Motion No. 2022-707
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-Appellant,

– against –

BRONX-LEBANON HOSPITAL,

Employer-Respondent,

STATE INSURANCE FUND,

Insurance Carrier-Respondent,

– and –

WORKERS' COMPENSATION BOARD,

Respondent.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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

JUSTIN TIMPERIO,

Claimant-Respondent,

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BRONX-LEBANON HOSPITAL,

Employer-Movant,

STATE INSURANCE FUND,

Insurance Carrier-Movant,

- and -

WORKERS' COMPENSATION BOARD,

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AFFIRMATION IN OPPOSITION TO MOTION SEEKING LEAVE TO APPEAL TO THE COURT OF APPEALS

A.D. 3rd Dept. No. 533584

WCB File No. G1955710

ARNOLD N. KRISS, ESQ., an attorney duly licensed to practice law before the Courts of the State of New York and Claimant-Respondent Dr. Justin Timperio's ("Timperio") attorney, affirms the following to be true under the penalties of perjury:

Annexed to Timperio's Opposition Papers to Bronx Lebanon Hospital's ("BLH") and the State Insurance Fund's (collectively "Movants") Motion ("Motion") seeking Leave to Appeal to the Court of Appeals are:

Exhibit	Item
A.	3rd Department's February 3, 2022, Decision and Order.
B.	3rd Department's August 26, 2022, Decision and Order Denying Reargument and Leave.
C.	Memorandum Opinion, *Timperio v. Bronx-Lebanon Hospital Center*, 384 F. Supp.3d 425, [S.D.N.Y 2019] (Gardephe, J.)
D.	Timperio's 3rd Department Brief.

This Affirmation is submitted in Opposition to Movants' application for an Order pursuant to *CPLR* § 5602(a)(1) granting Movants' leave to appeal to this Court from an unanimous Decision and Order ("Decision") of the New York State Supreme Court, Appellate Division 3rd Department, ("3rd Department"), dated February 3, 2022. In its Decision, the 3rd Department held that Timperio's injuries, sustained in the workplace, were not compensable under New York State's *Workers' Compensation Law* ("*WCL*"). (Timperio's Exhibit A). The 3rd Department also unanimously denied BLH's and the State Insurance Fund's Motion for Reargument and for Permission to Appeal to the Court of Appeals, in a Decision and Order on Motion, entered August 26, 2022. (Timperio's Exhibit B).

PRELIMINARY STATEMENT AND PROCEEDINGS BELOW

On March 1, 2018, Timperio filed a civil negligence action in the United States District Court, Southern District of New York, ("district court") against BLH seeking damages for the injuries Timperio sustained on June 30, 2017, at BLH. *Justin Timperio v. Bronx Lebanon Hospital Center, et ano.*, No. 18 Civ. 1804, (S.D.N.Y.) (Gardephe, J.).

On June 22, 2018, BLH filed a motion with the district court seeking a dismissal of Timperio's Complaint. On March 31, 2019, the district court issued an Order, and on April 26, 2019, a Memorandum Opinion based on the facts before it, denying BLH's motion, holding that Timperio's injuries were not compensable pursuant to *Workers' Compensation Law* § 10(1) in that Timperio's injuries did not "arise out of (Timperio's) employment." *Timperio v. Bronx-Lebanon Hospital Center*, 384 F. Supp.3d 425, [S.D.N.Y 2019] (Gardephe, J.).[1] (Timperio's Exhibit C).

On January 27, 2021, after a WCB administrative proceeding, the WCB Panel issued a decision that Timperio's injuries were compensable. Timperio appealed the WCB Panel's decision to the 3rd Department which unanimously reversed the WCB's

[1] BLH moved before Judge Gardephe for reconsideration of his decision denying BLH's motions to dismiss Timperio's federal Complaint. The motion for reconsideration was denied. However, Judge Gardephe stayed the federal action pending resolution of the instant proceeding.

decision.

LEAVE TO APPEAL IS NOT WARRANTED

This matter does not warrant review by this Court.

The 3rd Department conducted a case specific examination of the facts in Timperio's matter, then applied *WCL* § 10(1)'s requirements and this Court's long standing decisions interpreting *WCL* § 10(1). There are no "novel" or "conflicts with prior decisions of this Court," nor does the Decision "involve(s) a conflict among the departments of the Appellate Division." 22 N.Y.C.R.R § 500.22(b)(4).

POINT 1

WCL § 10(1) AS INTERPRETED BY THE COURT OF APPEALS, CLEARLY SETS FORTH THE STANDARDS FOR A COMPENSABLE *WCL* CLAIM

The 3rd Department's Decision does not present a conflict with this Court's prior decisions.

An application of *WCL* § 10(1) to Timperio's facts is consistent with this Court's holding in *Matter of Lemon v. N.Y.C. Transit Auth.*, 72 N.Y.2d 324 [1988], and over a century's worth of similar holdings by this Court. (See, *Matter of Malacarne v. City of Yonkers Parking Auth*, 41 N.Y. 2d 189 (1976); *Ognibene v. Rochester Mfg. Co.*, 298 N.Y. 85, (1948); *Matter of Field v. Charmette K. F. Co.*, 245 N.Y. 139 (1927); *McCarter v. La Rock*, 240 N.Y. 282 (1925); *Matter of Heitz v.*

Ruppert, 218 N.Y. 148 (1916)).

In *Matter of Lemon v. N.Y.C. Transit Auth., supra*, at 326-27, this Court held that, "Nevertheless, only if an injury flows as a natural consequence of the employee's duties can it be said to arise out of the employment." Movants disregard this well-settled law as not only stated in *Matter of Lemon, supra*, but also in *Connelly v. Samaritan Hosp.*, 259 N.Y. 137 [1932], which clearly set out the standards to be applied for *WCL* § 10(1) that the 3rd Department followed. Furthermore, it is uncontroverted that the record does not reveal any work-related motivation for the shooting of Timperio. This shooting was, "[A] purely fortuitous coincidence of time and place (and) is not enough . . . (since) there must be a causal relationship or nexus between the accident and the employment" to establish a nexus between Timperio's injuries and Timperio's BLH employment. *Matter of Lemon v. N.Y.C. Transit Auth.*, *supra*, citing, *Connelly v. Samaritan Hosp.*, *supra*.

WCL § 10(1) mandates that in order to have a viable workers' compensation claim the, ". . . injury (arises) out of and in the course of the employment without regard to fault as a cause of the injury, ..." These are two conjunctive elements of *WCL* § 10(1) that must be met.

POINT 2
THE 3rd DEPARTMENT APPROPRIATELY CONCLUDED THERE WAS SUBSTANTIAL EVIDENCE REBUTTING WCL § 21(1)'s PRESUMPTION

WCL § 21(1) creates a presumption that, in the absence of substantial evidence to the contrary, an injury sustained by an employee during the course of employment arose from the injured employee's employment.

Movants rely on cases that held if there is substantial evidence that an injury was a result of a personal dispute, it did not arise out of employment. That is not the full story. Those cases do not address injuries that were a result of a random act and did not arise out of a personal dispute. Those random attacks are no more work related than a personal dispute. The substantial evidence submitted by Timperio that his injuries were a result of an random attack without a nexus to Timperio's employment clearly rebuts the *WCL* § 21(1) presumption. (Timperio's Exhibit D, pages 22-24).

The 3rd Department's Decision reversing the WCB's determination follows the guidance of *Matter of Pell v. Board of Education*, 34 N.Y. 2d 222 [1974], where this Court held, "[T]he doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; . . . the courts have no right to review the facts generally as to

weight of evidence, beyond seeing to it that there is 'substantial evidence.'" [2] (See, *Cadme v. FOJP Serv. Corp.*, 196 A.D.3d 983 [3rd Dept. 2021].

In its Decision, the 3rd Department adhered to its judicial role in reviewing the WCB's determination. The Court found there was sufficient substantial evidence in the WCB record to rebut the *WCL* § 21(1) presumption that Timperio's injuries were not work related. (Timperio's Exhibit A).[3] (Exhibit A).

POINT 3

IT IS THE LEGISLATURE AND THE EXECUTIVE BRANCH'S RESPONSIBILITY TO ENACT WORKERS' COMPENSATION LAW CONCERNING RANDOM MASS SHOOTINGS

We readily acknowledge the concerns about random mass shootings and the injuries and deaths that have resulted. However, as important as these concerns are,

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[2] Substantial evidence "is related to the charge or controversy and involves a weighing of the quality and quantity of the proof. More than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence, or evidence beyond a reasonable doubt." (*300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y.2d 176 [1978].

[3] Movants inappropriately cite *Matter of Rosen v. First Manhattan Bank*, 202 AD 2d 864 [3rd Dept. 1994] *aff'd*, 84 NY2d 856 [1994]. (Decedent worker's death was caused by a coworker. As such it was not a random attack. Substantial evidence supported the finding the assault "arose in the course of his employment." (Citing, *Matter of Lemon v New York City Tr. Auth.*, supra, at 327).

the appropriate response is the enactment of legislation addressing this issue. The Legislature made it clear when the *WCL* was enacted that it intended to cover injuries to workers that arose out of and during the course of employment. *WCL* § 10(1).[4]

As stated previously in our 3rd Department brief, "Unfortunately and regrettably, mass shootings in and out of the workplace are our nations's re-occurring nightmare, with no end in sight. A decision to address the impact of a random shooter 's entry into the workplace, as in (Timperio's) case, requires that the *WCL* must be legislatively amended. (Timperio's Exhibit D, page 25). In *Ognibene v. Rochester Mfg. Co., supra*, this Court clearly stated "[T]he simple, yet at times abstruse, question for our determination is whether claimant suffered an injury 'arising out of and in the course of' his employment. Workmen's Compensation Law, § 10 . . . [L]iberally though the Workmen's Compensation Law is to be construed (§ 21), the courts must give heed to its provisions that the injury arose not only 'in the course of' but also 'out of' the employment . . . [P]erhaps, at some future time, new legislation may render industry responsible for all injuries sustained by employees upon the employer's premises during working hours; but, as the statute now stands,

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[4] Of course, the *WCL* provides protection to those whose employment responsibilities expose them to random acts of violence. (See, *Funicello v. Chain Bldg. Corporation et al*., 251 A.D. 759 (3rd Dept. 1937; *Timperio v. Bronx-Lebanon Hospital Center*, *supra*, at page 433).

an injury is not compensable unless it is one 'arising out of' as well as 'in the course of' the employment."[5] *Ognibene v. Rochester Mfg. Co., supra*, at pages 86, 87.

The answer to mass random workplace shootings should be addressed by the Legislature.

CONCLUSION

The Motion For Leave to Appeal should be denied.

Dated: New York, New York
September 30, 2022

Respectfully Submitted,

ARNOLD N. KRISS, ESQ.

On the Opposition to Motion
Gabriel Taussig, Esq.

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[5] Between 2019 and 2022, the New York State Legislature recognizing the need to expand workers' compensation benefits introduced numerous bills to amend the *WCL*, such as, Amd. §§ 201 & 204, add § 204-a, *WCL*, to provide an act to amend the workers' compensation law, in relation to providing four weeks of leave for worker-victims of domestic or sexual abuse violence; Amd §§ 13-a & 21-a, *WCL,* to enact a COVID-19 injured workers' protection act establishing a presumption for public employee death benefits where a member was required to physically report to work, did in fact physically report to work and COVID-19 was a significant contributing factor in the employee's death, and Amd § 21, *WCL,* adding a presumption for the death of an injured worker due to opioid overdose where that injured worker was prescribed opioids as a result of a workplace injury. (Source: https://nyassembly.gov/leg/?sh=advanced).

EXHIBIT A

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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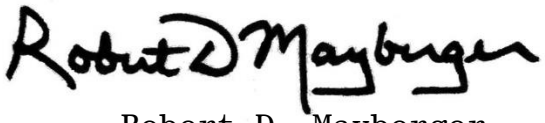

Robert D. Mayberger
Clerk of the Court

EXHIBIT B

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.

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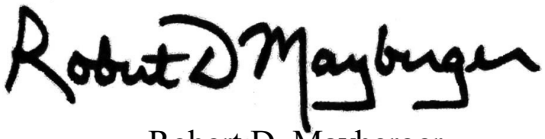

Robert D. Mayberger
Clerk of the Court

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUSTIN TIMPERIO,

Plaintiff,

- against -

BRONX-LEBANON HOSPITAL CENTER and UPSTATE GUNS AND AMMO, LLC,

Defendants.

MEMORANDUM OPINION

18 Civ. 1804 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

Plaintiff Justin Timperio brings claims against (1) Bronx-Lebanon Hospital Center (the "Hospital") for negligence; negligent infliction of emotional distress; and negligent hiring, retention, training and supervision; and (2) Upstate Guns and Ammo, LLC ("Upstate") for negligent entrustment and negligence per se. Defendants have moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The Hospital, in the alternative, moves for summary judgment.

On March 31, 2019, this Court issued an order (Dkt. No. 43) (1) converting the Hospital's motion to dismiss to a motion for summary judgment, and denying the motion; and (2) granting Upstate's motion to dismiss. The purpose of this opinion is to explain the Court's reasoning.

BACKGROUND[1]

I. FACTS

On June 30, 2017, Plaintiff Timperio – then a first-year medical resident – was shot by Dr. Henry Bello, a former Hospital employee. Bello's employment had resigned in 2015

[1] Unless otherwise noted, the following facts are drawn from the Complaint and are presumed true for purposes of resolving Defendants' motions. See Kassner v. 2nd Ave. Delicatessen, Inc., 496 F.3d 229, 237 (2d Cir. 2007).

after an allegation that he had sexually harassed a Hospital employee. (Cmplt. (Dkt. No. 9) at 1-2 & n.2)[2] On June 30, 2017, Bello returned to the Hospital. He was wearing a white doctor's coat and a Hospital identification badge, which had not been taken from him when his employment was terminated. (Id. at 2) Hidden under Bello's white coat was an AR-15 rifle and extra magazines, which he had purchased from Defendant Upstate, a firearms shop in Schenectady, New York. (Id.) Bello was also carrying a Tropicana orange juice container filled with gasoline, which he used to set fire to the Hospital's 16th floor nursing station. (Id.)

After arriving at the Hospital on June 30, 2017, Bello shot Plaintiff; killed another doctor; and wounded four other members of the medical staff and a patient. (Id. at 1-2) The bullet that hit Plaintiff entered his abdomen and exited his right thigh, "requiring surgical procedures and treatment . . . at Defendant Hospital and Mt. Sinai Hospital" from June 30, 2017 to July 21, 2017. (Id. at 2) After his rampage, Bello killed himself. (Id. at 3)

This was not the first shooting incident at the Hospital. (Id.) On November 11, 2011, a gang member shot into the Hospital's emergency room, hitting a nurse and a security guard. (Id.) Plaintiff alleges that, after the 2011 incident, the Hospital was on "notice that its security system was ineffective," but it did nothing to improve it. (Id.) Plaintiff also alleges that the Hospital "failed to take proper action" after it learned that Bello had sexually harassed another Hospital employee and should have taken custody of Bello's identification badge when he resigned. (Id.)

As for Upstate, Plaintiff alleges that it sold Bello, a New York City resident, an AR-15 rifle on June 22, 2017. (Id. at 5) According to Plaintiff, that sale constitutes negligent

[2] The page numbers of documents referenced in this Order correspond to the page numbers designated by this District's Electronic Case Filing system.

entrustment in violation of 15 U.S.C. § 7903(B), because Upstate was on notice that AR-15 rifles are "the semi-automatic weapon of choice in . . . mass death and casualty shootings." (Id. at 6-7) Plaintiff also alleges that Upstate was required to – but did not – contact the New York City Police Department before selling Bello the rifle to determine whether Bello had a New York City permit for the weapon. (Id. at 6)

DISCUSSION

I. Whether the Hospital's Rule 12(b)(6) Motion Should Be Converted to a Rule 56 Motion for Summary Judgment

In support of its motion to dismiss, the Hospital has submitted an affidavit from Debra Jarmon, a third-party administrator for workers compensation claims for the Hospital. Attached to Jarmon's affidavit are the following documents: (1) the Hospital's workers' compensation policy as of June 30, 2017 (Dkt. No. 36-2, at 3); (2) a workers' compensation claim the Hospital filed for Plaintiff on June 30, 2017 (Dkt. No. 36-2, at 29-32); (3) the New York State Workers' Compensation Board Notice of Case Assembly relating to Plaintiff (Dkt. No. 36-2, at 33); and (4) the New York State Workers' Compensation Board payment report for Plaintiff. (Dkt. No. 36-2, at 36)

Federal Rule of Civil Procedure 12(d) provides that "[i]f, on a motion under R. 12(b)(6) . . . matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d).

Accordingly, where, as here, a court considering a motion to dismiss is "presented with matters outside the pleadings," there are "two options." Chambers v. Time Warner, Inc., 282 F.3d 147, 154 (2d Cir. 2002). The court either "exclude[s] the extrinsic documents," or it

"convert[s] the motion to one for summary judgment," giving the parties adequate notice and an opportunity to "submit the additional supporting material contemplated by Rule 56." Id. (citing Carter v. Stanton, 405 U.S. 669, 671 (1972) (per curiam); Friedl v. City of N.Y., 210 F.3d 79, 83-84 (2d Cir. 2000); Morelli v. Cedel, 141 F.3d 39, 45-46 (2d Cir. 1998)). "'Federal courts have complete discretion to determine whether . . . to convert [a] motion [to dismiss] to one for summary judgment.'" Abbey v. 3F Therapeutics, Inc., No. 06 Civ. 409 (KMW), 2009 WL 4333819, at *5 (S.D.N.Y. Dec. 2, 2009) (quoting Carione v. United States, 368 F. Supp. 2d 186, 191 (E.D.N.Y. 2005)).

"'The essential inquiry in determining whether it is appropriate to convert a motion [to dismiss] into a motion for summary judgment is whether the non-movant should reasonably have recognized the possibility that the motion might be converted into one for summary judgment or was taken by surprise and deprived of a reasonable opportunity to meet facts outside the pleadings.'" Ferguson v. Jones, 10 Civ. 817 (PGG), 2011 WL 4344434, at *2 (S.D.N.Y. Sept. 12, 2011) (alteration in original) (quoting Costor v. Sanders, No. 07 Civ. 11311 (NRB), 2009 WL 1834374, at *2 (S.D.N.Y. June 16, 2009)).

Here, the Hospital requests that – if the Court finds it necessary to consider evidence outside the pleadings – its motion to dismiss be converted "to a summary judgment motion under FRCP 56." (Hospital Br. (Dkt. No. 35) at 8) Plaintiff does not oppose conversion. Indeed, Plaintiff has supplemented the record with his affidavit (see Kriss Decl., Ex. A (Dkt. No. 40)), and that affidavit makes clear that Plaintiff is familiar with the documents submitted by the Hospital. (See id. ¶¶ 7-8) Accordingly, the Hospital's motion to dismiss will be converted to a

motion for summary judgment.

II. LEGAL STANDARDS

A. Summary Judgment Standard

Summary judgment is warranted when the moving party shows that "there is no genuine dispute as to any material fact" and that it "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute about a 'genuine issue' exists for summary judgment purposes where the evidence is such that a reasonable jury could decide in the non-movant's favor." Beyer v. Cnty. of Nassau, 524 F.3d 160, 163 (2d Cir. 2008) (citing Guilbert v. Gardner, 480 F.3d 140, 145 (2d Cir. 2007)). "'[W]here the nonmoving party will bear the burden of proof at trial, Rule 56 permits the moving party to point to an absence of evidence to support an essential element of the nonmoving party's claim.'" Lesavoy v. Lane, No. 02 Civ. 10162 (RWS), 2008 WL 2704393, at *7 (S.D.N.Y. July 10, 2008) (quoting Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 116 (2d Cir. 1991)).

In deciding a summary judgment motion, the Court "'resolve[s] all ambiguities, and credit[s] all factual inferences that could rationally be drawn, in favor of the party opposing summary judgment.'" Spinelli v. City of N.Y., 579 F.3d 160, 166 (2d Cir. 2009) (quoting Brown v. Henderson, 257 F.3d 246, 251 (2d Cir. 2001)). However, a "'party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment . . . . [M]ere conclusory allegations or denials . . . cannot by themselves create a genuine issue of material fact where none would otherwise exist.'" Hicks v. Baines, 593 F.3d 159, 166 (2d Cir. 2010) (alterations in original) (quoting Fletcher v. Atex, Inc., 68 F.3d 1451, 1456 (2d Cir. 1995)).

B. Rule 12(b)(6) Standard

Upstate's motion is governed by Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "In considering a motion to dismiss . . . the court is to accept as true all facts alleged in the complaint," Kassner, 496 F.3d at 237 (citing Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 87 (2d Cir. 2002)), and must "draw all reasonable inferences in favor of the plaintiff." Id. (citing Fernandez v. Chertoff, 471 F.3d 45, 51 (2d Cir. 2006)).

III. ANALYSIS

A. The Hospital's Motion for Summary Judgment

The Hospital argues that it is entitled to summary judgment because Plaintiff's claims are barred by the exclusive remedy provision of Workers' Compensation Law §§ 11 and 29(6).

"As a general rule, when an employee is injured in the course of his employment, his sole remedy against his employer lies in his entitlement to recovery under the Workers' Compensation Law." Billy v. Consol. Mach. Tool Corp., 51 N.Y.2d 152, 156 (1980) (citing Workers' Compensation Law § 11). Workers' Compensation Law § 10 provides:

> Every employer subject to this chapter shall in accordance with this chapter, except as otherwise provided in section twenty-five-a hereof, secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of the employment without regard to fault as a cause of the injury . . . .

Workers' Compensation Law § 10.

Workers' Compensation Law § 11 provides in relevant part:

> The liability of an employer prescribed by the last preceding section shall be

> exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom, except that if an employer fails to secure the payment of compensation for his or her injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his or her legal representative in case of death results from the injury, may, at his or her option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury; and in such an action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his or her employment, nor that the injury was due to the contributory negligence of the employee.

Id. § 11.

Finally, Workers' Compensation Law § 29(6) provides:

> The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee, or in case of death his or her dependents, when such employee is injured or killed by the negligence or wrong of another in the same employ, the employer's insurer or any collective bargaining agent of the employer's employees or any employee, of such insurer or such collective bargaining agent (while acting within the scope of his or her employment). The limitation of liability of an employer set forth in section eleven of this article for the injury or death of an employee shall be applicable to another in the same employ, the employer's insurer, any collective bargaining agent of the employer's employees or any employee of the employer's insurer or such collective bargaining agent (while acting within the scope of his or her employment). The option to maintain an action in the courts for damages based on the employer's failure to secure compensation for injured employees and their dependents as set forth in section eleven of this article shall not be construed to include the right to maintain an action against another in the same employ, the employer's insurer, any collective bargaining agent of the employer's employees or any employee of the employer's insurer or such collective bargaining agent (while acting within the scope of his or her employment).

Id. § 29(6).

Here, with respect to Plaintiff's claim against the Hospital, the two key issues are whether (1) Plaintiff's injury "[arose] out of and in the course of [his] employment"; and (2) Plaintiff can elect to sue in lieu of accepting Workers' Compensation benefits.

The Court finds – based on the facts before it – that Plaintiff's injury did not

"aris[e] out of" his employment. Workers' Compensation Law § 10. "[O]nly if an injury flows as a natural consequence of the employee's duties can it be said to arise out of the employment." Matter of Lemon v. N.Y.C. Transit Auth., 72 N.Y.2d 324, 326-27 (1988) (citations omitted). "A purely fortuitous coincidence of time and place is not enough. There must be a causal relation[ship or nexus between the accident and the employment]." Connelly v. Samaritan Hosp., 259 N.Y. 137, 139 (1932).

"'In determining whether the victim of an assault is entitled to workers' compensation benefits, the test is whether the assault originated in work-related differences or from pure personal animosity between the combatants.'" Matter of Blair v. Bailey, 279 A.D.2d 941, 942 (3d Dep't 2001) (quoting Matter of Baker v. Hudson Val. Nursing Home, 233 A.D.2d 608, 608 (3d Dep't 1996)). Such a determination "is a question of fact." Id. at 942. Here, there is no evidence suggesting that the shooting originated in work-related differences.

The cases the Hospital cites are not to the contrary. In Pollock v. City of New York, a physician at Kings County Hospital was shot to death by a former patient "who was dissatisfied with surgical treatment he had received [at Kings County Hospital]." 145 A.D.2d 550, 550 (2d Dep't 1988). Because the shooting was related to the victim's work, the injury was subject to the Workers' Compensation Law. Similarly, in Ross v. State, a hospital employee died when he was stabbed by an "alleged lunatic whom the intestate was attempting, at the direction of his superior officers, to apprehend and return to the hospital." 8 A.D.2d 902, 902 (3d Dep't 1959). Because the injury arose from the victim's employment, it was held subject to the Workers' Compensation Law.

Finally, the Hospital cites an unpublished opinion in DeJesus v. N.Y.C. Health & Hosp. Corp., No. 25309/96, 2002 WL 31010978, at *1-2 (N.Y. Sup. Ct. Queens Cnty. Aug. 14,

2002). In that case, plaintiff – a New York City Health and Hospitals Corporation employee – was "forced off the elevator by an unknown male, and raped at knife point in a secluded bathroom." Id. at *1. The court held that plaintiff's claim was subject to the Workers' Compensation Law. Id. at *2. In doing so, the court did not address the "arising out of" requirement, but instead said that because "plaintiff filed for and is receiving Workers' Compensation benefits as a result of her injuries," she had "availed herself of her exclusive remedy" and could not sue her employer for an additional recovery. Id. at *1-2. That is not the case here. Plaintiff has not "availed" himself of Workers' Compensation benefits. (See Kriss Decl., Ex. A (Dkt. No. 40) ¶¶ 6-11) Instead, the Hospital filed a workers' compensation claim on behalf of Plaintiff without his knowledge, and when Plaintiff received workers' compensation checks, he did not cash them. (See id.)

Accordingly, the Hospital's motion for summary judgment will be denied.

B. UPSTATE'S MOTION TO DISMISS

Upstate moves to dismiss Plaintiff's claims on the ground that they are barred by the Protection of Lawful Commerce in Arms Act (the "Act"), 15 U.S.C. §§ 7901-7903. (Upstate Br. (Dkt. No. 33) at 7, 13)

The Act provides broad protection to sellers of firearms, and states that "[a] qualified civil liability action may not be brought in any Federal or State court." 15 U.S.C. § 7902(a). The Act defines "qualified civil liability action" as

> a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.

Id. § 7903(5)(A). "Qualified product" is defined as "a firearm." Id. § 7903(4). The Act carves out six exceptions to this prohibition, including claims for "negligent entrustment and negligence

per se." Id. § 7903(5)(A)(ii).

Plaintiff does not dispute that, unless an exception applies, his lawsuit is barred by the Act. (See Pltf. Br. (Dkt. No. 38) at 6) The Act defines "negligent entrustment" as "the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk or physical injury to the person or others." 15 U.S.C. § 7903(5)(B). The Act also states that it does not "create a public or private cause of action or remedy." Id. § 7903(5)(C). Accordingly, Plaintiff must also satisfy the requirements for a negligent entrustment claim under New York law.

In New York, the tort of negligent entrustment requires a plaintiff to prove "'some special knowledge on the part of the defendant concerning a characteristic or condition peculiar to [the user] which renders the [user]'s use of the chattel unreasonably dangerous . . . .'" Adeyinka v. Yankee Fiber Control, Inc., 564 F. Supp, 2d 265, 286 (S.D.N.Y. 2008) (third alteration in original) (quoting Troncoso v. Home Depot, U.S.A., Inc., 258 A.D.2d 644, 645 (2d Dep't 1999)); see also Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222, 237 (2001) ("The tort of negligent entrustment is based on the degree of knowledge the supplier of a chattel has or should have concerning the entrustee's propensity to use the chattel in an improper or dangerous fashion. Gun sales have subjected suppliers to liability under this theory. Of course, without the requisite knowledge, the tort of negligent entrustment does not lie." (citations omitted)).

Here, Plaintiff does not allege that Upstate knew – or should have known – about Bello's "propensity to use the chattel in an improper or dangerous fashion." Hamilton, 96 N.Y.2d at 237. Instead, Plaintiff asks the Court to re-write more than a century of law concerning this topic by finding that it would be negligent for Upstate to entrust an AR-15 to

anyone, because of "the increase of mass shootings with shooters using the AR-15." (Pltf. Br. (Dkt. No. 38) at 18-19) This Court cannot re-write the law in the fashion Plaintiff demands. Accordingly, Upstate's motion to dismiss Plaintiff's negligent entrustment claim will be granted.

As for Plaintiff's claim of negligence per se – because the Act does not define this term – the Court must look to New York law to determine the elements of such a claim. In New York, "the 'unexcused omission' or violation of a duty imposed by statute for the benefit of a particular class 'is negligence itself." Chen v. United States, 854 F.2d 622, 627 (2d Cir. 1988) (emphasis in original) (quoting Martin v. Herzog, 228 N.Y. 164, 168 (1920)). "However, it is 'long and firmly established in New York, that the violation of a rule of an administrative agency' is 'merely some evidence' of negligence but 'does not establish negligence as a matter of law' because a regulation 'lack[s] the force and effect' of a statute." Id. (alteration in original) (quoting Long v. Forest-Fehlhaber, 55 N.Y.2d 154, 160 (1982)).

In any event, the mere "[v]iolation of a statute . . . does not automatically constitute negligence per se. Only statutes designed to protect a definite class of persons from a particular hazard, which persons within the class are incapable of avoiding, can give rise to negligence per se for violation of the statute." German by German v. Fed. Home Loan Mortg. Corp., 896 F. Supp. 1395, 1396 (S.D.N.Y. 1995) (citation omitted). Moreover,

> [i]n order to warrant a finding of negligence per se for a statutory violation, the statute must evidence "an intention, express or implied, that from disregard of [its] command a liability for resultant damages shall arise 'which would not exist but for the statute.'" Three factors are of central importance in this inquiry: (1) whether the plaintiff is one of the class for whose benefit the statute was enacted, (2) whether a finding of negligence per se for violation of the statute would promote the legislative purpose, and (3) whether creation of such liability would be consistent with the legislative scheme.

Id. at 1397 (second alteration in original) (quoting Gain v. E. Reinforcing Serv., 193 A.D.2d 255, 257 (3d Dep't 1993)).

Plaintiff argues that Upstate was negligent per se because it sold the AR-15 to Dr. Bello in violation of provisions of the New York City Administrative Code requiring Dr. Bello to have a New York City permit for such a firearm. See N.Y.C. Admin. Code §§ 10-303(5), 10-306(c)-(e). The Administrative Code sets forth municipal rules, however, and Plaintiff has not shown that the violation of such rules – as opposed to the violation of a statute – constitutes negligence per se.

Plaintiff further contends that Upstate's alleged violation of the New York City Administrative Code constitutes a violation of the Gun Control Act. The Gun Control Act makes it

> unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver . . . (b) any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of any State law or any published ordinance applicable at the place of sale, delivery or other disposition, unless the licensee knows or has reasonable cause to believe that the purchase or possession would not be in violation of such State law or such published ordinance. . . .

18 U.S.C. § 922(b)(2).

As set forth above, the Gun Control Act addresses a sale or delivery that is unlawful "at the place of sale, delivery or other disposition." Here, Bello purchased the AR-15 in Schenectady, not in New York City. New York City Administrative Code § 303 has no applicability in Schenectady, where the firearm was purchased. Plaintiff argues, however, that the Gun Control Act prohibits any "other disposition" of a firearm, and because "Upstate Guns knew that Bello was a resident of NYC . . . the disposition of Upstate Gun's transaction with Bello was NYC." (Pltf. Br. (Dkt. No. 38) at 8) Plaintiff cites no authority in support of this interpretation of the statute, however, and the weight of the authority is against Plaintiff's interpretation. See, e.g., Huddleston v. United States, 415 U.S. 814, 823 (1974) ("other disposition" refers to the means by which a firearm can be transferred other than by "sale" or

"delivery," such as "through a redemptive transaction").

CONCLUSION

For the reasons stated above, this Court granted Defendant Upstate Guns' motion to dismiss (Dkt. No. 33), and denied Defendant Hospital's motion for summary judgment. (Dkt. No. 34).

Dated: New York, New York
April 26, 2019

SO ORDERED.

Paul G. Gardephe
United States District Judge

EXHIBIT D

Submitted by:
ARNOLD N. KRISS, ESQ.

New York Supreme Court
Appellate Division—Third Department

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.

Case No.: 533584

REPLY BRIEF FOR CLAIMANT-APPELLANT

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Workers' Compensation Board No. G1955710

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INTRODUCTION

This is an appeal by Dr. Justin Timperio ("Appellant") from a decision of the New York State Workers' Compensation Board Panel ("WCB"), duly filed on January 27, 2021, seeking a denial of Bronx Lebanon Hospital's ("BLH") workers' compensation claim filed by BLH on Appellant's behalf. (R-4-11).[1] Appellant submits a Reply Brief to Carrier-Respondent's ("State Insurance Fund") and Employer-Respondent's ("Bronx Lebanon Hospital" "BLH"), and Respondent Workers' Compensation Board's ("WCB") Briefs.

APPELLANT'S REPLY

Both Respondents' Briefs are devoid of any adequate response to the controlling Court of Appeals' decision in *Matter of Lemon v. N.Y.C. Transit Auth.*, 72 N.Y.2d 324, 326-27 [1988], deciding that in order to be compensable under the *Workers' Compensation Law*, ("*WCL*") only when an employee's injury, ". . . flows as a natural consequence of the employee's duties can it be said to arise out of employment." Furthermore, ("[A]n injury is compensable only where it 'aris[es] out of and in the course of the employment." *Gaspard v. Queens Party Hall Inc.*, 189 A.D.3d 1880 (3rd Dept. [2020]), leave to appeal denied, 36 N.Y.3d 912, [2021]. (Citations omitted)). Moreover, Respondents also clearly disregarded *WCL* § 10, which statutorily mandates that an employee's injury, such as Appellant's, must arise

[1] "R" refers to the Record On Appeal.

out of employment. Since Appellant's injury did not "arise" from his BLH employment, the injury is not compensable under the *WCL*.

Additionally, although Appellant was injured at work, the *WCL* § 21 presumption ("presumption") was rebutted by substantial evidence that Appellant's injury had absolutely nothing to do with his employment. Except for Appellant's mere presence in the workplace, there was no causal connection between the work Appellant performed and how Appellant was injured.

The doctrine of collateral estoppel precludes BLH from asserting, and the WCB determining that Appellant's injuries arose from his employment.

Respondents' Briefs failed to overcome Appellant's arguments that the claim is not compensable.

RESPONDENT BLH'S CARRIER-EMPLOYER'S POSITION IS UNPERSUASIVE

Respondent BLH misrepresents the facts by referring to Bello, at the time of the shooting as ". . . a disgruntled employee whose goal on the day he shot (Appellant) was to harm the Hospital itself, and that he shot (Appellant), a doctor at the Hospital, because (Appellant) was a Hospital employee for the sole purpose of advancing this goal." (BLH's Brief, Page 4).

Glaringly, no where in the agreed upon Joint Statement of Facts ("Stipulated Facts") entered into between Appellant and BLH is there a reference to Bello as, "a disgruntled Hospital employee whose goal on the day he shot (Appellant) was to

harm the Hospital itself,...." (R-262-265, BLH's Brief, Page 4). BLH inappropriately urges this Court to consider "facts" that were not part of the Stipulated Facts submitted by BLH and Appellant at the WCB administrative hearing and relied upon by the WCB in reaching its determination. (R-262-265).

This Court cannot disregard, "A fundamental principle of administrative law long accepted by this court [which] limits judicial review of an administrative determination solely to the grounds invoked by the agency, and if those grounds are insufficient or improper, the court is powerless to sanction the determination by substituting what it deems a more appropriate or proper basis." *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 593 [1982]. Indeed, "[t]he rule has been firmly established that a determination in an administrative proceeding must be based solely upon the record composed of the hearing evidence." *Simpson v. Wolansky*, 45 A.D.2d 876, 877 [2nd Dept. 1974], aff'd, 38 N.Y.2d 391 [1975].

BLH is wrong in asserting that the "evidence" that they didn't think relevant before but now wants the Court to consider for the first time, demonstrates that the assailant was a "disgruntled employee" with a work-related motivation. That is pure speculation and speculation concerning the facts cannot support the WCB's determination. *Matter of Zehr v. Jefferson Rehab. Ctr.*, 17 AD3d 811 [3rd Dept. 2005], *Matter of Mayette v. Village of Massena Fire Dept.*, 49 AD3d 920 [3rd Dept. 2008].

Many of the cases relied upon by Respondents in their effort to establish that Appellant's injury is compensable under the *WCL* pre-date *Matter of Lemon v. N.Y.C. Transit Auth.*, *supra*, and fail to take the reasoning of *Lemon* into consideration. Moreover, the cases cited by Respondents are factually distinguishable from the circumstances surrounding how Appellant was injured at BLH. For example, BLH mistakenly attempts to bolster its argument by citing cases concerning how "outside employees" were injured after following the employers' direction, *i.e.*, how to travel to work or to perform a "special errand." (BLH's Brief, Pages 13-14).

One such case, *Sheehan v. Bd. of Trustees of Vill. of Schuylerville*, 256 A.D. 148 [3rd A.D. 1939], is really instructive in defining injuries "arising out of employment." (BLH's Brief, Page 14). Sheehan was employed as a street laborer. After letting Sheehan out of the employer's truck, the supervisor gave Sheehan instructions where he would pick Sheehan up to return to work. Following his supervisor's directions where to meet the supervisor to return to the workplace, Sheehan was struck by an automobile and injured. Sheehan filed a workers' compensation claim, which was opposed by the employer and its insurance carrier. This Court affirmed the claim finding there was a causal connection between Sheehan's injuries and his duties.

In *Matter of Keevins v. Farmingdale UFSD*, 304 A.D.2d 1013 [3rd Dept. 2003], (a teacher walked around her desk and twisted her knee after retrieving

materials for a student which resulted in a claim). (BLH's Brief, Page 15). The WCB determined the injury was not compensable because it did not result from an accident nor did it arise out of the claimant's employment. This Court reversed the WCB stating, "For an injury to be compensable under the *Workers' Compensation Law*, it must have arisen both out of and in the course of employment. (Citations omitted).

The *Sheehan* and *Keevins*, *supra*, decisions are illustrative of the fact that when a claimant relies upon the presumption, the claim must be based upon some connection between the claimant's work and an injury. [See, *Matter of Scalzo v. St. Joseph's Hosp.*, 297 A.D2d. 883 [3rd Dept. 2002], (injury resulted from "workplace accident" where the claimant injured back quickly rising from office chair); *Matter of Torio v. Fisher Body Div.--General Motors Corp.*, 119 A.D.2d 955 [3rd Dept. 1986], (compensable injury where the claimant's knee popped out of joint as he rose from a cross-legged position on employer's lawn minutes before work); *Matter of Thompson v. New York Tel. Co.*, 114 A.D.2d 639 [3rd Dept. 1985], (injury arose "out of" employment where knee popped as the claimant descended employer's stairway).

All the aforementioned cases concerning employees' injuries were presumed to be causally connected based upon how the claimants were injured while performing their work. In contrast, Appellant was a victim of a mass shooting by Bello, a former employee who had left BLH approximately two and one-half years

earlier. Appellant's injury was not connected to his work duties or any foreseeable work-related duties when he was shot by Bello.

BLH also tries to insert a square peg into a round hole by equating a random mass workplace shooting with a workplace fire. However, a workplace fire is, "common to all who work because it is a 'hazard.' *Matter of Giliotti v. Hoffman Catering Co.*, 246 N.Y. 279 [1927]. (BLH's Brief, Pages 15-16). In *Giliotti*, the claimant was a domestic servant who slept on the employer's premises in a special section of the hotel. A fire occurred in the hotel while Giliotti was in his room after work and was suffocated to death by the fire. The Court of Appeals held, "[T]he danger from fire to which Giliotti was exposed attached specially to the premises where he was employed; it was peculiar to the situation and a risk to which his employment exposed him, in no way differing from the risk of injury from the collapse of the building." (Citing *Matter of Filitti v. Lerode Homes Corporation*, 244 N.Y. 291 [1927], "An accident due to fire springs from a risk peculiar to the particular locality of the work. If the employee were not in the burning 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. . . And death arose out of the employment. The danger from fire to which the employee was exposed attached specially to the premises where he was employed; it was peculiar to the situation and a risk to which his employment exposed him."

The danger of a fire is commonplace and is consistent with an employee being exposed to this danger. The keywords in *Gilotti* which distinguish Appellant are, "specially," "peculiar to the situation," and "a risk" of employment. A mass shooting which is aberrational, generally an isolated act, is not "a risk" related to Appellant's work duties.

BLH misconstrues the cases it cites involving an employee who is injured, "from assaults (which) are presumed to 'arise out of' employment absent contrary evidence." (BLH's Brief, Pages 16-18). For instance, in *Burke v. Towner Bros.*, 203 A.D. 384, 387 [3rd Dept. 1922], Burke's employer was a motorcycle and bicycle dealer who conducted competitive speed tests. A dispute occurred between Burke and Elsinger, a contestant. There was jealousy between them because Burke made a better test record. A fight ensued, and Elsinger kicked Burke in the stomach. Burke died from Elsinger's kick. The State Industrial Board (WCB) concluded that Burke's employment required him to participate in these competitive tests and Burke's death was causally connected to Burke's work. Burke's "assault was incidental to the performance of a duty [Burke] owed his master and was made while he was promoting his master's interest an assault occurs on an employer's premises." (BLH's Brief, Page 16). *Burke* unequivocally linked the employee's work responsibilities with his injury. It is thus clearly distinguishable from Appellant's incident.

BLH also cites *Katz v. A. Kadans & Co.*, 232 N.Y. 420, 421 [1922], (a claimant was a chauffeur who was attacked and stabbed by an insane man on the street). The award was sustained upon the theory that the injury occurred from a street risk. (BLH's Brief, Page 16). The Court of Appeals held in *Katz*, "[I]f the work itself involves exposure to perils of the street, strange, unanticipated and infrequent though they may be, the employee passes along the streets when on his master's occasions under the protection of the statute . . . The risk of being stabbed by an insane man . . . seems in a peculiar sense a risk incidental to the streets to which claimant was exposed by his employment (citing *Matter of Heidemann v. Am. Dist. Tel. Co.*, 230 N.Y. 305 [1921]. In discussing *Heidemann*, the Court noted that, . . . "it should be shown that the employment involves some special exposure; that the night watchman is exposed by his employment to the risk of being shot by accident as he nears a sudden brawl which it is his duty to investigate, while the night clerk whose business brings him on the street but whose duty is not to seek danger, is not so exposed." *Katz, supra*, at p. 421.

The Third Department contexualized and distinguished the *Katz* holding in *Coope v. Loew's Gates Theatre*, 215 A.D. 259 [3rd Dept. 1926], (an employee ticket seller, was attacked and injured by an unknown individual while working in the employer's ticket booth. The motive for the assault was unknown). The award for benefits was reversed and the claim was dismissed. In *Coope*, *Katz* was found by this

Court as "not applicable," holding, " . . . There is no evidence to show whether this ticket office was near the street, or to what extent it was open, inclosed, accessible to the public, or whether its occupant was exposed to an unusual peril. It is to be assumed that it was located in the lobby of the theatre. There is no evidence of any argument or dispute. It was merely a proposition of a personal nature made and rejected. Neither is there any proof of previous relationship or animosity except as it appears that a certain man made the proposition two or three weeks before and it is assumed that he was the husband of the woman who was guilty of the assault."

The *Coope* Court further stated, " . . . In *Heitz v. Ruppert*, 218 N. Y. 148, 152, 112 N. E. 750, 751 (L. R. A. 1917A, 344), 'The injury must be received (1) while the workman is doing the duty he is employed to perform, and also (2) as a natural incident of the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work.' In *Saenger v. Locke*, 220 N. Y. 556 at page 559 [1917], 116 N. E. 367, 368 (L. R. A. 1918F, 225), the same rule is expressed in the following language: 'Where injuries result from quarrels between fellow-servants the rule is that where the quarrel arose out of matters pertaining to the business, then the accident arises out of the employment. Where the quarrel is an independent affair having no connection with the master's work, then it does not.'" "[T]he claimant must not only be in the pursuit

of his employment but in furtherance of his employer's business." *Rydeen v. Monarch Furniture Co.*, 240 N. Y. 295 [1925].

Furthermore, the *Coope* Court cited *Rosmuth v. American Radiator Co.,* 201 A.D. 207 [3rd Dept. 1922] which held, "Under this broader conception of employment and its incidents, 'the test * * * is the relation of * * * the employment to the risk.' *Leonbruno Case, supra*, 229 N. Y. 473, 128 N. E. 712, 13 A. L. R. 522. The fact that the risk may be common to all mankind does not disentitle a workman to compensation, if in the particular case the risk is accentuated by the incidents of the employment. The question is whether there was a special exposure to the peril. *Heidemann v. American District Telegraph Co. Case, supra*, 230 N. Y. 307, 130 N. E. 302. In that case the court called attention to the well-known fact that 'crimes of violence flourish under cover of the night and darkness.' The fact that the duties of Rosmuth called him to a lonely spot, 200 feet away from the plant, after midnight, immediately following pay night, which was a matter of common knowledge in the community, furnishes sufficient evidence that the object of the assault was robbery, and that 'he was brought by the conditions of his work 'within the zone of special danger. *Leonbruno Case, supra*, 229 N. Y. 472, 128 N. E. 711, 13 A. L. R. 522."

Applying *Coope, Heitz, Saenger, Rydeen and Rosmuth, supra,* to the BLH's claim filed on behalf of Appellant, this claim is not compensable.

RESPONDENT WCB'S CASES ARE UNAVAILING

As set forth in Appellant's Brief, there is "substantial evidence" rebutting the presumption. (Appellant's Brief, Pages 22-24). The WCB's conclusion is not based upon any supporting case law, is illogical and speculative in concluding that the stipulated facts before the WCB leave "neutral," and the presumption prevails. (R-9). The WCB's interpretation of cited cases concerning how Appellant was injured were misinterpreted and misapplied.

In *Matter of Barth v. Cassar*, 38 A.D.2d 984 [3rd Dept. 1972], (the employee (claimant's deceased) drove a cab owned by the employer and the employee was under the employer's direction and control. (WCB's Brief, Page 29). The cab driver was shot to death while performing his work duties as a cab driver when he was robbed and killed). The Court held that, the employee's death arose out of and in the course of the employment since the cab driver was performing the work for which he was employed, and since he operated the cab in a public area – the streets were the cab driver's work location – and he was at risk of becoming a robbery victim. This holding is consistent with *Katz*, *supra*, that an assault upon a worker carrying out his duties in the public streets is a "street risk." *Barth* is irrelevant to how Appellant's injury was incurred in a non-public section of BLH.

Both BLH's and WCB's Briefs, similarly rely on *Matter of Fiorello v. Anastasi Bros. Co.*, 28 A.D.2d 755 [3rd Dept. 1967], (a baker who arrived for work at the

employer's plant at 6:30 a.m., parked his automobile in a remote area near the garage doors leading into the plant, was struck on the head by an unknown assailant, and was robbed of his wallet and ring). (BLH's Brief, Page 17 and WCB's Brief, Page 29). Benefits were affirmed by this Court. In *Fiorello*, and the other cases cited in the *Fiorello* decision, the Court highlighted the locations and times when the injured employees were assaulted. The circumstances leading to *Fiorello*'s injuries are clearly distinguishable, since Appellant's injury did not occur similarly in a comparable "zone of danger" and time.

The WCB also misconstrued *Notowitz v. Rose Towel & Linen Supply Co.*, 36 A.D.2d 543 [3rd Dept. 1971], aff'd, 29 N.Y.2d 502 [1971], (an employee was a laundry route salesman, who parked his employer's truck for the night in the company's private garage, and noticed three suspicious men who were still present when the employee exited the garage to go home. The employee ran, the three men caught the employee and assaulted him about a block away from the employer's garage, causing the employee's injuries). In awarding benefits, the WCB found that a hazard existed which did not permit the employee to safely leave the employer's premises. In confirming the WCB's determination, this Court stated, "The issue is whether the continuity of cause was so combined with the contiguity of time and space that the assault from origin to end should be taken to be one entire transaction. (See *Matter of Field v. Charmette Knitted Fabric Co.*, 245 N. Y. 139 [1927]," also

cited in Appellant's Brief, Pages 15-17). There is no comparable "contiguity of time and space" in connection with the assault inflicted by Bello upon Appellant.

Additionally, the WCB's application of the presumption is misapplied since, "[T]he lack of any evidence connecting . . . (an) accidental injury in the course of employment may not be supplied by the statutory presumption." "Presumptions are not substitutes for actual proof to establish the prerequisites for . . . benefits . . . ." (Citations omitted but included in Appellant's Brief Pages 21-22).

The WCB's conclusion that the Stipulated Facts are "neutral" is insufficient to support the finding that Appellant's injuries are compensable. (R-262-265, R-9-10).

THE DOCTRINE OF COLLATERAL ESTOPPEL PRECLUDES BLH FROM ASSERTING AND THE WCB FROM DETERMINING THAT APPELLANT'S INJURIES AROSE FROM HIS EMPLOYMENT.

The Parties In The District Court Acknowledged That There Were No Disputed Issues of Fact When They Sought Summary Judgment. The Federal District Did Not Infringe upon the WCB's Primary Jurisdiction When It Resolved the Remaining Legal Issue Before It.

It is the WCB's contention that collateral estoppel is inapplicable because in light of the WCB's primary jurisdiction, the federal district court in *Justin Timperio v. Bronx Lebanon Hospital Center, et ano*., 18 Civ. 1804 (S.D.N.Y.) (Gardephe J.) ("the federal action') did not have jurisdiction to determine the applicability of the *WCL* to Appellant's injury. (WCB's Brief, Pages 14-24). In Appellant's Brief we

demonstrated that under the circumstances in this case, the determination by the WCB concerning whether Appellant's injuries arose from his employment, was a question of law. (Appellant's Brief, Pages 6-9). Thus, this determination was properly made by the federal district court since, as a question of law, that issue was not subject to the primary jurisdiction of the WCB. This contention is predicated upon Appellant's and BLH's agreement to the Stipulated Facts underlying Dr. Timperio's injuries and the federal court recognizing there was no dispute concerning the facts. (R-262-265, R-101-113).[2] Consequently, in this situation, the WCB was left to determine whether under the criteria set forth in the statute and the agreed-upon facts, Appellant and BLH are subject to the *WCL,* as a question of law not subject to the WCB's primary jurisdiction. (Appellant's Brief, Pages, 6-9).

In response, the WCB maintains, that notwithstanding the agreement by Appellant and BLH concerning the facts underlying Appellant's injury, the decision whether the requirements of the *WCL* have been met is an "ultimate fact" which must be resolved by the WCB. (WCB's Brief, Page 17). In positing this argument, the WCB rejected the cases cited by Appellant which hold that the application of a statute to agreed-upon Stipulated Facts is a question of law. (WCB's Brief, Pages 17-18). The WCB argues that the cases are inapplicable because they involve appellate

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[2] The WCB points out that pursuant to 12 N.Y.C.R.R. § 300.5(b)(2), the WCB must approve a stipulation of facts. (WCB's Brief, Page 17). However, the WCB ignores the fact that while noting this rule, the WCB nevertheless proceeded to resolve the matter based upon the Stipulated Facts set forth by the parties' agreement. (R-9).

decisions applying facts established by lower courts. (WCB's Brief, Pages 17-18). The WCB's reading of the cases is simply wrong. Although they are indeed appellate decisions, they stand for the broader proposition that when a court applies a statute to agreed upon facts, it is deciding a question of law. (See, *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1068, 206 L. Ed. 2d 271 [2020]). ("The issue before us is, as we have said, whether the statutory phrase 'questions of law' includes the application of a legal standard to undisputed or established facts....[w]e conclude that the phrase 'questions of law' does include this type of review, and the Court of Appeals was wrong to hold the contrary."); *Koehler v. Roosevelt Field, Inc.*, 282 A.D. 296, 297 [3rd Dept. 1953], ("The facts being undisputed, the issue of law here involved is whether claimant's employment was covered by the law invoked by him.").

In the Context of Collateral Estoppel, the Federal District Court Issued a "Final" Decision

In responding to Appellant's contention that the doctrine of collateral estoppel precludes BLH from contending and the WCB from determining that Appellant's injuries arose from his employment, both BLH and the WCB only take issue with one of the prongs of the test for collateral estoppel. Respondents do not dispute that the parties had a full and fair opportunity to contest the issue in controversy. Nor do they question the fact that the issue resolved by the federal court is identical to the issue BLH asked the WCB to resolve again. Rather, their response to Appellant's assertion that collateral estoppel is applicable to this case is focused on their assertion that the

determination of the federal court was not a "final" determination. (BLH's Brief, Pages 4-13, WCB's Brief, Pages 19-24).

This assertion is predicated on an unduly narrow understanding of what constitutes "finality" for the purpose of collateral estoppel. "Final" can have varied meanings. *Lummus Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80, 89 (2d Cir. 1961). In the context of collateral estoppel, the word "final…is not identical to 'final' in the rule governing the jurisdiction of appellate courts." *Sherman v. Jacobson*, 247 F.Supp. 261, 268 (S.D.N.Y. 1965). Indeed, a "final judgment"in the collateral estoppel context, "includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." *Restatement (Second) of Judgments* § 13 (1982). For collateral estoppel purposes a decision can be considered "final" when "[t]here is no indication that th[e] decision was intended to be provisional and subject to change and modification in the future by the same tribunal or that it was 'avowedly tentative,'" *Sherman, supra*, at 270, (quoting *Bannon v. Bannon*, 270 N.Y. 484, 489 1 N.E.2d 975 (1936). "Finality" for purposes of collateral estoppel "turns upon such factors as the nature of the decision (i.e., that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review. 'Finality' ... may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again." *Lummus, supra,* at 89; see also *Kurlan v. C.I.R.*, 343 F.2d 625,

628 n.1 (2d Cir. 1965) ("[G]eneral expressions that only final judgments can ever have collateral estoppel effect are considerably overstated."). See also, *Allstate Ins. Co. v. Am. Home Assur. Co.*, 43 A.D.3d 113, 123 (1st Dept. 2007), ("An interlocutory decision that is nonappealable may nevertheless be final in the preclusive sense").

It was BLH's contention in the federal case and it is now, after the federal court ruled against BLH, that the federal court lacked jurisdiction because it is the WCB which has primary jurisdiction. (BLH's Brief, Pages 4-13 and WCB's Brief, Pages 14-24). In denying BLH's motion to dismiss the federal case for lack of jurisdiction, Judge Gardephe predicated his finding on the determination that Appellant is not subject to the *WCL*. The federal court thus rejected BLH's challenge to its jurisdiction to adjudicate Appellant's federal claims. *Timperio v. Bronx-Lebanon Hospital Center*, 384 F. Supp. 3d 425 [S.D.N.Y. 2019] (Gardephe, J.). (R-100-109). This confirmation of the federal court's jurisdiction was not a tentative determination. It resolved an issue raised by BLH which had to be resolved before the Court could adjudicate the claims of the case before it. While the resolution of such an issue may appropriately be the subject of a motion for reconsideration,[3] it is otherwise binding and may not be revisited. *Matter of Hanlon*, 189 A.D.3d 1405 (2nd Dept. 2020); *Brown v. State*, 250 A.D.2d 314 (3rd Dept. 1998).

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[3] Indeed, BLH made such a motion for reconsideration. It was denied. (R 229-234).

CONCLUSION

For a *WCL* claim to be sustained, it is necessary to establish that the employee's injury arose from employment. More than mere presence in the workplace is required. The intent of the State legislature in adopting WCL § 10, as well as, the many cases addressing this issue, clearly establish that Appellant's injury received at BLH, his workplace, is not compensable. Moreover, Respondents' reliance on the *WCL* § 21, presumption is misplaced. There was substantial evidence submitted to the WCB that there was no relationship, let alone a work-related relationship, between Appellant and Bello. There was also substantial evidence that Appellant's work at the time of the shooting did not place him a zone of danger. Similarly, there was no evidence that Bello's actions were related to his resignation almost two and a half years prior to the shooting.

In any event, the WCB was precluded by the doctrine of collateral estoppel from determining that Appellant's injuries arose from his employment and were thus subject to the *WCL*.

This Court must reverse the WCB's decision.

Dated: New York, New York
October 19, 2021

Respectfully Submitted,

On the Reply Brief
Gabriel Taussig, Esq.

ARNOLD N. KRISS, ESQ.

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Dated: New York, New York
October 19, 2021

ARNOLD N. KRISS

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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 or at

On October 20, 2021

deponent served the within: **REPLY BRIEF FOR CLAIMANT-APPELLANT**

upon:

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the 20th day of October, 2021.

Mariana Braylovskiy

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Job# [308353]

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	)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK	)		**EXPRESS NEXT DAY AIR**

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On September 30, 2022

deponent served the within: **Opposition to Motion**

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