No. APL-2023-00083

To be argued by:
DUSTIN J. BROCKNER
10 minutes requested

State of New York
Court of Appeals

In the Matter of the Application of
FRANCO COMPAGNONE,

Petitioner,

v.

THOMAS P. DINAPOLI, as State Comptroller,

Respondent,

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

BRIEF FOR RESPONDENT

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Appellate Division, Third Department No. 533530

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PRELIMINARY STATEMENT

At issue is whether substantial evidence supports the New York State Comptroller's determination that petitioner Franco Compagnone was not injured in an "accident," as required to receive accidental disability retirement benefits under Retirement and Social Security Law (RSSL) § 363. Petitioner was a police officer for the City of Rye. He was injured in a late-night incident in which he spotted a light on inside a house he presumed to be vacant because it was still under construction; walked around the house's perimeter shining his flashlight into the windows to search for potential intruders; and fell into a ditch that had been dug for a sewer line. The Comptroller denied petitioner accidental benefits on the ground that the incident did not qualify as an "accident" under the RSSL. The Appellate Division, Third Department, unanimously confirmed that determination.

This Court should affirm. Substantial evidence supports the Comptroller's determination that the incident resulted from a risk inherent in the performance of petitioner's regular job duties and thus was not a qualifying "accident." At the time of the incident, petitioner was indisputably engaged in his regular police duties: He was

investigating potential criminal activity at night in a house under construction. As the Comptroller rationally found, one risk inherent in that work was that petitioner could trip due to unseen variations in the terrain or other construction-related obstacles.

QUESTION PRESENTED

In an incident in which a police officer fell into a ditch outside a house under construction while searching for intruders at night, whether substantial evidence supports the Comptroller's determination that the incident was not an "accident" qualifying for benefits under RSSL § 363.

STATEMENT OF THE CASE

A. Disability Retirement Benefits[1]

Three different types of disability retirement benefits are potentially available to members of the New York State and Local Police and Fire Retirement System (P&F Retirement System). First, like members of the New York State Employees' Retirement System (Employees'

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[1] The following statutory background is the same as the statutory background set forth in the Comptroller's brief in another appeal pending in this Court, which similarly concerns accidental disability retirement benefits under the RSSL. *See* Brief for Respondent at 2-6, *Matter of Bodenmiller v. DiNapoli*, No. APL-2023-00140.

Retirement System), members of the 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, 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); 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 worked as a police officer for the City of Rye. (R92-93[2]). On October 27, 2013, he was serving as a patrol officer and assigned to the midnight shift. (R93, 105.) His duties included patrolling his post—a designated geographic area—and searching for any potential criminal activity. (R105-106, 132.) As petitioner explained, his job required him to be "proactive" and "look[ ] for any suspicious parties." (R105.)

Around 1 a.m., petitioner was patrolling in his vehicle when he saw a light shining from the second floor of a house that petitioner knew was supposed to be vacant because it was under construction. (R94, 106.) The house was among several in the area that were under construction. (R106-107.) As petitioner explained, the house was in a flood zone and was in the process of having its foundation lifted. (R94, 107.)

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

Petitioner undertook to investigate whether any intruders were inside the house, such as teenagers having a party. (R. 94, 106-107.) Petitioner parked his vehicle in front of the house. (R94.) The area was "very dark" and lacked streetlights. (R94-95.) Petitioner was unfamiliar with the terrain, having never been on the site before that night. (R112.)

Petitioner began to circle the house's perimeter while continually shining his flashlight into the house's second floor to look for any intruders. (R94-95, 111.) He walked using a sidestep motion and faced the house rather than the direction in which he was moving. (R94, 114.)

Petitioner testified that he had circled most of the house when he fell into a ditch in the ground and injured his knee. (R95.) At the time of the fall, he had been looking up at the second-floor window where the light was on. (R110-111.) Petitioner testified that the ditch was about three feet deep and six feet long and that he did not see any netting or barrier around it. (R97.) Petitioner was later told that the ditch was for a sewer line that was being installed. (R107.)

Two reports prepared on the same day as the incident stated that petitioner fell while traversing a construction site, although neither report mentioned any ditch. One report provided: "While checking

exterior of house under construction [petitioner] twisted right knee and fell on same injuring right knee." (R146) The other report provides that petitioner "states that while checking an open construction site in the dark[,] he twisted his right knee and fell injuring same." (R147.)

C. Administrative Proceedings

Petitioner applied for two kinds of disability retirement benefits: performance-of-duty benefits and accidental benefits. (*See* R105, 121-122, 126.) Petitioner was granted performance-of-duty benefits (R105),[3] but was denied accidental benefits on the ground that the 2013 incident was not an "accident" under RSSL § 363 (R124).[4] Petitioner requested a hearing and redetermination. (R9.)

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[3] Petitioner has separately been granted Social Security disability benefits. (R113.)

[4] Petitioner also sought accidental benefits based on an incident that occurred in June 2016, but that incident is not at issue on appeal. The Comptroller denied accidental benefits for the 2016 incident on the ground that the incident was not an "accident" under RSSL § 363. (R22, 28.) The Third Department upheld that determination (R189), and, on this appeal, petitioner does not challenge the Third Department's holding in this regard. (S*ee* Br. at 5-8.) Because petitioner has thereby abandoned any reliance on the 2016 incident, we do not address that incident here. *See, e.g.*, *Matter of NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Preserv.*, 27 N.Y.3d 174, 178 n.3 (2016).

At the hearing, petitioner testified, and exhibits were introduced. (R120-121.) Based on the record, the hearing officer concluded that petitioner failed to show that the incident constituted an "accident" under the RSSL. (R27-28.) The hearing officer explained that, at the time of the incident, petitioner was indisputably engaged in his "routine police duties" of conducting investigations. (R27.) Petitioner was "walking around the perimeter of a house that was under construction to investigate a suspicious light on the second floor when he fell into a hole." (R27.) The hearing officer found that encountering "a hole or construction materials and debris at a construction site is not an unexpected event." (R27.) Petitioner's injury thus "did not result from a sudden, unexpected event that was not an inherent risk of his ordinary duties." (R28.)

The Comptroller adopted the hearing officer's findings and conclusions. (R22.)

D. This Proceeding

Petitioner then petitioned for review in Supreme Court, Albany County, under C.P.L.R. article 78. (R8-19.) Petitioner alleged that the Comptroller's final determination was not supported by substantial evidence. (R12, 16-17.) After the Comptroller answered, Supreme Court

(Nichols, J.) transferred the case to the Appellate Division, Third Department, for initial disposition. (R3-4 [citing C.P.L.R. 7804(g)].)

The Appellate Division unanimously confirmed the Comptroller's determination. (R185-190.) The court recognized that, under this Court's precedent, an injury-causing event is an "accident" under the RSSL only if the event is sudden, unexpected, and not an inherent risk of the work performed. (R186 [citing *Matter of Kelly v. DiNapoli*, 30 N.Y.3d 674, 682 (2018)].) Before applying that principle, however, the Appellate Division stated that there was a "lack of clarity" in the existing caselaw governing the inquiry into whether an incident constitutes an accident. (*See* R186-188.) Specifically, the Appellate Division stated that the caselaw does not provide "clear answers" to the questions "whether and to what degree a petitioner's job assignment, actual knowledge, and readily imputable knowledge affect the inquiry." (R188.)

None of those questions, however, affected the Appellate Division's analysis or resolution of this case. As that court observed, police officers are "frequently injured due to hazards they encounter while traversing in dark and dangerous conditions," and such "circumstances are generally not deemed to be 'accidents'" because they are "considered

inherent risks of the work, although they may be unusual." (R188-189 [collecting cases].) The Appellate Division held that, on this record, substantial evidence supported the Comptroller's finding that the precipitating event was due to an inherent risk of petitioner's police duties and thus did not constitute an "accident." (*See* R188-189.) Petitioner was engaged in his regular employment duties, which included "conducting investigations in the dark." (R189.) And the risk that petitioner "might fall due to an unseen condition while engaged in such activity is an inherent risk of that employment." (R189.)

The Appellate Division denied petitioner's motion for reargument but granted leave to appeal. (R191.) The Appellate Division separately granted leave to appeal in *Matter of Bodenmiller 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 FAILED TO SHOW HE WAS INJURED IN 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 (same). Substantial evidence is a "minimal standard." *Matter of 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 long held that an "accident" under the RSSL 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); *accord, e.g.*, *Matter of Kenny v. DiNapoli,* 11 N.Y.3d 873, 874 (2008). Applicants for benefits must prove that the precipitating event was "sudden, unexpected, and outside the risks inherent in the work performed." *Matter of Rawlins v. Teachers' Retirement Sys. of the City of New York*, __ N.Y.3d __, 2024 WL 2331714, at *1 (2024) (quoting *Matter of Kowal v. DiNapoli*, 30 N.Y.3d 1124, 1125 [2018]); *accord, e.g.*, *Kelly*, 30 N.Y.3d at 678.

Applying that principle, a court considers whether a petitioner has shown that the precipitating event was (i) sudden and unexpected *and* (ii) not a risk inherent in the performance of that petitioner's job duties. This Court's decision in *Kelly* is instructive as to the latter requirement. As *Kelly* makes clear, a court looks to the risks that are inherent in the specific task that a petitioner is performing as part of that petitioner's job. *See* 30 N.Y.3d at 684-85. In *Kelly*, the petitioner was a police officer

who was injured while attempting to rescue people who were trapped in a house that had partially collapsed during Hurricane Sandy. *Id.* at 678-79. The petitioner injured his shoulder when he reached up to brace a rafter that had begun to fall from the roof. *Id.* at 678-79, 685. This Court upheld the denial of accidental benefits for the incident; it held that substantial evidence supported the Comptroller's determination that the petitioner was performing one of his job duties—responding to emergencies—and that, under the circumstances, a falling rafter was a risk of the work performed. *Id.*

A. The Incident Did Not Constitute an Accident Because It Resulted from a Risk Inherent in the Performance of Petitioner's Regular Job Duties.

The Appellate Division correctly held that substantial evidence supports the Comptroller's determination that the 2013 incident was due to a risk inherent in petitioner's ordinary job duties and thus did not constitute an accident under the RSSL. At the time of the incident, petitioner was assigned to the midnight patrol shift and performing his regular job duties: He was investigating potential criminal activity in the middle of the night at a house that was under construction. (R93, 105-106.) Specifically, petitioner had seen a light shining from the second

floor of that house, which was supposed to be vacant, and decided to look for potential intruders inside. (R93, 105-106.)

One risk inherent in conducting such an investigation was the risk that petitioner could trip due an unseen variation in the terrain or other construction-related obstacles. Petitioner knew that he was traversing an "open construction site." (R147.) It was the middle of the night, "very dark," and he was unfamiliar with the area, having never been on the site beforehand. (R95, 112.) Further, the specific work performed—searching for potential intruders—rendered petitioner vulnerable to potential tripping hazards. Petitioner had to focus on the window above him rather than on the ground below. As he circled the site, he was shining his flashlight at and looking up toward the house's second floor to search for intruders. (R94-95, 111.) Petitioner also walked using a sidestep motion, which meant that he was facing the house rather than the direction in which he was moving. (R114.) Thus, as the Appellate Division correctly held, the Comptroller rationally found that encountering an unseen ditch was one risk inherent in the work that petitioner was performing. (*See* R27-28.)

The Appellate Division's holding in this case comported with longstanding precedent. That court has repeatedly held that, when a police officer conducts an investigation or performs other police work under the "cover of darkness," the risk that the officer may trip on "an unseen condition" is an inherent risk of that officer's job duties. *Matter of Walion v. New York State & Local Police & Fire Retirement Sys.*, 118 A.D.3d 1215, 1215-16 (3d Dep't 2014). The Appellate Division has thus upheld the denial of accidental benefits in cases that are analogous to this one, such as when:

- a police officer was inspecting a house and shining his flashlight on the house's second floor when he stepped off a retaining wall that he failed to notice, *Matter of Minchak v. McCall*, 246 A.D.2d 952, 953 (3d Dep't 1998);

- a police officer was conducting a search under "the cover of darkness" when he tripped over a loose piece of concrete causing him to fall onto a partially constructed sidewalk, *Matter of Canner v. New York State Comptroller*, 97 A.D.3d 1091 (3d Dep't), *lv. denied* 20 N.Y.3d 851 (2012);

- a police officer was searching for a prowler at night in an unlit backyard overgrown with vegetation when he tripped, *Matter of Fischer v. New York State Comptroller*, 46 A.D.3d 1006 (3d Dep't 2007);

- a police officer was investigating a potential plane crash in the woods during a snowstorm when he tripped over a tree branch that was buried under the snow, *Matter of Garbowski v. Nitido*, 139 A.D.3d 1302, 1303 (3d Dep't 2016); and

- a police officer was executing an arrest warrant at night and shining his flashlight on the house in front of him when he stumbled on uneven pavement, *Matter of Valente v New York State Comptroller*, 205 A.D.3d 1295, 1296 (3d Dep't 2022).

See also, e.g., *Matter of Sweeney v. New York State Comptroller*, 86 A.D.3d 893, 894 (3d Dep't 2011) (citing additional cases); *Matter of Clair v. Regan*, 89 A.D.2d 663, 663-64 (3d Dep't) (upholding denial of accidental benefits to police officer who, while directing traffic, was running towards a car that was headed the wrong way when he slipped on ice), *lv. denied*, 57 N.Y.2d 608 (1982).

If the Legislature disagreed with that precedent, it could have taken action. The Legislature is presumed to be aware of longstanding Appellate Division precedent. *See, e.g.*, *Matter of Estate of Youngjohn v. Berry Plastics Corp.*, 36 N.Y.3d 595, 607-08 (2021). And, over the last several decades, the Legislature has frequently amended RSSL § 363. *See, e.g.*, L. 2007, ch. 495, §§ 3, 4; L. 2017, ch. 432, § 1. The Legislature, however, has never amended the definition of the term "accident," much less expanded that term to encompass tripping hazards that police officers encounter while actively engaged in police work. *See, e.g.*, *Estate of Youngjohn*, 36 N.Y.3d at 606 (noting that a statute's legislative history

"must be reviewed in light of the existing decisional law which the [l]egislature is presumed to be familiar with and to the extent it left it unchanged, that it accepted" [internal quotation marks omitted]).

Indeed, the Legislature has been aware since the early 1980s that requiring applicants for accidental benefits to prove that they were injured in a qualifying "accident" imposes a "very stringent condition precedent"; by then, it was known that accidental benefits were "most often denied on the basis that the applicant has not sustained an accident." L. 1984, ch. 661, Bill Jacket at 11-12 (March 1, 1984 Memorandum of Deputy Comptroller John S. Mauhs).

Although the Legislature decided, in 1984, to address the difficulty of obtaining accidental benefits, it did not do so by making any less demanding the requirement that an applicant be injured in a qualifying "accident"—a requirement that governs accidental benefits not just for police officers and firefighters, but all other members of the New York State Employees' Retirement System. *See supra* at 2-3. Instead, the Legislature created an entirely new class of benefit specifically for police officers and firefighters—performance-of-duty benefits—and, for a time, eliminated accidental benefits for those emergency responders hired

after January 1, 1985. *See* L. 1984, ch. 661, § 1. The 1984 amendment thus replaced "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, performance-of-duty benefits, which can be more favorable than accidental benefits depending on a petitioner's circumstances, do not require police or firefighters to show the disability resulted from an "accident." *See* L. 1984, ch. 661, § 1. And while the Legislature, in 1998, restored accidental disability retirement benefits for police and firefighters, it has never amended or expanded the definition of the term "accident" and has instead continued to make available performance-of-duty benefits for this group. *See supra* at 5-6.

Petitioner's counterarguments are unavailing. He contends that "not every fall while conducting an investigation in the dark is expected and also an inherent risk of the employment." (Be. R 14.) According to petitioner, a court must consider the "nature of the unseen condition," and, in this case, the ditch was allegedly of such a "magnitude" (three-feet deep and six-feet long) that petitioner did not reasonably expect such a ditch to "be present and unguarded and unsecured." (Br. at 13-15.)

Although the "nature" of an unseen condition is a relevant factor, the Comptroller considered that factor in finding that petitioner failed to show that he was injured in an accident. (R27-28.) The Comptroller nonetheless found that petitioner's encountering of a ditch on a construction site was not "an unexpected event." (R28.) And that finding was rational on this record: The specific hazard at issue—a ditch dug a few feet down for a sewer line—is an ordinary, normal feature of a construction site, especially one that is located in a flood zone and thus requires sufficient drainage. (R94, 107.)

The incident here bears no resemblance to the hypothetical incidents posited by petitioner (Br. at 11) in which a police officer steps on a "land mine" or "bear trap" while investigating a construction site. A land mine or bear trap on a construction site, absent proof that such a condition may be present, would be "out of the ordinary." *Lichtenstein,* 57 N.Y.2d at 1012. A sewer-line ditch, even one that lacks netting, is not.

Equally unavailing is petitioner's assertion (*see* Br. at 11) that the third party responsible for the construction site acted negligently in failing to place a barrier around the ditch, and thus that petitioner's injury was necessarily accidental. As a threshold matter, because

petitioner failed to argue during the administrative proceedings that a third party's negligence caused his injury (R32-37), that argument is unpreserved for this Court's review. *See, e.g.*, *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 430 (2009).

Even if considered, petitioner's argument that a third party's negligence caused his injury would not provide a ground to disturb the Comptroller's finding. To start, other than asserting that the ditch was large and lacked barriers (*see* Br. at 15), petitioner cites no facts or caselaw to support his assertion that the construction site was, in fact, negligently maintained under the circumstances. Nor does petitioner cite anything to suggest that the Comptroller credited petitioner's claim that the ditch was as deep as petitioner said or that it lacked barriers. Indeed, the reports prepared shortly after the incident state that petitioner fell at a construction site but do not mention any ditch, let alone an unusually deep one that lacked safeguards. (R146-147.)

In any event, it is ultimately irrelevant whether the incident was caused in part by a third party's negligence. This Court has repeatedly upheld the denial of accidental benefits when a petitioner's injury is due to a third party's misconduct. *See, e.g.*, *Kowal*, 30 N.Y.3d at 1125;

Rawlins, 2024 WL 2331714, at *1. That makes sense because, as this Court has explained, "the relevant question" is "whether the injury-causing event was sudden, unexpected, and outside the risks inherent in the work performed." *Rawlins*, 2024 WL 2331714, at *1. Here, as explained above, the Comptroller reasonably found that petitioner's job duties required him to navigate an unfamiliar construction site on foot in the dark and that a risk inherent in that work is the risk of encountering a construction-related tripping hazard.

B. This Case Does Not Squarely Implicate the Appellate Division's Questions About the Existing Caselaw and, In Any Event, the Caselaw Provides Sufficient Guidance.

Although the Appellate Division correctly held that substantial evidence supports the Comptroller's determination, it observed, before so holding, that there was a "lack of clarity" in the caselaw governing the inquiry into whether an incident qualifies as an accident under the RSSL. (*See* R186-188.) According to the Appellate Division, the existing caselaw did not provide "clear answers" to the questions "whether and to what degree" the inquiry is affected by a petitioner's (i) actual knowledge, (ii) readily imputable knowledge, and (iii) job assignment. (R188.)

This case, however, does not present those purportedly unanswered questions. The Appellate Division did not observe that any such question affected its analysis here. (*See* R188-189.) Rather, the court upheld the denial of benefits based on a straightforward application of the long-standing principle that an injury-causing event does not constitute an accident where, as here, it arose from a risk inherent in the performance of petitioner's regular job duties. (R188-189 [collecting cases].) Indeed, although petitioner's brief references the Appellate Division's questions (Br. at 15-18), petitioner fails to explain how any such question is implicated here.

Moreover, a few months after issuing the decision below, the Appellate Division issued its decision in *Bodenmiller*, which explained how the existing caselaw already provides a useful framework to analyze whether an incident constitutes an "accident." *See* 215 A.D.3d at 98-101. The Appellate Division explained that the caselaw recognizes two distinct kinds of injury-causing events. The first type of event is like the one at issue here; it "arise[s] out of a risk inherent in the petitioner's ordinary job duties." *Id.* at 98. The second type of event is one that the petitioner "could or should have reasonably anticipated," and therefore is

not unexpected or out of the ordinary. *Id.* at 99 (internal quotation marks omitted).

Although the Appellate Division ultimately granted leave to appeal in *Bodenmiller*, the framework it articulated accurately synthesizes the existing caselaw for the reasons stated by the Comptroller in his brief to this Court in *Bodenmiller*. *See* Brief for Respondent at 18-33, *Matter of Bodenmiller v. DiNapoli*, No. APL-2023-00140 (hereinafter "*Bodenmiller* Resp. Br."). To the extent the Court nonetheless wishes to address in this case the questions that the Appellate Division identified (R188), the Comptroller offers the following comments, which summarize and support his brief in *Bodenmiller*.

First, in assessing whether an incident constitutes an accident, a petitioner's actual knowledge is relevant—and can be dispositive. *See Bodenmiller* Resp. Br., at 18-24. In *Matter of Rizzo v. DiNapoli*, 39 N.Y.3d 991 (2022), this 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. Similarly, in *Kenny*, this Court upheld the Comptroller's denial of accidental 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. Other cases have similarly upheld the denial of benefits based on a petitioner's actual knowledge of a condition. *See, e.g.*, *Matter of Lang v. Kelly,* 21 N.Y.3d 972, 973 (2013); *Matter of Buddenhagen v. DiNapoli*, 224 A.D.3d 1061, 1062 (3d Dep't 2024).

Second, a petitioner's readily imputable knowledge—i.e., what petitioner could or should have reasonably expected—is also relevant and potentially dispositive. *See Bodenmiller* Resp. Br., at 23-33. As the Appellate Division recognized as far back as 1983, the Comptroller's determinations denying accidental benefits for lack of a qualifying accident have been consistently upheld where the incident "could reasonably be expected in the performance of duty." *Matter of Daly v. Regan*, 97 A.D.2d 575, 576 (3d Dep't 1983) (collecting cases), *lv. denied*, 61 N.Y.2d 602 (1984). And, as noted *supra* at 19-20, the Legislature was well aware at that time that the RSSL imposed a stringent condition precedent to receive accidental benefits yet has not amended the definition of the term "accident." Instead, in 1984, the Legislature sought to address the issue specifically for police officers and firefighters by

replacing accidental benefits with a new class of benefits—performance-of-duty benefits, which do not require a showing that an injury resulted from a qualifying accident.

Furthermore, in the decades since the creation of performance-of-duty benefits, the Appellate Division has upheld the denial of accidental benefits based on evidence of what a petitioner could have reasonably expected, again, without objection from the Legislature. These cases include those in which the hazard at issue is one that petitioner could have "reasonably anticipated," even if petitioner did not know of the hazard beforehand. *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). Indeed, petitioner acknowledges that a precipitating event is not an accident if it is one that petitioner could reasonably have anticipated. (*See, e.g.*, Br. at 15.)

Third, petitioner's specific job assignment is also relevant. Courts do not consider a petitioner's job duties in the abstract; they also consider the facts and circumstances of the work that a petitioner is required to perform as part of that petitioner's job duties. *See, e.g.*, *Rawlins*, 2024 WL

2331714, at *1; *Kelly*, 30 N.Y.3d at 684-85; *Matter of Hambel v. Regan*, 174 A.D.2d 891, 892 (3d Dep't), *aff'd for reasons stated below*, 78 N.Y.2d 1092 (1991). If, based on those facts and circumstances, the Comptroller reasonably finds that the precipitating event was not sudden, unexpected, or outside the inherent risks of the work performed, the determination to deny benefits should be upheld.

CONCLUSION

The Appellate Division's judgment should be affirmed.

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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), Dustin J. Brockner, 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 **5,422** words, which complies with the limitations stated in § 500.13(c)(1).

Dustin J. Brockner