fact garnered with the aid of time-tested methods of judicial inquiry; i.e., evaluation of witness credibility and the assessment of the probative value of the evidence of record as a whole. Unlike the "reasonably anticipated" standard it makes no pretense to giving rise to an objective body of law purporting to resolve disparate fact patterns in identical fashion because it acknowledges that the question of whether a given police officer was aware of facts which would render an incident beyond the scope of his ordinary job duties to be something other than fortuitous and unexpected, is an individualized inquiry which must be resolved on a case-by-case basis.

To summarize, to allow the "reasonably anticipated" standard to remain viable is to invite a continuation of the inconsistent and, candidly, arbitrary results which have bedeviled applicants, litigators and Courts since the that standard first reared its head. "Reasonably anticipated" should be consigned to the repository of unfounded and unworkable judicial constructs without further delay.

CONCLUSION

Accordingly, and for all of the above reasons, petitioner, Robert Bodenmiller respectfully requests that this Court enter its Order annulling the Opinion and Judgment of the Appellate Division, Third Department and, further, remitting the matter to respondent with a direction that the Final Determination is annulled and that the relief requested in the Notice of Petition and Verified Petition is granted, and, further, that this Court order such other and further relief as it may deem just and proper.

Dated: Smithtown, New York
January 2, 2024

Respectfully submitted,

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