

**Court of Appeals**  
*of the*  
**State of New York**

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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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**OPPOSITION TO MOTION FOR LEAVE TO APPEAL**

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LAW OFFICES OF ARNOLD N. KRISS  
Arnold N. Kriss, Esq.  
*Attorneys for Claimant-Appellant*  
123 William Street, 15<sup>th</sup> Floor  
New York, New York 10038  
Tel.: (212) 577-2000  
Fax: (212) 577-2138  
akriss@lawkriss.com

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**TABLE OF CONTENTS**

	<u>Page</u>
<b>TABLE OF AUTHORITIES</b> .....	ii
<b>LEAVE TO APPEAL IS NOT WARRANTED</b> .....	2
<b><i>MATTER OF ROSEN V. FIRST MANHATTAN BANK</i></b> <b>WAS NOT “FLIPPED ON ITS HEAD” BY THE</b> <b>3<sup>rd</sup> DEPARTMENT’S DECISION</b> .....	3
<b>CONCLUSION</b> .....	6

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases:</b>	
<i>Matter of Lemon v. New York City Tr. Auth.</i> , 72 N.Y.2d 324.....	4
<i>Matter of Rosen v. First Manhattan Bank</i> , 84 N.Y.2d 856 (1994) .....	2, 3, 4, 5
<i>Matter of Seymour v. Rivera Appliances Corp.</i> , 28 N.Y.2d 406.....	4, 5
<b>Statutes &amp; Other Authorities:</b>	
22 N.Y.C.R.R § 500.22(b)(4) .....	2
WCL § 10(1) .....	4
WCL § 21(1) .....	3, 4, 6

**COURT OF APPEALS  
STATE OF NEW YORK**

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

**JUSTIN TIMPERIO,**  
**Claimant-Respondent,**

**- against -**

**BRONX-LEBANON HOSPITAL**

**Employer-Movant,**

**STATE INSURANCE FUND**

**Insurance Carrier-Movant,**  
**- and -**

**WORKERS' COMPENSATION BOARD,**

**Respondent.**

**AFFIRMATION IN  
OPPOSITION TO  
MOTION FOR  
LEAVE TO  
APPEAL TO THE**

**A.D. 3<sup>rd</sup> Dept. No. 53358**

**Motion No. 2022-714  
(Pin No. 85775)**

**WCB File No.  
G1955710**

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**ARNOLD N. KRISS, ESQ.**, an attorney duly licensed to practice law before the Courts of the State of New York and Respondent Dr. Justin Timperio's ("Timperio") attorney, affirms the following to be true under the penalties of perjury in that this Affirmation is in Opposition to Appellant Workers' Compensation Board's ("WCB") Motion ("Motion") seeking Leave to Appeal to the Court of Appeals.

On September 30, 2022, Timperio filed with this Court and served upon

Respondents Bronx Lebanon Hospital's ("BLH") and the State Insurance Fund's ("SIF") attorneys, as well as the WCB's attorney, Timperio's Opposition to BLH's and SIF's Motion seeking Leave to Appeal to the Court of Appeals from a Decision ("Decision") and Order of the New York State Supreme Court, Appellate Division, 3<sup>rd</sup> Department, ("3<sup>rd</sup> Department"), dated February 3, 2022. (Exhibit A annexed to Timperio's Opposition to BLH's Motion). BLH's Motion was scheduled for October 3, 2022. ("BLH Motion No. 2022-707").

WCB now also seeks leave to appeal from the 3<sup>rd</sup> Department's Decision. Similar issues are raised in both BLH's Motion No. 2022-707 and the instant Motion filed by WCB. ("WCB Motion No. 2022-714").

Accordingly, we request that Timperio's September 30, 2022, Affirmation in Opposition to BLH Motion No. 2022-707, together with Timperio's Exhibits A-D annexed thereto, as well as, this instant Affirmation opposing WCB's Motion No. 2022-714, be considered together as one Opposition to both BLH Motion No. 2022-707 and WCB Motion No. 2022-714.

**LEAVE TO APPEAL IS NOT WARRANTED**

The 3<sup>rd</sup> Department's Decision is not in conflict with *Matter of Rosen v. First Manhattan Bank*, 84 N.Y.2d 856 [1994], or other precedents of this Court, nor is

there a conflict among decisions concerning the issues raised in this matter and with the Appellate Division Departments. 22 N.Y.C.R.R § 500.22(b)(4).

The 3rd Department's Decision was issued after that Court engaged in a case specific examination of the WCB record, applied the statute and properly found that the record before the WCB established substantial evidence to rebut the *Workers' Compensation Law* ("WCL") § 21(1) presumption that the injuries suffered by Timperio were work-related.

***MATTER OF ROSEN V. FIRST MANHATTAN BANK***  
**WAS NOT "FLIPPED ON ITS HEAD"<sup>1</sup> BY**  
**THE 3<sup>rd</sup> DEPARTMENT'S DECISION**

WCB mistakenly maintains that the 3<sup>rd</sup> Department's conclusion that Timperio's injury is not compensable is in conflict with this Court's determination in *Rosen*, a case involving an assault by co-employees about a work-related matter. The facts in *Rosen* and the circumstances leading to Timperio's injuries are fundamentally dissimilar.

*Rosen's* journey to this Court began with a WCB decision finding that a compensable claim existed when Rosen was killed by a co-worker. *Rosen's* WCB determination was affirmed by the 3<sup>rd</sup> Department. This Court then affirmed the 3<sup>rd</sup> Department's *Rosen* decision holding that Rosen's death at the hands of a co-

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<sup>1</sup> WCB's Motion, pages 1 and 11.

worker was compensable. In reaching its determination, in the context of the facts of the *Rosen* case, this Court found 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 (citing, *Matter of Seymour v. Rivera Appliances Corp.*, 28 N.Y.2d 406, 409).<sup>2</sup> *Matter of Rosen v. First Manhattan Bank*, *supra*, at 857. The *Rosen* Court went on to conclude, “Thus, substantial evidence supports the conclusion that the assault “arose in the course of his employment” (see, Larson, Workmen's Compensation § 15.43, at 4–132; *Matter of Lemon v. New York City Tr. Auth.*, 72 N.Y.2d 324, 327 . . .” *Matter of Rosen v. First Manhattan Bank*, *supra*, at 857.

Neither the *WCL* nor *Rosen* provide support for the WCB’s restricted view that in the instance of an injury resulting from an assault at the workplace, the

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<sup>2</sup> Relying on this quoted sentence from the *Rosen* decision, WCB argues that any assault resulting in an injury by an employee at a workplace that is not a result of personal animosity, is work-related and thus compensable under the *WCL*. (WCB’s Motion, page 9). The limited presumption authorized by *WCL* § 21(1) does not create this dichotomy. Rather, *WCL* § 21(1) requires that in order for the presumption to apply, and in the absence of substantial evidence to the contrary, a claim must come within the provisions of *WCL* Chapter [67], including the requirement found in *WCL* § 10(1) that the claim arise out of and in the course of a worker’s employment. Thus, by simply requiring substantial evidence to rebut the presumption that the elements of *WCL* § 10(1) causality exists, *WCL* § 21(1) allows for the submission of *any* relevant evidence that the cause of a claim did not arise from the employment (even though it may also be, that it is not a result of personal animus or any other personal considerations).

*WCL* § 21(1) presumption can only be rebutted by the submission of evidence that the assault was a result of personal animus.

In *Seymour*, a case also involving a dispute among co-employees, and cited by the WCB, this Court found a slight nexus existed between the injury and employment, stating, “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 (citation omitted).” *Matter of Seymour v. Rivera Appliances Corp.*, *supra*, at 409.

Both *Rosen* and *Seymour*, cited in WCB’s Motion, were based on each case’s individual facts and the application of the *WCL*. The incidents were found to be compensable because they arose from disputes between co-employees in a work- related context, and not from any personal animosities between co-employees. Therefore, a nexus existed, and the incidents were not “motivated by purely personal animosity” since the altercations were work-related between the *Rosen* and *Seymour* co-employees.

In light of the work-related circumstances leading to the assaults in *Rosen* and *Seymour*, and the legal analysis of those circumstances, the holdings in these cases are materially distinguishable from the random assault resulting in Timperio’s injuries.



## CONCLUSION<sup>3</sup>

The 3<sup>rd</sup> Department's Decision considered *Rosen*, as well as, other cases, in distinguishing Timperio's facts from those cases. The 3<sup>rd</sup> Department properly concluded that Timperio's injuries, inflicted by an individual who was not Timperio's co-worker, was unknown to Timperio and had no connection to Timperio's duties, were in contrast to the assault on Rosen by a co-worker in a non-personal, work-related dispute. The 3<sup>rd</sup> Department also properly concluded that the circumstances leading to the random assault on Timperio constituted substantial evidence rebutting the *WCL* § 21(1) presumption.

WCB's Motion For Leave To Appeal should be denied.

Dated: New York, New York  
October 7, 2022

Respectfully Submitted,



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ARNOLD N. KRISS, ESQ.

**On the Opposition to Motion  
Gabriel Taussig, Esq.**

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<sup>3</sup> We are constrained to take issue with WCB's counsel's unwarranted impeachment of Timperio's motivation in seeking justice in a court of law to redress the serious gunshot injuries he suffered as a consequence of a horrendous, unprovoked attack. Besides being unwarranted, this irrelevancy has no bearing on whether WCB's Motion should be granted, let alone whether Timperio suffered a compensable workers' compensation claim. (WCB's Motion, page 15).

STATE OF NEW YORK )  
 )  
COUNTY OF NEW YORK )

ss.:

**AFFIDAVIT OF SERVICE  
BY OVERNIGHT FEDERAL  
EXPRESS NEXT DAY AIR**

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

**On October 6, 2022**

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

**upon:**

*See Attached Service List*

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

**Sworn to before me on October 6, 2022**



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

**Job# 316207**

Service List:

LETITIA JAMES

**ATTORNEY GENERAL OF THE STATE OF NEW YORK**

Sarah L. Rosenbluth, Assistant Solicitor General

*Attorney for Respondent*

The Capitol

Albany, New York 12224

(518) 776-2025

sarah.rosenbluth@ag.ny.gov

**MAURO LILLING NAPARTY LLP**

100 Crossways Park Drive, Suite

310 Woodbury, New York 11797

Tel.: (516) 487-5800

Fax: (516) 487-5811

clilling@mlnappeals.com

*Appellate Counsel to:*

**WEISS, WEXLER & WORNOW, P.C.**

*Attorneys for Employer-Movant and Insurance Carrier-Movant*

25 Park Place, 4th Floor

New York, New York 10007

Tel.: (212) 227-0347

Fax : (212) 227-1549

eperigoe@wwandwlaw.com