No. APL-2018-00101

To be argued by:
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10 minutes requested

State of New York
Court of Appeals

In the Matter of the Application of

WAYNE SEON,

Petitioner-Respondent,

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

v.

THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,
THERESA L. EGAN, as Executrix Deputy Commissioner of
NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES TRAFFIC
VIOLATIONS BUREAU, THE NEW YORK STATE DEPARTMENT OF
MOTOR VEHICLES ADMINISTRATIVE ADJUDICATIONS BUREAU, and
THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES APPEALS BOARD,

Respondents- Appellants.

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PRELIMINARY STATEMENT

The New York State Department of Motor Vehicles (DMV) suspended the driver's license of petitioner-respondent Wayne Seon after finding that he caused serious physical injury to Julian Mendez, in violation of Vehicle and Traffic Law (VTL) § 1146(c), by striking Mendez with a bus. That collision caused Mendez severe leg injuries that required his hospitalization and caused his death a few weeks later.

A divided Appellate Division, First Department, annulled DMV's decision, concluding that the record lacked substantial evidence that Mendez sustained a "serious physical injury"—a term statutorily defined to include both protracted impairment of health and death.

This appeal seeks to reinstate the suspension ordered by the DMV.

First, the Appellate Division erred in limiting its review to whether the bus collision ultimately caused Mendez's death. The DMV proceedings addressed VTL § 1146(c) as a whole, and encompassed the question whether the crash caused Mendez

serious physical injury, which can entail not only death but also a substantial risk of death, or various forms of impairment.

Second, substantial evidence supported DMV's determination that Mendez suffered such a serious physical injury. Reports from the responding police officer, the accident-reconstruction specialist, and hearing testimony showed that Seon's bus struck Mendez, pinning Mendez under the bus. The evidence also showed that Mendez suffered severe leg injuries as a result and required immediate hospitalization. And the evidence showed that Mendez died a few weeks after the accident, while he was still in the hospital as result of the accident.

Drawing on this evidence and common sense, DMV rationally concluded that Seon caused a serious physical injury to Mendez. The Appellate Division's contrary ruling improperly reweighed the evidence and incorrectly substituted its judgment for the agency's.

QUESTION PRESENTED

Did substantial evidence support the Department of Motor Vehicles' determination that petitioner-respondent Wayne Seon caused an elderly pedestrian serious physical injury when Seon struck the pedestrian with a bus?

The Appellate Division answered no.

STATEMENT OF THE CASE

A. Statutory Framework

Through the VTL, the Legislature has repeatedly sought to protect pedestrians from motor-vehicle drivers who fail to exercise sufficient care while driving. Such carelessness can cause substantial and even fatal harm to pedestrians. "Each year in New York State, over 300 pedestrians and bicyclists are killed in vehicular crashes and a much greater number are injured." Letter from Sen. Daniel Squadron and Assemblyman Brian Kavanagh to Gov. David Paterson (Aug. 4, 2010), *in* Bill Jacket for ch. 333 (2010), at 12. Many of these crashes "result from carelessness on the part of drivers." *Id.*

To help reduce the number of these crashes, the Legislature has required every driver to "exercise due care to avoid colliding with any" pedestrian or bicyclist. VTL § 1146(a). Until 2010, drivers whose failure to exercise due care killed or caused "serious physical injury" to a pedestrian or cyclist were subject to a license suspension of forty-five to seventy-five days for their first offense, and a license revocation for a second offense within an eighteen-month period. *See* Ch. 571, §§ 2–3, 2006 N.Y. Laws 3478, 3478–79.

In 2010, the Legislature amended the VTL to further protect pedestrians by increasing the penalties imposed on drivers who fail to exercise due care. The Legislature enacted these amendments after a series of fatal collisions demonstrated that the prior penalties had not been stringent enough to discourage reckless driving that places pedestrians at serious risk of harm. *See* Melissa Grace, *Moms of Kids Killed in Chinatown Car Accident Demand Probe*, N.Y. Daily News, Mar. 10, 2009, *in* Bill Jacket for ch. 333, *supra*, at 29 (describing crash in which two children—ages three and four—were killed when "a van jumped a curb" "and plowed into a nursery school class returning from a library trip"); Letter from

Assemblyman Micah Z. Kellner to Gov. David Paterson (June 29, 2010), *in* Bill Jacket for ch. 409 (2010), at 6–7 (describing collision in which three-year-old child was permanently disabled after being struck by motorist traveling the wrong way down a one-way street).

The Legislature intended the amendments to "make it a serious traffic infraction to injure or kill a pedestrian or bicyclist by failing to meet the VTL's existing obligation to exercise due care." Squadron & Kavanagh Letter, *supra*, *in* Bill Jacket for ch. 333, *supra*, at 12. To that end, the Legislature amended VTL § 1146 to provide that drivers who cause "serious physical injury" to a pedestrian or bicyclist while failing to exercise due care are subject to a fine of up to $750, up to fifteen days' imprisonment, and a license suspension in accordance with VTL § 510. Ch. 333, § 2, 2010 N.Y. Laws 1084, 1085 (codified at VTL § 1146(c)(1)). VTL § 510, in turn, was amended to impose a mandatory six-month license suspension for the first § 1146 violation, and a mandatory one-year license suspension for a second § 1146 violation within a five-year period. Ch. 409, § 2, 2010 N.Y. Laws 1221, 1221 (codified at VTL § 510(2)(b)(xiv)).

As used in these provisions, the term "serious physical injury" means "physical injury [defined as 'impairment of physical condition or substantial pain'] which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the functions of any bodily organ." *See* VTL § 1146(c)(1) (adopting definition of "serious physical injury" from Penal Law § 10.00(10)).

B. Seon's Fatal Collision with an Elderly Pedestrian Who Was Legally Crossing the Street

In November 2014, Julian Mendez—an eighty-eight-year-old pedestrian—was legally crossing Vyse Avenue in the Bronx when petitioner-respondent Wayne Seon hit him with a New York City Transit Authority bus. (Record on Appeal (R.) 11, 46–47, 53–55, 262–263.) Although Mendez was in the middle of a marked crosswalk and had the right of way, Seon failed to see him. (R. 53, 65–67, 263.) The bus's front wheel ran over Mendez, causing him "severe leg injuries." (R. 54, 262.) Mendez was immediately taken to St. Barnabas Hospital. (R. 261–262.) He never left the hospital,

dying a few weeks later as a result of the injuries he had sustained in the collision. (R. 54, 261–262.)

C. The Administrative Hearing

The New York City Police Department (NYPD) then issued Seon a summons for violating VTL § 1146(c)—i.e., for causing a pedestrian serious physical injury while failing to exercise due care. (R. 46–47.) The summons did not limit the charge to any specific form of serious physical injury, instead alleging that Seon had violated § 1146(c) as a whole. (R. 46.) An administrative law judge (ALJ) in DMV's Traffic Violations Bureau held a hearing to adjudicate that charge. (R. 48–79.)

Two witnesses testified at the hearing: Seon and Officer Charlie Viera, an NYPD accident-reconstruction specialist who investigated the incident. (R. 50–68.) Officer Viera also submitted three exhibits into evidence: his investigative report; an accident report drafted by a police officer who responded to the scene after the collision; and a witness statement that Seon provided after the crash. (R. 51–58, 261–267.) During his testimony, Officer Viera

either discussed or read into the record each of these three exhibits. (*See* R. 51–58.)

The hearing record showed that Seon struck Mendez with the bus while Seon was turning right onto Vyse Avenue from East 174th Street. (R. 59, 64–65, 264.) That intersection is controlled by traffic lights and has four clearly marked crosswalks with pedestrian walk signals. (R. 52–53, 261.)

The evidence established that Mendez was legally crossing Vyse Avenue when Seon hit him with the bus. According to the responding officer's accident report, Mendez had a walk signal in his favor. (R. 263.) And Officer Viera testified that, based on his investigation, he had concluded that Mendez was using the pedestrian crosswalk when Seon drove the bus into Mendez. (R. 54–55, 70–71, 263–264.) Officer Viera opined that Seon should have been able to see Mendez and prevent the accident. As Officer Viera explained, the large glass doors on the right side of the bus provided Seon with a direct view of Mendez walking in the crosswalk as the bus turned right. (R. 70–71.)

But Seon did not see Mendez as he turned the bus through the crosswalk. As Seon testified, he heard a "thump" at the front-right side of the bus midway through the turn. (R. 57, 65–66.) Seon further testified that after exiting the vehicle, he heard "a grave noise" (R. 56) and, for the first time, saw Mendez—who was lying "on the side of the tire, just behind the tire itself" (R. 66–67).

The hearing evidence showed that the collision caused Mendez both "protracted impairment of health" and death. The responding officer's accident report noted that Mendez was "pinned under the passenger side body of the bus[,] behind the front wheel." (R. 263–264.) Officer Viera stated in his report, and confirmed at the hearing, that Mendez "[s]uffered severe leg injuries" and was "[t]ransported by [Emergency Medical Services] to Saint Barnabas Hospital" for treatment. (R. 261-262; *see* R. 54.) Officer Viera's report also explained that although the police had not initially considered Mendez's injuries to be life-threatening (R. 261), Mendez never left the hospital and "died as a result of his injuries, pronounced by Dr. Carazas." (R. 262; *see* R. 261 (Mendez "succumbed to his injuries").) Officer Viera reiterated that

conclusion at the hearing, testifying that Mendez had "received a leg injury" and "died as a result of his injuries." (R. 54; *see* R. 60 (Mendez died from "complication[s] from the collision").)

D. The Administrative Decision

The ALJ determined that clear and convincing evidence showed that Seon had violated VTL § 1146(c) by causing Mendez serious physical injury while failing to exercise due care. (R. 76–77.) The ALJ explained on the record that he had reached that decision based on his review of the hearing evidence and testimony, including the accident report, Officer Viera's accident-reconstruction report, and the testimony of both Officer Viera and Seon. (R. 75–77.)

For that violation, the ALJ imposed a fine and a seventy-five-day license suspension. (R. 78.) He made clear, however, that DMV would increase these penalties to reflect any mandatory statutory minimum penalties. (R. 78.) The next day, DMV sent Seon an order of suspension stating that his license would be suspended for six months (R. 81)—as required when a failure to exercise due care in striking a pedestrian causes the pedestrian serious physical injury, *see* VTL §§ 510(2)(b)(xiv)(A), 1146(c).

Seon appealed to DMV's Administrative Appeals Board (R. 87–90), which affirmed the ALJ's decision (R. 171–172). The Board concluded that clear and convincing evidence supported the ALJ's determination, including the reports and testimony that Mendez had been severely injured, and subsequently died, from having his legs run over by Seon's bus. (R. 172.) The Board declined to modify Seon's penalty, recognizing that the six-month license suspension "is mandated by statute and cannot be modified." (R. 172.) The Board also rejected as unpreserved Seon's argument that the ALJ had deprived him of due process by failing to provide him with copies of the exhibits introduced at the hearing. (R. 172.)

In accordance with its decision, DMV issued an order reinstating Seon's six-month license suspension, which had been stayed while his administrative appeal was pending. Because Seon's license had been suspended for three days before the Board received his appeal, the reinstatement order provided Seon credit for that period and thus suspended his license for 177 days. (R. 108, 196.)

E. Annulment of the Administrative Decision by a Divided Appellate Division

Seon filed a C.P.L.R. article 78 proceeding in Supreme Court, Bronx County, to challenge DMV's determination. (R. 8–19.) Supreme Court (Thompson, J.) stayed the suspension of Seon's license during the pendency of the proceeding and transferred the matter to the Appellate Division, First Department, for substantial-evidence review, as required by C.P.L.R. 7804(g). (R. 2–3.)

In a divided decision, the First Department annulled DMV's determination and reinstated Seon's driver's license. (R. 341–342.) The court held that substantial evidence supported the ALJ's determination that Seon had failed to exercise due care in striking Mendez, given the uncontested evidence that Mendez had the right of way and Officer Viera's testimony that Seon should have been able to see Mendez and prevent the collision. (R. 348.) But the majority determined that substantial evidence did not support the ALJ's determination that Mendez suffered serious physical injury from being run over by the bus. (R. 349–351.)

In reaching that conclusion, the majority acknowledged that the "serious physical injury" required for a violation of VTL

§ 1146(c) may include protracted impairment of health, death, or substantial risk of death. But the majority ruled that it could not consider whether the collision had caused Mendez protracted impairment of health because both the NYPD and DMV had purportedly relied solely on Mendez's death. (R. 350.) The majority further reasoned that even if it could consider whether Mendez suffered protracted impairment of health, insufficient evidence supported the ALJ's determination because the record contained supposedly conflicting evidence about whether Mendez's leg had been pinned under the bus. (R. 350–351.) Finally, the majority concluded that insufficient evidence supported the ALJ's determination that Mendez died because of the injuries he sustained in the crash. (R. 349–350.)

Two justices dissented. They explained that substantial evidence supported not only the ALJ's determination that Seon failed to exercise due care, but also the ALJ's determination that the collision caused Mendez serious physical injury. The dissent opined that the court should not have limited its review to whether the collision caused Mendez's death, because the summons, the

hearing evidence, and the ALJ's decision had all addressed whether Seon violated VTL § 1146(c) "as a whole"—including whether Seon's lack of due care had caused Mendez protracted impairment of health. (R. 356.)

The dissent also reasoned that the record contained substantial evidence that the crash had severely impaired Mendez's health, including evidence that the bus "struck him and ran over his legs, pinning him behind the right front tire of the bus." (R. 361; *see* R. 359.) As the dissent explained, "[i]t would be a miracle even for a young, healthy person not to sustain a serious injury under such circumstances, and for a person of [Mendez's] age, serious injury would be inescapable." (R. 361.) At any rate, the dissent noted, the record also contained substantial evidence that the collision led to Mendez's death, including Officer Viera's report that Mendez "died as a result of his injuries, pronounced by Dr. Carazas." (R. 359–360 (quotation marks omitted).)

ARGUMENT

Substantial Evidence Supports the Department of Motor Vehicles' Determination That Mendez Suffered Serious Physical Injury from Being Run over by a Bus

Contrary to the conclusion reached by the Appellate Division majority, substantial evidence supports DMV's finding that Seon's lack of due care caused Mendez serious physical injury. Substantial evidence means "such relevant proof as a reasonable mind may accept as adequate to support" a determination. *300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y.2d 176, 180 (1978). This is a "minimal standard," *Matter of Haug v. State Univ. of N.Y. at Potsdam*, 32 N.Y.3d 1044, 1045 (2018) (quotation marks omitted), akin to the standard of legal sufficiency required for a "court to submit a question of fact to a jury," *Matter of Stork Rest. v. Boland*, 282 N.Y. 256, 274 (1940).

In conducting substantial-evidence review, a court "may not substitute its judgment for that of the agency." *Matter of Haug*, 32 N.Y.3d at 1046. Because "often there is substantial evidence on both sides," *Matter of Ridge Rd. Fire Dist. v. Schiano*, 16 N.Y.3d 494, 500 (2011), the reviewing court may not reweigh the evidence

or choose between competing factual accounts, *see, e.g.*, *Matter of Marine Holdings, LLC v. New York City Commn. on Human Rights*, 31 N.Y.3d 1045, 1047 (2018). Instead, the court asks only whether the agency's decision was supported by "reasonable and plausible" inferences from the record before it. *Matter of Haug*, 32 N.Y.3d at 1046 (quotation marks omitted).

Here, DMV had before it testimony and documents showing that Seon ran over Mendez with a bus, causing him "severe leg injuries" that required his hospitalization. DMV also had evidence—including a statement from a doctor—that Mendez died from those injuries a few weeks after the crash. Drawing fair inferences from this evidence, a rational administrative fact-finder could have concluded that Seon's lack of due care caused Mendez to suffer protracted impairment of health or to die—either of which constitutes serious physical injury under VTL § 1146(c).

A. The Administrative Proceedings Addressed Both Mendez's Protracted Impairment of Health and His Subsequent Death.

The Appellate Division fundamentally erred at the outset by limiting its review to whether substantial evidence supported the

determination that the collision caused Mendez's death. The proceedings against Seon were never limited to that single theory of "serious physical injury" under VTL § 1146(c).

To the contrary, the NYPD's summons alleged that Seon had violated VTL § 1146(c) "as a whole and did not focus on a particular definition of serious physical injury." (R. 356; *see* R. 46.) The summons thus plainly alleged that Seon had violated VTL § 1146(c) by failing to exercise due care and causing Mendez serious physical injury as a result, including protracted impairment of health, death, or both. *See* VTL § 1146(c); Penal Law § 10.00(10).

The administrative proceedings that followed likewise encompassed both theories of injury. The proceedings did not include any formal pleadings or motions in which the NYPD limited its position. Instead, Officer Viera presented evidence covering the circumstances of the crash, the severe leg injuries that Mendez suffered as a result, his immediate hospitalization, and his death a few weeks later without ever having left the hospital. (*See* A. 50–62.) And Seon had a full opportunity to cross-examine Officer Viera and present his own evidence about both Mendez's leg injuries and his

subsequent death. Indeed, Seon argued at the hearing that Mendez's injuries might not have been very severe. (*See* R. 61.) Seon thus had notice that the hearing encompassed any viable theory of serious physical injury.

Moreover, the Appellate Division's approach ignored first principles of substantial-evidence review. The ALJ determined based on his review of all of the hearing evidence that Seon had "failed to exercise due care and violated [§ 1146(c)]" (R. 76)—that is, caused Mendez "serious physical injury" in any form. The reviewing court therefore had to consider whether *any* rational inferences supported that finding, *see, e.g.*, *Matter of Kelly v. DiNapoli*, 30 N.Y.3d 674, 684 (2018), including inferences that Seon's careless driving had caused Mendez's protracted impairment of health.

The Appellate Division majority incorrectly concluded that it had to ignore evidence of Mendez's protracted impairment of health, because the NYPD began investigating the crash after Mendez died. (*See* R. 343, 348–349, 351; *see also* R. 356.) But nothing in the VTL requires the NYPD to begin investigating

immediately after a crash or risk forfeiting a legal argument that is encompassed within its summons and administrative proceedings. In any event, the record does not remotely suggest that the NYPD's investigation was limited to Mendez's death, even if his death triggered the inquiry. On the contrary, Officer Viera's investigation and testimony addressed both the extent of the physical injuries that Mendez initially suffered and his subsequent death from those injuries. (R. 54, 262.)

The Appellate Division majority's narrow interpretation of the summons, proceedings, and administrative decision contravene not only the plain text of § 1146(c) but also its fundamental goal. The Legislature broadly defined "serious physical injury" to protect pedestrians from not only fatalities but also serious physical harm. And the Legislature authorized DMV's Traffic Violations Bureau to adjudicate violations of § 1146(c) through informal administrative proceedings that do not require formal pleadings or strict adherence to the rules of evidence. *See generally* VTL § 225(1), (3); 15 N.Y.C.R.R. pt. 121. The NYPD thus properly proceeded on, and DMV properly considered, any viable theory of serious physical

injury by alleging and ultimately determining that Seon had violated § 1146(c).

B. Substantial Evidence Demonstrates That Mendez Suffered Protracted Impairment of Health from Being Hit by a Bus.

As the Appellate Division dissent correctly recognized (R. 358–362), the record here contains substantial evidence that Mendez suffered a protracted impairment of health when Seon's bus struck him and ran over his legs. As Seon testified, he was turning the bus through the pedestrian crosswalk when he heard a "thump" sound at the front of the bus that was loud enough to cause Seon to stop the bus to investigate. (R. 66.) Seon also conceded that when he exited the bus, he saw Mendez lying "on the side of the tire, just behind the tire" (R. 67), and heard Mendez making "a grave noise" (R. 56). Seon's own testimony thus supplied substantial evidence that Seon's bus hit and ran over Mendez, seriously injuring Mendez as a result.

Consistent with Seon's account, the police accident report, Officer Viera's investigative report, and Officer Viera's testimony all demonstrated that the full weight of the front-half of the bus had

driven over Mendez's legs—an event that the Appellate Division majority acknowledged would imply that Mendez suffered a "significant injury." (R. 352.) The contemporaneous accident report stated that when the bus struck Mendez, he became "pinned under the passenger side body of the bus behind the front wheel." (R. 263–264.) Officer Viera's report and testimony both make clear that Mendez sustained "severe leg injuries" from this collision. (R. 262; *see* R. 54.) And the police reports and testimony further showed that after being run over, Mendez was "transported by [Emergency Medical Services] to St. Barnabas Hospital" for treatment, where he remained until he succumbed to his injuries a few weeks later. (R. 54, 60–61, 261–264.)

Based on this evidence and reasonable inferences drawn from it, an administrative fact-finder could rationally conclude that Seon's bus ran over Mendez and severely injured his legs, causing Mendez to suffer protracted impairment of health within the meaning of VTL § 1146(c). Indeed, many courts, including this Court, have found serious physical injuries to a victim's legs to constitute such a protracted impairment of health. *See, e.g.*, *People*

v. Garland, 32 N.Y.3d 1094, 1095 (2018) (protracted impairment of health where bullet fragments in leg required victim to use "crutches for about two months" and suffer muscle damage (quotation marks omitted)); *People v. Pittman*, 253 A.D.2d 694, 694 (1st Dep't 1998) (protracted impairment of health where victim was struck "on her leg numerous times with a pipe," needed to use "crutches for two weeks," and experienced leg pain).[1]

The Appellate Division majority erroneously reasoned that a lack of "medical proof" about Mendez's injuries (R. 351) rendered insubstantial the reports and testimony demonstrating that he suffered severe leg injuries that warranted hospitalization and subsequently caused his death. The substantial-evidence standard does not require expert testimony or formal medical proof to establish the severity of an injury. *See Matter of Francis (New York*

[1] *See also People v. Wong*, 165 A.D.3d 468, 468 (1st Dep't 2018) (shattered kneecap caused victim pain); *People v. Marquez*, 49 A.D.3d 451, 451 (1st Dep't 2008) (broken bones in victim's foot "required him to use crutches for two months and continued to cause him difficulty in standing and walking").

City Human Resources Admin.—Ross), 56 N.Y.2d 600, 602 (1982).[2] Rather, reports and testimony of police officers or other laypeople may constitute substantial evidence of a severe injury. *See id.* Indeed, hearsay "is admissible as competent evidence in an administrative proceeding, and if sufficiently relevant and probative may constitute substantial evidence." *Matter of Haug*, 32 N.Y.3d at 1046. Seon's own testimony, the police reports, and Officer Viera's testimony thus provided substantial evidence of Mendez's protracted impairment of health.

Moreover, as the Appellate Division dissent correctly observed (R. 359–361), the ALJ was entitled to use everyday experience and common sense to draw reasonable and plausible inferences about the extent of Mendez's physical injuries, without requiring medical proof. *See Matter of Haug*, 32 N.Y.3d at 1046; *Matter of Natasha W. v. New York State Off. of Children & Family Servs.*, 32 N.Y.3d 982,

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[2] *See also Matter of CBS, Inc. v. State Human Rights Appeal Bd.*, 54 N.Y.2d 921, 923 (1981) (administrative proceedings need not contain "all the accoutrements of an adversarial trial"); *Matter of Hecht v. Monaghan*, 307 N.Y. 461, 470 (1954) (similar).

984 (2018) (rational inferences may be drawn "as a matter of common sense" (quotation marks omitted)).[3] And here, a reasonable fact-finder could conclude based on the hearing evidence, experience, and common sense that "any person, let alone an 88 year old, admitted to the hospital for a month based on injuries sustained after being run over and pinned under a bus, has suffered serious physical injuries." (R. 360.) As the dissent recognized, an elderly pedestrian such as Mendez "would most likely sustain a serious injury even by an accidental fall without the impact of a city bus striking and running over him." (R. 360.) The ALJ did not have to blind himself to these realities.

In concluding that the record lacked substantial evidence of Mendez's protracted impairment of health, the Appellate Division also misapplied the substantial-evidence standard by weighing the evidence anew and choosing between competing factual inferences.

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[3] *See also* Gov. Andrew M. Cuomo, *Manual for Administrative Law Judges and Hearing Officers* 200, 218 (2011), https://tinyurl.com/yb5oycsa (ALJs may rely on "his or her own experience, knowledge and common sense" to draw a "rational relationship . . . between the offered evidence and the fact to be proven").

For instance, the court rejected the police report's statement that Mendez had been "pinned under" the bus on the ground, finding that this statement was purportedly "not consistent with" Seon's testimony that he found Mendez lying "on the side of the tire, just behind the tire itself." (R. 352 (quotation marks omitted).) But the ALJ was "free to choose between . . . alternative factual versions" of events, *Matter of MNORX, Inc. (Ross)*, 46 N.Y.2d 985, 986 (1979), and the reviewing court may not "second-guess the agency's choice," *Matter of Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 417 (1986). The ALJ thus could have accepted the responding officer's view that Mendez's legs had been pinned under the bus, even if Seon presented a conflicting view. *See Matter of State Div. of Human Rights (Granelle)*, 70 N.Y.2d 100, 106 (1987).

In any event, Seon's testimony did not necessarily conflict with the other evidence. As the Appellate Division dissent explained, Seon's testimony that he saw Mendez "just behind the tire" accords with "the information in the accident report that [Mendez] was pinned *behind the front tire*." (R. 359 (quotation marks omitted; emphasis added).) And Seon's testimony was

consistent with the police report, since it suggested that, at minimum, the full weight of the bus rolled over Mendez's legs—whether or not Mendez's legs remained "pinned" under the bus after he was struck. (*See* R. 66 (Seon's testimony that he heard "thump by the right side front door"); R. 67 (Seon's testimony that he found Mendez lying "on the side of the tire, just behind the tire itself").) Because a reasonable fact-finder could conclude that such a collision caused Mendez a protracted impairment of health, the Court should reverse the Appellate Division's contrary ruling.

C. Substantial Evidence Also Demonstrates That Mendez Died from the Injuries He Sustained in the Bus Crash.

The hearing record also contains substantial evidence that Seon's lack of due care caused Mendez's death. Officer Viera's report and testimony made clear that the severe leg injuries Mendez suffered during the collision warranted his immediate transportation to St. Barnabas Hospital for treatment. (R. 54, 261–262.) And although the police did not initially consider Mendez's injuries life-threatening, substantial evidence demonstrates that the injuries ultimately took Mendez's life. Officer Viera's report and testimony,

for example, explained that Mendez never left the hospital. Rather, a few weeks after the collision, Mendez "died as a result of his injuries, pronounced by Dr. Carazas." (R. 261–262, 360; *see* R. 54.) Officer Viera's investigative report likewise states that Mendez "succumbed to his injuries." (R. 261.) And when asked whether "any other complications" might have caused Mendez's death, Officer Viera reiterated that Mendez's death had been "determined" to have resulted from "complication[s] from the collision." (R. 60.)

The Appellate Division majority thus erred in reasoning that Officer Viera did not present any "evidence at all tying [Mendez's] death to the injuries suffered by him in the accident." (R. 350.) Both the hospital doctor's pronouncement and the investigating officer's report specifically linked Mendez's leg injuries to his death. And a rational fact-finder could draw further support for that connection from the circumstances of the bus crash, the severity of Mendez's leg injuries, and Mendez's age. The evidence showed that Mendez—an eighty-eight-year-old pedestrian—was hit by the front right of the bus and pinned under the body of the bus, behind the front right tire. The ALJ could reasonably infer from these facts that the

collision caused Mendez to suffer leg injuries that were severe enough to cause his death a few weeks later.

The Appellate Division majority also incorrectly faulted Officer Viera for failing to present "a death certificate" or other "medical evidence" to prove that Mendez's death resulted from the injuries he sustained in the crash. (R. 350.) As explained above, the NYPD did not have to present medical evidence. See *supra* at 22–24. Instead, Officer Viera's report of both his own conclusions and the doctor's pronouncement constitute substantial evidence. *See Matter of Haug*, 32 N.Y.3d at 1046 (hearsay admissible in administrative proceeding); *Matter of Hecht v. Monaghan*, 307 N.Y. 461, 470 (1954) ("[t]echnical legal rules of evidence" inapplicable in administrative proceedings).

The Appellate Division majority also improperly "substitute[d] its judgment for that of the agency." *See Matter of Haug*, 32 N.Y.3d at 1046. For instance, the majority interpreted the statement that Mendez "died as a result of his injuries, pronounced by Dr. Carazas" (R. 262) to mean only that Dr. Carazas had pronounced Mendez dead, and not that Dr. Carazas had declared that Mendez died from

his injuries. (*See* R. 350.) But even if that were one plausible interpretation of the statement, another plausible interpretation is that Dr. Carazas told Officer Viera that Mendez died from his injuries. Indeed, that is the interpretation given by the dissent below. (R. 360.) And when, as here, a "similar quantum of evidence is available to support" varying rational conclusions, the agency is entitled to choose the rational conclusion it sees fit.[4] *Matter of Haug*, 32 N.Y.3d at 1046 (quotation marks omitted).

The Appellate Division majority further erred in deciding that it was more likely that Mendez died from a condition unrelated to the bus crash than that he died from the injuries he sustained in the collision. (R. 349–351.) To reach that determination, the majority noted that Mendez's injuries were not originally considered life-threatening, and that a single line of testimony

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[4] Nor should the majority have rejected Officer Viera's testimony that "[i]t was determined" that Mendez died from his injuries. (*See* R. 350.) Although Officer Viera did not specify who made that determination (R. 350), a reasonable inference from the context of his report and testimony is that Officer Viera made that determination based on his investigation and "contact with the physician who pronounced Mendez dead as a result of his injuries" (R. 360).

stated that it was possible that the bus had run over Mendez's foot. (*See* R. 344, 350.)

But that reasoning improperly rejected countervailing inferences that could rationally be drawn from the record evidence—for instance, that injuries not initially considered life-threatening may ultimately cause a victim's death, and that injuring even a foot can be fatal.[5] And the majority's reasoning likewise improperly failed to account for the substantial evidence showing that it was Mendez's leg injuries, rather than some other medical problem, that ultimately caused his death. As this Court has explained, when "room for choice exists," the agency's selection must stand—even if the agency's inferences were not "the most probable," *Matter of Matter of Marine Holdings*, 31 N.Y.3d at 1047 (quotation marks omitted).

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[5] *See, e.g.*, Stephanie Pagones et al., *Woman Dies After Boyfriend Slashes Her Foot with Sword: Cops*, N.Y. Post, Dec. 3, 2018, https://tinyurl.com/yahcf8k9 (victim died from blood clot caused by foot injury weeks after sustaining the injury); *Northern Ireland Minister (46) Died from Clot After Breaking Toe*, Belfast Telegraph, Aug. 8, 2018, https://tinyurl.com/y8aqdt6v (same).

D. The Embedded Clear-and-Convincing-Evidence Standard Does Not Defeat the Substantial Evidence of Serious Physical Injury.

In annulling the ALJ's determination, the Appellate Division majority misconstrued the way in which the substantial-evidence standard interacts with the standard of clear and convincing evidence that applied to the underlying administrative proceedings. The majority reasoned that it was required to find that the substantial-evidence standard was not satisfied if the court could draw two different conflicting inferences from the same evidence. (*See* R. 352–353.) But that reasoning is incorrect.

Because substantial-evidence review mirrors legal-sufficiency review, *see Matter of Stork Rest.*, 282 N.Y. at 274; Arthur Karger, *The Powers of the New York Court of Appeals*, § 13:5, at 460 (3d ed. 2005), the question for the Appellate Division was whether *any* "valid line of reasoning and permissible inferences . . . could possibly" support DMV's finding, *see Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499 (1978). Put differently, DMV's decision must stand if DMV *could have* rationally found clear and convincing evidence that Seon caused Mendez protracted impairment of health—even if a rational

fact-finder examining the same evidence could have drawn different inferences to reach a different result. *See, e.g.*, *Granelle*, 70 N.Y.2d at 106.

In taking a contrary view, the Appellate Division conflated review for substantial evidence with review for weight of the evidence. As the majority noted, clear and convincing evidence "'is neither equivocal nor open to opposing presumptions.'" (R. 353 (quoting *Matter of Gail R. (Barron)*, 67 A.D.3d 808, 812 (2d Dep't 2009)).) An appellate court applying that standard to conduct weight-of-the-evidence review—and thus to decide whether the evidence presented actually satisfied the underlying burden of proof, *see, e.g.*, *People v. Danielson*, 9 N.Y.3d 342, 348–49 (2007)—may properly conclude that evidence subject to dueling inferences is not clear and convincing. *See, e.g.*, *Shawangunk Conservancy v. Fink*, 305 A.D.2d 902, 903–04 (3d Dep't 2003).

But here, the Appellate Division was performing substantial-evidence review. And unlike weight-of-the-evidence review, substantial-evidence review does not turn on whether the appellate court *actually finds* the underlying evidence clear and convincing.

See Danielson, 9 N.Y.3d at 349 ("A legally sufficient verdict can be against the weight of the evidence."). Rather, the appellate court must uphold the agency's determination so long as "a rational [fact-finder] *could have found*" the evidence clear and convincing. *Matter of State of New York v. Floyd Y.*, 30 N.Y.3d 963, 964–65 (2017) (emphasis added).

Applying these standards here, the Appellate Division should have upheld DMV's conclusions because a rational fact-finder could have found clear and convincing evidence that Mendez suffered serious physical injury. The possibility that a rational fact-finder could have also found clear and convincing evidence of a contrary result does not change the analysis. *See, e.g.*, *Matter of Marine Holdings*, 31 N.Y.3d at 1047 (substantial-evidence review asks "not whether the reviewing court finds the proof convincing, but whether the agency could do so" (alteration, ellipsis, and quotation marks omitted)).

Indeed, even under the reasonable-doubt standard—"a more rigorous standard of proof than the clear and convincing evidence standard," *People v. Kost*, 82 A.D.3d 729, 729 (2d Dep't 2011)—this

Court has recognized that evidence may be conflicting yet legally sufficient. *See People v. Delamota*, 18 N.Y.3d 107, 115–16 (2011). That is because legal-sufficiency review, like substantial-evidence review, is limited to determining whether the fact-finder "could rationally conclude" that one version of events "was credible and accurate." *Id.* at 116. If so, the court must accept the fact-finder's decision, "regardless of [the court's] subjective assessment" of the evidence. *Id.*

By treating the purportedly conflicting evidence as a bar to confirming DMV's determination, the Appellate Division majority improperly reweighed the evidence. The "opposing presumptions" that the majority noted (R. 353 (quotation marks omitted)) would have required annulling DMV's finding only if no valid line of reasoning could have allowed DMV to find clear and convincing evidence that Mendez suffered protracted impairment of health. That was not the case here.

CONCLUSION

For these reasons, this Court should reverse the Appellate Division's decision.

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February 4, 2018

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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), Scott A. Eisman, 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 6,130 words, which complies with the limitations stated in § 500.13(c)(1).

/s/ Scott A. Eisman
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