No. APL-2023-00140

To be argued by:
FREDERICK A. BRODIE
10 minutes requested

State of New York
Court of Appeals

In the Matter of the Application of

ROBERT BODENMILLER,

Petitioner,

v.

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,

For an Order Pursuant to Article 78
of the Civil Practice Law & Rules.

BRIEF FOR RESPONDENT

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Supreme Court, Albany County, Index No. 910065-21
Appellate Division, Third Department No. 534821

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PRELIMINARY STATEMENT

Petitioner Robert Bodenmiller was working as a Suffolk County police officer when the wheels of his pedestal-style rolling office chair became caught in a hole or rut on the floor.[1] The chair tipped, causing petitioner to reach out with his right arm and grab the desk for balance. While that maneuver prevented the chair from falling, it also allegedly injured petitioner's right arm. Prior to the incident, petitioner had been assigned to desk duty, knew that the floor at the desk where he sat was worn away and contained holes, and had observed the holes that day.

At issue here is whether substantial evidence supports the determination by the New York State Comptroller that the incident was not an "accident," as required to obtain accidental disability retirement benefits under New York Retirement and Social Security Law (RSSL) § 363. The Appellate Division, Third Department, confirmed the Comptroller's determination. This Court should affirm because substantial evidence supports the determination that the incident was not unexpected. Petitioner had actual knowledge of the floor's condition

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[1] The damaged areas of the floor are referred to in the record as both "holes" and "ruts," and we use those terms interchangeably.

and should have anticipated an incident like the one that occurred. Indeed, his inattention to a known condition is precisely the kind of misstep that this Court has held sufficient to defeat a finding that a qualifying accident occurred.

QUESTION PRESENTED

Whether substantial evidence supports the Comptroller's determination that an incident, in which the petitioner's office chair wheel became caught in a rut, was not an "accident," as required to obtain accidental disability retirement benefits under RSSL § 363.

STATEMENT OF THE CASE

A. Disability Retirement Benefits

Three different types of disability retirement benefits are potentially relevant to this case. First, like members of the New York State Employees' Retirement System (Employees' Retirement System), members of the New York State and Local Police and Fire Retirement System (P&F Retirement System) who become disabled may be able to obtain either *ordinary* disability retirement benefits or, if disabled as a result of an "accident," *accidental* disability retirement benefits. A third type of disability retirement benefits, called *performance-of-duty*

disability retirement benefits, is available only to members of the P&F Retirement System who become disabled in the performance of duty, without regard to whether the disability resulted from a qualifying accident.

More particularly, ordinary disability retirement benefits are available to members of either system with at least ten years of service who become disabled. *See* RSSL §§ 362(aa) (P&F Retirement System), 62(aa) (Employees' Retirement System). The cause of the disability is not a factor in determining eligibility, and therefore the member need not have been disabled in the performance of duty to obtain ordinary disability retirement benefits. The amount of ordinary disability retirement benefits depends on the member's salary and length of service; nevertheless, such benefits are generally not less than one-third of the member's final average salary. *See* RSSL §§ 362(b) (P&F Retirement System), 62(b) (Employees' Retirement System).

Accidental disability retirement benefits are available only to members of either system injured as the result of an "accident" sustained in the performance of duty. RSSL § 363(a) (P&F Retirement System); RSSL § 63(a) (Employees' Retirement System). As this Court has

explained, an "accident" means "a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact," *Matter of Lichtenstein v. Board of Trustees,* 57 N.Y.2d 1010, 1012 (1982) (internal quotation marks and citation omitted), a requirement that can make these benefits difficult to obtain. Accidental disability retirement benefits provide 75% of the member's final average salary. *See* RSSL §§ 363(e)(3) (P&F Retirement System), 63(e)(3) (Employees' Retirement System). The benefits, however, are reduced by any benefits payable under the Workers' Compensation Law. *See* RSSL §§ 364(a) (P&F Retirement System), 64(a) (Employees' Retirement System).

A third alternative, performance-of-duty-disability retirement benefits, was established by the Legislature in 1984, specifically and only for police officers and firefighters who are disabled in the performance of their duties but not as the result of qualifying accidents. *See* RSSL § 363-c(b)(1). Performance-of-duty disability retirement benefits are computed at the rate of 50% of final average salary. They nonetheless are sometimes more favorable than accidental disability retirement benefits because they provide for an annuity for accumulated contributions to the

pension system and they are not reduced by any benefits payable under the Workers' Compensation Law. RSSL §§ 363-c(f), 363-c(i).

The Legislature created performance-of-duty benefits for police officers and firefighters because of the "very stringent condition precedent" required to obtain accidental disability retirement benefits, namely that the member's disability be the proximate result of an accident sustained while in service. *See* L. 1984, ch. 661, Bill Jacket at 9 (Sponsor's Memorandum in Support of Legislation), 11 (March 1, 1984 Memorandum of Deputy Comptroller John S. Mauhs). The new performance-of-duty benefit was "intended to replace the stringent eligibility standards for accidental disability retirement with less onerous criteria." L. 1984, ch. 661, Bill Jacket at 19 (July 20, 1984 Memorandum of Governor's Office of Employee Relations). Accordingly, the criteria for awarding performance-of-duty disability retirement benefits were intended to be "considerably less restrictive" than those for accidental disability retirement. L. 1984, ch. 661, Bill Jacket at 12 (March 1, 1984, Memorandum of Deputy Comptroller John S. Mauhs).

With the enactment of performance-of-duty disability retirement benefits, the Legislature initially eliminated accidental disability

retirement benefits for police officers and firefighters hired after January 1, 1985. L. 1984, ch. 661, § 1 (enacting RSSL § 363-c[a]). The performance-of-duty benefit was intended to supersede the accidental disability retirement benefit for those hires, L. 1984, ch. 661, Bill Jacket at 14 (Budget Report on Bills dated July 13, 1984), which would result in the accidental disability benefit for police and firefighters eventually being phased out.

But the Legislature restored the accidental disability retirement benefit for police and firefighters in 1998. L. 1998, ch. 489 § 1 (amending RSSL § 444). The restoration was intended to address "inequity" caused by the absence of such benefits for police officers and firefighters hired more recently. *See* Sponsor's Memorandum (*reproduced in* N.Y.S. Legislative Annual—1998, at 311). The result was that police and firefighters injured in a qualifying "accident" could once again choose to receive accidental disability retirements benefits rather than performance-of-duty disability retirement benefits.

B. Petitioner's Injury

Petitioner was employed as a Suffolk County police officer. (R70.[2]) In February 2019, following the denial of a separate claim for accidental disability retirement benefits based on other events,[3] petitioner was assigned to desk duty in the First Precinct (Babylon, Long Island). (R71, 135.) Among other things, desk duty involved handling walk-in complaints, processing paperwork, answering the phone, and other administrative duties. (R101, 108.)

When performing his desk duty assignment, petitioner did not sit at the same desk on every occasion. (R80.) Although he preferred to work at a more isolated desk at the extreme left of the work area as one faced the front door (R10, 83; *see* R147 [showing desk on the left side of photograph]), three or four times during the five- or six-month period preceding the incident (R106), petitioner worked at a desk located at the extreme right of the work area as one faced the front door, near the exit leading to the precinct's back offices (R10; *see* R145 [showing desk]).

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[2] Parenthetical references to "R__" refer to pages in the Record on Appeal.

[3] *See Bodenmiller v. DiNapoli,* 157 A.D.3d 1120 (3d Dep't 2018).

Petitioner was not assigned a particular chair, but the available chairs were mostly standard black office chairs with a central column resting on five "feet" with wheels at the bottom. (R97-98; *see* R145 [showing chair].)

On the floor in front of the desk at the right of the work area, where a rolling desk chair ordinarily would be placed, the tile flooring was worn away to the plywood subfloor. (*See* R130, 132.) Within the worn-out area of the floor, two ruts or holes were gouged out of the plywood. (*See* R132.) The ruts were at least three inches across. (R103.) Petitioner was aware of the floor's condition, including the ruts or holes. (R104, 106, 110-111.)

On June 12, 2019, petitioner was seated at the desk on the right (R87, 90; *see* R130, 145) in a black pedestal-type chair with five wheels (R91). Petitioner knew that the wheels of his chair "could or should be in th[e] general area" of the two holes. (R107.)

Before the incident occurred, petitioner had sat at the desk near the doorway for 5½ to six hours and had gotten up and sat back down more than five times. (R102-103, 113.) After that, petitioner once more began to roll the chair backward to get up, but this time the chair stopped rolling and started to tip over. (R90, 122, 135.) The chair stopped rolling because one of the wheels became stuck in one of the ruts in the floor.

(R90, 122, 126, 135.) Petitioner reached out to grab the desk to keep from falling over. (R90, 122, 126, 135.) He avoided falling over by grabbing the desk drawer, but that maneuver allegedly injured his right shoulder. (R90, 94, 121-122, 126, 135.)

C. Administrative Proceedings

Petitioner applied for accidental disability retirement benefits.[4] (*See* R121-122.) The P&F Retirement System denied the application on

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[4] Petitioner did not apply for performance-of-duty disability benefits based on the June 12, 2019 incident. He ultimately retired in November 2021 and opted to take his service retirement benefit (as opposed to any form of disability retirement benefit) based on his 34.96 years of credited service. Given his years of service, his service benefits were likely superior to the benefits he would have received for a performance-of-duty disability retirement.

To the extent petitioner also sought workers' compensation benefits for the June 12, 2019 incident, the records of that claim would be confidential under Workers' Compensation Law § 110-a(1). However, petitioner's mishap with a rolling desk chair is the sort of workplace injury for which workers' compensation benefits have been awarded. *See, e.g., Lehsten v. NACM-Upstate New York,* 236 A.D.2d 1, 4 (3d Dep't 1997) (workers' compensation available for injury incurred when claimant "twist[ed] to the right in response to the movement of her chair"), *rev'd on other grounds,* 93 N.Y.2d 368 (1999); *Employer: Adirondack Med. Cntr.,* 2022 WL 17549298, *1 (WCB No. G326 1329, Dec. 1, 2022) (workers' compensation available for wrist injury incurred when worker fell from rolling chair).

the ground that the incident was not an "accident" under RSSL § 363. (R124.) Petitioner requested a hearing and redetermination. (R9.)

At the ensuing hearing, petitioner testified that he was "aware of the condition of the floor" but did not know the "severity" of the ruts. (R104; *see also* R106, 110.) Nothing prevented petitioner from seeing the ruts in the floor, however, and he in fact observed them. (R105.) He stated: "I'm sure I had observed the holes" while looking at everything else around the desk. (R104.) Asked directly whether he "had seen the condition of the floor prior to getting stuck," petitioner responded: "Yes, I glanced at the floor, I saw it, yes." (R104.)

Based on the record evidence, the hearing officer found that petitioner was aware of the ruts in the floor, and the hazard they posed could or should reasonably have been anticipated. (R22.) The hearing officer noted that petitioner had been working at his desk for approximately six hours and, in that time, had gotten up from his seat and returned to it more than five times. (R22.) Petitioner's testimony "painted a picture of a well-worn floor which contained a rut, as well as acknowledging he was aware of its presence, if not the severity of it."

(R22.) Consequently, petitioner's fall "was the result of [his] inattention." (R22.)

Because petitioner had not "sustained his burden of proving he was confronted with a sudden, extraordinary, and unexpected event outside his ordinary job duties," the hearing officer concluded that the incident was not an "accident" under RSSL § 363, and therefore recommended denying petitioner's application for accidental disability retirement benefits. (R23.) The Comptroller adopted the hearing officer's findings and conclusions. (R25.)

D. This Proceeding

Petitioner filed a petition for review in Supreme Court, Albany County (R8-19), pursuant to article 78 of the C.P.L.R. The petition contended, among other things, that the Comptroller's final determination was not supported by substantial evidence (*see* R12, 15-16). The Comptroller answered, denying the petition's substantive allegations. (R29-38.) Finding that the petition raised an issue of substantial evidence, Supreme Court (Corcoran, J.) transferred the case for initial disposition to the Appellate Division, Third Department, under C.P.L.R. 7804(g). (R3-4.)

After briefing and oral argument, the Appellate Division confirmed the Comptroller's final determination over a single dissent. (R165-169, 171.) The Appellate Division observed that, under this Court's precedent, an accident is "a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact." (R166 [internal quotation marks and citation omitted].) When the existence of an accident is challenged, "the dispositive question is whether injury was caused by a precipitating accidental event which was not a risk of the work performed." (R166 [internal quotation marks and citation omitted].)

Adopting a useful framework for analyzing whether an incident constitutes an "accident," the Appellate Division described two distinct kinds of precipitating events. (R166.) The first type arises out of a risk inherent in a petitioner's ordinary job duties. (R166.) The court explained that such precipitating events "can never be considered accidents because, by definition, they are not 'unexpected.'" (R166.) Citing its own precedent and this Court's decision in *Matter of McCambridge v. McGuire,* 62 N.Y.2d 563 (1984), the court concluded that, contrary to the Comptroller's determination, falling from a desk chair does not constitute a risk inherent in a police officer's ordinary job duties. (R167.)

Turning to the second type of precipitating event, the court explained that an event that does not involve inherent risks of the work performed may nonetheless constitute a qualifying accident if it was "unexpected, out of the ordinary, and injurious in impact." (R167 [internal quotation marks and citations omitted].) And a precipitating event is not unexpected or out of the ordinary if the petitioner "could or should have reasonably anticipated" it. (R167 [internal quotation marks and citations omitted].)

The Appellate Division recognized that this Court, in *Matter of Kelly v. DiNapoli,* 30 N.Y.3d 674 (2018), rejected the notion that the petitioner in that case was required to "demonstrate that a condition was not readily observable in order to demonstrate an 'accident.'" (R167-168 [quoting *Kelly*, 30 N.Y.3d at 685 n.3].) But the Appellate Division concluded that this Court's observation in *Kelly* did not foreclose using the "reasonably anticipated" test. (R167-168.) Indeed, the two cases decided in *Kelly* both involved precipitating events that arose out of risks inherent in the petitioners' ordinary job duties and thus were necessarily reasonably anticipated. (R168 [*citing Kelly,* 30 N.Y.3d at 684-85].) Moreover, the court explained, "it is logically consistent that a condition

could be readily observable, but the precipitating event itself could still not be reasonably anticipated," such as when a person "fully is aware of a defect" but may "reasonably not comprehend its risk in the particular situation." (R168.) Conversely, "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." (R168.)

Applying the "substantial evidence" standard, *see* C.P.L.R. 7803(4), the Appellate Division sustained the Comptroller's denial of petitioner's application for accidental disability retirement benefits as reasonable and supported by substantial evidence in the record. (R168-169.) Among other things, the supporting evidence included petitioner's testimony that he knew the flooring was in poor condition; that he had observed two three-inch ruts in the floor; and that he knew his chair had wheels that would be near those ruts. (R169.) Thus, petitioner had actual knowledge of the hazardous condition that caused an incident that he "could or should have reasonably anticipated." (R167 [internal quotation marks and citations omitted].) Accordingly, the Appellate Division declined to

disturb the Comptroller's finding that the precipitating event was not unexpected and therefore did not constitute an accident. (R169.)

Justice Lynch dissented. (R169-171.) Justice Lynch acknowledged that the two ruts in the floor were readily observable and that petitioner had actual knowledge of those defects. (R171.) However, petitioner did not know that "the chair would get stuck and go over backwards," which Justice Lynch viewed as the sort of "sudden, unexpected event" that should qualify as an accident under the RSSL. (R171.)

The Appellate Division denied petitioner's motion for reargument but granted leave to appeal. (R172.) The Appellate Division separately granted leave to appeal in *Matter of Compagnone v. DiNapoli,* 213 A.D.3d 7 (3d Dep't 2023), which similarly involves the question whether a precipitating event constituted an "accident" under RSSL § 363.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTED THE COMPTROLLER'S DETERMINATION THAT PETITIONER'S INJURY WAS NOT PROVEN TO RESULT FROM AN ACCIDENT

Members of the P&F Retirement System are entitled to accidental disability retirement benefits if they are incapacitated for the performance of duty "as the natural and proximate result of an accident." RSSL § 363(a)(1). Members seeking such benefits have the burden of demonstrating that their disability resulted from an accident. *See* State Administrative Procedure Act § 306(1); *see also Lichtenstein,* 57 N.Y.2d at 1011 (stating that "petitioner must establish" entitlement to accidental disability retirement under analogous New York City provision).

The Comptroller has "exclusive authority" to determine applications for benefits from the P&F Retirement System. RSSL § 374(b); *see also* RSSL § 74(b) (similar provision for Employees' Retirement System); *Matter of Bohlen v. DiNapoli,* 34 N.Y.3d 434, 441 (2020); *Matter of Demma v. Levitt,* 11 N.Y.2d 735, 737 (1962). The Comptroller's decision that an applicant is not entitled to disability retirement benefits, if supported by substantial evidence, "must be accepted." *Demma,* 11 N.Y.3d at 737; *see also Bohlen,* 34 N.Y.3d at 441 (similar; reviewing

Comptroller's decision to exclude longevity payments from petitioner's final average salaries for purposes of calculating retirement benefit). Substantial evidence is a "minimal standard." *Haug v. State University of New York at Potsdam,* 32 N.Y.3d 1044, 1045 (2018) (internal quotation marks and citation omitted). The proof required is "less than a preponderance of the evidence," and the standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable." *Kelly,* 30 N.Y.3d at 684 (internal quotation marks and citation omitted).

This Court has explained that, under RSSL § 363, an "accident" is "a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact." *Lichtenstein*, 57 N.Y.2d at 1012 (internal quotation marks and citation omitted); *see also Matter of Kenny v. DiNapoli,* 11 N.Y.3d 873, 874 (2008) (same). Applicants for benefits thus must demonstrate that their injuries were caused "by sudden, unexpected events that were not risks inherent in their ordinary job duties." *Kelly,* 30 N.Y.3d at 678.

Here, and as further explained below, the Appellate Division correctly sustained the Comptroller's determination as supported by

substantial evidence in the record. The incident did not constitute a qualifying accident because it was not unexpected: the holes in the floor were a known condition, and the risk that petitioner's rolling chair might get stuck in one of those holes and become unstable could or should have reasonably been anticipated. Indeed, that risk would readily have been avoided if petitioner had been attentive. Even if the Court were to adopt the alternate approach urged by the Chief Judge in two recent cases, the precipitating event here still would not qualify as an accident.

A. The Incident Did Not Constitute a Qualifying Accident Because It Was Not Unexpected.

1. Petitioner Had Actual Knowledge that There Were Three-Inch Holes Under His Rolling Chair.

Substantial evidence supports the Comptroller's finding that petitioner had actual knowledge that there were three-inch holes in the floor right near the wheels of his rolling chair. Petitioner conceded that he was "aware of the condition of the floor." (R104, 110.) He stated: "I'm sure I had observed the holes or the condition of the overall floor" while looking around the desk. (R104.) Asked directly whether he "had seen the condition of the floor prior to getting stuck," he said: "Yes, I glanced at the floor, I saw it, yes." (R104.) Petitioner knew the floor was old and

needed care. (R103, 111.) Further, nothing blocked petitioner from seeing the ruts in the floor (R105), which were clearly visible (*see* R130, 132). Petitioner had worked at the same desk three or four times previously and the floor's condition had not changed. (R106; *see also* R105.)

Petitioner is thus wrong to insist that the record fails to demonstrate his "actual awareness" of the "underlying condition" that caused his injury (*see* Br. at 22). The evidence in the record readily meets the "minimal standard" of substantial evidence. *Haug,* 32 N.Y.3d at 1046 (internal quotation marks and citation omitted).

While petitioner additionally contends that the holes in the floor could not be seen "from a seated position" (Br. at 8), that fact only demonstrates the very close proximity of the holes to the seat, and thus the wheels, of his chair. Petitioner expressly admitted that he saw the holes when he was not sitting down and that he knew they were there (R104). On the very day of the incident, petitioner had earlier left his desk and returned to it more than five times. (R102-103, 113.) The Comptroller thus had ample evidence to find that petitioner knew that there were holes in the floor right near, and perhaps under, his rolling chair.

The Comptroller further correctly found, based on substantial evidence, that the chair-tipping incident was not an unexpected event but rather "the result of the applicant's inattention." (R46; *see* R25 [adopting findings].) Petitioner's continued rolling around his workspace on the wheeled chair demonstrated his inattention to the risks posed by the holes he had observed. Petitioner could or should reasonably have prevented the incident by requesting a mat to place under the chair, placing a piece of cardboard over the damaged area, asking that the floor be fixed, or requesting a chair without wheels. He did none of those things. Only after the incident occurred did petitioner bring the condition of the floor to the attention of others in the precinct. (R95-96, 104-105.)

2. Given His Knowledge of the Holes Under His Chair, Petitioner Could or Should Have Reasonably Anticipated That His Chair Would Get Stuck in a Hole and Tip.

Because petitioner had actual knowledge that there were three-inch holes in the floor right near or under his rolling chair, he could or should have reasonably anticipated that his chair would get stuck in a hole and tip, as the Appellate Division correctly concluded.

This Court's recent decision in *Matter of Rizzo v. DiNapoli* is instructive. 39 N.Y.3d 991 (2022), *affg.* 201 A.D.3d 1098 (3d Dep't). Rizzo worked at a toll plaza at the Lincoln Tunnel, when she was injured by a heavy metal door that slammed on her hand. *Rizzo,* 201 A.D.3d at 1098. Rizzo had responded to an emergency and thereafter walked to a booth that she and fellow police officers used to prepare written reports. *Id.* She knew the heavy metal door to the booth closed on its own, as it had no mechanism to slow its closure. *Id.* And she knew it was windy that day. *Id.* She may not have appreciated, however, the strength of the wind and her own inability to use her hand to prevent the door from slamming shut on her—i.e., the *extent* of the hazard that the heavy metal door posed. After all, had she appreciated that risk, she likely would have used her full body, and not just her hand, to prevent the door from closing on her.

This Court nonetheless affirmed the decision to deny Rizzo's application for accidental disability retirement benefits. 39 N.Y.3d at 992. The Court made clear that while a "known condition" may pose a workplace risk, "it cannot be the cause of an accident compensable under Retirement and Social Security Law § 363." *Id.* at 992.

As the Appellate Division explained, Rizzo "could have reasonably anticipated" the very risk that caused her injury. 201 A.D.3d at 1098. And that proposition holds true even if the extent of that risk is not fully understood—just as Rizzo did not anticipate *how* quickly and forcefully the booth door would close when she attempted "to avoid that quick and forceful closure." *See Rizzo,* 39 N.Y.3d at 992.

The result in *Rizzo* is consistent with this Court's decisions in *Kenny* and *Matter of Lang v. Kelly,* 21 N.Y.3d 972 (2013). *Kenny* upheld the Comptroller's denial of accidental disability benefits to a petitioner "who slipped on a wet ramp while exiting a restaurant, knew that the ramp was wet and therefore knew of the hazard that led to his injury before the incident occurred." 11 N.Y.3d at 874-75. Notably, the Court relied on the petitioner's knowledge of the condition—the wet pavement—to conclude that petitioner also knew of the hazard that condition posed—the hazard of slipping. Similarly, the petitioner in *Lang* was well aware of the computer wires that for months had been strung on the floor across a locker room doorway. 21 N.Y.3d at 973. Without specifically addressing whether petitioner thus was also aware of the tripping hazard those wires posed, the Court affirmed the denial of

accidental disability benefits for injuries incurred when petitioner proceeded to trip over those wires. *Accord Matter of Manning v. DiNapoli,* 150 A.D.3d 1382, 1383 (3d Dep't 2017) (finding no accident on facts similar to those in the present case).[5]

Similarly here, petitioner had actual knowledge of a condition—holes in the floor—that gave rise to a readily anticipated risk—the risk that his rolling desk chair would get stuck in a hole and tip. In that circumstance, there is no accident under the definition employed by this Court—namely, a "sudden, fortuitous mischance, *unexpected*, out of the

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[5] These more recent precedents do not necessarily conflict with the Court's earlier decision in *Matter of Knight v. McGuire,* which was decided together with *Matter of McCambridge v. McGuire,* 62 N.Y.2d 563 (1984). In *Knight*, the Court held that a police officer was entitled to accidental disability retirement benefits for injuries incurred after he slipped on a wet pavement and fell backwards. *Id.* at 567, 568. The Court in *Knight* did not discuss whether the dangerous condition was in fact known to the petitioner. Knight slipped when, on a rainy morning, he was picked up by a police car from duty at a hospital. *See Matter of Knight v. McGuire,* Record on Appeal to the New York Court of Appeals at 15-16. The record does not establish whether the area where the incident occurred, which was just outside the hospital, *see id.* at 43, 53, was sheltered from the rain by an awning or other covering, but the New York City Police Department's investigation found "no negligence on the part of Police Officer Knight," *id.* at 25. To the extent *Knight* is inconsistent with this Court's later precedents in *Kenny* (2008), *Lang* (2013), and *Rizzo* (2022), however, it has been overruled.

ordinary, and injurious in impact." *Lichtenstein,* 57 N.Y.2d at 1012 (emphasis added). If an occurrence is the reasonably anticipated result of a known condition, it is not "unexpected," but rather is "anticipated," which means "predicted, foreseen, or *expected*."[6]

It thus does not matter whether, as petitioner claimed (R104, 106), he failed to appreciate the "severity" of the holes in the floor, and thus the risk that the holes could stop his chair from rolling. While the hearing officer was not required to credit that testimony, the hearing officer had ample ground to find that this very hazard could or should reasonably have been anticipated. A person need not know the "severity" of a hazard to perceive that it exists and, therefore, to expect that a mishap may occur. Just seeing the holes that existed in the floor (*see* R130, 132) was sufficient to inform a reasonable person that a chair wheel is unlikely to roll over them smoothly and might instead get stuck.

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[6] Dictionary.com, "anticipated" (adj.; definition 1; emphasis added), *available at* https://www.dictionary.com/browse/anticipated (last visited May 6, 2024); *see also* Merriam-Webster.com, "anticipated" (adj.) (defining "anticipated" as "expected or looked-forward to"), *available at* https://www.merriam-webster.com/dictionary/anticipated (last visited May 6, 2024); Black's Law Dictionary 722 (11th ed. 2019) (defining "expectation" as "the act of looking forward; anticipation").

Contrary to petitioner's argument (Br. at 21-25) and the Appellate Division dissent (R170), nothing in this Court's decision in *Matter of Kelly v. DiNapoli* precludes the use of a "reasonably anticipated" test to assess the extent of a hazard posed by a known risk. *Kelly* did not address the "reasonably anticipated" test, concluding instead that the claimed accidental events arose from risks that were inherent in the petitioners' regular job duties. *Kelly,* 30 N.Y.3d at 684-85. In a footnote, the Court further indicated that the Appellate Division erred in concluding that one of the petitioners, Sica, could or should have recognized the danger posed under the circumstances. *See id.* at 685 n.3. However, the error the Court found in that conclusion was that the Appellate Division should have limited its review to the basis relied upon by the agency for its determination, and the Comptroller "did not consider whether Sica was, or should have been, aware of the toxic fumes that injured him." *Id.* In contrast to the present case, there was no finding by the Comptroller that Sica had actual knowledge of the condition—the toxic fumes—that gave rise to the hazard the caused his injuries.

Thus, the Appellate Division here did not base its opinion on a "flawed reading of the factual record" in *Kelly*, as petitioner contends

(Br. at 26). The Appellate Division distinguished *Kelly* as a case in which the precipitating events arose from risks inherent in the petitioners' job duties. (*See* R168.) That was the extent of the Appellate Division's discussion of *Kelly*'s facts, and that discussion was correct. Both cases decided in *Kelly* involved risks that the petitioner's job required them to encounter. *See Kelly,* 30 N.Y.3d at 684-85 (holding that Comptroller could rationally conclude in *Kelly* that there was no sudden, unexpected event that was not an inherent risk of petitioner's regular duties); *id.* at 685 (holding that Comptroller rationally concluded in *Sica* that petitioner's injuries resulted from a risk inherent to his ordinary duties as a firefighter). That is why the Court in *Rizzo* stated 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." *See Rizzo,* 39 N.Y.3d at 992.

Moreover, the Appellate Division has applied the "reasonably anticipated" test to claims for accidental disability retirement benefits for over 20 years, without objection by the Legislature. *See, e.g., Matter of Avery v. McCall,* 308 A.D.2d 677, 678 (3d Dep't 2003); *see also Matter of Tuper v. McCall,* 259 A.D.2d 941, 941-42 (3d Dep't 1999) (employing same

test using slightly different language). Petitioner provides no reason for this Court to change that practice now.

3. Petitioner's Contrary Arguments Do Not Support His Position.

Petitioner's remaining arguments for reversal fail to overcome the dispositive effect of his knowledge of, and subsequent inattention to, the dangerous condition that caused his roller chair to tip.

To begin, petitioner errs in arguing that the justification proffered here in support of the Comptroller's determination is unpreserved (Br. at 27 n.8). The P&F Retirement System contended in the administrative proceedings that the incident was not an accident because petitioner knew about the ruts—indeed, that was the P&F Retirement System's principal argument to the hearing officer. (*See* R151-152 [describing "substantial evidence in the record showing that Mr. Bodenmiller had knowledge of the hazard"].) Crediting that argument, the hearing officer recommended denying petitioner's application for accidental disability retirement benefits on the ground that petitioner was aware of the rut in the floor and thus could or should have reasonably anticipated the incident. (R22.) The Comptroller adopted that recommendation in its

final determination (R25) and defended its determination in the Appellate Division on this ground (*see* Third Dep't NYSCEF #9 at 11-12, 14).

Petitioner's arguments are not assisted by *Matter of McCambridge v. McGuire,* 62 N.Y.2d 563 (1984), the decision of this Court on which petitioner relies (*see* Br. at 14-15). Unlike this case and *Rizzo*, *McCambridge* did not involve a known hazard. The petitioner there leaned on the shoulder of a fellow police officer to steady himself and the other officer "unexpectedly moved away," causing the petitioner to fall. *Id.* at 567. Because the petitioner had no reason to expect that the other officer would move, the resulting fall was neither a risk of the work performed, nor an expected, reasonably anticipated event. *Id.* at 568.[7]

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[7] An analogous case is *Matter of Gasparino v. Bratton,* 236 A.D.2d 306 (1st Dep't 1997), *rev'd sub nom. Matter of Starnella v. Bratton*, 92 N.Y.2d 836 (1998), *rearg. denied,* 92 N.Y.2d 921 (1998), cited by the dissent below (R170). There, the petitioner Gasparino, a police officer, slipped and fell on a pool of water in the men's room. *See* 92 N.Y.2d at 838, 839. There was, however, no indication that Gasparino could see the pool of water or had reason to know it existed. To the contrary, the record showed that Gasparino's view of the puddle was likely blocked by the person who entered the men's room just before he did. *See Matter of Gasparino v. Bratton,* New York County Clerk's Index No. 109215/95, Record on Appeal to the New York Court of Appeals at 26, 55. Consistent

(*continued on the next page*)

The petitioner in *McCambridge* was not aware of *any* hazard, let alone the extent of a hazard. Here, in contrast, and as set forth *supra* at 7-8 and 18-19, petitioner had ample reason to expect that the wheels of his chair would not readily roll over the ruts in the floor but rather would catch in one of them and become unstable.

Further, petitioner's desk chair was not defective. (R108.) That fact distinguishes this case from accidental disability cases involving rolling chairs that failed unexpectedly due to unperceived defects. *See, e.g., Matter of Crone v. DiNapoli,* 201 A.D.3d 1260, 1261-62 (3d Dep't) (metal framing of chair failed), *lv. denied,* 38 N.Y.3d 910 (2022); *Matter of Meyer v. New York State Comptroller,* 92 A.D.3d 1122, 1123 (3d Dep't 2012) (chair wheel defective); *cf. Matter of DiLello v. DiNapoli,* 83 A.D.3d 1361, 1362-63 (3d Dep't) (substantial evidence supported determination that fall from chair was not an accident, where hearing officer discredited petitioner's claim that chair was defective), *lv. denied,* 17 N.Y.3d 717 (2011).

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with those facts, the officer supervising the internal investigation of the incident found no negligence on Gasparino's part. *Id.* at 23.

Petitioner errs in suggesting (Br. at 28) that the "reasonably anticipated" test is not objective. The Third Department has made clear that the test is purely an objective test by focusing its determination on whether petitioner "could or should" have reasonably anticipated the hazard, without regard to whether the petitioner actually did so. (R168 [quoting *Matter of Stancarone v. DiNapoli,* 161 A.D.3d 144, 149 (3d Dep't (2018)].) Additionally, this Court has relied on the actions and perceptions of a reasonable person in numerous contexts, and the test is usually regarded as objective. For example, this Court described the "reasonable person" standard used in negligence cases as an "objective, reasonable person standard." *Bethel v. New York City Transit Auth.,* 92 N.Y.2d 348, 353 (1998); *see also* Restatement (2d) of Torts § 283 (1965). Similarly, in *Metro. Prop. & Cas. Ins. Co. v. Mancuso,* the Court required an insured to notify their insurer that a tortfeasor was underinsured "with reasonable promptness after the insured knew or reasonably should have known" the tortfeasor was underinsured. 93 N.Y.2d 487, 495

(1999). The Court commented that "reasonable ascertainment" is "an objective standard." *Id.*[8]

Finally, the "reasonably anticipated" test does not make superfluous the statute's further condition that an accident must not be "caused by [the member's] own willful negligence," *see* RSSL § 363(a)(1); *cf. Rizzo,* 39 N.Y.3d at 1001-02 (Wilson, J. dissenting). The "willful negligence" condition does not create an entitlement to benefits for permanently disabling injuries caused by negligence that is *less* than willful. To the contrary, for decades, this Court has held that injuries caused by "one's own misstep" are not accidental for purposes of the statute, *Matter of Starnella v. Bratton,* 92 N.Y.2d 836, 839 (1998)—even if the misstep does not rise to the level of willful negligence. For example,

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[8] *See also, e.g., Clifton Park Apts., LLC v. New York State Div. of Human Rights,* __ N.Y.3d __, 2024 N.Y. Slip Op. 00793, 2024 WL 628036, *2 (Ct. App. Feb. 15, 2024) (reasonable person standard applicable in housing discrimination retaliation claims is "objective standard"); *People v. Messano,* 41 N.Y.3d 228, 2024 WL 116381, *2 (Ct. App. Jan. 11, 2024) (reasonable suspicion of criminal activity based on totality of circumstances is "objective basis" for investigative stop in public place); *Matter of Afton C. (James C.),* 17 N.Y.3d 1, 9 (2011) (how a reasonable parent would have acted is "objective test"); *Karlin v. IVF Am., Inc.,* 93 N.Y.2d 282, 294 (1999) (acts or practices likely to mislead a reasonable consumer is "objective definition" of deceptive).

in *Matter of City of Lackawanna v. Nitido,* 140 A.D.3d 1576 (3d Dep't 2016), a firefighter was injured when he tripped on a concrete step in the fire station. The step was not defective and the firefighter had tripped over it on a prior occasion. The court concluded that the incident resulted from the firefighter's misstep or inattention and thus was not accidental.

If the Court disagrees, however, and regards as material petitioner's actual awareness of the extent of the hazard posed, it should remand the matter to the Comptroller for an express factual finding on that issue. The hearing officer wrote that petitioner's "testimony painted a picture of a well-worn floor which contained a rut, as well as acknowledging he was aware of its presence, if not the severity of it." (R22.) The hearing officer thus stopped short of finding that petitioner in fact understood the risk posed by a known condition, using language that may have reflected an intent to characterize petitioner's testimony politely and nonjudgmentally. After all, under Appellate Division precedent that has accepted the applicability of the "reasonably anticipated" test, there was no reason for the hearing officer to expressly discredit petitioner's testimony that he had not appreciated the extent of the risk. Because the hearing officer could have chosen to discredit that

testimony, he should be given the opportunity to consider whether to do so on remand.

B. Even Using the Alternate Approach Proposed by the Chief Judge, Petitioner's Chair Catching in a Rut on the Floor Was Not an Accident.

In two fairly recent cases, now-Chief Judge Wilson expressed concern in dissenting opinions that police officers and firefighters injured by slipping and falling at the stationhouse could potentially recover disability retirement benefits greater than those awarded for injuries incurred by exerting themselves in the line of duty. *See Rizzo*; 39 N.Y.3d at 994 (Wilson, J., dissenting); *Kelly,* 30 N.Y.3d at 690 (Wilson, J., dissenting in part).

As those opinions recognized, *see Rizzo,* 39 N.Y.3d at 997-98 (Wilson, J., dissenting); *Kelly*, 30 N.Y.3d at 689-90 (Wilson, J., dissenting in part), the seemingly incongruous outcomes in disability retirement cases result from a series of actions by the Legislature. In 1984, the Legislature set out to eliminate accidental disability retirement benefits for police and firefighters and replace them with a new performance-of-duty benefit, which was more generous in some respects and less generous in others. Although performance-of-duty benefits are computed

at the rate of 50% of final average salary while accidental disability benefits are computed at the rate of 75% of final average salary, *see supra* at 4, the Legislature compensated for that lesser rate by allowing members to collect performance-of-duty benefits without any offset for workers' compensation payments and without any requirement to meet the hurdle of establishing a qualifying "accident." Fourteen years later, in 1998, the Legislature restored accidental disability retirement benefits for police and firefighters, while leaving in place the performance-of-duty retirement benefits that were intended to replace them. *See supra* at 5-6. This resulted in giving police and firefighters a choice between the higher rate available in the performance-of-duty program and the freedom from the workers compensation reduction in the accidental disability program.

Against that background, Chief Judge Wilson suggested a different formulation for assessing which incidents qualify as accidents under the RSSL. *See Rizzo*; 39 N.Y.3d at 994 (Wilson, J., dissenting); *Kelly,* 30 N.Y.3d at 686, 690 (Wilson, J., dissenting in part). That test involved two inquiries:

(1) Whether the hazard that injured the petitioner was "part of the bargained-for risks of the job"; and

(2) Whether the hazard was "truly unexpected and out of the ordinary, or rather [wa]s part of the ordinary risks of daily life." *Kelly,* 30 N.Y.3d at 686 (Wilson, J., dissenting in part); *see also Rizzo,* 39 N.Y.3d at 994 (Wilson, J., dissenting).

This Court has not adopted that approach. Even if it were to do so, however, petitioner would not qualify for accidental benefits. As the Chief Judge observed in *Kelly,* "ris[ing] from chairs" is one of the things we do "[i]n the ordinary course of our lives." 30 N.Y.3d at 691 (Wilson, J., dissenting in part); *see also Rizzo,* 39 N.Y.3d at 1004 (Wilson, J., dissenting) ("falling from a desk chair" is one of "the everyday risks we all bear"); *id.* at 998 (referring to "so commonplace an occurrence as falling out of a desk chair" and expressing disapproval of *Crone*). Indeed, petitioner acknowledged below that a hole in office flooring is "a routine risk encountered by office workers, generally." (Third Dep't NYSCEF #6 at 6.)

That conclusion is consistent with *Starnella,* where this Court held that "[a] fall down the stairs as the result of one's own misstep, without more, is not so out-of-the-ordinary or unexpected as to constitute an accidental injury as a matter of law." *Id.*, 92 N.Y.2d at 839; *see also*

Lichtenstein, 57 N.Y.2d at 1012 ("commonsense definition" of accident requires, among other things, that it be "out of the ordinary").

Treating petitioner's mishap as too commonplace to qualify as an accident also comports with caselaw from the Appellate Division recognizing that falling from a chair is "not so out-of-the-ordinary or unexpected as to constitute an accidental injury as a matter of law." *Matter of Gamman v. Kelly,* 11 A.D.3d 389, 390 (1st Dep't 2004) (internal quotation marks and citation omitted) (chair "'slid backwards out from under'" police officer); *see also Matter of Russell v. Bd. of Trustees*, 288 A.D.2d 19, 19-20 (1st Dep't 2001) (similar; rolling chair tipped over when stopped by a wire on floor), *lv. denied,* 97 N.Y.2d 608 (2002); *Matter of Cheers v. State,* 251 A.D.2d 735, 736 (3d Dep't 1998) (petitioner's fall while trying to sit down on desk chair was not "an unexpected or extraordinary event" because her job duties required her to travel to and from her desk).

CONCLUSION

The judgment entered April 13, 2023 should be affirmed.

Dated: Albany, New York
May 6, 2024

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Frederick A. Brodie, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains **7,215** words, which complies with the limitations stated in § 500.13(c)(1).

Frederick A. Brodie