Workers' Compensation Board No. G1955710
Appellate Division– Third Department Case No. 533584

Court of Appeals

of the

State of New York

In the Matter of the Claim for Compensation Under the Workers' Compensation Law by

JUSTIN TIMPERIO,

Claimant-Respondent,

– against –

BRONX-LEBANON HOSPITAL,

Employer-Movant,

STATE INSURANCE FUND,

Insurance Carrier-Movant,

– and –

WORKERS' COMPENSATION BOARD,

Respondent.

MOTION FOR LEAVE TO APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Section 500.1 of the Rules of the Court of Appeals, Defendant-Employer, BRONX-LEBANON HOSPITAL, advises the Court that, upon information and belief, in 2018 BRONX LEBANON HOSPITAL became BronxCare Health System and BronxCare Health System is the parent of 1650 BLHC Services Corp., BronxCare New Directions Fund, Inc., BronxCare Special Care Center, Inc., The Bronx-Lebanon Highbridge Woodycrest Center, Inc., BronxCare Dr. Martin Luther King, Jr. Health Center, Inc. The BronxCare Development Corp., Bronx Health Access IPA, Inc. and BLHC PPS, LLC.

Pursuant to Section 500.1 of the Rules of the Court of Appeals, Defendant-Insurance Carrier, STATE INSURANCE FUND, advises the Court that, upon information and belief, STATE INSURANCE FUND is a state agency continued in the Department of Labor for the purpose of insuring employers against liability for personal injuries or death sustained by their employees.

STATE OF NEW YORK
COURT OF APPEALS

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Appellate Division
Third Dept. Case No.: 533584

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the annexed Affirmation of Caryn L. Lilling, dated September 22, 2022, and all of the pleadings and proceedings had herein, including the Briefs and Record on Appeal submitted to the Appellate Division, Third Department, the undersigned will move this Court on behalf of Defendant-Employer, BRONX-LEBANON HOSPITAL, and Defendant-Insurance Carrier, STATE INSURANCE FUND, at the courthouse located at 20 Eagle Street Albany, New York 12207, on October 3, 2022, at 10:00 o'clock in the forenoon of

that day, or as soon thereafter as counsel may be heard for an order, pursuant to CPLR 5602(a), granting Defendants leave to appeal to this Court, together with such other further relief as this Court deems just and proper.

Dated: Woodbury, New York
September 22, 2022

Respectfully Submitted:

MAURO LILLING NAPARTY LLP

By: 
Caryn L. Lilling

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BRONX-LEBANON HOSPITAL and
THE STATE INSURANCE FUND

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AFFIRMATION IN SUPPORT

CARYN L. LILLING, ESQ., an attorney duly admitted to practice law before the Courts of this State, hereby affirms the following to be true under penalties of perjury:

I am a member of MAURO LILLING NAPARTY LLP, appellate counsel to WEISS, WEXLER & WORNOW, P.C., attorneys for Defendant-Employer,

BRONX-LEBANON HOSPITAL, and Defendant-Insurance Carrier, STATE INSURANCE FUND, in the above-captioned action.

This Affirmation is submitted in support of the Defendants' motion for an order, pursuant to CPLR 5602(a), granting them leave to appeal to this Court from the Decision and Order of the Appellate Division, Third Department dated February 3, 2022, together with such other further relief as this Court deems just and proper.

PRELIMINARY STATEMENT

This case involves a mass shooting at a workplace. The shooter, Henry Bello, a previous employee of Bronx-Lebanon Hospital (hereinafter "BLH" or "Hospital"), who resigned amid allegations of sexual misconduct, secreted a loaded AR-15 rifle and a container filled with gasoline into the Hospital and up to the 16th floor under a doctor's coat. Once on the 16th floor, Bello entered a non-public work area, where he opened fire, killing one doctor, wounding five members of the medical staff – including claimant, Dr. Justin Timperio (hereinafter "claimant" or "plaintiff"), a BLH-employed resident – and one patient.

The Workers' Compensation Board (hereinafter the "Board") issued a decision, holding that claimant's claim was compensable under the Workers' Compensation Law ("WCL") because the injury (1) arose *in the course* of employment and (2) arose *out* of the employment. Pursuant to WCL § 21(1), an injury is presumed to have arisen *out* of the employment where it has been established that the injury arose *in the course* of employment, absent substantial evidence to the contrary. The Board noted that the "issue of compensability in the present case is relatively simple, given the undisputed facts in this case" (R. 9). The undisputed facts included that (1) at the time of the shooting, claimant was an employee of the Hospital and was performing work duties in a non-public area of the Hospital; (2) the assailant was a former employee of the Hospital and unknown to claimant; and (3) the shooting was *not* motivated by any personal animosity between claimant and the assailant. Accordingly, the Board concluded that the WCL § 21(1) presumption (that the injury arose out of the employment), was *not* rebutted and the claim was deemed compensable.

On appeal, the Appellate Division, Third Department reversed. Contrary to well-settled law, and despite the undisputed facts, the Third Department concluded that the evidence on the record rebutted the WCL § 21(1) presumption, because the assailant was unknown to claimant and because there was no evidence that the

attack was based upon "an employment-related animus between the two individuals or that the attack had any nexus to Timperio's employment or 'performance of h[is] job duties'" (Matter of Timperio v Bronx-Lebanon Hosp., 203 AD3d 179, 185 [3d Dept 2022]).

It is respectfully submitted that the Third Department's decision is contrary to well-settled law and will preclude future claimants from obtaining Workers' Compensation benefits for injuries that were previously compensable. Under almost a century of case law, a claimant who was injured by an unknown assailant at or even near their workplace, while performing work-related duties was entitled to Workers' Compensation benefits (see e.g. Matter of Jean-Pierre v Brookdale Hosp. Med. Ctr., 190 AD3d 1053 [3d Dept 2021]; Matter of Shanbaum v Alliance Consulting Group, 26 AD3d 587 [3d Dept 2006]; Matter of Tompkins v Morgan Stanley Dean Witter, 1 AD3d 695 [3d Dept 2003]; Blair v Bailey, 279 AD2d 941, 942-43 [3d Dept 2001]; Matter of Boston v Medical Servs. For Women, 215 AD2d 845 [3d Dept 1995]; Bennett v G.O. Dairies, Inc., 114 AD2d 574 [3d Dept 1985]; Conyers v Rush Bar, 38 AD2d 987 [3d Dept 1972]; Valenti v Valenti, 28 AD2d 572 [3d Dept 1967]); Moran v Moran Transp. Lines, 264 AD 966 [3d Dept 1942]; see also Seymour v Rivera Appliances Corp., 28 NY2d 406, 409 [1971];

DeAngelis v Garfinkel Painting Co., 20 AD2d 162, 163-164 [3d Dept 1963], affd 18 NY2d 727 [1966]).

In this case, the Third Department focused on the fact that the assault was "arbitrary" and not based upon "work-related differences" to conclude that such evidence was sufficient to rebut the presumption that claimant's injuries did not arise out of the employment (Matter of Timperio, 203 AD3d at 185). Not only is the Third Department's decision contrary to its own prior case law (see e.g. Jean-Pierre, 190 AD3d at 1054-55; Shanbaum, 26 AD3d 587; Tompkins, 1 AD3d 695; Blair, 279 AD2d at 942-43; Boston, 215 AD2d 845; Bennet, 114 AD2d 574; Conyers, 38 AD2d 987; Valenti, 28 AD2d at 573; Moran, 264 AD 966)), but it will strip employees of avenues of compensation that were previously open to them, including for injuries sustained during mass casualty events such as mass shootings and terrorist attacks, which unfortunately appear to be on the rise.

Given the significant impact the Third Department's case will have on future Workers' Compensation cases (which are exclusively heard by the Third Department), together with the erroneous interpretation of well-settled law, review of this case by this Court is warranted.

STATEMENT OF FACTS

FACTUAL BACKGROUND

On June 30, 2017, claimant was working as an employee at his place of employment, Bronx Lebanon Hospital (hereinafter "BLH" or the "Hospital"), starting at 6:00 a.m. (R. 49, 262-263).[1] Specifically, he was working as a family medicine resident physician and was receiving a salary from BLH for his work (R. 263).

At approximately 2:50 p.m., Bello entered the Hospital dressed in a doctor's white medical coat (R. 64, 229). Bello had been previously employed by BLH as a medical doctor, but resigned in February 2015 after an accusation of workplace sexual harassment (R. 63, 229). Claimant and Bello did not know each other and had not previously worked at BLH or elsewhere together (R. 64, 263-264).

Under this white medical coat, Bello secreting a loaded AR-15 rifle, additional ammunition magazines, and an orange juice container filled with gasoline (R. 48, 64, 263). Armed with these dangerous instruments, Bello entered the hospital, traversed the hospital, and proceeded to the 16th floor of BLH, where

[1] Number preceded by "R" refer to the Record on Appeal submitted in connection with the appeal to the Appellate Division, Third Department.

claimant was performing work duties by writing patients' medical charts in a non-public work area (R. 64, 263).

On the 16th floor of BLH, Bello, using the AR-15, opened fire, killing one doctor, wounding five members of the medical staff, including claimant – who was located in a secured and non-public area – and wounding a patient (R. 64, 102, 229-230, 263). Bello shot claimant in his abdomen; the bullet then exited claimant's right thigh (R. 64). As a result of this gunshot wound, claimant required various surgical procedures, treatments, and hospital stays at BLH and Mount Sinai Hospital from June 30, 2017 to July 21, 2017 (R. 64, 264).

During this incident, Bello also used the gasoline in the orange juice container to set fire to the nurse's station on BLH's 16th floor (R. 102). Subsequently, Bello killed himself while still at BLH by shooting himself with his own weapon (R. 102).

PROCEDURAL HISTORY AND TIMELINESS

The Federal Action

On February 28, 2018, plaintiff filed a negligence action against BLH and Upstate Guns and Ammo, LLC in the Southern District of New York (Timperio v

Bronx-Lebanon Hospital Center, et al., US Dist Ct, SD NY, 1:18-cv-01804-PGC, Doc 1 [Feb. 28, 2018]). Regarding the claims against BLH, plaintiff alleged that BLH: (i) was negligent in failing to provide adequate premises safety; (ii) was negligent in failing to obtain Bello's BLH identification card and property upon termination of Bello's employment; (iii) negligently hired and continued to employ Bello; and (iv) negligently inflicted emotional distress on plaintiff (id.).

By motion dated June 22, 2018 and reply memorandum dated July 31, 2018, BLH moved to dismiss this federal action, pursuant to Federal Rule of Civil Procedure § 12(b)(6), because plaintiff's claims were barred by the exclusive remedy provisions of Workers' Compensation Laws § 11 and § 29(6) (R. 47, 50-51). BLH further argued that the intentional tort exception to the exclusivity provision of the Workers' Compensation Law was not applicable (R. 52-55).

Plaintiff opposed BLH's motion to dismiss by memorandum dated July 24, 2018. Plaintiff argued that his injury was not a Workers' Compensation Law compensable assault; BLH was not entitled to Workers' Compensation Law § 29's exclusivity protection in plaintiff's premises liability lawsuit; plaintiff was not seeking Workers' Compensation benefits; and plaintiff's claims should, therefore, not be dismissed (R. 58-77).

By order dated March 31, 2019, and memorandum opinion filed April 26, 2019, Southern District of New York District Judge Paul Gardephe ordered, in relevant part, that BLH's motion to dismiss was converted to a motion for summary judgment, and that the motion was denied (R. 100). The Court concluded that the ultimate test for determining whether the victim of assault is entitled to workers' compensation benefits was whether the assault originated from work-related differences or from personal animosity between combatants, and further opined that there is no evidence on the record suggesting that the shooting in the present matter originated in work-related differences (R. 108). As such, the Court denied BLH's motion for summary judgment (R. 109).

On May 9, 2019, BLH filed a motion and accompanying memorandum for reconsideration of the Court's March 31, 2019 order and April 26, 2019 memorandum, or in the alternative, an order certifying an interlocutory appeal to the Second Circuit, and separately, a stay of all proceedings in this matter pending the Workers' Compensation Board's final determination of plaintiff's exclusive remedy (R. 116). Plaintiff filed an opposition on May 22, 2019, and BLH filed a reply memorandum on May 28, 2019 (R. 134-163).

On June 20, 2019, the Court heard argument on BLH's motion (R. 230). Thereafter, on July 11, 2019, BLH submitted the Workers' Compensation Board's decision – described below – awarding workers' compensation benefits to plaintiff (R. 230). Plaintiff then reported to the Court, on February 26, 2020, that the Workers' Compensation Board appellate panel issued a decision remanding the case to the trial calendar for development of the record on all issues regarding the establishment of a claim (R. 231).

By order, dated March 9, 2020, the Court denied BLH's motion for reconsideration or, in the alternative, an order certifying an interlocutory appeal, but the order did not include the Court's reasoning (R. 229-234). The Court, however, granted BLH's motion to stay the federal matter pending the completion of the Workers' Compensation Board proceedings (R. 229-234). In coming to this determination, the Court took note of the plethora of New York state court decisions holding that an award of workers' compensation benefits precludes plaintiffs from suing their employer in tort (R. 232). The Court did not go so far as to agree that the Workers' Compensation Board decisions are binding on the court, but stated that the proceedings may affect the outcome in the federal case, and the Court will accordingly stay the litigation until the administrative proceedings were complete (R. 233).

The Worker's Compensation Board Action

On July 3, 2017, the Workers' Compensation Board received the First Report of Injury regarding claimant's injuries (R. 38-40). On that same date, the Workers' Compensation Board mailed claimant a Notice of Case Assembly, which was ultimately returned to sender on July 15, 2017 (R. 41-43). The Workers' Compensation Board then sent a Case Assembly Follow-Up Notice on December 20, 2017, which again was returned to sender on January 31, 2018 (R. 44-46). Thereafter, on May 8, 2019, a Request for Further Action by Carrier form was prepared, requesting an administrative decision from the Workers' Compensation Board to establish a claim and enter awards in accordance with medical evidence (R. 114-115). Subsequently, on June 25, 2019, the Workers' Compensation Board was mailed a letter from claimant's counsel enclosing Claimant's Authorization to Disclose Workers' Compensation Record Form OC-110A (R. 166-167).

A Workers' Compensation Board hearing before WCL Judge George Blassman was conducted on July 5, 2019 (R. 168-173). Neither the claimant nor claimant's representation was present for the hearing (R. 168). However, a lawyer for both BLH and their insurance carrier was present (R. 168). Judge Blassman agreed to establish the claim without prejudice because the claimant was not

present, and indicated no further action pending an indication from claimant that he was ready to proceed with the case (R. 170, 172).

A Notice of Decision was filed by the Workers' Compensation Board on July 10, 2019, consistent with the July 5, 2019 hearing (R. 174-176). On August 8, 2019, counsel for claimant submitted an Application for Board Review to the Workers' Compensation Board, requesting that the board vacate the July 10, 2019 decision due to claimant not appearing at the Workers' Compensation Board hearing on July 5, 2019 (R. 189-190). The Application for Board Review explained claimant's failure to appear at the hearing by stating that claimant had no notice of it (R. 189). Claimant also submitted an affidavit, which stated that claimant never received any Workers' Compensation Board notices at the address listed and had moved from that address by March 18, 2018 (R. 191-194). Claimant also stated that at no point did he file a claim for or accept any workers' compensation benefits as a result of his injury on June 30, 2017, and that the claim was filed without his knowledge (R. 191).

Subsequently, on December 16, 2019, claimant's counsel sent a letter to the Workers' Compensation Board, asserting that claimant's injuries were not subject to the Workers' Compensation Law or the jurisdiction of the Workers'

Compensation Board (R. 195-196). Claimant's attorney also used the letter to inform the Board of the procedural history of the related Federal Action (R. 195-196).

A Workers' Compensation Board hearing was conducted on December 18, 2019 before WCL Judge Craig Cooke, with all counsels present, but with claimant absent (R. 198). Claimant's counsel reiterated claimant's position, which was outlined in the Application for Board Review, claimants' affidavit, and the December 16, 2019 letter (R. 189-196). Judge Cooke explained that the Workers' Compensation Board was interpreting claimant's Application for Board Review from August 8, 2019 as asking it to vacate the failure to prosecute finding, but not the entirety of the establishment of benefits (R. 211). He then suggested that the claimant file a new appeal to clarify claimant's position, detailing that he had a decision from a district court judge that he felt collaterally estopped the Board from deciding the applicability of the Workers' Compensation Laws to the present matter (R. 211). The Court then indicated that it would refer the matter to the Appellate Board and include an internal note regarding the discussion at the hearing (R. 216-217). Accordingly, on December 23, 2019, the Workers' Compensation Board mailed a Notice of Decision to the parties, stating that no further action was planned by the Board at that time (R. 220-221).

Subsequently, on February 18, 2020, the Workers' Compensation Board issued a Memorandum of Board Panel Decision, detailing that the issue presented for administrative review was whether the record supported the establishment of the claim (R. 222-227). The Board Panel determined that it was not bound by the federal court's decision that the claimant's injury did not occur in the course of his employment, and found that the federal judgment was not entitled to res judicata or collateral estoppel as the Board was not party to the federal action (R. 225). Moreover, the Board asserted that, had they been heard on BLH's motion in the Federal Action, the Board would have argued that the question of whether an accident occurred in the claimant's employment lies squarely within the jurisdiction of the Board, and the federal court should abstain from exercising jurisdiction over the issue (R. 225).

Nonetheless, the Board determined that it was prejudicial to the claimant to establish the claim without providing him an opportunity to present evidence to the Board regarding whether his injuries were sustained during the course of his employment, particularly considering that such a determination could have a significant impact on the pending Federal Action (R. 226). In coming to this determination, the Board further considered the fact that the claimant maintained that he did not receive notice of the hearing during which the claim was established

(R. 226). Ultimately, the Board rescinded the establishment of the claim, without prejudice, and based upon a review of the record and a preponderance of the evidence (R. 226). Accordingly, the case was returned to the trial calendar for development of the record on all issues regarding the establishment of the claim, whereby the WCL judge was directed to make a final determination regarding the establishment of the claim, and specifically whether claimant's injury occurred in the course of his employment (R. 226).

A hearing before the Workers' Compensation Board was held on April 2, 2020 before WCL Judge Michael Cestaro (R. 235-259). At the hearing, Judge Cestaro indicated that he would put the case on the calendar for a 15-minute control date (R. 256). On this date, either the carrier would present prima facie medical evidence or both parties would submit a joint statement of facts and Judge Cestaro would direct a memorandum of law on the legal issues (R. 256, 258). Thereafter, the Workers' Compensation Board mailed a Notice of Decision to all parties, which stated that the case would be given the first available calendar for 15 minutes for a control date for the reasons stated above (R. 260-261).

In accordance with the April 2, 2020 hearing, all parties submitted a joint statement of facts to the Workers' Compensation Board on May 27, 2020 (R. 262-

265). The Board held another hearing before Judge Cestaro on May 29, 2020 (R. 266-278). At this hearing, the parties agreed that there was prima facie medical evidence and discussed a briefing schedule for memoranda of law, culminating in a calendar date after September 15, 2020 for summations and a decision on compensability (R. 271-275). A Notice of Decision continuing the case and reflecting the outcome of the hearing was filed with the Workers' Compensation Board on June 3, 2020 (R. 279-280).

Subsequently, on July 9, 2020, both BLH and the State Insurance Fund submitted a memorandum of law and summation ultimately arguing that a finding of compensability must be made (R. 281-293). In response, and in accordance with the briefing schedule, the claimant submitted his memorandum of law in opposition to BLH's memorandum on August 26, 2020 (R. 294-315). A hearing was then scheduled for September 21, 2020 (R. 317).

At the September 21, 2020 hearing, Judge Cestaro allowed both parties to submit oral arguments to the Board, in addition to the written memoranda previously submitted (R. 317-59). After hearing both sides and taking into consideration the written memoranda, Judge Cestaro held that the Workers' Compensation Board had primary jurisdiction over the case (R. 334-335). Judge

Cestaro also made clear that, in order to rebut the presumption that an injury occurring at the injured person's place of work arose in and out of such person's course of employment, the party attempting to rebut the presumption must present substantial evidence that the accident did not occur in and out of the course of employment (R. 349). At bottom, Judge Cestaro concluded that the case was compensable, based in part on the fact that the claimant was at his job and doing a duty that was required of him when he was injured (R. 352). The awards, however, were held in abeyance at the request of claimant's counsel, pending a filing of the appeal (R. 359). As with the prior hearings, a Notice of Decision was filed with the Workers' Compensation Board on September 24, 2020, outlining the outcome of the hearing (R. 360-361).

On October 16, 2020, claimant filed an Application for Board Review of Judge Cestaro's September 21, 2020 determination of compensability, along with a memorandum of law (R. 362-372). In response, on November 11, 2020, BLH and the State Insurance Fund submitted a Rebuttal of Application of Board Review which included a rebuttal memorandum of law (R. 374-382).

On January 27, 2021, the Workers' Compensation Board issued a Memorandum of Board Panel Decision reviewing the Workers' Compensation

Law Judge's September 24, 2020 decision (R. 4-10). Again, consistent with the Board's February 18, 2020 decision, the Board Panel found that the Federal Action did not prevent the Board from addressing compensability of this claim (R. 8). The Board then opined that none of the information cited by the claimant rebutted the presumption that the assault occurred in and out of the claimant's course of employment; in fact, all such information was either neutral or supportive of the finding that the claim arose out of the claimant's employment (R. 9). Accordingly, the Board Panel affirmed Judge Cestaro's September 24, 2020 decision that the claim was compensable (R. 9-10).

The Third Department Appeal at Issue

Claimant filed a Notice of Appeal to the Appellate Division, Third Department on February 2, 2021, appealing the Board Panel's January 27, 2021 decision (R. 1). Thereafter, on May 20, 2021, claimant filed in the Appellate Division, Third Department, a Stipulated Records List and a Certification Pursuant to CPLR 2015 (R. 384-390). Claimant then filed his Appellant's Brief on June 22, 2021, arguing that: (i) the Workers' Compensation Board should have been estopped from deciding compensability in light of the decisions in the Federal Action; (ii) the claim submitted by BLH to the Workers' Compensation Board on claimant's behalf was improperly established, as claimant's injuries allegedly did

not arise out of his employment; and (iii) the Worker's Compensation Board improperly applied the Workers' Compensation Law § 21 presumption to the facts of this matter (Brief of Claimant-Appellant). In response, BLH and the State Insurance Fund filed a joint Respondent's Brief on September 16, 2021, and the Workers' Compensation Board filed its own Respondent's Brief on September 29, 2021 (Brief of Employer-Insurance Carrier-Respondents; Brief of Workers' Compensation Board). Claimant then filed a Reply Brief on October 20, 2021 (Reply Brief of Claimant-Appellant).

The Third Department issued a decision on the appeal on February 3, 2022 (Timperio, 203 AD3d 179). As an initial matter, the Court held that the Board should have adjudicated the issue of compensability in the first instance, and that it was not estopped or otherwise precluded from doing so (id. at 182-184). However, the Court ultimately reversed the Board's decision on compensability, holding that claimant presented evidence "sufficient to rebut the presumption articulated in Workers' Compensation Law § 21(1) and to establish that the assault on Timperio resulted exclusively from arbitrary, broad-sweeping and gravely maligned personal animosity and not from work-related differences with Timperio" (id. at 184-86). The Court's decision did not address the case law or arguments proffered by any of

the respondents, and instead focused on whether the injury arose out of either work-related differences or personal animosity (id.).

JURISDICTION

On March 3, 2022, within 30 days of the Appellate Division's decision, BLH and the State Insurance Fund moved to reargue the Third Departments' decision and/or for leave to appeal to this Court (Annexed as **Exhibit "A"** is a copy of the motion).

On August 25, 2022, the motion on behalf of BLH and the State Insurance Fund was denied. The order of the Appellate Division, Third Department, which denied BLH and State Insurance Fund's motion for leave to reargue and/or leave to appeal to this Court was served with Notice of Entry on August 26, 2022 (Annexed as **Exhibit "B"**). Accordingly, the instant motion is timely, having been made within 30 days of service of the Order of the Appellate Division denying BLH's and State Insurance Fund's motion for leave to appeal with notice of entry (see Whitfield v City of New York, 90 NY2d 777 [1997]["computation of the time to appeal or move for leave to appeal will commence upon service of the Appellate Division order with written notice of its entry, provided that such service is made

after the [amended] judgment has been entered"]; see also 22 NYCRR 500.22[b][2][ii][a-c]).

Moreover, the Appellate Division's February 3, 2022's decision reversed the Workers' Compensation Board's decision that the claimant's injury was compensable under the Workers' Compensation Law, thereby finally determining the matter.

QUESTIONS PRESENTED

The following questions of law are issues of public importance that: (i) involve conflicts with prior decisions of this Court and the Third Department; (ii) involve imposing limitations on workers compensation benefits that could impact workers going forward; and (iii) involve scenarios that are likely to recur in the future.

1. Does the WCL § 21(1) presumption, that an injury arose out of claimant's employment if it arose in the course of employment, apply in cases where the assailant does not know the claimant, does not work at the location of the incident, and was not prompted solely by personal animus, and where the claimant was performing work duties at the time of the assault?

Answer: Yes. As a general matter, an assault which arose in the course of employment is presumed to have arisen out of the employment, absent substantial evidence to the contrary (see Toro v 1700 First Ave. Corp., 16 AD2d 852, 852-53 [3d Dept 1962], affd 12 NY2d 1001 [1963]). Generally, in cases where the workplace injury is a result of an assault, the presumption is only rebutted with "substantial evidence that the assault was motivated purely by personal animosity" (Matter of Rosen v First Manhattan Bank, 84 NY2d 856, 857 [1994]). However, should there be "any nexus, however slender, between the motivation for the assault and the employment," an award of compensation for injuries resulting from an assault should be sustained (Seymour v Rivera Appliances Corp., 28 NY2d 406, 409 [1971]). The Third Department has extrapolated on these principles by routinely holding that, in cases where claimants are injured by unknown assailants with unknown motivations while the claimants are performing work duties, the WCL § 21(1) presumption applied and was not rebutted, and the claims were compensable (see e.g. Blair v Bailey, 279 AD2d 941, 942-43 [3d Dept 2001]; Conyers v Rush Bar, 38 AD2d 987 [3d Dept 1972]; Valenti v Valenti, 28 AD2d 572, 573 [3d Dept 1967]); Moran v Moran Transp. Lines, 264 AD 966 [3d Dept 1942]). Therefore, the Third Department's decision in this case stands in conflict with the prior decisions of this Court, as built upon by the Third Department.

2. If it stands, will the Third Department's decision in the present matter as it relates to compensability improperly narrow the scope of compensable claims in the future?

Yes. Should the Third Department's decision in the instant matter be followed in the future, those decisions would necessarily be at odds with prior awards of compensability in cases where claimants were assaulted or injured as a corollary to an intentional act by an unknown assailant occurring at claimants' work premises. Moreover, adherence to this decision would render victims injured in the course of and out of their employment, as a result of a mass casualty event such as a mass shooting or a terrorist attack, *unprotected* by the Workers' Compensation Laws. Previously, such situated victims were able to recover under the Workers' Compensation Laws, such as victims of the September 11, 2011 terrorist attacks (see e.g. Matter of Tompkins v Morgan Stanley Dean Witter, 1 AD3d 695 [3d Dept 2003]; Matter of Shanbaum v Alliance Consulting Group, 26 AD3d 587 [3d Dept 2006]).

LEAVE TO APPEAL IS WARRANTED

Leave to appeal to this Court is warranted in the present case because the Third Department's determination that claimant's injuries are not compensable under the Workers' Compensation Law is contrary to well-established law from

the Third Department and this Court. Moreover, the scope of compensability under the Workers' Compensation Laws as it relates to injuries sustained by attacks by strangers is of public importance, as the implications of this determination could impact employees throughout the State of New York.

POINT I

THE THIRD DEPARTMENT IMPROPERLY DECLINED TO APPLY THE WCL § 21(1) PRESUMPTION THAT CLAIMANT'S INJURY AROSE OUT OF HIS EMPLOYMENT.

In this case, the Third Department reversed the decision of the Workers' Compensation Board and held that claimant's "proof was sufficient to rebut the presumption articulated in Workers' Compensation Law § 21(1) and to establish that the assault on Timperio resulted exclusively from arbitrary, broad-sweeping and gravely maligned personal animosity and not from work-related differences with Timperio" (Timperio, 203 AD3d at 185). It is respectfully submitted that the Third Department's holding in this regard represents a drastic change in the law and will have significant repercussions if it is not reconsidered and reversed.

It is axiomatic that to be compensable under the provisions of the Workers' Compensation Law, an injury must both (1) arise *in* the course of employment and

(2) arise *out* of the employment (Matter of Rosen v First Manhattan Bank, 202 AD2d 864, 864 [3d Dept 1994], affd 84 NY2d 856 [1994]). Moreover, and as explained further below, an assault which arose *in* the course of employment is presumed to have arisen *out* of the employment, absent substantial evidence to the contrary (WCL § 21; Barth v Cassar, 38 AD2d 984 [3d Dept 1972]; Toro v 1700 First Ave. Corp., 16 AD2d 852, 852-53 [3d Dept 1962], affd 12 NY2d 1001 [1963]). Ultimately, whether an injury has arisen out of and in the course of employment "is a factual issue for the Board to resolve and its decision will not be disturbed when supported by substantial evidence" (Morales v Lopez, 192 AD3d 1298, 1299-1300 [3d Dept 2021], citing Matter of Siliverdis v Sea Breeze Services Corp., 82 AD3d 1459, 1460 [3d Dept 2011]). Moreover, the Board has broad authority to "draw any reasonable inference from the evidence in the record" (Matter of Pappas v State Univ. of N.Y. at Binghamton, 53 AD3d 941, 943 [3d Dept 2008]).

As will be shown, the facts in the record and the corresponding relevant case law leads to the conclusion that claimant's injuries are compensable under the Workers' Compensation Law. First, claimant's injuries arose in the course of his employment. Second, the court erred in failing to apply the WCL § 21(1) presumption and in determining that "the assault on Timperio resulted exclusively

form arbitrary, broad-sweeping and gravely maligned personal animosity" (Timperio, 203 AD3d at 185). Third, the record establishes a requisite nexus between the motivation for the assault and claimant's employment.

Claimant's Injuries Arose
In the Course of His Employment

Both the claimant's appeal as well as the Third Department's decision conflates the two requirements for compensability under the Workers' Compensation Law, rendering it necessary to discuss each part separately. The first question, as outlined above, is whether the claimant's injuries arose *in* the course of his employment. The Third Department's decision did not address whether claimant's injuries arose in the course of his employment, but seemingly implied that the injury arose in the course of employment, since its analysis concerned the second issue as to whether WCL § 21's presumption applied, a presumption that presupposes the injuries arose in the course of employment. At bottom, the facts are clear that the shooting that is the subject of this claim undisputedly occurred in the course of claimant's employment.

In general, "the determination of whether an activity is within the course of employment or is purely personal is a factual question for the Board's resolution and depends upon whether the activity is reasonable and sufficiently work related"

(Blanchard v Eagle Nest Tenancy in Common, 285 AD2d 857 [3d Dept 2001][citations omitted]). In making this determination, the Workers' Compensation Board has broad authority to resolve factual issues by, in part, drawing any reasonable inferences from the evidence in the record (Matter of Marshall v Murnane Assoc., 267 AD2d 639, 640 [3d Dept 1999]; see also Blanchard, 285 AD2d at 857). Whether an activity is within the course of employment does not require an extensive factual basis; often courts have made this determination simply based on whether the injury occurred while the claimant was on duty in his place of employment or whether the claimant was performing a job-related activity at the time of the injury (see e.g. Valenti v Valenti, 28 AD2d 572, 573 [3d Dept 1967]; see also Bennett v G.O. Dairies, Inc., 114 AD2d 574 [3d Dept 1985]).

For example, in Valenti, the decedent was performing his work duties at his place of employment when he was shot to death by a non-employee occupant of the restaurant (Valenti, 28 AD2d at 572). The Third Department held that "at the time of the shooting, the decedent was on duty in his place of employment and was, therefore, in the course of his employment" (id. at 573). Similarly, in Bennett, the claimant was performing a job-related activity when she was wounded by gunshots from an unknown assailant, and therefore, the Third Department held that

the injury was sustained in the course of claimant's employment (Bennett, 114 AD2d at 574). Moreover, in Blanchard, the Third Department found that an accident occurred while in the course of employment where the accident happened within the time and space limits of decedent's employment, even when there was no direct evidence as to whether the decedent was actually engaged in a work-related activity when the accident occurred (Blanchard, 285 AD2d at 857-58).

Here, it is uncontroverted that claimant was at his place of employment, during scheduled work hours, and performing a job-related activity at the time of his injury. Specifically, claimant, BLH, and The New York State Insurance Fund submitted joint statement of facts, which established that: (i) "Timperio was employed by BLH as a medical resident on June 30, 2017, and received his salary"; (ii) "Timperio was engaged as a medical resident at the time he was shot on June 30, 2017"; (iii) "On June 30, 2017, at about 2:50 p.m., Timperio was on BLH's 16th floor, writing patients' medical chart notes in a non-public work area"; and (iv) "on June 30, 2017, at about 2:50 p.m., Bello shot Timperio" (R. 262-263). These facts alone are sufficient to support a determination that claimant's injuries arose in the course of his employment (see e.g. Valenti, 28 AD2d at 573; Bennett, 114 AD2d at 574; Blanchard, 285 AD2d at 857-58). Moreover, the record is

devoid of any facts or suggestions that the claimant was engaged in a non-work related and/or purely personal activity at the time of the shooting.

Accordingly, the only conclusion the record supports is that claimant's injuries arose in the course of his employment.

The WCL § 21(1) Presumption Applies, Because the Assault on Claimant Did Not Result from Personal Animosity

As the claimant's injuries arose in the course of his employment, the injuries are *presumed* to have *also* arisen *out* of his employment, absent substantial evidence to the contrary (WCL § 21; Barth v Cassar, 38 AD2d 984 [3d Dept 1972]; Toro, 16 AD2d at 852-53). Generally, in cases where the workplace injury is a result of an assault, the presumption is only rebutted with "substantial evidence that the assault was motivated purely by personal animosity" (Matter of Rosen v First Manhattan Bank, 84 NY2d 856, 857 [1994]). However, should there be "any nexus, however slender, between the motivation for the assault and the employment," an award of compensation for injuries resulting from an assault should be sustained (Seymour v Rivera Appliances Corp., 28 NY2d 406, 409 [1971]).

The crux of the matter, however, and where the Third Department deviated from established case law, is that where the record is barren of any evidence of a prior relationship between the claimant and the attacker, "cases involving the two original combatants and the instigation and cause of the dispute between them are inapposite" (id.). Nonetheless, the Third Department relied on such "cases involving the original combatants and the instigation and cause of the dispute between them." Instead, the Third Department's analysis necessarily should have focused on cases where there was no evidence of a prior relationship between the claimant and the attacker. Had it done so, it would have been unable to escape the conclusion that, if the claimant was attacked by an unknown assailant while performing work duties, the injury arose out of *and* in the course of his employment (see e.g. Conyers v Rush Bar, 38 AD2d 987 [3d Dept 1972]; Blair v Bailey, 279 AD2d 941, 942-43 [3d Dept 2001]; Valenti, 28 AD2d at 573; Moran v Moran Transp. Lines, 264 AD 966 [3d Dept 1942]).

For example, in Conyers, the claimant was performing his work as a bartender when he was shot by an unknown assailant. The Third Department affirmed the decision of the Workers' Compensation Board that "the accidental injury and death arose out of and in the course of employment" (id.). Importantly, the Third Department affirmed the decision of the Workers' Compensation Board

that "the assault was not motivated by personal animosity and that the presumption, under section 21, subdivision 1 of the Workmen's Compensation Law was not overcome by substantial evidence to the contrary" (id.).

Conyers is not an anomaly. The Third Department in Blair, similarly found that "there is no evidence to support the conclusion that the assault arose from a personal dispute between claimant and [the assailant] or, for that matter, that they had even met prior to the date in question," and ultimately held that the claimant's injury arose out of and in the course of his employment considering the circumstances under which the assault occurred and the location of the assault. Likewise, in Valenti, the Third Department held that "although there is no indication for the reason for the shooting, the claimant is entitled to the benefit of the presumption that, when an employee is accidentally killed in the course of his employment, in the absence of substantial evidence to the contrary, the death arose out of the employment" (Valenti, 28 AD2d at 573). Even more, the Third Department in Moran, opined that, even when the "assailant was unidentified and has never been apprehended" and when the record did not reflect "substantial proof indicating the reason or motive for the assault," there was substantial evidence to sustain the finding of compensability.

In the instant matter, again, the facts are uncontroverted. Claimant and Bello never worked together, and, in fact, did not know each other at all at the time of the attack (R. 64, 263-264). The Third Department acknowledged these facts by stating:

> The undisputed facts in the record demonstrate that the attack was perpetrated by an individual who was not employed by the hospital at the time of the attack (and had not worked there for over two years), was not and never was Timperio's coworker, did not know Timperio and provided no reason for the attack prior to taking his own life.

(Timperio, 203 AD3d at 185). Considering this, with particular focus on the fact that claimant and Bello did not know each other prior to the assault, it is clear that there is no evidence to support the conclusion that the assault arose from a personal dispute (see e.g. Blair, 279 AD2d at 942-43). Moreover, the fact that Bello provided no reason for the attack is not sufficient to rebut the WCL § 21(1) presumption that the attack arose out of claimant's employment (see Valenti, 28 AD2d at 573 [holding that "although there is no indication for the reason for the shooting, the claimant is entitled to the benefit of the presumption that, when an employee is accidentally killed in the course of his employment, in the absence of substantial evidence to the contrary, the death arose out of the employment"]).

At bottom, the record is barren of any evidence of a prior relationship between claimant and Bello. Accordingly, an analysis of cases "involving the two combatants and the instigation and cause of the dispute are inapposite" (Seymour, 28 NY2d at 409). Nonetheless, the Third Department relied almost exclusively on cases where there was some prior relationship between combatants – however new – which precipitated the assaults in question, and where the attack itself was the result of a specific and directed disagreement between the claimant and the attacker. For example, the Court cited: Matter of McMillan v Dodsworth (254 AD2d 619 [3d Dept 1998]), where the claimant and attacker were sisters; Matter of Blaska v New York State Department of Law (96 AD3d 1252 [3d Dept 2012]), where, after being asked to wait for claimant to exit a bus first, the attacker grew impatient and began a verbal altercation which escalated to a physical altercation; Matter of Wardsworth v K-Mart Corp. (72 AD3d 1244 [3d Dept 2010]), where the attacker had previously stolen the claimant's car, and a week later, the claimant approached her stolen vehicle with the attacker inside, which lead to a physical altercation; and Matter of Turner v F.J.C. Sec. Servs. (206 AD2d 649 [3d Dept 2003]), where the attacker, a co-worker, approached the claimant and started a physical altercation based upon a rumor that the claimant wanted to harm the attacker.

Even further, the Third Department somehow twisted the fact that the claimant and Bello had no personal relationship whatsoever to come to the conclusion that "the assault on Timperio resulted exclusively from arbitrary, broad-sweeping and gravely maligned personal animosity" (Timperio, 203 AD3d at 185). In coming to this conclusion, the Third Department seemed to require affirmative evidence of "employment-related animus" to trigger the WCL § 21(1) presumption. This conclusion is a gross misapplication of the facts and the law, as the law does not require *any* proof of employment-related animus to trigger the WCL § 21(1) presumption, but instead requires *substantial evidence* that the assault was motivated purely by personal animosity to *rebut* a WCL § 21(1) presumption.

In fact, and as described above, courts in New York routinely find that, in cases where the claimant and assailant are not known to each other and there is no other evidence of a personal disagreement or other reason for the assault, which is the case in the present matter, the presumption under WCL § 21(1) applies (see e.g. Conyers, 38 AD2d at 987; Blair, 279 AD2d at 942-43; Valenti, 28 AD2d at 573; Moran, 264 AD at 966). The Workers' Compensation Board's January 27, 2021 final determination was consistent with this law, when it stated: "the lack of any prior personal or professional relationship between the claimant and the co-worker

does not rebut the WCL 21 presumption as there is no evidence whatsoever to support that the shooting was motivated by personal animosity" and "[t]he lack of any prior personal or professional relationship between the claimant and the former employee actually supports the finding that the claim is compensable" (R. 9).

Therefore, the law dictates that the Board's decision should not have been disturbed, that the WCL § 21(1) presumption should apply in the present matter, and that claimant's injuries are compensable as they arose in the course and out of claimant's employment.

The Record Established the Requisite Nexus Between the Assault and Claimant's Employment to Apply the WCL § 21(1) Presumption

Furthermore, even if one were to credit the Third Department's finding that there was a personal motivation for the assault, the claim is still compensable "if there is any demonstrated nexus, however slender, between the motivation for the assault and employment" (Gutierrez v Courtyard Marriott, 46 AD3d 1241, 1242 [3d Dept 2007]; see also Seymour, 28 NY2d at 409). The requisite nexus does not require an extensive showing. In fact, courts have also explained this requirement by stating that there must exist "*any* credible nexus between the motivation for the assault and the employment" (Blair, 279 AD2d at 942 [emphasis added]). For

example, in Gutierrez, the Third Department found the necessary nexus existed between the decedent's employment and her death when the perpetrator, who was the decedent's boyfriend, was also an employee of the hotel, and the presumed motive for the attack was that the perpetrator was "overly jealous as a result of the manner in which decedent dealt with customers at the hotel," which was a jealousy born from the perpetrator's personal romantic relationship with the decedent (Gutierrez, 46 AD3d at 1242). Moreover, "[a] claimant is not required to prove that something directly related to job duties caused the injury" (Keevins v Farmingdale UFSD, 304 AD2d 1013, 1014 [3d Dept 2003]).

In fact, courts have found claims compensable under the Workers' Compensation Law where an assault occurred without reason or provocation, but while the claimant was performing business duties. As described above, in Conyers, Blair, Valenti, and Moran, the Third Department considered – and, in part, relied upon – the fact that each claimant was at their place of employment and performing work duties when the respective assaults occurred (Conyers, 38 AD2d at 987; Blair, 279 AD2d at 942-43; Valenti, 28 AD2d at 573; Moran, 264 AD at 966). Additionally, in Bennett (114 AD2d at 574-75), the Third Department upheld the Board's finding of compensability when the claimant was wounded by gunshots from an unknown assailant moments after parking her car across the

street from the store where she worked, because, at the time of the accident, she was being paid her hourly wage and she was driving the store manager to work, thereby providing her employer with a benefit.

Even when an employee is not performing work duties, but instead is entering or leaving their place of employment, merely being present "within the precincts" of employment is sufficient to establish a claim for Workers' Compensation benefits (Matter of Boston v Medical Servs. For Women, 215 AD2d 845 [3d Dept 1995]). For example, in Boston, the Third Department found the Worker's Compensation claim compensable, stating that the claimant's injuries occurred while she was still within the precincts of her employment when a stranger threw acid in the claimant's face as she was leaving her place of employment (id.). Similarly, in Matter of Jean-Pierre v Brookdale Hosp. Med. Ctr. (190 AD3d 1053, 1054-55 [3d Dept 2021]), the Third Department found that an assault by an unknown assailant "arose out of and in the course of [the claimant's] employment so as to be compensable" when the claimant had already exited the building where she was employed, but was assaulted "within the employer's multi-building complex" and was therefore "within the precincts of [the claimant's] employment" at the time of the assault.

The language in DeAngelis v Garfinkel Painting Co. (20 AD2d 162, 163-164 [3d Dept 1963], affd 18 NY2d 727 [1966]), is perhaps the most instructive to the case at bar. In DeAngelis, an individual threw a stone through a window of the claimant's work premises, first damaging the premises and then injuring the employee (id.). The court stated that "it is apparent, and perhaps likely, that the person who threw the stone into the closed window of the work premises intended to damage the premises. Nothing in this record tends to defeat the presumption of section 21," further stating that "the case at bar is, indeed, precisely the kind of case in which the mandate of the statutory presumption ought to be effective" (id.). In considering this result, the court opined that "[i]ndeed, if the premises were set on fire, or blown up by an enemy of the owner, it could not seriously be argued that the claimant's injury would not arise out of employment" (id.). Similarly, courts in New York have considered whether the danger attached specifically to the premises where the claimant was employed and whether it was a risk to which his employment exposed him (see e.g. Gilotti v Hoffman Catering Co., 246 NY 279, 282-83 [1927]).

Here, there should have been no dispute regarding whether there was any nexus between claimant's injuries and his employment. Not only was claimant on his employer's property when the incident occurred, but he was in the hospital, on

the 16th floor, in a non-public work area, where he was performing work duties by writing patients' medical charts (R. 64, 263). Moreover, at the time of the assault, claimant was employed at BLH as a family medicine resident physician and was receiving a salary for his work (R. 263).

Additionally, the danger claimant faced was attached specifically to BLH and claimant's employment at BLH exposed him to it (see Gilotti, 246 NY at 282-283). Bello was a prior employee of BLH and resigned due to accusations of workplace sexual harassment (R. 63, 229). Moreover, Bello did not commit the assault on the way to BLH, on the level he entered BLH, or on any floor, public space, or non-public work area between where Bello entered BLH and the 16th floor of the hospital (R. 64, 263). Instead, he entered the hospital, traversed the hospital, and entered the 16th floor of BLH, and, once on the 16th floor, entered a non-public work area (R. 64, 263). It was only once Bello was in the non-public work area on the 16th floor of BLH that he opened fire with the AR-15 that he secreted into the hospital under his doctor's coat, wounding five members of the medical staff, including claimant, and a patient, and killing a doctor (R. 64, 102, 229-230, 263).

The danger – and the subsequent injuries as a result of that danger – was not "common to all, shared by anybody and everybody in the vicinity," but rather attached specifically to BLH and the 16th floor non-public work area where claimant was writing patient charts, and to which claimant's employment at BLH exposed him (see Gilotti, 246 NY at 282-283). The record evidence clearly established that Bello intended to inflict harm on people and property at BLH, which is "precisely the kind of case in which the mandate of the statutory presumption ought to be effective" (see DeAngelis, 20 AD2d at 163).

The Third Department, in coming to their decision in the instant matter and determining that "there is no evidence that...the attack had any nexus to Timperio's employment or 'performance of h[is] job duties," did not explain how the facts on the record led to this conclusion (Timperio, 203 AD3d at 185). The absence of an explanation was likely because the only conclusion supported by the law in the Third Department is that the facts in the record support a conclusion that there was a "nexus, however slender, between the motivation for the assault and employment, [such that] an award of workers' compensation…benefits is appropriate" (see Gutierrez, 46 AD3d at 1242; see also Seymour, 28 NY2d at 409). The Board agreed, finding the claimant's injuries compensable, and stating that: "[i]n this case, there is more than the slender nexus required between the

claimant's employment and the assault at issue. The assault occurred while the claimant was working, it was perpetrated by a former employee, and the assault occurred in a non-public area of the hospital" (R. 9).

When considering the uncontroverted facts of the present matter and the relevant and applicable case law in both the Third Department and this Court, it is clear that the Third Department erred in reversing the Workers' Compensation Board's decision of compensability, and, therefore, review by this Court is warranted.

POINT II

THE THIRD DEPARTMENT'S DECISION DENYING WORKERS' COMPENSATION BENEFITS TO CLAIMANT WOULD STRIP FUTURE VICTIM-EMPLOYEES OF COMPENSATION FOR INJURIES ARISING FROM RANDOM OR UNPROMPTED ASSAULTS AND MASS-CASUALTY EVENTS AT THE WORKPLACE.

The Workers' Compensation Law is "designed to insure that an employee injured in the course of employment will be made whole…" (Maines v Cronomer Valley Fire Dept., Inc., 50 NY2d 535, 544 [1980]; see also Williams v Hartshorn, 269 NY 49 [1946]["The Workmen's Compensation Law, Consol. Laws, c. 67, was designed to assure the workingman a protection against loss of earning power

through injury sustained in his employment, irrespective of how that injury occurred or what brought it about"]). In the instant matter, however, the Third Department's decision defeats the purpose of the Workers' Compensation Law when it limited recovery for assaults at the workplace to only those involving affirmative "employment-related animus" (Timperio, 203 AD3d at 185). The Third Department's incorrect interpretation of the Workers' Compensation Law, if followed by future decisions, will change the entire landscape of Workers' Compensation Law cases. Pursuant to the Third Department's decision in this case, injuries sustained at or near the workplace from assaults by unknown assailants, for unknown reasons, or any other reason (except *purely* personal animosity), will no longer be compensable unless the claimant is able to link the assault to "work-related differences" between the assailant and the claimant.

As outlined above, New York has a long history of allowing Workers' Compensation Law claims in cases where the injury was caused by a non-employee or unknown assailant and/or for unknown reasons (see e.g. Valenti, 28 AD2d 572; Bennett, 114 AD2d 574; Conyers, 38 AD2d 987; Blair, 279 AD2d 941; Moran, 264 AD 966). Moreover, this Court affirmed compensability where the claimant was injured as a result of an individual presumably intending to damage the building in which the claimant worked (DeAngelis, 20 AD2d 162 [3d Dept

1963], affd 18 NY2d 727 [1966]). The foregoing concepts are part of the previously solid foundation that allowed for compensation under the Workers' Compensation Law for injuries that occurred as a result of actions by non-employees for reasons other than ones solely based on personal animus. Such actions range from attacks targeting a single person (see e.g. Valenti, 28 AD2d 572; Bennett, 114 AD2d 574; Conyers, 38 AD2d 987; Blair, 279 AD2d 941; Moran, 264 AD 966) to incidental injuries as a result of an attack on property (see e.g. DeAngelis, 20 AD2d 162), and even to incidental injuries as a result of a terror attack (see e.g. Matter of Tompkins v Morgan Stanley Dean Witter, 1 AD3d 695 [3d Dept 2003]; Matter of Shanbaum v Alliance Consulting Group, 26 AD3d 587 [3d Dept 2006]). In all of these instances, the various courts were simply answering the question of whether the injury occurred in the course of and out of the claimant's employment, and the answers were in the affirmative.

Should the Third Department's holding stand in the present case, workers would be stripped of the protection of the Workers' Compensation Law in a great variety of instances, particularly in cases such as the ones listed above. These instances include tragic – and previously compensable events – such as mass shootings, as in the present case, and even terror attacks, such as those which occurred on September 11, 2001. This is because, in analyzing such claims, the

Third Department necessarily engages in the analysis of whether an injury occurred in the course of and out of the claimant's employment when determining compensability, which was the *very same* analysis required in the present matter, and upon which the present matter was decided (Tompkins, 1 AD3d 695; Shanbaum, 26 AD3d 587; Duff v Port Authority of N.Y. and N.J., 13 AD3d 875 [3d Dept 2004]).

For example, in Tompkins, the Third Department engaged in an analysis of whether the claimant, who was struck by flying debris resulting from the second plane hitting Two World Trade Center, was within the scope of his employment at the time of the injury, when he was on his way to – and two blocks away from – his office in Two World Trade Center (id. at 695). The Court found that "substantial evidence supports the Board's finding that claimant's injuries arose out of and in the course of his employment" (id. at 696). Similarly, in Shanbaum, the Third Department, after engaging in the required analysis, found that the claimant was injured in the course of her employment when the claimant was injured as she fled from her apartment, where she was permitted to work, and after she had already logged into work, as a result of the terrorist attacks on the World Trade Center.

The Third Department did not indiscriminately award Workers' Compensation benefits to anyone who was injured due to the September 11 terrorist attacks. Instead, the Third Department vigorously adhered to the requirements of the Workers' Compensation Law that the injury must arise out of and in the course of employment in order to be compensable. For example, in Duff, the Third Department affirmed the Board's determination that the claimant's injury was not work related, where the claimant had been at home when the towers were hit, and decided "of his own volition and not at the request or direction of his employer, to risk his life by going to the site and, thereafter, to assist as a volunteer in the rescue efforts" (id. at 876-77).

Although it is not suggested that the circumstances of the present case can compare to the events of September 11, 2001 in terms of scope, trauma, or the scale of devastation, the similarities are enough to exemplify how, should the Third Department's decision in this matter have occurred before September 11, 2001, there would have been far fewer awards of compensation as a result of the terror attacks, including for the claimants in Tompkins and Shanbaum. By way of comparison, first, neither the September 11 terrorist attacks nor the mass shooting at BLH were perpetrated by individuals who were currently employed at the locations in question. Second, none of these attacks were perpetrated by co-

workers of the claimants. Third, none of the claimants knew the attackers. And fourth, none of the attacks were a result of "employment-related animus." In fact, the September 11 terrorist attacks are even farther removed from the employment of the claimants than the attack in the instant matter, because in this case, the attacker was previously employed by the hospital where the attack occurred, left his employment under less-than-ideal circumstances, and used his prior employment at BLH to facilitate his commission of the mass shooting. These four considerations formed the basis for the Third Department's decision to deny Workers' Compensation Benefits in the present matter. Thus, should the Third Department's instant decision have been applied to the September 11 terrorist attacks, Tompkins, Shanbaum, and other similarly situated claimants would *not* have been awarded compensation.

As demonstrated, then, the Third Department's decision in the present matter could have a tremendous impact going forward. Using a recent example from current events, should this decision stand and be followed in future cases, the employee-victims of the May 15, 2022 mass shooting at Tops Friendly Market in Buffalo, NY would not have any recourse through the Workers' Compensation Law for the injuries or death resulting from the mass shooting. To start, the shooter did not choose the supermarket because of "employment-related animus" – or even

because he knew somebody who worked there – but rather because the area "was home to the largest percentage of black residents near his home in New York's largely white Southern Tier" and he wanted to "kill as many black people as possible" (The New York Times, *Mass Shooting in Buffalo* [May 15, 2022], available at https://www.nytimes.com/2022/05/15/briefing/mass-shooting-buffalo-new-york.html [last accessed June 30, 2022]). The shooter did not work at the Tops supermarket; instead, he had to drive approximately three hours from his home in Conklin, New York to commit this atrocity (The Associated Press, *Buffalo shooting suspect is indicted on a domestic terrorism charge* [Jun. 1, 2022], available at https://www.npr.org/2022/06/01/1102485057/buffalo-shooting-suspect-charged-with-domestic-terrorism [last accessed June 30, 2022]).

Therefore, under the Third Department's decision in the present matter, the employees at Tops, who were injured or killed, will have no recourse through Workers' Compensation for the injuries sustained, including a security guard, a pharmacist, and an employee collecting shopping carts (Jon Harris, Jay Tokasz, *Tops employee survives bullet through neck from mass shooter* [May 15, 2022], available at https://buffalonews.com/news/local/tops-employee-survives-bullet-through-neck-from-mass-shooter/article_2c7666e8-d48c-11ec-b677-4b06defdab16.html [last accessed June 30, 2022]). Such a holding is contrary to

the law in New York prior to the decision in the instant matter, under which these prospective claims would have been compensable.

Under the previous law, these employees, who were "performing a job-related activity" when they were "wounded by gunshots" during their shift while at their place of employment and therefore acting in the course of their employment (see e.g. Valenti, 28 AD2d 572; Bennett, 114 AD2d 574), and had no prior relationship with the shooter (see e.g. Conyers, 38 AD2d at 987; Blair, 279 AD2d at 942-43; Valenti, 28 AD2d at 573; Moran, 264 AD at 966), would have been provided Workers' Compensation benefits since the shooter specifically chose the Tops market to commit his mass shooting, intending to do damage at that location, establishing the necessary nexus between their employment and their injuries (see e.g. DeAngelis, 20 AD2d 162).

Accordingly, the Third Department's decision in the present matter will have far-reaching implications for compensability of injuries resulting from victims of random singular acts of violence, to victims of mass shootings, and even to victims of terror attacks, by drastically narrowing the scope of compensability in a manner that is contrary to the well-established law in New York, even as workplace shootings are arguably on the rise (see e.g. Noah Berger, *We're Seeing a Spike in*

Workplace Shootings. Here's Why [May 27, 2021], available at https://www.npr.org/2021/05/27/1000745927/why-were-seeing-a-spike-in-workplace-shootings [last accessed June 30, 2022]). Therefore, this Court should grant leave to appeal from the Third Department's February 3, 2022 decision.

WHEREFORE, for all the foregoing reasons it is respectfully submitted that an order be issued pursuant to CPLR 5602(a)(1)(i) and 22 NYCRR § 500.22, granting BLH and State Insurance Fund leave to appeal from the Decision and Order of the Appellate Division, Third Department dated February 3, 2022, together with such other and further relief as this Court deems is just and proper.

Dated: Woodbury, New York
September 22, 2022

Caryn L. Lilling

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT
IN THE MATTER OF THE CLAIM FOR COMPENSATION UNDER THE WORKERS' COMPENSATION LAW CASE OF

JUSTIN TIMPERIO,
Claimant-Respondent,
- against -

BRONX-LEBANON HOSPITAL,
Employer-Respondent,
STATE INSURANCE FUND.,
Insurance Carrier-Respondent,
THE WORKERS' COMPENSATION BOARD,
Respondent Agency.

NOTICE OF MOTION FOR REARGUMENT AND LEAVE TO APPEAL TO THE COURT OF APPEALS

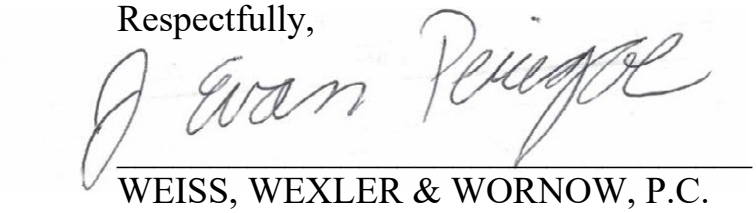
App. Div. Case No: 533584, WCB Case Number: G1955710

PLEASE TAKE NOTICE, that upon the attached affirmation dated March 3, 2022, of J. Evan Perigoe, an attorney admitted to practice in the State of New York, and upon all papers and proceedings herein, the undersigned will move in this Court at a Term for Motions at the Courthouse for the Appellate Division, Third Department, Empire State Plaza, Justice Building, Room 511, Albany, NY, on March 21, 2022, or as soon thereafter as counsel may be heard, for an Order to permit reargument and/or leave to appeal to the Court of Appeals on behalf of the State Insurance Fund and Bronx Lebanon Hospital, 2022, pursuant to Rule of Practice 1250.16 (d), as well as any further relief this Court may deem proper.

PLEASE TAKE FURTHER NOTICE, that this motion shall be submitted on the papers and your personal appearance in opposition to this motion is neither required nor permitted.

Dated: New York, New York
March 3, 2022

Respectfully,



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AFFIRMATION OF SERVICE

I, J. Evan Perigoe, affirm under penalty of perjury that:

I am an attorney duly admitted to practice law in the Courts of New York State, that I am part of a legal practice at the below address and that I am not a party to this action.

On March 3, 2022, I served a true copy of the Notice of Motion for Extension of Time, by depositing a copy thereof, enclosed in a postage-paid wrapper, in an official depository under the exclusive care and custody of U.S. Postal Service within the State of New York, addressed to each of the following at the last known address set forth after each name:

Letitia James
Attorney General of the State of New York State Dept. of Law, Labor Bureau
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New York, NY 10005

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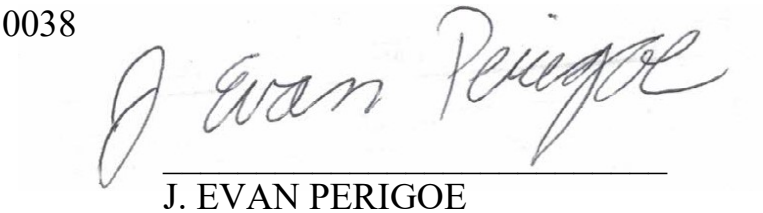
JUSTIN TIMPERIO
6 Richmeadow Cresent
London, ON N6H5E4
CANADA

Dated: New York, New York
March 3, 2022



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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT
IN THE MATTER OF THE CLAIM FOR COMPENSATION UNDER THE WORKERS' COMPENSATION LAW CASE OF

JUSTIN TIMPERIO,
Claimant-Respondent,
- against -

BRONX-LEBANON HOSPITAL,
Employer-Respondent,
STATE INSURANCE FUND.,
Insurance Carrier-Respondent,
THE WORKERS' COMPENSATION BOARD,
Respondent Agency.

ATTORNEY AFFIRMATION IN SUPPORT OF MOTION FOR REARGUMENT AND LEAVE TO APPEAL TO THE COURT OF APPEALS

App. Div. Case No: 533584, WCB Case Number: G1955710

I, J. EVAN PERIGOE, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirm under penalty of perjury:

I am associated with the law firm of Weiss, Wexler & Wornow, P.C., which represents the State Insurance Fund and its insured, Bronx-Lebanon Hospital, in relation to this matter. I am familiar with the facts of this case.

This affirmation is submitted in support of the would-be appellant's motion for an order seeking reargument and leave to appeal to the Court of Appeals in relation to this Court's order, dated February 3, 2022, that found that the "Board's decision establishing the claim must be reversed."

INTRODUCTION

The Court should grant reargument in this matter or, alternatively, grant leave to appeal the February 3, 2022, decision to the Court of Appeals, for two reasons.

First, the February 3, 2022, decision is in clear conflict with holdings of the Court of Appeals dating back over 100 years. Specifically, the February 3, 2022, decision held that the assault of Dr. Timperio at work did not arise out of his employment because his assailant "provided no reason for the attack" but on January 24, 1922, the Court of Appeals made clear in Katz that even injuries received while working from assailants with no clear motive arise out of employment.

Additionally, the Court of Appeals' Giliotti, and Malena decisions clearly hold that any injuries arise out of employment if they result from a worker entering a "zone of danger" in the course of employment. Its De Angelis decision states that this applies even where injuries are from an assailant with unknown motives. The February 3, 2022, decision also did not apply any "zone of danger" analysis.

Further, in Rosen the Court of Appeals was clear that, under WCL § 21, any assault in the course of employment is *presumed* to arise out of employment, with rebuttal of that presumption dependent upon "*substantial evidence that the assault was motivated by purely personal animosity.*" The February 3, 2022, decision recognized that Dr. Timperio was assaulted at work by a man he had never worked

with (and who could have no animosity towards him, personally), but contrary to Rosen, it reversed the Board's finding that the assault arose out of his employment.

Further, the February 3, 2022, decision would strip workers injured and killed in terrorist attacks and mass shootings (and their families) of their previously well-recognized right to workers compensation benefits, and leave nearly all of them with no recovery at all. That is, under the February 3, 2022, decision, the workers injured or killed in fact patterns similar to (1) the worst mass shooting in New York history, the 2009 Binghamton shooting, (2) the four deadliest US mass shootings in 2022, and (3) the September 11, 2001 terrorist attack on the World Trade Center, would all be ineligible for benefits. This is contrary to the purposes of the Workers' Compensation Law, which is "designed to insure that an employee injured in the course of employment will be made whole…" (Maines v Cronomer Valley Fire Dept., Inc., 50 NY2d 535, 544 [1980]).

Moreover, without workers compensation benefits, it is likely that most employees would be unable to recover anything from their employers. This is clear because non-employee victims often recover nothing at all against the institutions where shootings took place, as occurred in the (1) the 2009 Binghamton shooting, (2) the school shootings at Columbine and Virginia Tech (3) the worst post-9/11 terrorist attack in the U.S., the Pulse nightclub shooting.

I. The Court should grant leave to appeal to the Court of Appeals

(1) Appeal to the Court of Appeals should be permitted wherever (1) the issues presented are of public importance, (2) and involve a conflict with prior decisions of the Court of Appeals.

We submit that the starting point for the factors that this Court should consider in weighing whether or not to grant leave to appeal to the Court of Appeals in a workers compensation case are contained in Rule 500.22 (b) (4) of the State's Court Rules. This states that the reasons "why the questions presented merit review" by the Court of Appeals include considerations including (but not limited to):

> [1] that the issues are novel or [2] of public importance, [3] present a conflict with prior decisions of this Court, or [4] involve a conflict among the departments of the Appellate Division.

As the Court of Appeals itself (which approved that rule) is well positioned to determine what factors merit its own review, this rule provides the context for this Court's own rule 1250.16 (d) (3) (i) which simply requires a party to give the "reasons that the questions should be reviewed by the Court of Appeals."

But this Court must never require any party to prove the applicability of all four considerations in Rule 500.22 (b) (4) because *no more than two of these considerations can ever apply in the same case*. That is, the first consideration – novelty of the legal issue – is mutually exclusive with the third and fourth considerations, both of which obviously would only apply if the legal issue had

been previously addressed. Likewise, the third and fourth issues are mutually exclusive of each other, since it should be impossible to have "a conflict among the departments of the Appellate Division" if the Court of Appeals has already decisively ruled on the issue.

Thus, if a movant can prove public importance, and any other factor, the Court should permit review by the Court of Appeals.

(2) Review of the February 3, 2022, decision is warranted because it is contrary to 100 years of Court of Appeals precedent.

(a) The 2022 reversal of the Board's finding that one of the six workers who was shot by a man who "provided no reason for the attack" had compensable injuries is contrary to the Court of Appeals' 1922 holding affirming the Board's finding of compensability when a worker was stabbed by an "insane man" who stabbed "anyone near him."

For over one hundred years prior to February 3, 2022, it was clear that – absent evidence of some purely personal motive of an attacker – *any injury resulting from violence in the course of employment was compensable* under the Workers Compensation Law. That is, on January 24, 1922, the Court of Appeals held in Katz v A. Kadans & Co. that even an injury to a worker sustained while working from an "insane man running amuck" arose out of employment. (232 NY 420, 421-22 [1922]).

While numerous decisions of the Court of Appeals from the hundred years since the Katz decision bear discussion as well, the factual similarities of Dr.

Timperio and Mr. Katz's cases are so striking that *even standing alone*, the Katz case shows review by the Court of Appeals is warranted. Specifically, each of these men was going about his employment in the place and at the time when he was supposed to be – Dr. Timperio in the hospital, Mr. Katz, driving his employer's car from a delivery he had just made. (Katz, 232 NY at 421). Mr. Katz's assailant was an "insane man" who "stabbed anyone near him" and who there is no indication that Mr. Katz had any prior dealings with. (Id.) Dr. Timperio's assailant was a man who he had not previously worked with who shot six people and who "provided no reason for the attack" before he "shot and killed himself." (Matter of Timperio v. Bronx-Lebanon Hospital, 2022 NY Slip Op 00711 [3d Dept, Feb 3, 2022].)

Yet, while the Court of Appeals affirmed the Board's decision that Mr. Katz had suffered a compensable injury (Katz, 232 NY at 422) the February 3, 2022, decision reversed the Board's finding that Dr. Timperio had suffered a compensable injury. Moreover, there is no question that Katz v A. Kadans remains good law; although it was cited in SIF's brief (Resp. Br. for SIF and Bronx-Lebanon Hospital, p. 16.) nothing in the February 3, 2022, decision or any of the other briefing raises any doubts regarding Katz.

Thus, this Court should grant leave to appeal the February 3, 2022, decision to the Court of Appeals based solely on it being contrary to Katz v A. Kadans.

(b) The 2022 reversal of the Board's finding of that Dr. Timperio's injuries arose out of his employment is contrary to the Court of Appeals 1927 holding that injuries arise from employment whenever the employer brings a worker into a "zone of danger"

The February 3, 2022, decision is contrary to the Court of Appeals 1927 decision in Giliotti v. Hoffman Catering Co.,, which holds that injuries arise out of employment where the employment calls an employee into what turns out to be "a zone of danger," as well as its subsequent holding in Matter of Malena v. Leff. (respectively, 246 N.Y. 279, 283 [1927], 265 N.Y. 533, 534 [1934].)

In Giliotti, the Court of Appeals made clear that the Board may establish a claim even where nothing about the job itself, other than the place that it was performed, exposed the worker to the risk that materialized as a source of an injury. (246 N.Y. 279, 283 [1927].) Indeed, the Court of Appeals held that it was irrelevant that the hazard that led to the injury, such as the fire that had injured Mr. Giliotti, is one that, in general, is "common to all who work," and even those who do not work, because the hazard:

> attached specially to the premises where [the worker] was employed; it was peculiar to the situation and a risk to which his employment exposed him… If the employee were not in the …. building he would not be within the zone of danger. It follows that his employment called him into a place of potential danger from that source.

(Matter of Giliotti v. Hoffman Catering Co., 246 N.Y. 279, 283 [1927].)

The February 3, 2022, decision, did not affirm the Board's finding of compensability by reasoning that, if Dr. Timperio had not come to work at the

Hospital, he would not have been in the "zone of danger" and would not have been shot. Rather, that decision reversed the Board's compensability finding even though it found Dr. Timperio was in the hospital, in the course of his employment and that his injuries resulted from an assailant who entered the hospital and shot people there. (Matter of Timperio v. Bronx-Lebanon Hospital, 2022 NY Slip Op 00711 [3d Dept, Feb 3, 2022].)

Thus, the failure to apply the "zone of danger" analysis that the Court of Appeals determined was appropriate in Giliotti, indicates that review by the Court of Appeals of the February 3, 2022, decision is warranted.

Notably, Giliotti, essentially over-ruled the Court of Appeals' own prior holding from just two years earlier in Matter of McCarter v. LaRock, 240 N.Y. 282, (1925), which had held that, to be compensable, injuries must have an "origin in a risk incidental to the employment."

Further, less than a decade after McCarter was originally decided, the Court of Appeals entirely reversed itself when a nearly identical fact pattern came before it in Matter of Malena v. Leff, 265 N.Y. 533, 534 (1934). In both McCarter and Malena, the worker received his injuries (although Mr. Malena's were fatal) because of an explosion in a nearby building that was not under the employer's control. But, unlike in McCarter, the Court of Appeals more recent Malena

decision affirmed the Board's finding of compensability, again indicating that McCarter was overruled.

Review by the Court of Appeals off the February 3, 2022, decision is also warranted because that decision is contrary to Malena. That is, if explosions in nearby buildings arise out of the work of any employee injured in them *even though these events are clearly not under employer control or related to the worker's job*, then other dangers more firmly under the employer's control and/or more tightly connected to a worker's status an employee must also arise from work. Here, the injury (1) occurred on the employer's premises, (2) was inflicted by a former employee, (3) who left employment after being accused of wrongdoing, suggesting he had animus towards the employer, and (4) all but one of the people the former-employee shot were employees, as opposed to members of the public, which suggests employees were specifically targeted. Thus, review by the Court of Appeals of the February 3, 2022, decision is certainly warranted.

Lest there be any doubt on the issue, McCarter was once and for all "limited almost to its own peculiar facts" when in, De Angelis v Garfinkel Painting Co., the Court of Appeals affirmed a decision of this Court making that very statement. (18 NY2d 727 [1966] affirming DeAngelis v Garfinkel Painting Co., 20 AD2d 162, 163-64 [3d Dept 1963].)

(c) The 2022 reversal of the Board's finding that Dr. Timperio's injuries arose out of his employment is contrary to the Court of Appeals' 1966 holding that injuries to workers in the course of employment from assailants with unknown motives arise out of employment.

In De Angelis, the Court of Appeals found that the claimant was "injured when [a] stone was thrown through window in apartment house where he was working." (Id.) Neither the Court of Appeals' decision nor this Court's decision, which the Court of Appeals affirmed, indicates that the rock-thrower's motive was to injure Mr. De Angelis for some personal reason. Indeed, the stone-thrower's motive was clearly unknown, as this Court's decision "could only surmise that the person who threw the stone into the closed window of the work premises intended to damage the premises" before concluding that "the case at bar is … precisely the kind of case in which the mandate of the statutory presumption [of § 21 (1)] ought to be effective." (DeAngelis, 20 AD2d 162, 164 [3d Dept 1963] aff'd sub nom De Angelis v Garfinkel Painting Co., 18 NY2d 727 [1966].)

The February 3, 2022, decision held that the fact that the assailant "provided no reason for the attack prior to taking his own life" rebutted the presumption of compensability articulated in Workers' Compensation Law § 21 (1).

Therefore, the February 3, 2022, decision merits review because the Court of Appeals in De Angelis clearly did not consider the unknown motives of the assailant as rebutting the presumption of Workers' Compensation Law § 21 (1).

(d) The 2022 reversal of the Board's finding that Dr. Timperio's injuries arose out of his employment is contrary to the Court of Appeals 1994 instruction in Rosen that injuries in the course of employment are presumed to arise out of the employment, absent substantial evidence that the assault was motivated by purely personal animosity

The February 3, 2022, decision's conclusion that the presumption of compensability in WCL § 21 (1) may be rebutted with evidence that there was no relationship between an injured worker and his or her assailant is directly contrary to how the Court of Appeals has instructed that this analysis should occur.

Section 21 of the Workers Compensation Law states that "it shall be presumed in the absence of substantial evidence to the contrary (1) That the claim comes within the provision of this chapter."

In Matter of Rosen v First Manhattan Bank, the Court of Appeals instructed that the proper method to apply WCL § 21 (1) is that:

> an assault which arose in the course of employment is presumed to have arisen out of the employment, absent substantial evidence that the assault was motivated by purely personal animosity.

(Matter of Rosen v First Manhattan Bank, 84 NY2d 856, 857 [1994]) (emphasis added.) Notably, this holding in Rosen depended on an earlier decision of the Court of Appeals, Matter of Seymour v. Rivera Appliances Corp., in which the Court of Appeals had upheld the Board's finding of compensability, reversing a finding by the Appellate Division that the basis for the assault was not work-related. (Matter of Seymour v. Rivera Appliances Corp., 28 N.Y.2d 406, 409, 322

N.Y.S.2d 243 [1971] reversing Seymour v Rivera Appliances Corp., 33 AD2d 958, 960.)

The February 3, 2022, decision expressly held that the "proof [presented] was sufficient to rebut the presumption articulated in Workers' Compensation Law § 21 (1)." Yet despite actually citing the very passage from Rosen quoted above, the February 3, 2022, decision *never held* that there was "substantial evidence that the assault was motivated by purely personal animosity" towards Dr. Timperio. (Matter of Timperio v. Bronx-Lebanon Hospital, 2022 NY Slip Op 00711 [3d Dept, Feb 3, 2022].) This appears to be because the February 3, 2022, decision erroneously stated that the above-quoted test in Rosen "said differently" equated to:

> [w]hether the injury producing event arose out of and in the course of [a] claimant's employment depends upon whether it 'originated in work-related differences or purely from personal animosity'

(Matter of Timperio v. Bronx-Lebanon Hospital, 2022 NY Slip Op 00711 [3d Dept, Feb 3, 2022] quoting Matter of Mosley v Hannaford Bros. Co., 119 AD3d 1017 [3d Dept 2014] citing Matter of Cuthbert v Panorama Windows Ltd., 78 AD3d 1450, 1451 [2010]; see Matter of Gutierrez v Courtyard by Marriott, 46 AD3d 1241, 1242 [2007]).)

Unlike the Court of Appeals' Rosen rule, however, the so-called "equivalent" test allows for two possibilities for the source of an injury: (1) "work-

related differences" or (2) "purely from personal animosity." As such, this "either or" rule cannot possibly produce the correct result under Rosen where, as here, *injuries fall into neither category* because the assailant and victim have never previously met each other. Attempting to apply this "either/or" rule here appears to have led to a ruling based on whether there were "work related differences" between Timperio and his assailant, even though *this forms no part of the test laid out by the Court of Appeals*. Rather the Court of Appeals test looks solely to the issue of whether "purely from personal animosity" led to the injuries, and if there is no evidence of this, then presumption § 21 (1) has not been rebutted.

The result of the confusion on this point in the February 3, 2022, decision is an erroneous holding that § 21 (1) may be rebutted by the absence of evidence of personal animosity – *which is the precise opposite of the Court of Appeals' rule in Rosen that it quoted*. That is, the February 3, 2022, decision emphasized the absence of any relationship at all between Timperio and the attacker as "sufficient to rebut the presumption articulated in Workers' Compensation Law § 21," specifically noting that:

> The undisputed facts in the record demonstrate that the attack was perpetrated by an individual who was not employed by the hospital at the time of the attack (and had not worked there for over two years), was not and never was Timperio's coworker, did not know Timperio and provided no reason for the attack prior to taking his own life. Nor did Timperio know the attacker, and there is no evidence that the attack was based upon an employment-related animus between the two

> individuals or that the attack had any nexus to Timperio's employment or "performance of h[is] job duties."

(Matter of Timperio v. Bronx-Lebanon Hospital, 2022 NY Slip Op 00711 [3d Dept, Feb 3, 2022].)

In fact, where – as here – there is no evidence of any prior relationship between the injured worker and the assailant, there cannot be substantial evidence that "the assault was motivated by purely personal animosity." (Rosen, 84 NY2d 856.) Thus, the result of the February 3, 2022, decision is clearly contrary to the express direction from the Court of Appeals in Rosen that the decision cited.

Review by the Court of Appeals is therefore appropriate.

(3) Review of the February 3, 2022, decision, is warranted based on its public importance as it strips victims of mass-shootings and terrorism in the workplace of their previously-existing right to claim workers compensation benefits, and would likely leave them with zero recovery.

(a) That the compensation given to victims of mass shootings and their families is of public importance is clear from the repeated extensions of the deadline to file claims related to the September 11, 2011 attacks and from the media attention given to terrorism and mass shootings.

The unpleasant truth is that violent workplace incidents, including workplace mass-shootings, are likely to happen in New York in the future. While we all may *hope* that there is never another terrorist attack similar to September 11,

2001, such an attack remains a realistic possibility and New York City remains a target.[1]

It is axiomatic that mass shootings and other mass-casualty events, such as terrorist attacks, generate a high level of media attention. Indeed, I, J. Evan Perigoe, have been personally contacted by two different news organizations to comment on this Court's February 3, 2022, decision. Although I have handled thirty-nine appeals from the Workers Compensation Board, this is the first time any cases I have ever been involved in has generated this level of media attention. This suggests the public has an interest in this issue.

Moreover, the media coverage associated with mass shootings and terrorist killings frequently extends to the families of deceased victims and surviving victims, even years later. Indeed, on February 16, 2022, during the time I was drafting this motion, a news broadcast I happened to be listening to featured a story about changes to the gun industry sought by families of the Sandy Hook Elementary School shooting victims as a result of their settlement with the insurers

[1] 2 Arrested In Alleged Terror Plot Targeting Trump Tower, New York Stock Exchange, Other Government Buildings, CBSnews.com, Sep. 25, 2020, https://newyork.cbslocal.com/2020/09/25/alleged-terror-plot-nyc-trump-tower-new-york-stock-exchange/ (last accessed Feb 17, 2022).
Terror Suspect Arrested After Allegedly Plotting 9/11-Style Attack In U.S., CBS New York, Dec. 25, 2020, available https://www.cbsnews.com/newyork/news/terror-plot-arrest/ (last accessed Feb 17, 2022).

of a bankrupt gun manufacturer.[2] Notably, this story comes *nearly a decade* after a gunman – despite having no clear reason for doing so – killed 20 young students and 6 adult staff members on December 14, 2012, at the school.[3]

Of course, the issue of victims of high-profile mass casualty events and their families being denied workers compensation are particularly likely to become part of the public conversation, which makes any ruling – such as the February 3, 2022, decision here – of particular public importance.

For example, the public has been sufficiently concerned that *all victims* of the September 11, 2001, terrorist attacks – including those who did not develop any signs of illness for many years – have potential access to workers compensation benefits such that the deadline to file a claim has been extended in 2006, 2007, 2013, 2016, and 2018. (See WCL § 162, L.2006, c. 446, § 1, eff. Aug. 14, 2006, deemed eff. Sept. 11, 2001. Amended L.2007, c. 199, § 1, eff. July 3,

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[2] Families of Sandy Hook victims announce $73 million settlement with Remington, Feb. 16, 2022, 5:08 AM ET, NPR.org, https://www.npr.org/2022/02/16/1081049193/families-of-sandy-hook-victims-announce-73-million-settlement-with-remington (last accessed Feb. 17, 2022).

[3] Tom Winter and Lisa Riordan Seville, Newtown report: Shooter Adam Lanza had no clear motive, was obsessed with Columbine, NBCNews.com, Nov. 25, 2013, https://www.nbcnews.com/news/world/newtown-report-shooter-adam-lanza-had-no-clear-motive-was-flna2D11651840; Sandy Hook Elementary: Newtown, Connecticut shooting timeline, theoaklandpress.com, Dec. 15, 2012, archived at https://web.archive.org/web/20121221111722/http://theoaklandpress.com/article (last accessed Feb 24, 2022).
s/2012/12/15/news/nation_and_world/doc50cd1eec00eb9242897410.txt

2007; L.2008, c. 489, § 18, eff. Aug. 5, 2008, deemed eff. Sept. 11, 2001; L.2013, c. 489, § 11, eff. Nov. 13, 2013, deemed eff. Sept. 11, 2001; L.2016, c. 326, § 1, eff. Sept. 11, 2016, deemed eff. Sept. 11, 2001; L.2018, c. 266, § 2, eff. Sept. 7, 2018, deemed eff. Sept. 11, 2001.)

Indeed mere *delays* in the provision of medical care through workers compensation to victims have prompted public outcry elsewhere. For example, following the mass shooting at the San Bernardino Office of Public Health on December 2, 2015 – during which 13 employees and one other person were killed – survivor complaints about delays in receiving authorizations for treatment[4] led to the enactment of a law requiring the immediate appointment of a nurse case manager to all claims resulting from similar incidents.[5]

Moreover, the vast majority of the victims of the September 11, 2001, terrorist attacks are in the New York City area, and these victims and their advocates remain active even 20 years after the attack.[6] As we shall prove below,

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[4] Richard K. De Atley, With each new mass shooting, San Bernardino terror attack victims worry about being 'forgotten', The Sun (San Benadino), Nov. 30, 2018, available at https://www.sbsun.com/2018/11/30/with-each-new-mass-shooting-san-bernardino-terror-attack-victims-worry-about-being-forgotten/ (last accessed Feb 23, 2022.)

[5] Joe Nelson, Gov. Brown passes bill prompted by San Bernardino terrorist attack, Redlands Daily Facts, Oct. 18, 2017, available at https://www.redlandsdailyfacts.com/2017/10/18/gov-brown-passes-bill-prompted-by-san-bernardino-terrorist-attack/ (last accessed Feb 23, 2022.)

[6] Danielle Haynes, 9/11 victims ask Biden to declassify evidence or skip memorials, Aug. 6, 2021 available at

the February 3, 2022, decision would strip workers compensation benefits from nearly every worker injured or killed by a future mass shootings or terrorist act in New York, including any future event identical to the September 11, 2001, attacks, and would leave victims and their survivors with no remedy. Thus, one would reasonably expect the many 9/11 victims, their families and their advocates to use their platform with the media and the public to elevate this issue in the media and public consciousness the first time such a terrorism or mass-shooting victim, or a surviving family, is denied workers compensation.

(b) Prior to the February 3, 2022, decision, it was clear that every worker injured as the result of violence, including terrorism or mass-shooting, was presumed to be entitled to workers compensation benefits, with evidence of a purely personal motive for an assault able to defeat this presumption.

As was already discussed above, it was well understood for *one hundred years* prior to February 3, 2022, that *any injury resulting from violence was presumed to be* compensable under the Workers Compensation Law. (See above, point [I] [2].) This presumption could then be rebutted if there was affirmative evidence of a purely personal motive of an attacker.

Following the terrorist attacks at the World Trade Center on September 11, 2001, this Court *never questioned* that all of the victims who were injured and

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https://www.upi.com/Top_News/US/2021/08/06/President-Joe-Biden-911-memorials/4251628278090/ (last accessed Feb 23, 2022).

killed (or, actually, their statutory beneficiaries)[7] had compensable workers compensation claims. Indeed, the Court even upheld the Board when it found that a claimant had an injury that arose "out of and in the course of his employment" after he was struck by flying debris while still two blocks away from the office at Two World Trade Center that he was commuting to. (Tompkins v Morgan Stanley Dean Witter, 1 AD3d 695, 696 [3d Dept 2003].) The Court also affirmed the Board's decision to find compensable injuries another claimant suffered when she fled an apartment located across the street from the World Trade Center, that her employer had authorized as a work-location, as she had already logged on to her laptop and begun working that morning. (Matter of Shanbaum v All. Consulting Group, 26 AD3d 587 [3d Dept 2006].)

Although literally thousands of claims were filed related to the events of 9/11 at the World Trade Center,[8] and this Court heard numerous appeals of the Board's compensability decisions,[9] *not one claim was ever found non-compensable*

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[7] See, e.g., Matter of Crisman v Marsh & McLennan Companies, Inc., 6 AD3d 899, 899 (3d Dept 2004).

[8] The New York State Workers Compensation Board received, 2,206 death claims by the September 11, 2003, deadline to file a claim. Lloyd Dixon Rachel Kaganoff Stern, *Compensation for Losses from the 9/11 Attacks*, Rand Institute for Civil Justice (2004), p. 18, available at https://www.rand.org/content/dam/rand/pubs/monographs/2004/RAND_MG264.pdf [last accessed: (Feb 17, 2021).

[9] Young v Pentax Precision Instrument Corp., 57 AD3d 1323, 1324 [3d Dept 2008]; Matter of Shanbaum v All. Consulting Group, 26 AD3d 587 [3d Dept 2006]; Matter of Wald v Avalon Partners, Inc., 23 AD3d 820, 821 [3d Dept 2005];

based on the injuries not "arising out of" the employment because they resulted from a terrorist attack. Notably, the compensability of these claims resulted purely from an application of the ordinary workers compensation law, as the only special legislation ever passed related to the 9/11 attacks merely extended the deadlines to file claims. (See WCL art. 8-a.)

(c) **The February 3, 2022, decision is of public importance because, under this decision, not one employee working at the World Trade Center during the September 11, 2001, attacks would have been entitled to workers compensation benefits, nor will any victim of a similar future terrorist attack have such benefits.**

If the rule of the February 3, 2022, decision were applied to the workers injured and killed on September 11, 2001, who were while physically present at their places of employment within the World Trade Center, it is clear that *not one of these workers would be found to have a compensable claim*. That is, the February 3, 2022, decision found Timperio's injuries did not to arise out of his employment because:

> The undisputed facts in the record demonstrate that the attack was perpetrated by an individual who was not employed by the hospital at the time of the attack (and had not worked there for over two years), was not and never was Timperio's coworker, did not know Timperio and provided no reason for the attack prior to taking his own life. Nor did Timperio know the attacker, and there is no evidence that the attack was based upon an employment-related animus between the two

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Matter of Duff v Port Auth. of N.Y. and N.J., 13 AD3d 875, 877 [3d Dept 2004]; Matter of Betro v Salomon Smith Barney, 8 AD3d 847, 847 [3d Dept 2004]; Matter of White v Fuji Bank, Ltd., 8 AD3d 817, 817 [3d Dept 2004]; Matter of Chalcoff v Project One, 12 AD3d 872, 872 [3d Dept 2004]).

> individuals or that the attack had any nexus to Timperio's employment or "performance of h[is] job duties" …. Such proof was sufficient to rebut the presumption articulated in Workers' Compensation Law § 21 (1) and to establish that the assault on Timperio resulted exclusively from arbitrary, broad-sweeping and gravely maligned personal animosity and not from work-related differences with Timperio.

(Matter of Timperio v. Bronx-Lebanon Hospital, 2022 NY Slip Op 00711 [3d Dept, Feb 3, 2022].)

It is easy to see how the rule announced by the February 3, 2022 decision would eliminate *every* claim on behalf of workers in their offices at the World Trade Center on September 11, 2001. Indeed, although there are important differences between Bello's attack at Bronx-Lebanon Hospital and the 9/11 WTC attacks, they parallel each other closely enough that one can simply replace references to (a) Bello and (b) Dr. Timperio, respectively, in the February 3, 2022, decision with references to (a) the 9/11 attackers who destroyed the North Tower, and (b) any worker killed or injured in the attack on that tower. As in:

> The undisputed facts in the record demonstrate that the attack [on the North Tower of the World Trade Center was perpetrated by Mohamed Atta, Abdulaziz al-Omari, Suqami, Wail al-Shehri, and Waleed al-Shehri] individual[s] … not employed by [any business in the World Trade Center] at the time of the attack…. [These men] w[ere] not and never w[ere] [the claimant's] coworker[s], did not know [the claimant] and provided no reason for the attack prior to taking [their] own li[ves]. Nor did [the claimant] know [Mr. Atta or any of the other] attacker[s], and there is no evidence that the attack was based on employment-related animus between the [claimant and any of the attackers] or that the attack had any nexus to [the claimant's] employment or 'performance of h[is] job duties' Such proof was sufficient to rebut the presumption articulated in Workers' Compensation Law § 21 (1) and to

> establish that the assault on [the claimant] resulted exclusively from arbitrary, broad-sweeping and gravely maligned personal animosity and not from work-related differences with [the claimant].

(Matter of Timperio v. Bronx-Lebanon Hospital, 2022 NY Slip Op 00711 [3d Dept, Feb 3, 2022]) (additional parenthetical statements insert by movant, not contained in original.)

Since we know for a fact that every employee at the World Trade Center injured or killed while at work – and even some travelling to, or fleeing from work – had compensable claims, it follows that the February 3, 2022, decision must clearly be wrong.

And if the February 3, 2022, decision is allowed to stand, the implication is obvious: anyone killed by a terrorist while at work in New York who could have successfully filed a workers compensation claim prior to February 3, 2022, is now entirely unable to do so.

(d) The February 3, 2022, decision is of public importance because this decision would eliminate workers compensation coverage for all mass shootings, including shootings with facts identical to the most deadly mass shooting in New York's history, the four most deadly mass shootings in the United States in 2021.

The rule of the February 3, 2022, decision is of public importance because it would make victims of the most deadly mass shootings ineligible for workers compensation benefits. In fact, all of the most deadly mass shooting in the history of the State of New York, as well as the four most deadly mass shootings of 2021

in the Unties States (had they happened in New York), involved mass killings in workplaces and compensable injuries to employees and their survivors under the pre-February 3, 2022, law.

(i) The February 3, 2022, decision, would strip victims like the employees killed in the 2009 Binghamton shooting of workers compensation benefits.

New York's most deadly mass shooting took place on April 3, 2009, when a gunman entered an immigration center in Binghamton, New York.[10] Before killing himself, the gunman killed 13 other people, including one of the receptionists, a part-time caseworker, and a teacher of English as a second language.[11] The remaining victims were students learning English, as the shooter himself had been at one point. A manifesto detailing paranoid delusions – including police misconduct and persecution through secret visits to his residence – was later received by a TV station, postmarked the day of the attack.[12]

Critically, there was nothing about the gunman's own experience at the immigration center that motivated his decision to shoot anyone. Indeed, it is not

[10] List of shootings in New York, Wikipedia.org, https://en.wikipedia.org/wiki/List_of_shootings_in_New_York (last accessed Feb. 23, 2022).
[11] Binghamton shooting, Wikipedia.org, https://en.wikipedia.org/wiki/Binghamton_shooting (last accessed Feb. 23, 2022).
[12] Jiverly Wong, Letter to News 10 Now (PDF), Mar. 18, 2009, NY Times, http://graphics8.nytimes.com/packages/pdf/nyregion/2009/20090407_WONG_LETTER.pdf.

even clear that the gunman had ever met any of the victims. Rather, like the "insane man running amuck" in Katz. V. A Kadans & Co., the Binghamton gunman's decision to shoot people in the immigration center seems to have been an either entirely irrational choice, wholly disconnected from reality, or a near-arbitrary selection made by someone who simply wanted to kill many people in the same place. Thus, "there is no evidence that the attack was based upon an employment-related animus between the [shooter and the victims] or that the attack had any nexus to [the victim's] employment or 'performance of [their] job duties,'" so the immigration center's employees would not be entitled to any workers compensation benefits. (Matter of Timperio v. Bronx-Lebanon Hospital, 2022 NY Slip Op 00711 at *4 [3d Dept, Feb 3, 2022].)

(ii) The February 3, 2022, decision would not allow employees killed in a fact pattern similar to the March 16, 2021, Atlanta Spa Shootings to have workers compensation benefits.

On March 16, 2021, a man with a gun killed eight people, including six workers, at three Atlanta area businesses: Young's Asian Massage, Gold Massage Spa and Aromatherapy Spa.[13] The killer was found to be a customer of the

[13] Hanna Park, He shot at 'everyone he saw': Atlanta spa workers recount horrors of shooting, (nbcnews.com), Apr. 2, 2021, https://www.nbcnews.com/news/asian-america/he-shot-everyone-he-saw-atlanta-spa-workers-recount-horrors-n1262928 (last accessed Feb. 23, 2022.);
Atlanta spa shootings: Who are the victims? BBC News, Mar. 22, 2021, https://www.bbc.com/news/world-us-canada-56446771 (last accessed Feb. 23, 2022).

massage parlors and admitted that his motive was that he saw these as sources of sexual temptation for him that he sought to "eliminate."[14]

There was no specific evidence that the attacker in the Atlanta Spa shootings ever previously met any of the specific victims, as opposed to simply visiting the establishments where they worked. Thus, "there is no evidence that the attack was based upon an employment-related animus between the [shooter and the victims] or that the attack had any nexus to [the victim's] employment or 'performance of [their] job duties'" and so the victims would not be entitled to workers compensation benefits if the February 3, 2022, decision were applied to these facts. (Matter of Timperio v. Bronx-Lebanon Hospital, 2022 NY Slip Op 00711, at *4 [3d Dept, Feb 3, 2022].)

[14]Graig Graziosi, Robert Aaron Long: Georgia shooter's 'really bad day' and sexual hang-ups led to murders at massage parlors he frequented, The Independent (UK), Mar. 18, 2021, https://www.independent.co.uk/news/world/americas/robert-aaron-long-georgia-shooting-sexual-racism-b1818532.html (last accessed Feb. 23, 2022); 2021 Atlanta spa shootings, Wikipedia.com, https://en.wikipedia.org/wiki/2021_Atlanta_spa_shootings (last accessed Feb 23, 2022); Shamar Walters and Corky Siemaszko, With motive still disputed, some point to shooting suspect's religion, shame, NBC News, Mar. 18, 2021, https://www.nbcnews.com/news/us-news/motive-still-disputed-some-point-shooting-suspect-s-religion-shame-n1261399

(iii) The February 3, 2022, decision would not allow employees killed in a fact pattern similar to the March 22, 2021, Boulder "King Soopers" supermarket shooting to have workers compensation benefits.

On March 22, 2021, a gunman killed 10 people in a King Soopers grocery store in Boulder, Colorado.[15] The victims included one of the store's managers, two other employees, a repairman who was there to fix a Starbucks coffee machine in the store, a responding police officer, and five customers.[16] The shooter was apprehended but was determined to be too mentally ill to stand trial,[17] and the FBI concluded that his social media accounts did not suggest radical views.[18]

There was no indication that the shooter in the Boulder grocery store was a former employee, or even any evidence that he was ever a customer of the store, let alone any evidence that his interactions with any store's employees in any way contributed to the attack. Thus, for the three store employees and maintenance worker who were killed, "there is no evidence that the attack was based upon an

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[15] 2021 Boulder shooting, Wikipedia.org, https://en.wikipedia.org/wiki/2021_Boulder_shooting (last accessed Feb. 23, 2022).

[16] Id. See also, Service Tech, 23, Among Victims of Mass Shooting in Colorado, Fermag.com, https://www.fermag.com/articles/service-tech-23-among-victims-of-mass-shooting-in-colorado/ (last accessed Feb. 23, 2022)

[17] Colleen Slevin, Colorado supermarket shooting suspect incompetent for trial, AP News, December 3, 2021, https://apnews.com/article/colorado-boulder-3e9a7f842870d31b556d1019d9b8abca (last accessed Feb. 23, 2022)

[18] Colleen Slevin, et al. Lawyer: Colorado shooting suspect needs mental health review, AP News, Mar. 25, 2021, https://apnews.com/article/ahmad-al-aliwi-alissa-1st-court-appearance-boulder-shooting-d870b03a763d8b20fdfa04a26a1379a1

employment-related animus between the [shooter and the victims] or that the attack had any nexus to [the victim's] employment or 'performance of [their] job duties'" and so the victims would not be entitled to workers compensation if the February 3, 2022, decision were applied to these facts. (Matter of Timperio v. Bronx-Lebanon Hospital, 2022 NY Slip Op 00711, at *4 [3d Dept, Feb 3, 2022].)

(iv) The February 3, 2022, decision would not allow employees killed in a fact pattern similar to the April 15, 2021, FedEx shooting to have workers compensation benefits.

On April 15, 2021, a former employee of a FedEx distribution facility in Indianapolis killed eight others before shooting himself. The shooter had not worked at the facility since October, 2020.[19] Despite the fact that many of the victims were non-white and Sikhs, the FBI concluded that he shooter's motive was not based on ideology or bias, but was "an act of suicidal murder" intended to "demonstrate his masculinity and capability while fulfilling a final desire to experience killing people."[20]

[19] Tony Cook and Johnny Magdaleno, FedEx shooting: How inadequate interventions failed to stop killings, Indystar.com, Nov. 11, 2021, https://www.indystar.com/in-depth/news/investigations/2021/11/11/indianapolis-fedex-shooting-sheila-hole-inadequate-interventions-failed-stop-killings/6237864001/ (last accessed Feb. 23, 2022)

[20] Id.

The victims of the FedEx shooting included, Jaswinder Singh, age 68, who had "only started working at the FedEx facility this week,"[21] Karli Smith, age 19, who was "awaiting her first pay cheque after starting work at the plant two weeks ago,"[22] Samantha Blackwell, also age 19, "who had only been on the job for a matter of weeks,"[23] and Amarjit Sekhon, 49, who "began working at the FedEx facility six months ago on an overnight shift."[24] As the gunman himself had stopped working at the FedEx facility in October, 2020, and the shooting was on April 15, 2021, it seems clear that at least three of his victims were never his "co-workers," and that it is unclear whether a fourth, Ms. Sekhon, was his co-worker, as she would have started either just before, or just after he stopped working there. Such "non-co-worker" employee victims are clearly disqualified from benefits under the February 3, 2022, decision.

That said, it does not appear that even those employees who worked at the FedEx facility at the same time as the gunman would be entitled to workers compensation benefits either. This is because the FBI's assessment was that the

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[21] Indianapolis FedEx shooting: Who were the eight victims? BBC News, Apr. 18, 2021, https://www.bbc.com/news/world-us-canada-56789254 (last accessed Feb. 23, 2022).
[22] Id.
[23] Dan Klein, FedEx victim Samaria Blackwell, 19, dreamed of becoming a police officer, Wishtv.com, https://www.wishtv.com/news/local-news/fedex-victim-samaria-blackwell-19-dreamed-of-becoming-a-police-officer/ (last accessed Feb. 23, 2022).
[24] See note ___ above. (BBC)

shooter was not even motivated by ill will towards his employers or former co-workers: he simply wanted to kill people and to die at the hands of the police. Therefore, "there is no evidence that the attack was based upon an employment-related animus between the [shooter and the victims] or that the attack had any nexus to [the victim's] employment or 'performance of [their] job duties'" and so none of the employee-victims would be entitled to workers compensation benefits if the February 3, 2022, decision were applied to these facts. (Matter of Timperio v. Bronx-Lebanon Hospital, 2022 NY Slip Op 00711, at *4 [3d Dept, Feb 3, 2022].)

(v) The February 3, 2022, decision would not allow employees killed in a fact pattern similar to the May 26, 2021, VTA shooting to have workers compensation benefits.

On May 26, 2021, a gunman killed 9 people at the Santa Clara Valley Transportation Authority's control center, before being killed.[25] The gunman was an employee of the VTA who had previously been disciplined, and who, in April 2021, had broadcast over the VTA's radio system his anger of a policy that ended cash payouts for unused vacation days.[26]

[25] 2021 San Jose shooting, Wikipedia.org, https://en.wikipedia.org/wiki/2021_San_Jose_shooting, (last accessed Feb. 23, 2022).

[26] David DeBolt et al. VTA shooter blew up on radio dispatch, complained about pay, vacation, coworkers say, The Mercury News (San Jose), (May 28, 2021) https://www.mercurynews.com/2021/05/28/vta-shooter-blew-up-on-radio-

While one might try to distinguish a case like the VTA shooting from the rule in the February 3, 2022, decision on the basis that the victims were the assailant's co-employees, the stated basis of the February 3, 2022, decision would not permit this. That is, the February 3, 2022, decision recognized that the attacker in the case, Bello, had previously resigned his position as a doctor at the hospital following allegations of sexually harassment, and that he shot not only Dr. Timperio, a first-year medical resident, but also another doctor (who died) and four other members of the medical staff, as well as one patient, and that he set "fire to the hospital's sixteenth floor nursing station." (Matter of Timperio v. Bronx-Lebanon Hospital, 2022 NY Slip Op 00711, at *1 [3d Dept, Feb 3, 2022].) The February 3, 2022, decision also found that the Board was not permitted to conclude that there was a nexus between Timperio's injury (Id. at *4-*5) and his work even though the Hospital's brief had argued that the above facts showed Timperio was shot (1) out of professional jealousy, as he held the same position Bello resigned from, and (2) because Bello targeted hospital employees based on a grievance against the Hospital. (Resp. Br. for SIF and Bronx-Lebanon Hospital, p. 30.)

Thus, were the February 3, 2022, decision applied to the fact pattern of the VTA shooting, the conclusion would have to be that the victims would receive no

dispatch-complained-about-pay-vacation-coworker-say/, (last accessed Feb. 23, 2022).

workers compensation benefits. That is, applying the February 3, 2022, decision, the Board could not conclude from the VTA shooter's past record of discipline or angry statements about the VTA over its radio system, that the shooting of VTA employees was motivated by his animus against the VTA. As such, the fact pattern of the VTA shootings would lead to the same result as the other mass shootings discussed for the same reasons: because "there is no evidence that the attack was based upon an employment-related animus between the [attacker and the victims] or that the attack had any nexus to [the victim's] employment or 'performance of h[is] job duties." (Matter of Timperio v. Bronx-Lebanon Hospital, 2022 NY Slip Op 00711, at *4 [3d Dept, Feb 3, 2022].)

Simply put, if the Board can't find a nexus based on the facts in the February 3, 2022, case, the mere fact that a mass shooter remains an employee would not be enough to allow it to find such a nexus for other employees. Indeed, it is unclear that anything other than an explicit statement by the gunman that he shot his victims because of their status as employees would be sufficient to establish that the injuries arose out of claimant's work under the February 3, 2022, decision.

(e) Victims of terrorism and mass shootings are unlikely to have any meaningful compensation or recovery if they are deprived of workers compensation benefits, such that they would likely be left with no recourse under the February 3, 2022, decision.

We submit that it is highly unlikely that employee-victims of mass shootings or terrorism would be likely to receive any compensation at all if workers

compensation is not available. Specifically, (1) individual terrorists and shooters are likely judgment proof, (2) it takes decades to get compensation from sponsors of terrorism, (3) gun manufacturers are largely immune from suits and (4) there is typically no viable claim against the employer or business where a mass shooting or terrorist attack has occurred (other than, for employees prior to February 3, 2022, a workers compensation claim).

(i) Terrorists and mass Shooters are usually judgment proof.

People with substantial assets do not typically become mass-shooters or the terrorist foot-soldiers who actually commit terrorist attacks. Notably, the families of 9/11 victims have sued the Taliban, al-Quida, the government of Iran and the government of Saudi Arabia, but they did not sue the actual perpetrators or their estates.[27] Likewise, there was no suit by the families of the 2009 Binghamton victims, or any of the families of the 2021 shootings discussed above against the actual perpetrators of those attacks.

(ii) It is usually not viable to sue the sponsors of terrorism, and even when it may be, suits take decades.

Nearly all mass shootings, and a surprisingly high proportion of terrorist attacks, are committed by so-called "lone wolves" – lone attackers, or "self-radicalized" terrorists who commit their acts out of ideological conviction, but

[27] In re Terrorist Attacks on September 11, 2001, 03MDL01570GBDSN, 2020 WL 5848990, at *1 (SDNY Sept. 30, 2020).

without any material support from an organization. Suits against larger organizations are not viable in these contexts.

Even when suits are brought against organizations alleged to have provided material support, the road to recovery is long and uncertain. Over two decades after September 11, 2001, the 9/11 victim-plaintiffs are still obtaining limited discovery against the Saudi government. (See, e.g. In re Terrorist Attacks on September 11, 2001, 03MD1570GBDSN, 2022 WL 137855, at *1 [SDNY Jan. 14, 2022]). Although default judgments were secured against the Taliban and the government of Iran years ago after they failed to appear, the long-standing economic sanctions by the U.S. against Iran and the designation of the Taliban as a terrorist organization meant there were few U.S. assets upon which to execute the judgment.[28] It is only after the Taliban has claimed to be the legitimate government of Afghanistan (a claim still not recognized by the U.S.) that the plaintiffs *may* be able to collect against some of the $3.5 billion dollars that was deposited in the United States by the prior Afghan government.[29]

That said, it is important to recognize that the 9/11 victims and their families all received workers compensation benefits and that this did not foreclose their

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28 Charlie Savage, More Sept. 11 Victims Who Sued the Taliban Want Frozen Afghan Funds, NYTimes.com, https://www.nytimes.com/2021/12/02/us/politics/9-11-families-taliban-funds.html (last accessed Feb. 23, 2022).

29 Id.

ability to seek these additional damages against the organizers of the attack. This illustrates an important role of workers compensation benefits in terrorism cases: to provide some benefits to victims and the families of the deceased as they pursue full compensation from the genuine wrongdoers.

(iii) The Protection of Lawful Commerce in Arms Act protects gun manufacturers

Under 15 U.S.C. §§ 7901, 7902, and 7903, gun manufacturers and dealers are immune from liability as a result of crimes being committed with their products, with only limited exceptions. These exceptions include defective products, breach of contract, criminal misconduct, and – if they have actual reason to know a gun is intended for use in a crime – for negligent entrustment, as well as any other actions for which they are directly responsible in much the same manner that any consumer product manufacturer would be responsible.

This law substantially limits the ability of victims of mass shootings and their surviving family members to sue gun manufacturers and dealers. The Second Circuit Court of Appeal – whose judgments is unquestionably binding in every suit brought by a New York resident against an out-of-state gun manufacturer with an amount in controversy over $75,000[30] – has affirmed the constitutionality of the PLCAA. (City of New York v. Beretta USA Corp., 524 F.3d 384 [2nd Cir. 2008].)

[30] 28 U.S.C. §1332(a).

Although Sandy Hook shooting victims recently obtained a settlement of their suit against a gun manufacturer, an expert on suits against the gun industry commented that this was the result of "unique elements."[31] One of these elements was the gun maker's bankruptcy, which allowed its insurers to settle for the maximum under their policies, $73 million.[32] Another was that the Connecticut's highest court gave a broad interpretation to the claim for "unethical marketing" under the state's Unfair Trade Practices Act[33] to allow the suit for marketing a weapon "for use in assaults against human beings,"[34] to go to trial. As was already noted above, this settlement also took nearly a decade of litigation following the 2012 shooting to obtain.

By contrast, although the victims of the Binghamton shooting (which occurred just three years earlier than the Sandy Hook shooting), also sued the gun manufacturer and the sporting goods retailer that sold the firearms used by the

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[31] Melissa Chan, Why It's So Difficult to Sue Gun Makers, Despite Sandy Hook, Feb 18, 2022, https://time.com/6149343/sandy-hook-remington-other-gun-lawsuits/ (last accessed Feb. 24, 2022).
[32] Id. 4 Insurers, 5 Policies to Pay $73M Sandy Hook Settlement Against Gunmaker Remington, insurancejournal.com, Feb. 17, 2022, https://www.insurancejournal.com/news/national/2022/02/17/654731.htm (last accessed Feb. 24, 2022).
[33] See note 31, above
[34] Christine Fernando, Sandy Hook settlement: Remington gunmaker to pay $73M to families, Feb 15, 2022, https://www.usatoday.com/story/news/nation/2022/02/15/sandy-hook-families-reach-settlement-remington-arms/6797030001/ (last accessed Feb. 24, 2022).

gunman, this suit was dismissed in 2013. (Al-Salihi v Gander Mtn., Inc., 3:11-CV-00384 NAM, 2013 WL 5310214, at *1 [NDNY Sept. 20, 2013].)

Thus, for victims of mass-shootings in New York, significant barriers to recovery from any firearms manufacturer remain at this time. That said, nothing in the Workers Compensation Law precludes an employee injured at work from bringing such a suit should she or he desire to.

(iv) In most cases, it would be impossible for victims of mass shootings and terrorism to establish employer negligence.

Although the February 3, 2022, decision "frees" employee-victims of terrorism and mass shootings to sue their employers by making them ineligible for workers compensation, this "freedom" is illusory. Generally, there are no viable claims against these employers, so these victims are "free" to bring a suit that will not result in any recovery. This is most clear because non-employee victims – who can always sue the institutions or businesses where a mass shooting took place – rarely bring suit, let alone obtain recovery.

(a) There would be no negligence for employers whose premises were subject to terrorism similar to that at the World Trade Center on September 11, 2001, and so an employee's only remedy is workers compensation.

Of course, the families of the workers who had been killed while in their offices at the World Trade Center on September 11, 2001, were unable to bring suit against their employers by the exclusive remedy provisions of the workers

compensation system. (WCL § 11.) However, even if this provision had not applied, it is difficult to see what basis for liability they could have successfully alleged. Would they argue that it was negligent for the employers in question to lease office space on the higher floors of the World Trade Center's North and South Towers? Would they argue that the employers had a duty to obtain information prior to the attacks that eluded U.S. Government's intelligence? It seems entirely likely that such a suit would find no negligence by any employer.

Likewise, future terrorist attacks – which, like 9/11 are entirely likely to be motivated by factors wholly disconnected from the employers of the victims – are unlikely to involve employer negligence.

(b) Most victims of the worst post-9/11 terrorist attack had no recovery, as most were not eligible for workers compensation and had no actionable claim

Notably no lawsuits were ever filed against the business – Pulse Nightclub – where the most deadly terrorist attack since September 11, 2001, took place. Notably, 48 of the 49 victims killed in the June 12, 2016, mass-shooting were customers,[35] and so were not precluded from suing the club owner or the event's promoter. Instead, the survivors and the families of the deceased chose to sue only marketing giants Facebook, Google and Twitter for providing substantial

[35] Orlando nightclub shooting: Who were the victims? BBC News, Jun. 14, 2016, https://www.bbc.com/news/world-us-canada-36516389, (last accessed Feb. 23, 2022).

assistance to a person who commits an act of international terrorism, though the Eleventh Circuit Court of Appeals affirmed dismissal of the suit because they could not establish the statutory requirement that the attack "transcend national boundaries." (Colon v Twitter, Inc., 14 F4th 1213, 1221 [11th Cir 2021].) That said, the FBI deemed this a terrorist attack, as the gunman swore allegiance to Islamic State and vowed vengeance for U.S. attacks in Syria and Iraq.[36]

As with the 9/11 victims, it is difficult to see what the victims of the Pulse Nightclub shooting might have alleged had they brought suit against the club's operator. The club had arranged for an off-duty, but uniformed, Orlando PD officer to work as a security guard, as well as for two bouncers, one of whom was the only employee killed.[37] It could plausibly be argued that this level of security is reasonable for a nightclub, where there might be not only violence from people refused admission or drunk customers, but potentially a person who produces, and even fires, a handgun. But, a reasonable club operator would hardly think it likely that a terrorist armed with both a SIG Sauer MCX semi-automatic rifle and a 9 mm

[36] David Harris, Official: FDLE to wrap up Pulse shooting investigation within month, Orlando Sentinel, jul. 13, 2016, https://www.orlandosentinel.com/news/pulse-orlando-nightclub-shooting/os-fdle-response-letter-20160713-story.html (last accessed Feb. 23, 2022).
[37] Orlando nightclub shooting, Wikipedia.org, https://en.wikipedia.org/wiki/Orlando_nightclub_shooting (last accessed Feb. 23, 2022).; Orlando nightclub shooting: Who were the victims? BBC News, Jun. 14, 2016, https://www.bbc.com/news/world-us-canada-36516389, (last accessed Feb. 23, 2022).

Glock semi-automatic pistol would arrive and begin shooting indiscriminately into a crowd.[38]

Unlike 9/11 attacks, there was no special government program for victims of the Pulse shootings. Thus, *nearly all* of the victims of the worst terrorist attack in the last 20 years received no compensation whatsoever for their injuries.

(c) The non-employee victims of New York's worst mass shooting and the worst mass shootings of 2021 have not brought suit against the institutions where the shootings occurred, suggesting negligence could not be proved by employees or non-employees.

After New York's most deadly mass-shooting, the 2009 Binghamton shootings, the families of survivors did not sue the operator of the immigration center that was the employer of the 3 murdered staff members, even though 10 of the victims were not employees and, therefore, were not barred from filing such an action. Rather, they only brought the aforementioned unsuccessful suit against the gun's manufacturer and distributor. (Al-Salihi v Gander Mtn., Inc., 3:11-CV-00384 NAM, 2013 WL 5310214, at *1 [NDNY Sept. 20, 2013].)

Although the statute of limitations to file suit has not yet run on any of the shootings in 2021 discussed above, my searches on Westlaw and Google do not reveal the existence of any lawsuits filed against the institutions in those cases. Notably, the 2021 Atlanta Spa Shootings and the 2021 Boulder "King Sooper"

[38] Id.

shootings both involved significant numbers of non-employee victims, who would clearly not be barred from filing suit by any exclusive remedy provision of workers compensation in any state.

(d) Non-employee victims in school shootings either get less recovery than they would under the WCL, or, more frequently, no recovery, so the February 3, 2022, decision is of public importance by removing all workers compensation benefits in mass shooting cases.

It is also clear that employees would typically be unable to recover against their employer for negligence following a mass shooting because the non-employee victims of school shootings and their families typically get no recovery. Even when, in the unusual case, such victims recover, the amount is less than it would be had New York Workers Compensation Law applied.

The only school shooting in the U.S. in the last 15 years involving more than 10 deaths where victims recovered from a school district – the settlement for the 2018 Parkland school shooting – actually shows the bar for recovery in these cases is so high as to be nearly insurmountable. In that case, the school district's own "psychiatrists recommended placing [the student who later committed the shooting] in a residential treatment facility as early as" four years before the attack, but even *after this* recommendation the school district allowed him to receive firearms training through a school-based JROTC program (although it eventually banned him from firearms training, and from even carrying a backpack on

campus).[39] The school's "resource officer" then apparently failed to check the student's house for a gun, despite promising to do so.[40]

Even in this rare case of recovery, the payouts from the settlement for the 2018 Parkland shooting was far less favorable to the victims than it would have been had they been employees subject to New York's Workers Compensation Law. That is, the district settled only after it had won a ruling in Florida's Supreme Court limiting its liability to $300,000 per victim.[41] This is around $100,000 *less* than the estimated lifetime workers compensation payout to each of the victims killed on 9/11, even though the Parkland victims were mostly teenagers, while on average, the 9/11 victims had many fewer years of life and work ahead of them. [42] Moreover, the payouts to the 9/11 victims were also calculated based on a $400 per week cap on wage replacement benefits in effect in

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[39] Rafael Olmeda, School officials worried about Nikolas Cruz and guns 18 months before mass shooting, South Florida Sun-Sentinel, Mar. 16, 2018, https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-reg-florida-school-shooting-mental-health-20180316-story.html (last accessed Feb. 23, 2022).

[40] Id.

[41] Parkland school shooting families settle suit with district, NBCnews.com, Oct. 19, 2021, https://www.nbcnews.com/news/us-news/parkland-school-shooting-families-settle-suit-district-n1281834 (last accessed Feb. 23, 2022).

[42] Lloyd Dixon Rachel Kaganoff Stern, *Compensation for Losses from the 9/11 Attacks*, Rand Institute for Civil Justice (2004), p. 18, available at https://www.rand.org/content/dam/rand/pubs/monographs/2004/RAND_MG264.pdf [last accessed: (Feb 17, 2021).

2001, that had more than doubled to $870.61 that would have applied to victims of the 2018 Parkland shootings, had they been workers in New York at the time.

Suits by non-employees related to other notable school shootings were entirely unsuccessful. For example, the suit over the 2007 mass shooting at Virginia Tech was dismissed after Virginia's highest court concluded that, based on what was known to the university prior to the shootings "it cannot be said that it was known or reasonably foreseeable," that "criminal harm" would result to the victims. (Commonwealth v Peterson, 286 Va 349, 359 [2013].) The suit following the 1999 Columbine High School shootings against the school district and police – who allegedly prevented paramedics from reaching victims who subsequently died for hours after the shooters were dead—was also dismissed. (Schnurr v Bd. of County Com'rs of Jefferson County, CIV.00-B-790, 2001 WL 1808547, at *1 [D Colo Nov. 27, 2001].)

I have looked diligently at whether lawsuits were filed against the institutions where all of the school shootings with 10 or more victims since the 2007 Virginia Tech shooting occurred. These include the Sandy Hook School Shooting, the Santa Fe High School Shooting, and the Umpqua Community College (Roseburg, Oregon) shooting. I could find no evidence that any suit was filed against the school district or college related to these shootings.

We submit that, since non-employee school shooting victims, at best, get less money than they would if they were employees subject to New York's Workers Compensation Law applied, and, more likely, get nothing at all, the February 3, 2022, decision's removal of claimants from the workers compensation system is certainly a matter of public importance.

(e) The February 2022 decision is of public importance because it strips mass-shooting victims of workers compensation benefits, likely leaving them with no remedy.

The February 3, 2022, decision "frees" victims of mass shooting and terrorism from the exclusive remedy provision of the Workers Compensation Law in the same way that using a hammer to shatter the glass of a fish tank "frees" the fish inside. If this decision is left in effect, the next victims of a terrorist attack or mass shooting are likely to be left in the same position as the non-employee victims of Pulse nightclub shooting or the Virginia Tech shooting: with *no remedy whatsoever*.

That is, proving negligence seems likely to require showing the employer could have somehow stopped an attack by a person who, most likely is (1) either (a) willing to sacrifice his or her life in a terrorist act or deliberate "suicide by cop", (b) has severe psychiatric disturbances, or (c) both (a) and (b), and (2) is most likely armed with high power automatic or semi-automatic weapons.

And even in those rare cases where such employer negligence could be proven, doing so would likely take years of litigation.

We submit that the February 3, 2022, decision is of public importance because – although Dr. Timperio and his counsel might prefer to be free of the exclusive remedy provision, WCL § 11 – this is simply not the case for the vast majority of workers who are victims of terrorism and mass shootings, who would be far more likely to be left with no remedy at all.

II. The Court should grant re-argument

Granting re-argument is appropriate where the Court is persuaded that it may have overlooked or misapprehended a party's arguments. (Rule 1250.16 [d] [2].)

The arguments raised in point (I) (1) above document numerous conflicts between the February 3, 2022, decision and the case law of the Court of Appeals. Moreover, the February 3, 2022, decision is also clearly contrary to how both the Board and this Court handled thousands of claims resulting from the terrorist attacks of September 11, 2001.

Thus, rather than granting leave to appeal to the Court of Appeals – which the arguments presented suggest would lead to reversal of the February 3, 2022, decision – one alternative would be for this Court to grant re-argument, such that it would have an opportunity to re-examine its decision.

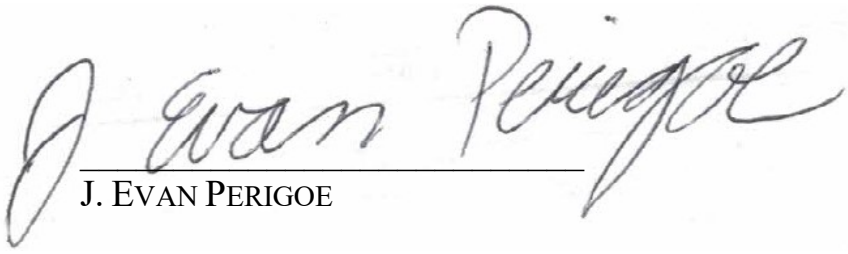
Of course, if reargument is denied, the Court should certainly grant leave to appeal to the Court of Appeals for the reasons laid out above.

CONCLUSION

The February 3, 2022 decision is contrary to numerous decisions of the Court of Appeals – form the 1922 decision in Katz v. Kadans to the 1994 decision in Rosen. Moreover, it is absolutely clear that if the February 3, 2022, decision is left in effect, it would work the dramatic change in our law of stripping workers injured in terrorist attacks and mass shootings of all workers compensation benefits, likely leaving these workers and their families with no recovery whatsoever.

Therefore, this Court should grant reargument or, in the alternative, grant leave to appeal to the Court of Appeals.

Dated: New York, New York
March 3, 2022



J. EVAN PERIGOE

EXHIBIT B

NEW YORK SUPREME COURT
APPELLATE DIVISION-THIRD DEPARTMENT

----------x

In the Matter of the Claim of JUSTIN TIMPERIO,

Appellant,

– against –

BRONX-LEBANON HOSPITAL, et al.

Respondent,

– and –

WORKERS' COMPENSATION BOARD,

Respondent.

----------x

NOTICE OF ENTRY

Case No.: 533584

PLEASE TAKE NOTICE that the within is a true copy of a Decision and Order on Motion of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, decided and duly entered duly entered in the office of the Clerk, New York Supreme Court Appellate Division, Third Judicial Department on August 25, 2022.

Dated: New York, New York
August 26, 2022

Yours etc.

LAW OFFICES OF ARNOLD N. KRISS
Attorneys for Claimant-Appellant
JUSTIN TIMPERIO
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BY:

ARNOLD N. KRISS, ESQ.

To: **CLERK OF THE NEW YORK SUPREME COURT**
Appellate Division, Third Department
P.O. Box 7288, Capitol Station
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State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: August 25, 2022 533584

In the Matter of the Claim of JUSTIN TIMPERIO,
Appellant,
v
BRONX-LEBANON HOSPITAL et al.,
Respondents.

WORKERS' COMPENSATION BOARD,
Respondent.

DECISION AND ORDER ON MOTION

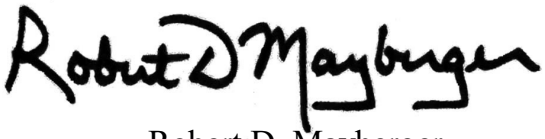
Motions for reargument or, in the alternative, for permission to appeal to the Court of Appeals.

Upon the papers filed in support of the motions and the papers filed in opposition thereto, it is

ORDERED that the motions are denied, without costs.

Lynch, J.P., Clark, Aarons and Reynolds Fitzgerald, JJ., concur.

ENTER:



Robert D. Mayberger
Clerk of the Court

STATE OF NEW YORK)

COUNTY OF NEW YORK) ss.:

PAULA EARLY, residing at 125 Landau Avenue, Floral Park, New York 11001, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at the address shown above. On August 26, 2022, deponent served the within Notice of Entry upon the following attorneys in this matter:

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at the physical and email addresses designated by said attorneys for that purpose, that being the address within the state designated by them for the purpose upon the preceding papers in this action, or the place where they then kept an office, between which places there then was and now is a regular communication by mail.

Paula Early
PAULA EARLY

Sworn to before me this
26th day of August, 2022.

ARNOLD N. KRISS
Notary Public, State of New York
No. 4502900
Qualified in Kings County
Commission Expires 09/30/2025

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: February 3, 2022 533584

In the Matter of the Claim of
JUSTIN TIMPERIO,
Appellant,
v
OPINION AND ORDER
BRONX-LEBANON HOSPITAL et al.,
Respondents.

WORKERS' COMPENSATION BOARD,
Respondent.

Calendar Date: January 12, 2022

Before: Lynch, J.P., Clark, Aarons and Reynolds Fitzgerald, JJ.

Law Offices of Arnold N. Kriss, New York City (Arnold N. Kriss of counsel), for appellant.

Weiss, Wexler & Wornow, PC, New York City (J. Evan Perigoe of counsel), for Bronx-Lebanon Hospital and another, respondents.

Letitia James, Attorney General, New York City (Nina M. Sas of counsel), for Workers' Compensation Board, respondent.

Reynolds Fitzgerald, J.

Appeal from a decision of the Workers' Compensation Board, filed January 27, 2021, which ruled, among other things, that Justin Timperio sustained an injury arising out of and in the course of his employment.

On June 30, 2017, Henry Bello, a physician who had worked for the Bronx-Lebanon Hospital (hereinafter the hospital) from August 2014 until his resignation in February 2015 following an allegation that he had sexually harassed a hospital employee, entered the hospital wearing a white doctor's coat and a hospital identification badge and carrying, among other things, a loaded AR-15 rifle. In addition to setting fire to the hospital's sixteenth floor nursing station using a juice container filled with gasoline, Bello shot Justin Timperio, who was a first-year medical resident at that time,[1] shot and killed another doctor and shot and wounded four other members of the medical staff in addition to a patient. Timperio was shot in the abdomen, and the bullet exited his right thigh, requiring a hospital admission, surgical procedures and treatment. After the mass shooting, Bello shot and killed himself. In July 2017, the hospital and its workers' compensation carrier, the State Insurance Fund, filed a First Report of Injury form indicating that a former employee had shot Timperio while Timperio was performing his normal work duties and that his injuries required emergency surgery. The Workers' Compensation Board filed and mailed a Notice of Case Assembly, as well as a follow-up notice, to Timperio's last known address notifying him that a workers' compensation claim had been opened on his behalf, but the correspondence was returned without delivery.

In March 2018, Timperio filed a civil action in the United States District Court for the Southern District of New York (hereinafter the federal action) against the hospital, alleging causes of action for negligence, negligent infliction of emotion distress and negligent hiring, retention, training and supervision. Motion practice ensued, and, in an April 2019 memorandum opinion, the District Court (Gardephe, J.) denied the hospital's motion for summary judgment, finding, as relevant here, that Timperio's injuries did not arise out of and in the course of his employment because there was no evidence that the shooting originated in work-related differences (Timperio v Bronx-Lebanon Hosp. Ctr., 384 F Supp 3d 425, 432-433 [SD NY

[1] Bello never worked with Timperio, and they had no prior knowledge of one another.

2019]).[2] In May 2019, the hospital moved in District Court for an order certifying an interlocutory appeal or, in the alternative, for a stay pending the resolution of the proceedings before the Board; the District Court granted the request for a stay but denied the balance of the motion (Timperio v Bronx-Lebanon Hosp. Ctr., 2020 WL 8996683, *1, 3, 2020 US Dist LEXIS 41589, *1, 7-8 [SD NY, Mar. 9, 2020, No. 18-CV-1804 (PGG)]).

Following April, May and September 2020 hearings before a Workers' Compensation Law Judge (hereinafter WCLJ) to determine whether the Board had the authority and jurisdiction – in light of the federal action – to adjudicate the compensability of the claim, the WCLJ found that the Board has primary jurisdiction over the claim, established the claim for a gunshot wound to the abdomen and set Timperio's average weekly wage for purposes of awarding temporary indemnity benefits. Upon administrative review, the Workers' Compensation Board affirmed, finding initially that it is not precluded or estopped by the federal action to address the compensability of the claim and, secondly, that Timperio failed to rebut the presumption that the attack occurred during the course of his employment, as the assault occurred while he was working in a non-public area within the hospital, was perpetrated by a former employee, and was not motivated by personal animosity. Timperio appeals.

For the reasons that follow, we agree with the Board that it should have determined the issue at hand in the first

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[2] In the same federal action, Timperio alleged claims against Upstate Guns and Ammo, LLC (hereinafter UGA) for negligent entrustment and negligence per se, but the District Court granted UGA's motion to dismiss those claims (Timperio v Bronx-Lebanon Hosp. Ctr., 384 F Supp 3d at 428, 433-435). UGA's subsequent motion for entry of partial final judgment pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure was denied, the District Court having found that UGA had not demonstrated that it will suffer any significant hardship if a partial final judgment is not entered (Timperio v Bronx-Lebanon Hosp. Ctr., 2020 WL 9211177, *1, 3-4 [SD NY, Mar. 9, 2020, No. 18-CV-1804 (PGG)]).

instance and that it is not estopped from doing so but find, however, that Timperio did not sustain an injury arising out of and in the course of his employment. We therefore reverse. "It is axiomatic that an employee injured during his or her employment is limited in his or her remedy to workers' compensation [benefits] unless the injury was due to an intentional tort perpetrated by the employer or at the employer's direction" (Vasquez v McGeever, 1 AD3d 767, 768 [2003] [internal quotation marks and citations omitted]; see Workers' Compensation Law §§ 11, 29 [6]; Weiner v City of New York, 19 NY3d 852, 854 [2012]; Bello v City of New York, 178 AD3d 648, 649 [2019]; Owens v Jea Bus Co., Inc., 161 AD3d 1188, 1189 [2018]; Wilson v A.H. Harris & Sons, Inc., 131 AD3d 1050, 1051 [2015], lv denied 26 NY3d 914 [2015]). Indeed, "primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the . . . Board[,] and . . . it is therefore inappropriate for the courts to express views with respect thereto pending determination by the [B]oard" (Botwinick v Ogden, 59 NY2d 909, 911 [1983], citing O'Rourke v Long, 41 NY2d 219, 224 [1976]; see Liss v Trans Auto Sys., 68 NY2d 15, 20 [1986]; Vasquez v McGeever, 1 AD3d at 768; Besaw v St. Lawrence County Assn. for Retarded Children, 301 AD2d 949, 950 [2003]; Corp v State of New York, 257 AD2d 742, 743, [1999]). Here, the mixed question of fact and law that is raised concerning whether Timperio sustained an injury arising out of and in the course of his employment is unquestionably a matter for the Board to decide in the first instance (see O'Rourke v Long, 41 NY2d at 228; Nunes v Window Network, LLC, 54 AD3d 834, 835 [2008]; Melo v Jewish Bd. of Family & Children's Servs., 282 AD2d 440, 441 [2001]; Corp v State of New York, 257 AD2d at 743), and its findings in this regard are "final and conclusive unless reversed on direct appeal, and are not subject to collateral attack in a plenary action" (Aprile-Sci v St. Raymond of Penyafort R.C. Church, 151 AD3d 671, 673 [2017] [internal citation omitted]; accord Matter of Rosa v June Elec. Corp., 140 AD3d 1353, 1357 [2016], lv denied 28 NY3d 910 [2016]; see Cunningham v State of New York, 60 NY2d 248, 252 [1983]; Alfonso v Lopez, 149 AD3d 1535, 1536 [2017]).

Moreover, we reject Timperio's contention that the Board was collaterally estopped or otherwise precluded from adjudicating the compensability of the claim based upon the District Court's prior finding that Timperio's injuries did not occur within the course of his employment. "The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (Ryan v New York Tel. Co., 62 NY2d 494, 500 [1984]; accord Wilson v City of New York, 161 AD3d 1212, 1216 [2018]). "Collateral estoppel comes into play when four conditions are fulfilled: (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits" (Conason v Megan Holding, LLC, 25 NY3d 1, 17 [2015] [internal quotation marks omitted]; see CitiMortgage, Inc. v Ramirez, 192 AD3d 70, 72 [2020]; Emmons v Broome County, 180 AD3d 1213, 1216 [2020]). However, "[w]hen no order or final judgment has been entered on a verdict or decision, or when the judgment is subsequently vacated, collateral estoppel is inapplicable" (Church v New York State Thruway Auth., 16 AD3d 808, 810 [2005]; accord Miller v Moore, 101 AD3d 1510, 1511 [2012]; see Matter of McGrath v Gold, 36 NY2d 406, 411 [1975]; Rudd v Cornell, 171 NY 114, 127-128 [1902]; Ruben v American & Foreign Ins. Co., 185 AD2d 63, 65 [1992]; see also Jeffrey's Auto Body, Inc. v Allstate Ins. Co., 159 AD3d 1481, 1482-1483 [2018]; Gadani v DeBrino Caulking Assoc., Inc., 86 AD3d 689, 692 [2011]). Even assuming for the sake of argument that it was proper for Timperio in the federal action to litigate, and for the District Court to decide, in the first instance, the question of whether Timperio sustained an injury arising out of and in the course of his employment, collateral estoppel does not apply because the District Court's April 2019 memorandum opinion denying the hospital's motion for summary judgment was not a final judgment and "does not constitute an adjudication on the merits" (Carrier Corp. v Allstate Ins. Co., 187 AD3d 1616,

1618 [2020] [internal quotation marks and citation omitted]; see Wilson v City of New York, 161 AD3d at 1216; Martinetti v Town of New Hartford Police Dept., 307 AD2d 735, 736 [2003]). Indeed, although a final judgment may, for purposes of collateral estoppel or issue preclusion, "include any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect[,] [t]he denial of a motion for summary judgment is not such" (Kay-R Elec. Corp. v Stone & Webster Const. Co., Inc., 23 F3d 55, 59 [2d Cir 1994] [internal quotation marks and citation omitted]).

Turning to the compensability of the claim, "[a]n injury is only compensable under the Workers' Compensation Law if it arose out of and in the course of a worker's employment" (Matter of Warner v New York City Tr. Auth., 171 AD3d 1429, 1429-1430 [2019] [internal quotation marks and citation omitted]; see Workers' Compensation Law § 10 [1]; see Matter of Richards v Allied Universal Sec., 199 AD3d 1207, 1208 [2021]). "Pursuant to Workers' Compensation Law § 21 (1), an assault which arose in the course of employment is presumed to have arisen out of the employment, absent substantial evidence that the assault was motivated by purely personal animosity" (Matter of Rosen v First Manhattan Bank, 84 NY2d 856, 857 [1994]; see Matter of Seymour v Rivera Appliances Corp., 28 NY2d 406, 409 [1971]; Matter of Belaska v New York State Dept. of Law, 96 AD3d 1252, 1253 [2012], lv denied 19 NY3d 814 [2012]). Said differently, "[w]hether the injury producing event arose out of and in the course of [a] claimant's employment depends upon whether it 'originated in work-related differences or purely from personal animosity'" (Matter of Mosley v Hannaford Bros. Co., 119 AD3d 1017, 1017 [2014], quoting Matter of Cuthbert v Panorama Windows Ltd., 78 AD3d 1450, 1451 [2010]; see Matter of Gutierrez v Courtyard by Marriott, 46 AD3d 1241, 1242 [2007]). "An award of compensation may be sustained even though the result of an assault, so long as there is any nexus, however slender, between the motivation for the assault and the employment" (Matter of Seymour v Rivera Appliances Corp., 28 NY2d at 409 [citation omitted]; see Matter of Mosley v Hannaford Bros. Co., 119 AD3d at 1017-1018). Here, however, such nexus is lacking.

The undisputed facts in the record demonstrate that the attack was perpetrated by an individual who was not employed by the hospital at the time of the attack (and had not worked there for over two years), was not and never was Timperio's coworker, did not know Timperio and provided no reason for the attack prior to taking his own life. Nor did Timperio know the attacker, and there is no evidence that the attack was based upon an employment-related animus between the two individuals or that the attack had any nexus to Timperio's employment or "performance of h[is] job duties" (Matter of McMillian v Dodsworth, 254 AD2d 619, 620 [1998]; see Matter of Wadsworth v K-Mart Corp., 72 AD3d 1244, 1245 [2010]; Matter of Mintiks v Metropolitan Opera Assn., 153 AD2d 133, 137-138 [1990], appeal dismissed 75 NY2d 1005 [1990]). Such proof was sufficient to rebut the presumption articulated in Workers' Compensation Law § 21 (1) and to establish that the assault on Timperio resulted exclusively from arbitrary, broad-sweeping and gravely maligned personal animosity and not from work-related differences with Timperio (see Matter of Belaska v New York State Dept. of Law, 96 AD3d at 1253; Matter of Wadsworth v K-Mart Corp., 72 AD3d at 1245; Matter of Turner v F.J.C. Sec. Servs., 306 AD2d 649, 650 [2003]; Matter of Mintiks v Metropolitan Opera Assn., 153 AD2d at 137-138; compare Matter of Valenti v Valenti, 28 AD2d 572, 572-573 [1967]). Accordingly, the Board's decision establishing the claim must be reversed.

Lynch, J.P., Clark and Aarons, JJ., concur.

ORDERED that the decision is reversed, with costs, and matter remitted to the Workers' Compensation Board for further proceedings not inconsistent with this decision.

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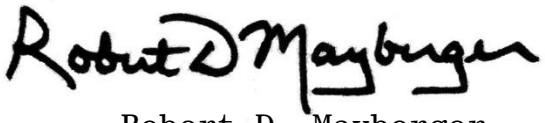

Robert D. Mayberger
Clerk of the Court

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE BY OVERNIGHT FEDERAL EXPRESS NEXT DAY AIR

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

On September 22, 2022

deponent served the within: **Motion for Leave to Appeal**

upon:

LAW OFFICES OF ARNOLD N. KRISS
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HON. LETITIA JAMES
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at the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on
September 22, 2022

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

T. Heath

Job# 315776