To Be Argued By:
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Appellate Division, Third Department Case No. 533530

Court of Appeals

STATE OF NEW YORK

In the Matter of the Application of

FRANCO COMPAGNONE,

Petitioner-Appellant,

against

THOMAS P. DINAPOLI, as State Comptroller,

Respondent-Respondent.

For a Judgment Pursuant to Article 78 to Review and Annul the Determination Made by the Executive Deputy Comptroller of the New York State and Local Retirement System Denying Petitioner's Application for Accidental Disability Retirement and for Such Other Appropriate Relief.

REPLY BRIEF FOR PETITIONER-APPELLANT

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PRELIMINARY STATEMENT

Petitioner-Appellant Franco Compagnone (the "appellant") submits this brief in reply to the answering brief submitted by the New York State Comptroller (the "respondent" or "Comptroller"). In the underlying petition, the appellant seeks relief from a decision of the respondent which denied the appellant's application for accidental disability retirement benefits. The petitioner appeals to this Court from an Opinion and Judgment of the Appellate Division, Third Department, dated January 26, 2023, wherein the Third Department held that the Respondent's findings were supported by substantial evidence and adjudged that the Respondent's determination is confirmed, and the petition was dismissed.

Appellant Police Officer Franco Compagnone became permanently incapacitated due to injuries sustained at work on October 27, 2013, and June 6, 2016. At the time of the incident of October 27, 2013, at approximately 1:00 a.m., while in the performance of his duties as a police officer, the Appellant was investigating a suspicious light coming from a residence which was under construction. As Appellant walked alongside the house, he suddenly and unexpectedly fell into a three-foot-deep hole in the ground. The hole in the ground was completely unsecured without any barricades, protective fencing, safety cones safety tape, or sawhorses.

The Appellant in this case contends that the Respondent's determination in denying his application for accidental disability retirement benefits on the grounds that the incident was not a qualifying accident under the New York State Retirement and Social Security Law (“RSSL”) Section 363, was not supported by substantial evidence and is contrary to case law that would otherwise support his application for benefits. In that vein, the Respondent's determination was arbitrary and capricious and, as will be shown, was based upon a loose application of the case law. The rationale adopted by the Third Department in this case renders any injury involving a fall while conducting an investigation in the dark to be an incident and not an accident under the law.

In its answering brief, the Respondent submits that 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.” In denying the petitioner’s application, the Respondent credits the Comptroller’s finding that there was an inherent risk that the petitioner could trip due to unseen variations in the terrain or other construction-related obstacles.

For the reasons set forth below, the appellant submits that the Respondent’s determination is unsupported by substantial evidence and the judgment of the Appellate Division should be reversed.

ARGUMENT

THE INCIDENT OF OCTOBER 27, 2013 DID NOT RESULT FROM A RISK INHERENT IN THE PERFORMANCE OF PETITIONER'S REGULAR JOB DUTIES

The Third Department ruled that an incident would be expected, and thus, not an accident, if it could be reasonably anticipated because the officer had direct knowledge of the hazard. (Matter of Stancarone v. DiNapoli, 161 AD3d 144 [3d Dept 2018]). The Court further held that for an event to be expected (and therefore not an accident) the record must contain specific information from which it could be found that a person in the applicant's position and location could or should have reasonably anticipated the hazard (*Id.*).

In its answering brief, the Respondent submits that the risk inherent in conducting an investigation in the middle of the night on a construction site is that the petitioner could trip due to an unseen variation in the terrain or other construction-related obstacles (Respondent's Brief, pp. 15-16).

However, in reaching that determination, the Respondent and Third Department ignore or at the minimum downplay the fact that the appellant did not "trip" due to an unseen variation in the terrain or other construction-related obstacles. The fact of this case is that the appellant fell into an unseen three-foot-deep hole. This fact is supported by appellant's sworn and unrefuted testimony. This was not a simple variation in the terrain. This was not a divot or other regular

variation in the terrain that another officer in the applicant's position or location could have reasonably anticipated. Appellant could not have reasonably known that there would be a man-made hole in the ground that was large enough to submerge his whole body. Yes, it was a construction site, but it wasn't a war zone. Construction sites are generally subject to safety laws at the local, state and federal level. The fact that this hole was not sectioned off or made safe is substantial evidence that falling into that type of hole could not have been anticipated. There were no barriers in place to protect him or anyone else from falling into that hole. There was no safety tape and no sawhorses.

Although it is reasonable for an officer in the appellant's position and location to encounter construction materials and debris at a construction site, that was not the cause of the Appellant's fall and resultant injuries. The hole that Appellant fell into was described as waist deep, three feet deep, three feet wide and approximately 6 feet in length. There were no barricades, cones or netting to warn or prevent any person from falling into the hole. The circumstances were such that the Appellant was by himself at 1:00 am in a residential area with no streetlights, it was very dark and he used his flashlight to look into the second floor to see if anyone was in the house.

Taken together, the facts do not amount to substantial evidence that the Appellant could have reasonably anticipated falling into a massive hole which left

him waist deep upon falling in. Even where it can be reasonably anticipated that there may be a hole dug at a construction site, the homeowners and/or contractors were negligent in creating an unreasonably hazardous condition by not making the area reasonably safe, i.e., barricades or cones. An officer in the appellant's position and location would expect a hole of that depth and dimensions to be barricaded or surrounded by cones or have any other indication or warning. Based on Appellant's sworn and unrefuted testimony, there was nothing to obstruct any person from avoiding that hole.

In its answering brief, Respondent submits that 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." (Respondent's Brief, p. 16). However, the Appellate Division did not describe the unseen condition as a "ditch". The Appellate Division held that "As he continued walking the perimeter of the house, petitioner fell in a three-foot-deep hole in the ground that had been dug alongside the house. As petitioner's regular employment duties included conducting investigations in the dark, the risk that he might fall due to an unseen condition while engaged in such activity is an inherent risk of that employment; thus, substantial evidence supports respondent's finding that this incident did not constitute an accident within the meaning of the Retirement and Social Security Law." Compagnone v. DiNapoli, 213 A.D.3d 7, 12, 182 N.Y.S.3d 352, 357 (2023).

In an effort to move away from an accurate description of the unseen condition, the Respondent conveniently describes the three-foot-hole as a simple ditch. And the Third Department cloaks the three-foot-hole as an unseen condition, which sets this case up to be an unfair precedent for all future applicants who should otherwise be rightfully and justly entitled to accidental disability retirement benefits. The fact of the three-foot-hole in this case should mean more to the Respondent than just a "variation in the terrain", "construction obstacle", "construction debris", "unseen condition", or simply a "ditch". If there's anything this case should stand for, it's that facts should matter. Extenuating facts and circumstances should matter. As held in *Matter of Stancarone v. DiNapoli*, the record must contain specific information from which it could be found that a person in the applicant's position and location could or should have reasonably anticipated the hazard. Matter of Stancarone v. DiNapoli, 161 AD3d 144 [3d Dept 2018]). In this case, the type of hazard should be the deciding factor in determining whether an officer in the appellant's position and location could or should have reasonably anticipated the hazard. The question before the Respondent and the Appellate Division should be whether an officer in the appellant's position and location could or should have reasonably anticipated falling into a three-foot-deep hole (emphasis added) at a residential construction site.

In denying the appellant's application, the Respondent incorrectly relied upon the case of Matter of Walion v. New York State & Local Police & Retirement System, 118 AD3d 1215, 1215-1216 (3d Dept 2014). There, a police officer stumbled on unlit steps during an investigation. Based on these facts, the Third Department confirmed that the incident did not constitute an accident and holding that the risk an officer may trip on an unseen condition while engaged in such investigation is not unforeseen, but rather is an inherent risk of the officer's employment duties. That case should be distinguished from the case at bar because the Appellant did not merely trip on construction materials or debris. The Appellant fell into a massive hole that was not warded off at all. Hence, where it is reasonable to anticipate stumbling on unlit steps, the hole in this case, albeit on a construction site, was large enough to submerge the Appellant waist deep and long enough that he could lie down in the hole. A reasonable person could not accept the facts in this case as adequate to support the conclusion that Appellant should have anticipated the hazardous hole. Moreover, each case requires a fact-specific inquiry, and the Hearing Officer loosely applied the facts from *Matter of Walion* to the case at bar.

In this context, Appellant agrees that conducting investigations in the dark is a part of his regular employment duties. However, not every fall while conducting an investigation in the dark is expected and also an inherent risk of the employment. As argued in the appellant's brief, by not considering the nature of the unseen

condition, the Third Department may as well find that if the Appellant had stepped on a land mine, it would not have been an accident. What if the Petitioner stepped into a bear trap? Or fell into an uncovered manhole? Hence, the nature of the unseen condition must be an integral part of the test.

As the facts demonstrate that the Appellant was conducting an investigation on a residential construction site, an officer in the Appellant's position and location arguably could or should reasonably anticipate tripping and falling due to unseen hazardous conditions, such as construction materials and debris. However, the record does not contain specific information from which it could be found that a person in the appellant's position and location could or should have reasonably anticipated the hazard. The record shows that the appellant fell into a three-foot-deep hole that was not sectioned off or made safe, without any barriers in place to protect the appellant or anyone else from falling into that hole. There was no safety tape and no sawhorses. There were no barricades, cones or netting to warn or prevent any person from falling into that hole. These were all facts established in the record but were not then considered by the Third Department as relevant for the purpose of determining whether the Appellant could or should have reasonably anticipated the hazard.

The Third Department cites to the matter Matter of Stancarone v. Dinapoli, 161 Ad3d 144 (3rd Dept 2018), which holds that for an event to be expected (and therefore not an accident) the record must contain specific information from which

it could be found that a person in the [Appellant's] position and location could or should have reasonably anticipated the hazard. The Third Department did not apply this test to the unique facts surrounding the event of October 27, 2013. In applying this test, the nature of the unseen condition or hazard should have been a key element in determining whether the Appellant could or should have reasonably anticipated the hazard. There is no specific information from which it could be found that appellant could or should have reasonably anticipated the hazard. Rather, the respondent summarily concluded that because falling due to an unseen condition is an inherent risk of conducting an investigation in the dark, the incident involving appellant is not an accident.

In Matter of Vito Castellano v. Thomas P. DiNapoli, the Third Department held that the Respondent's finding that the incident where police officer slipped on black ice was not an accident was not supported by substantial evidence. The facts of that case are such that "As petitioner exited his vehicle, he slipped on what he later described as black ice and sustained injuries. Petitioner testified that, although it was cold and blustery at the time of his fall, it was not raining or snowing, and he did not recall any precipitation occurring in the days prior to the incident. As appellant was focused on "[o]bserving the scene," he also did not recall looking down at the surface of the parking lot prior to exiting his patrol vehicle." Castellano v. DiNapoli, 197 A.D.3d 1478, 1480, 154 N.Y.S.3d 170, 172 (2021). Nonetheless,

the Court found “absent some indication of meteorological conditions that would be amenable to the presence or formation of black ice, respondent's determination – that petitioner could have reasonably anticipated the slippery condition that he encountered at the time of his fall – is not supported by substantial evidence. (Id, at 170, 173).

Similar to Appellant Compagnone in this case, Appellant Police Officer Vito Castellano’s incident also occurred at night and the facts of that case demonstrate the parking lot where he slipped and fell due to an unseen condition (black ice) was poorly illuminated (*Id.,* at 172).

As decided by the Third Department in this case, the takeaway is that any fall due to an unseen condition is an inherent risk of conducting an investigation in the dark and because an inherent risk cannot be unexpected, the Third Department in this case affirmed the Respondent’s determination. However, if that is the takeaway, then that would be inconsistent with holding in *Castellano v. DiNapoli.*

In reconciling these two decisions, this Court should find that absent some evidence in this case record that Appellant could have reasonably anticipated the hazardous condition of a three-foot-deep hole that he encountered at the time of his fall – the Respondent’s determination was without substantial evidence and must be overturned. As previously argued, there was no indicia that a hole of that size and magnitude would be present at the residential construction site. Based on the size of

the hole and the danger it presented, it would not have been reasonable for a similarly situated police officer to anticipate the hazard. This is especially the case as the hole was not barricaded or surrounded by any safety tape or the like to prevent someone from falling in the hole. Moreover, there is no evidence in the record to suggest that the nature of the unseen condition is something that is common for a construction site or that the Appellant knew or should have known he could fall into a hole that would land him waist deep.

CONCLUSION

Given the attendant circumstances of the incident in question were highly unusual, unsafe, and irregular, and that the Third Department did not seemingly apply the standard set forth in Stancarone v. Dinapoli, and for all the aforementioned reasons, including those points of argument that were made in the Petitioner-Appellant's Brief, it is respectfully submitted that the Opinion and Judgment of the Appellate Division should be reversed. Moreover, the Appellant's petition should be granted with costs, the Respondent's determination be annulled, and an order be entered adjudging and declaring Appellant entitled to accidental disability retirement benefits, and for such other and further relief as this Court deems just and proper.

Dated: White Plains, New York
August 19, 2024

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,641 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: White Plains, New York
August 19, 2024

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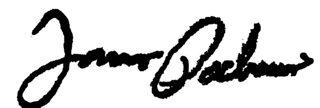

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