# Court of Appeals
# of the State of New York

In the Matter of the Claim of

JUSTIN TIMPERIO,

*Respondent*,

v.

BRONX-LEBANON HOSPITAL and STATE INSURANCE FUND,

*Respondents*,

WORKERS' COMPENSATION BOARD,

*Appellant*.

## MOTION FOR LEAVE TO APPEAL


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Dated: September 26, 2022

Workers' Compensation Board Case No. G1955710
Third Department No. 533584

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## NOTICE OF MOTION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE that, upon the annexed papers, and the record and briefs, the undersigned will move this Court at a Motion Term to be held on October 10, 2022, for an order granting appellant Workers' Compensation Board (the "Board") leave to appeal to the Court of Appeals. Leave to appeal is sought from the decision and order of the Appellate Division, Third Department, entered August 25, 2022, which denied appellant's motion for reargument or, in the alternative, for leave to appeal from an opinion and order of the Third Department entered February 3, 2022. That opinion and order reversed the decision of the Board, with costs, and remitted the matter to the Board for further proceedings.

The motion will be submitted without oral argument.

Dated: Albany, New York
September 26, 2022

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## MEMORANDUM OF LAW
## IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

## PRELIMINARY STATEMENT

Respondent Justin Timperio was an employee of Bronx-Lebanon Hospital when he was injured in a mass shooting that took place there. He attempted to sue the hospital for damages, but his action was stayed pending the outcome of proceedings before the Workers' Compensation Board (the "Board"), which the hospital initiated. The Board found that the claim arose out of Timperio's employment and was thus compensable, meaning that workers' compensation was the exclusive remedy for Timperio and that his private lawsuit against his former employer could not proceed. The Board reached its decision in reliance on this Court's decision in *Matter of Rosen v. First Manhattan Bank*, 84 N.Y.2d 856 (1994), which held 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." *Id.* at 857.

The Third Department reversed and, in so doing, flipped the *Rosen* presumption on its head. It found that there was no evidence of *any* motivation for the attack. Under *Rosen*, that would mean that there was

no substantial evidence that the assault was motivated by purely personal animosity and thus no basis to displace the presumption of compensability. The Third Department, however, held that the absence of evidence of motive *rebutted* the presumption, leading to a finding that Timperio's claim is *not* compensable through the workers'-compensation system—thereby clearing the way for Timperio to proceed with his tort claim against the hospital.[1]

The Third Department's decision conflicts with both this Court's decision in *Rosen* and earlier Third Department precedent. It also threatens to upend the bargain upon which the workers'-compensation system is based. Under that bargain, employees injured on the job receive compensation regardless of fault, while employers receive assurance that they will not be held liable in tort for additional money damages. If the Third Department's decision is permitted to stand, that assurance to employers would be undermined, while innumerable employees injured or killed in random acts of workplace violence would be improperly

[1] The hospital, together with the insurance carrier, has also moved for leave to appeal. That motion is returnable on October 3, 2022.

excluded from the system. Leave should be granted to prevent that result and to correct the Third Department's error.

## QUESTION PRESENTED

Whether substantial evidence supports the Board's determination that Timperio's injuries arose out of his employment and are thus compensable through the workers'-compensation system, where he was shot on the job and there was no evidence that the incident was motivated by purely personal animosity.

## TIMELINESS OF THIS MOTION

A copy of the Third Department's opinion and order with notice of entry was served by email (with consent) on February 7, 2022. (Addendum ["Add."] 1-12.) On March 8, 2022, the Board timely served by regular mail a notice of motion for reargument or leave to appeal.

The Third Department denied the Board's motion by decision and order dated August 25, 2022. (Add. 15.) A copy of the Third Department's decision and order with notice of entry was served by email on August 26, 2022. (Add. 13-16.)

This motion, filed and served on September 26, 2022, is therefore timely. *See* C.P.L.R. 2103(b)(7), 5513(b); General Construction Law § 25-a(1).

## JURISDICTIONAL STATEMENT

This Court has jurisdiction over this motion and the proposed appeal under C.P.L.R. 5602(a)(1)(i). This is an appeal from a decision of the Board, taken pursuant to Workers' Compensation Law § 23. In its opinion and order, the Third Department reversed the decision of the Board establishing Timperio's claim. The Third Department's decision has finally determined the proceeding because it determined that the claim is not compensable. Although the Third Department remitted the matter to the Board for further proceedings, nothing remains before the Board other than the purely ministerial task of dismissing the application before it.

The question whether substantial evidence supports the Board's determination that Timperio's claim arose out of his employment is a question of law, and it is preserved for this Court's review. (*See* Board App. Div. Br. at 25-31.)

## STATEMENT OF THE CASE

### A. Underlying Incident

On June 30, 2017, a mass shooting occurred at Bronx-Lebanon Hospital ("BLH") in Bronx, New York. (Record on Appeal ["R."] 262 ¶ 1.) The shooting was committed by a former BLH doctor, Henry Bello, who had resigned from the hospital in 2015 following an allegation of workplace sexual harassment. (R. 63, 262 ¶ 1.) Bello killed one individual and wounded six before killing himself. (R. 63-64.) Justin Timperio, a first-year medical resident and BLH employee, was one of Bello's victims, suffering a non-fatal gunshot wound to the abdomen. (R. 262 ¶ 2; R. 264 ¶ 19.) Timperio was performing his job duties when he was shot. (R. 263 ¶ 13.) Timperio's employment at BLH did not overlap with that of Bello; indeed, the two men did not know each other at all. (R. 263 ¶¶ 4-6.)

In March 2018, Timperio commenced a civil suit in the United States District Court for the Southern District of New York against BLH. (*See* R. 100.) On BLH's motion, the district court stayed proceedings in federal court pending the outcome of Board proceedings, which BLH had initiated. (R. 114, 229-234.)

## B. Decision of the Workers' Compensation Board

The Board determined that the claim was compensable—a finding that, under the exclusive-remedy provision of the Workers' Compensation Law ("W.C.L."), precludes Timperio from seeking a separate tort recovery. (R. 9.) *See* W.C.L. § 29(6). The Board based its compensability determination on its application of the presumption set forth in W.C.L. § 21(1). (R. 8-9.) That provision states that "it shall be presumed in the absence of substantial evidence to the contrary" that "the claim comes within the provision of this chapter."[2] In *Matter of Rosen v. First Manhattan Bank*, 84 N.Y.2d 856 (1994), this Court explained that, under this statutory presumption, an assault that occurs in the course of a claimant's employment is presumed to have arisen out of that employment, and thus presumed to be compensable, absent substantial evidence that the assault was motivated by "purely personal animosity." *Id.* at 857.

Relying on the § 21(1) presumption and its interpretation in *Rosen*, the Board found the issue of the claim's compensability to be "relatively

[2] For the Court's convenience, the full text of W.C.L. § 21 is set forth in the addendum to this motion. (*See* Add. 17.)

simple" in light of the undisputed facts. (R. 9.) The Board reasoned that, contrary to Timperio's argument, "[t]he lack of any prior personal or professional relationship between [Timperio] and [Bello] actually supports the finding that the claim is compensable," because it means that there was "no evidence whatsoever to support that the shooting was motivated by personal animosity." (R. 9.) In the absence of such evidence, the Board concluded that the presumption had not been rebutted and that the claim was compensable.

### C. Decision of the Appellate Division, Third Department

In an opinion and order entered February 3, 2022, the Third Department unanimously reversed the Board's decision, holding that the claim was not compensable under the W.C.L. The court reasoned that there was no demonstrated "nexus" between the assault and Timperio's employment, even though Timperio was on the job at the time, and that the W.C.L. § 21(1) presumption was rebutted by (i) evidence that Timperio and Bello had never been coworkers and did not know each other, and (ii) the absence of evidence of a motivation for Bello's attack, such as whether it arose out of any employment-related animus between Bello and Timperio. (Add. 9.) The court thus concluded that the record

"establish[ed] that the assault on Timperio resulted exclusively from arbitrary, broad-sweeping and gravely maligned personal animosity and not from work-related differences with Timperio." (Add. 9.)

The Board, the employer, and the insurance carrier all moved for reargument or alternatively leave to appeal. The Third Department denied those motions by order dated August 25, 2022. (Add. 15.)

## REASONS FOR GRANTING LEAVE TO APPEAL

## POINT I

### THE THIRD DEPARTMENT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT

Leave should be granted because the Third Department's holding in this case conflicts with this Court's holding in *Matter of Rosen v. First Manhattan Bank*, 84 N.Y.2d 856 (1994). In *Rosen*, the Court held that, "[p]ursuant 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." *Id.* at 857. *Rosen* applied that presumption to a case involving a claimant who was killed by a coworker in the employer's office building. The Court held that, in light of evidence that the coworkers may have been engaged in a dispute over a loan—a

practice that apparently was condoned by the employer—and that they had no social ties outside of work, the Board acted within its fact-finding province in rejecting other testimony of possible personal motives for the attack as insufficient to overcome the statutory presumption. *Id.*

*Rosen* thus establishes a simple framework for applying the W.C.L. § 21(1) presumption: as long as an injury occurred on the job, the default rule is that the injury is compensable. That default rule can be overcome only with substantial evidence that the attack was motivated by personal animosity toward the victim.

That approach makes sense for two reasons. First, the presumption effectuates the statutory objective of ensuring broad coverage for all workers, with only limited exclusions. *Matter of Johannesen v. New York City Dept. of Hous. Preserv. & Dev.*, 84 N.Y.2d 129, 134 (1994); *Matter of Richardson v. Fiedler Roofing*, 67 N.Y.2d 246, 250-51 (1986). Second, it is rational to exclude those injuries sustained in assaults proved to have been motivated by personal animosity toward the victim. Such assaults are work-related only in the technical sense that they occur in the workplace. *See, e.g.*, *Matter of Colas v. Dunrite Watermain*, 295 A.D.2d 775 (3d Dep't 2002) (W.C.L. § 21[1] presumption rebutted by evidence

that decedent was killed by co-worker with whom she had been involved in tumultuous romantic relationship), *lv. denied*, 100 N.Y.2d 514 (2003). The fact that such assaults occur in the workplace, however, may be incidental; because such assaults arise out of personal animosity between assailant and victim, they may be just as likely to occur outside the workplace as within.

Here, there was no evidence of purely personal animosity between Bello and Timperio; the men did not even know each other. Indeed, the record provided no explanation for Bello's conduct at all; at most, the fact that Bello had resigned some two years earlier after being accused of workplace sexual harassment suggested he might have harbored animus toward BLH generally, but the record provided no further detail about that possibility. Thus, there was no evidence—let alone substantial evidence—of purely personal animosity as required to rebut the W.C.L. § 21(1) presumption, and accordingly no basis for excluding a claim for Timperio's workplace injuries from the workers'-compensation system.

The Third Department nonetheless reasoned that the *absence* of evidence of a motivation for Bello's attack (and in particular, the absence of evidence of "an employment-related animus" between Bello and

Timperio) was sufficient to *rebut* the presumption, thereby flipping the default rule of *Rosen* and W.C.L. § 21(1) on its head. (Add. 9.) The Third Department appears to have been confused by language in an earlier decision of this Court, *Matter of Seymour v. Rivera Appliances Corp.*, 28 N.Y.2d 406 (1971), which addressed a different issue. The issue in *Seymour* was whether an injury that occurred in connection with an altercation during an afternoon break was a workplace injury giving rise to the presumption in the first place. The Court explained that "[a]n 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." *Id.* at 409 (internal citation omitted). The nexus requirement was satisfied, the Court held, because, but for the employment relationships of the individuals involved, the incident would not have occurred. *Id. Seymour* did not address the showing required to rebut the presumption.

The Third Department appears to have conflated the inquiry set forth by this Court in *Rosen*—regarding the evidence needed to rebut the presumption—with the inquiry set forth in *Seymour*, regarding whether an injury was sustained in the course of employment, thereby triggering

the presumption in the first instance. Based on the absence of evidence of an employment-related animus between Bello and Timperio, the Third Department found both that the nexus requirement was not satisfied and also that the presumption of compensability was rebutted. Under the Third Department's decision, injuries incurred in the course of employment are compensable only if the claimant affirmatively demonstrates that the motivation for the assault was an employment-related animus between assailant and victim. That rule puts the onus on a claimant who, as here, has undisputedly suffered an injury in the course of employment, to provide evidence of the requisite employment-related animus. *Rosen*, however, held that a claim arising from an assault that occurs in the course of employment is compensable *unless* there is substantial evidence that the assault was motivated by purely *personal* animosity. The fact that the "nexus" language from *Seymour* continues to give rise to confusion provides further reason to grant leave.

## POINT II

### THE THIRD DEPARTMENT'S DECISION CONFLICTS WITH APPELLATE DIVISION PRECEDENT

In addition to conflicting with this Court's precedent, the Third Department's decision also conflicts with its own precedent, thus creating

inconsistent law in the only department of the Appellate Division that hears appeals from Board determinations. *See* W.C.L. § 23.

Earlier decisions of the Third Department routinely affirmed the compensability of claims that, like the claim here, arose from seemingly random acts of workplace violence committed by assailants unknown to their victims. For example, in *Matter of Blair v. Bailey*, 279 A.D.2d 941, 941 (3d Dep't), *lv. dismissed*, 96 N.Y.2d 824 (2001), the son of the claimant's employer shot the claimant for unknown reasons. The Third Department affirmed the Board's finding of compensability in light of the absence of any evidence to support the conclusion "that the assault arose from a personal dispute between claimant and [the employer's] son or, for that matter, that they had even met prior to the date in question." *Id.* at 942-43. So, too, in *Matter of Barth v. Cassar*, 38 A.D.2d 984, 984 (3d Dep't), *lv. denied*, 30 N.Y.2d 485 (1972), where a taxi driver was killed on the job by an unknown assailant in a robbery; in *Matter of Fiorello v. Anastasi Bros. Co.*, 28 A.D.2d 755, 755 (3d Dep't 1967), where a worker was injured by an unknown assailant in a robbery that occurred in the employer's parking garage; in *Matter of Valenti v. Valenti*, 28 A.D.2d 572, 573 (3d Dep't 1967), where a restaurant employee was shot by a patron

for unknown reasons; and in *Matter of DeAngelis v. Garfinkel Painting Co.*, 20 A.D.2d 162, 163-64 (3d Dep't 1963), *aff'd*, 18 N.Y.2d 727 (1966), where a worker was injured when an unknown assailant threw a stone through the window of his work premises.

These cases establish that injuries sustained in the course of employment at the hands of unknown assailants with unknown motivations—including assailants known to the employer but not the victim, as in *Matter of Blair,* and assailants with no known connection to either the employer or victim, as in *Matter of Barth*—are indeed compensable through the workers'-compensation system. Thus, the facts on which the Third Department relied to hold that the claim in this case is *not* compensable—that Bello "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" (Add. 9)—actually *support* the Board's finding of compensability.

## POINT III

### IF ALLOWED TO STAND, THE THIRD DEPARTMENT'S DECISION WILL PRECLUDE COUNTLESS INJURED EMPLOYEES FROM RECOVERING WORKERS' COMPENSATION BENEFITS

Absent intervention by this Court, the Third Department's decision is likely to have negative repercussions for claimants injured on the job whose employers lack BLH's resources to fund significant tort awards.

While Timperio seeks to avoid the workers'-compensation system so that he can proceed with a potentially more lucrative tort action against BLH, many claimants lack such employers and thus depend on the workers'-compensation system to redress their injuries. Imagine, for example, that a clerk in a convenience store is caught in the crossfire of a gunfight that erupts in the store. The owner of the store might not have the resources to pay a significant tort judgment, and the clerk might not even have a viable tort claim against the owner in the first instance. Under the Third Department's decision, however, an insurance carrier could defend a decision to deny the clerk's workers'-compensation claim by arguing that the presumption of compensability was rebutted by evidence showing that the incident did not arise from work-related differences, but rather from a random act of workplace violence involving

people unknown to each other. The same argument could be made to preclude employees who were injured in the May 2022 shooting at the Tops supermarket in Buffalo from receiving workers'-compensation benefits.

Further, if the Third Department's decision had been on the books before 9/11, employees who worked in the Twin Towers would not have had compensable claims, in light of the absence of any evidence that the hijackers were motivated by work-related animus. Thousands of workers'-compensation claims, however, were correctly paid to the victims of 9/11 and their families.[3] *See, e.g.*, New York State Workers' Compensation Bd., *World Trade Center Cases in the New York Workers' Compensation System* (Sept. 2009), *available at* http://www.wcb.ny.gov/content/main/TheBoard/WCBWTCReport2009.pdf. Leave is thus warranted to preserve the availability of the workers'-compensation

[3] In the wake of 9/11, the Legislature passed a law that made it easier for participants in World Trade Center rescue, recovery, and cleanup operations to apply for workers'-compensation benefits. *See* W.C.L. §§ 161-169. However, existing law protected workers who were injured (or who died) on the job at the Twin Towers when the planes hit.

remedy for countless workers injured on the job in New York State as a result of workplace violence.

## CONCLUSION

The Court should grant the Board's motion for leave to appeal.

Dated: Albany, New York
September 26, 2022

Respectfully submitted,

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# Addendum

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**NEW YORK SUPREME COURT**
**APPELLATE DIVISION-THIRD DEPARTMENT**

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

**JUSTIN TIMPERIO,**

**Claimant-Appellant,**

**– against –**

**BRONX-LEBANON HOSPITAL,**

**Employer-Respondent,**

**STATE INSURANCE FUND,**

**Insurance Carrier-Respondent,**

**– and –**

**WORKERS' COMPENSATION BOARD,**

**Respondent.**

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**NOTICE OF ENTRY**

**Case No.: 533584**

**PLEASE TAKE NOTICE** that the within is a true copy of an Opinion and Order 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 Department on February 3, 2022.

Dated: New York, New York
February 7, 2022

Yours etc.

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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

[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]).

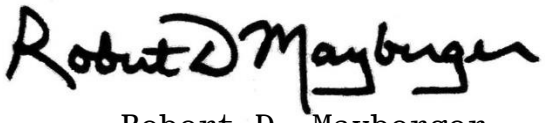
Turning to the compensability of the claim, "[a]n injury is only compensable under the Workers' Compensation Law if it arose out of and in the course of a worker's employment" (Matter of Warner v New York City Tr. Auth., 171 AD3d 1429, 1429-1430 [2019] [internal quotation marks and citation omitted]; 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.

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 February 7, 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
7th day of February, 2022

Notary Public

ARNOLD N. KRISS
Notary Public, State of New York
No. 4502900
Qualified in Kings County
Commission Expires 9/30/2025

**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**
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**BY:**

**ARNOLD N. KRISS, ESQ.**

To: **CLERK OF THE NEW YORK SUPREME COURT**
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State of New York
Supreme Court, Appellate Division
Third Judicial Department

533584

Decided and Entered: August 25, 2022

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

McKinney's Consolidated Laws of New York Annotated
Workers' Compensation Law (Refs & Annos)
Chapter 67. Of the Consolidated Laws
Article 2. Compensation (Refs & Annos)

McKinney's Workers' Compensation Law § 21

# § 21. Presumptions

Currentness

In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary

1. That the claim comes within the provision of this chapter;

2. That sufficient notice thereof was given;

3. That the injury was not occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another;

4. That the injury did not result solely from the intoxication of the injured employee while on duty. [1]

5. That the contents of medical and surgical reports introduced in evidence by claimants for compensation shall constitute prima facie evidence of fact as to the matter contained therein.

**Credits**
(L.1922, c. 615. Amended L.1923, c. 568; L.1946, c. 268, § 1.)

## Footnotes

1 So in original. Period probably should be semicolon.

McKinney's Workers' Compensation Law § 21, NY WORK COMP § 21
Current through L.2022, chapters 1 to 562. Some statute sections may be more current, see credits for details.

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