To be Argued by:
ARNOLD N. KRISS
(Time Requested: 10 Minutes)

APL-2023-00049
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,

Respondent,

– against –

BRONX-LEBANON HOSPITAL, STATE INSURANCE FUND and WORKERS' COMPENSATION BOARD,

Appellants.

BRIEF FOR RESPONDENT

ARNOLD N. KRISS, ESQ.
GABRIEL TAUSSIG, ESQ.
LAW OFFICES OF ARNOLD N. KRISS
40 Clinton Street, Suite 10H
Brooklyn, New York 11201

– and –

125 Landau Avenue
Floral Park, New York 11001
Tel.: (212) 577-2000
Fax: (212) 577-2138
akriss@lawkriss.com

Attorneys for Respondent

Date Completed: July 20, 2023

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

PRELIMINARY STATEMENT

Dr. Justin Timperio ("Respondent") was shot and injured during a mass shooting which occurred at the Bronx Lebanon Hospital on June 30, 2017. (Joint Record on Appeal("R"), R-262-265). On February 3, 2022, the New York State Supreme Court, Appellate Division, Third Judicial Department ("3rd Dept.") in a unanimous decision, determined that a claim for Workers' Compensation benefits, filed by Appellant Bronx Lebanon Hospital ("BLH") on Respondent's behalf, was not a compensable claim.[1] The Court found that the requirements of New York State *Workers' Compensation Law* ("*WCL*") § 10(1) had not been met. In reaching that conclusion, it also held that the presumption of compensability provided by *WCL* § 21(1) with respect to employees injured at their place of employment, was rebutted by substantial evidence. *Matter of Timperio v. Bronx Lebanon Hospital*, 203 AD 3d 179 [3rd Dept. 2022]. (R-395-402).

1 The 3rd Dept. is the primary appellate court for reviewing Workers' Compensation appeals. The 3rd Dept.'s. expertise concerning Workers' Compensation appellate matters was recognized by Judge Michael Garcia who stated, "Workers' compensation insurance is a heavily regulated area of the law, and the consequences of any modification to that law can be far-reaching, affecting both past and future allocation of risk and liability. . .. By law, an appeal of a decision of the Workers' Compensation Board must be taken to the Appellate Division, Third Department (*Workers' Compensation Law* § 23). 'The rationale behind this provision is to create a court with a specific expertise to deal with the complexity of the appeals that are generated in this area' (citing *Matter of Empire Ins. Co. v Workers' Compensation Bd.*, 201 AD2d 425, 426 [1st Dept 1994]). So, while it is true the Third Department is not the final 'arbiter' of New York law it plays a unique role in developing the law of workers' compensation." *Matter of Verneau v. Consol. Edison Co. of New York*, 37 N.Y.3d 387 [2021]. (Garcia, J. *dissenting*).

The general statutory rule is that when an assault occurs in the workplace and an employee is injured, the employee or the employer may file an application for Workers' Compensation benefits for the injured employee if the injury was related to the work performed by the employee. In exchange, the employer is protected from a civil lawsuit by the injured employee seeking damages from the employer, only if the employee's injury is determined to be compensable. *WCL* § 11.

For the reasons set forth in the 3rd Dept.'s decision, this Court is respectfully asked to affirm that this is not a Workers' Compensation compensable claim pursuant *WCL* § 10(1) and *WCL* § 21(1). Furthermore, the 3rd Dept was correct in finding that there was no substantial evidence before the Workers' Compensation Board ("WCB") establishing a nexus between Respondent's injuries and his employment. The 3rd Department was also correct in determining that the *WCL* § 21(1) presumption, that an injury occurring in the workplace is compensable, was successfully rebutted by substantial evidence. (R-395-402).

FACTS

The facts are undisputed by the parties. (R-262-265).

On June 30, 2017, at 2:50 p.m., BLH, located at 1650 Grand Concourse, Bronx, New York, was the site of a mass shooting committed by a former BLH physician, Henry Bello ("Bello") who entered BLH with a loaded AR-15 rifle and other dangerous items. Bello was hired by BLH in August 2014, and left BLH's

employment in February 2015, approximately 2 years and 4 months prior to the June 30th shooting. At about 2:50 p.m., Respondent was working on BLH's 16th floor, writing patients' medical chart notes, in a non-public enclosed work area, when Bello shot and seriously wounded Respondent.[2,3]

It is undisputed that on June 30th Respondent and Bello did not know each other, were never co-employees and there was never any prior direct or indirect personal or professional contact between them in or out of the workplace. They were complete strangers. Certainly, no hostile relationship existed between them.[4]

---

2 According to news reports, Respondent and five other BLH medical employees were wounded on BLH's 16th Floor, and one other doctor was shot and killed on BLH's 17th floor. Also, a BLH patient was also wounded. Annie Correal and William K. Rashbaum, *Details Emerge in Deadly Shooting at Bronx-Lebanon Hospital Center*, *New York Times,* July 2, 2017.

3 Respondent was hired by BLH in 2016 as a family medicine resident physician. Respondent suffered an entry gunshot wound to his abdomen which exited his right thigh. Due to Respondent's injuries, Respondent did not return to work at BLH. (R-262-265).

4 On March 1, 2018, and prior to the commencement of the proceedings before the WCB which are the subject of this litigation, Respondent filed a civil negligence action in the United States District Court ("district court") against BLH seeking damages for the injuries Respondent sustained on June 30th at BLH. *Justin Timperio v. Bronx Lebanon Hospital Center, et ano.*, No. 18 Civ. 1804, (S.D.N.Y.) (Gardephe, J.) ("the federal action"). On March 31, 2019, the district court issued an Order, and on April 26, 2019, a Memorandum Opinion denying BLH's motion to dismiss Respondent's lawsuit, as well as, its alternative request for summary judgment. (R101-113). *Timperio v. Bronx-Lebanon Hospital Center*, 384 F. Supp.3d 425 [S.D.N.Y 2019] (Gardephe, J.), holding, "[H]ere, with respect to (Respondent's) claim against (BLH), the two key issues are whether (1) (Respondent's) injury "[arose] out of and in the course of [his] employment"; and (2) (Respondent) can elect to sue in lieu of accepting Workers' Compensation benefits. The Court finds – based on the facts before it – that (Respondent's) injury did not 'arise[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 relationship

3rd DEPT.'S DECISION

In its unanimous decision the 3rd Dept. reversed the WCB stating that,

> 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.

---

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, [3rd Dept. 2001] (quoting Matter of Baker v. Hudson Val. Nursing Home, 233 A.D.2d 608, 608, [3d Dept. 1996])." Subsequent to its decision, the district court stayed the federal action pending the resolution of this proceeding. (R-229-234)

> 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 McMillan 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])."
>
> *Matter of Timperio v. Bronx-Lebanon Hosp.*, 203 A.D.3d 179, 184–85 (2022), *leave to appeal granted*, 39 N.Y.3d 910, 206 N.E.3d 1263 (2023). (R-395-402).

ISSUES FOR REVIEW

1. Respondent's injuries are not compensable under *WCL* § 10(1) in that they did not arise out of and in the course of Respondent's employment.

2. The *WCL* § 21(1)'s, presumption was rebutted by substantial evidence.

3. *Matter of Rosen v. First Manhattan Bank*, 84 N.Y.2d 856 [1994], does not compel a determination that Respondent's injuries were compensable.

4. Appellants' broad and sweeping expressions of concern are unavailing. It is for the Legislature to determine whether all random workplace assaults should be compensable under the *WCL*.

ARGUMENT

POINT I.

RESPONDENT'S INJURIES ARE NOT COMPENSABLE UNDER *WCL* § 10(1) IN THAT THEY DID NOT ARISE OUT OF AND IN THE COURSE OF RESPONDENT'S EMPLOYMENT

Appellants and Respondent agree that the undisputed facts before the WCB establish that Respondent was assaulted at his place of employment. (R-262-265). Thus, one of the two prongs required by *WCL* § 10(1) for the establishment of a compensable claim have been met. However, the statute's two prongs are in the conjunctive and must be considered jointly.[5]

WCL § 10(1)'s second prong requires that in addition to the injury occurring in the workplace, it must arise from the employment. Apparently, both Appellants recognize that the undisputed facts alone do not provide the substantial evidence needed to support that second prong. Rather, they rely on the *WCL* § 21(1) presumption to provide the support for their contention that the injuries suffered by

5 *WCL* § 10(1) provides in relevant part, "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...." (emphasis supplied).

Respondent arose from his employment. BLH states that, "Claimant's injuries arose in the course of his employment and the Court should have applied the *WCL* 21(1) presumption that the injury arose out of the employment." (BLH Brief, p. 24). WCB states that, "This appeal turns on the proper application of W.C.L. 21(1)." (WCB's Brief, p. 1).

In 1988, the Court of Appeals decided in *Matter of Lemon v. N.Y.C. Transit Auth.*, 72 N.Y.2d 324, 327 [1988] 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 (*Matter of Malacarne v City of Yonkers Parking Auth.*, 41 N.Y.2d 189, 193; see also, *Matter of Connelly v Samaritan Hosp.*, 259 N.Y. 137, 139*; Matter of McCarter v LaRock*, 240 NY 282, 285-286; *Matter of Scholtzauer v C. & L. Lunch Co.*, 233 N.Y. 12, 14-15). Similarly, for an injury to occur in the course of employment, 'it must have been received while the employee was doing the work for which he was employed' (*Matter of Malacarne v City of Yonkers Parking Auth.*, *supra*, at 193, citing *Matter of Scholtzauer v C. & L. Lunch Co.*, *supra*, at 14-15)."

Since there was no apparent work-related motivation for Bello shooting Respondent, no doubt, the shooting was, "A purely fortuitous coincidence of time and place [which] is not enough. There must be a causal relationship or nexus between the accident and the employment" to establish a nexus between Respondent's injuries and Respondent's employment. *Matter of Lemon v. N.Y.C.*

Transit Auth., supra, at 327, citing, *Matter of Connelly v. Samaritan Hosp., supra*, at 139.

Lemon's holding unambiguously follows the well-established principle that mere presence in the workplace is not the standard to be applied when determining whether an "accident arose *out of* the employment." It has long been recognized by this Court in order to establish compensability that, "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] order to uphold an award the risk which causes the injury must, within rational limits, be incidental to the employment and more than a risk utterly disconnected from and unrelated to the employment, and which only causes injury because the employee happens to be in a certain position…[We] have insisted that there must be some connection between accident and employment other than a mere physical location of the employee which placed him in the pathway of a cause producing injuries, no matter where or how that cause originated. . . [T]he decisive question is whether this was an accidental injury 'arising out of employment' . . . (and) . . . that the injuries must arise out of the employment means that the employment in a reasonable sense must lead to the injuries and requires that there shall be some perceptible, causal connection between the employment and the

accident causing the injuries." *Matter of McCarter v. La Rock, supra*, at 284, 285, 286, 289 [1925], citing *Matter of Heitz v. Ruppert*, 218 N. Y. 148 [1916].

In *Matter of Ognibene v. Rochester Mfg. Co.*, 298 N.Y. 85 [1948], the Court again 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 arise not only 'in the course of' but also 'out of' the employment."

The WCB cites *Matter of Baker v. Hudson Valley Nursing Home*, 233 A.D.2d 608, 609 [3rd Dept. 1996], wherein an assault occurred during working hours on the employer's premises and which involved work-related comments claimant had allegedly made about another employee. ". . . In view of this, a sufficient nexus exists between the motivation for the assault and claimant's employment to support the Board's award of workers' compensation benefits." The WCB's brief only reported that the *Baker* assault occurred in the workplace. Inexplicably, the WCB omits that the 3rd Dept. found a causal work connection in the claimant's work-related comments leading to the assault. (WCB Brief pp. 23-24).

Relying on a circuitous argument, and citing *Matter of Giliotti v. Hoffman Catering Co.*, 246 N.Y. 279 (1927), BLH argues that because Bello shot Respondent

in a non-public room on the 16th floor of the hospital, the danger of being shot was not common to all but arose out of Respondent's employment because it was "attached specifically to BLH." (BLH Brief pp. 43-44).[6] *Giliotti*, *supra*, does not support BLH's contention. In *Giliotti*, *supra*, a chef died in a fire that occurred in a hotel where he worked and lived. The chef was required to reside in the hotel as a condition of his employment and he died in his sleep while in his room. The Court determined that the death arose from the decedent's employment because the chef was required to reside at the hotel as a condition of employment and the danger of fire attached specially to the particular premises.

In contrast, Respondent was not within a zone of danger when he was shot in the non-public room making medical entries. There is no nexus, even a slight nexus, between Respondent's duties as a medical resident making chart entries in a non-public room and the cause of his injury. Moreover, "An accident does not 'arise out of the employment' merely because the presence of the employee at the scene of an accident is occasioned thereby. An accident which occurs must spring from one of

6 To the extent BLH suggests that Bello's almost two-and a half years prior employment provided the required nexus, it is incorrect. Indeed, in *Matter of Masek v. St. Vincent's Med. Ctr.*, 97 A.D.2d 580 [3rd Dept. 1983], a case involving an assault upon a psychiatric center employee by a former patient three years after the patient's discharge, a nexus was found solely because of the patient's ongoing harassment of the employee during the intervening years. As noted by former Chief Judge Cardozo, *In Matter of Field v. Charmette Knitted Fabric Co.*, 245 N.Y. 139 [1927], "Continuity of cause has been so combined with contiguity in time and space that the quarrel from origin to ending must be taken to be one." *(id.*, at p 142).

the risks peculiar to the particular locality of the work. 'An injury does not arise out of the employment unless the hazard causing it is, within rational apprehension, an attribute of or peculiar to the specific duties of the employment.' " (citations omitted). *Giliotti*, *supra*, at 286 (1927).

Appellants do not demonstrate how the uncontroverted and agreed upon facts, standing alone, established that Respondent's injuries were a natural consequence of the work he was performing as a doctor while he was situated in a non-public room making entries in medical charts.

POINT II.

THE *WCL* § 21(1) PRESUMPTION WAS REBUTTED BY SUBSTANTIAL EVIDENCE

In apparent recognition that the established facts alone did not support the required nexus between the assault on Respondent and his employment, both Appellants rely on the *WCL* § 21(1) presumption.

WCL § 21(1), provides, "In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary . . . That the claim comes within the provision of this chapter"

The standard of proof to rebut the *WCL* § 21(1) presumption is substantial evidence. "Substantial evidence" is defined as "such relevant proof as a reasonable mind may accept as adequate to supply a conclusion or ultimate fact." *People ex rel.*

Vega v Smith, 66 N.Y.2d 130, 139 (1985); *300 Gramatan Ave Assocs. v. State Div. of Human Rights*, 45 N.Y.2d 176, 180-81 (1978). In *FMC Corp. (Peroxygen Chemicals Div.) v. Unmack*, 92 N.Y.2d 179, 188 [1998], the Court described the quantum of evidence needed to establish substantial evidence, "The substantial evidence standard is a minimal standard. It requires less than "clear and convincing evidence" (*Matter of Carriage House Motor Inn v City of Watertown*, 136 AD2d 895 [4th Dept. 1988], and less than proof by "a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt (*300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY2d, at 180, *supra)."*

Courts have also defined the threshold of substantial evidence as evidence, "related to the charge or controversy and involves a weighing of the quality and quantity of the proof," and the term "means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v. State Div. of Human Rights, supra*, at 180).

In *Matter of Johnson v. New York City Transit Auth.*, 182 A.D.3d 970, 972 [3rd Dept. 2020], the Court held, "In reviewing the (WC)Board's determination in this regard, contrary to claimant's contentions, '[o]ur task is to determine whether the Board's conclusion is supported by substantial evidence' (*Matter of Grover v. State Ins. Fund*, 165 A.D.3d 1329, 1329, 85 N.Y.S.3d 239 [2018], *aff'd* 33 N.Y.3d 971, 99 N.Y.S.3d 780, 123 N.E.3d 264 [2019]). This is so even where, as here, the

relevant facts are largely undisputed, as 'substantial evidence consists of proof within the whole record of such *quality and quantity* as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably — probatively and logically' (*300 Gramatan Ave. Assoc. v. State Div. of Human Rights,* 45 N.Y.2d 176, 181, 408 N.Y.S.2d 54, 379 N.E.2d 1183 [1978] [emphasis added]; *accord Matter of Yoga Vida NYC, Inc. [Commissioner of Labor],* 28 N.Y.3d 1013, 1015[2016])."

The rebuttal of the *WCL* § 21(1) presumption does not require, "irrefutable proof excluding every conclusion other than that offered by the employer." *Matter of Hanna v. Able Body Labor,* 62 A.D.3d 1200, 1201 [3rd Dept. 2009]. See also, *Matter of Rasiej v. Syska Hennesy Grp., Inc.*, 145 A.D.3d 1332, 1332 [3rd Dept. 2016]; *Matter of Fatima v. MTA Bridges & Tunnels,* 106 A.D.3d 1327, 1328 [3rd Dept. 2013].

In the present appeal, the *WCL* § 21(1) presumption was rebutted by substantial evidence as set forth in the agreed upon joint facts submitted to the WCB by Respondent and BLH. (R-262-265). For instance, relevant to the rebuttal of the presumption are the facts that there is no motive as to why Bello shot Respondent; Bello was hired by BLH in August 2014 and resigned from BLH's employment in February 2015, approximately 2 years and 4 months prior to the June 30th shooting; on June 30th Bello was not a BLH employee; Bello had no work-related contact with

BLH since his employment ended; Respondent and Bello did not know each other; they never worked together at BLH; they were never co-employees; had no relationship out of the workplace, and there was never any direct or indirect contact between Respondent and Bello. (R-262-265).

That Respondent and Bello had no personal or work-related relationships, sufficiently provided the evidentiary basis for 3rd Dept.'s finding that, "the assault on Timperio resulted exclusively from arbitrary, broad-sweeping and gravely maligned personal animosity and not from work-related differences with Timperio." (R-401). This evidence constituted circumstantial evidence sufficient to support the 3rd Dept.'s conclusion that Respondent's injury and Bello's actions were not work-related and there was no personal animosity between them.[7]

Significantly, when Respondent was injured he was in a non-public area not performing any risky or dangerous work-related functions and not performing any work-related duties requiring his interaction with the public or any patient or co-worker. (R-262-265). Any one of these factors might have exposed Respondent to a work-related injury. "In the context of assaults upon an employee, the causal link may be supplied by a work environment which increased the risk of attack or a work-

7 "Circumstantial (sometimes called 'indirect') *evidence* is direct evidence of a collateral fact, that is, of a fact other than a fact in issue, from which, either alone or with other collateral facts, the fact in issue may be inferred." *Prince, Richardson, Evidence,* [11th ed. By Richard Farrell], § 4-301. (emphasis in original). See also, *Spett v. President Monroe Bldg. & Mfg. Corp.*, 19 N.Y.2d 203, 205 [1967].

related motivation for the assault" (*Matter of Mintiks, supra*, at 137 [1990], app. dismissed 75 N.Y.2d 1005 [1990].

Also, in *Matter of Timperio v. BLH, supra*, the federal action commenced by Respondent against BLH, the Court's analysis distinguished the instant assault from that in *Pollock v. City of New York*, 145 A.D.2d 550, [2d Dept. 1988], when a Kings County Hospital physician was shot to death by a former patient "who was dissatisfied with surgical treatment he had received at [Kings County Hospital]," concluding, "Because the shooting was related to the victim's work, the injury was subject to the Workers' Compensation Law." See also, *Ross v. State*, 8 A.D.2d 902, (3rd Dept. 1959), (when a hospital employee died when he was stabbed by an alleged lunatic whom the employee was attempting, at the direction of his superior officers, to apprehend and return to the hospital). The Federal Court also concluded, "Because the injury arose from the victim's employment, it was held subject to the Workers' Compensation Law." *Timperio v. Bronx-Lebanon Hospital Center*, *supra*, at 433. (R-108).

As *Pollock, supra*, and *Ross, supra*, suggest, there are many potential work-related injury risks one can imagine a doctor can suffer in a hospital, such as, being attacked by an out-of-control patient the doctor was treating, or by a patient's disgruntled family member unhappy with the doctor's treatment, contracting a

transmissible disease or developing carpal tunnel syndrome after making repeated medical entries.

POINT III.

MATTER OF ROSEN v. FIRST MANHATTAN BANK DOES NOT COMPEL A DETERMINATION THAT RESPONDENT'S INJURIES WERE COMPENSABLE

Both Appellants place significant reliance on this Court's decision in *Matter of Rosen v. First Manhattan Bank,* 84 N.Y.2d 856 [1994] *("Rosen")*, to support their contention that in instances of workplace assaults, if the evidence does not establish that the assault was motivated by personal animosity, it is irrefutably presumed to be related to the employment. WCB asserts that, "The opponent of a claim can show that the assault did not arise out of the employment, and thereby rebut the presumption, by coming forward with substantial evidence that the 'the assault was motivated by purely personal animosity.' Thus, if a worker was assaulted on the job, the default rule is that the resulting injury is compensable. That default rule can be overcome only with substantial evidence that the assault was motivated by personal animosity toward the victim." (emphasis added). (WCB Brief p. 12). Similarly, BLH asserts that, "Generally, in cases where the workplace injury is a result of an assault, the presumption is only rebutted with 'substantial evidence that the assault was motivated purely by personal animosity.' " (citation omitted). (BLH Brief p. 31).

Appellants' contention is misplaced. In essence it places an unsupported limitation on the circumstances under which the *WCL* § 21(1) presumption can be rebutted. Appellants' contention is inconsistent with the plain language of *WCL* §§ 21(1) and 10(1) and reflects a misapplication of *Rosen* and its progeny.

WCL § 21(1) provides that the presumption can be rebutted by substantial evidence that a claim does not come within the provisions of the law. One of those provisions is *WCL* § 10(1) which provides that for a claim to be compensable it must arise out of and in the course of the employment. That is the totality of the relevant statute. There is no limitation to be found concerning the factors that may be considered in determining whether a claim arose out of the employment.

Specifically, *WCL* § 21(1) does not support the contention that an assault in the workplace can only be rebutted by a showing that the assault was motivated by a personal animus. *WCL* § 21(1) does not create such a dichotomy. There is nothing in *WCL* § 21(1) that precludes a finding that the presumption is rebutted by substantial evidence when the motivation for the attack was neither work related nor personal.[8]

8 WCB Brief, p.2 states, "The Third Department held that the absence of evidence of motive *rebutted* the presumption that Timperio's on-the-job injury arose out of his employment." (emphasis in original). This is an inaccurate characterization of the 3rd Dept.'s holding in that it omits the Court's further essential holding that, "[T]he assault on Timperio resulted exclusively from arbitrary, broad-sweeping and gravely maligned personal animosity...." (R-401).

As was noted by this Court in *Matter of Verneau v. Consol. Edison Co. of New York*, 37 N.Y.3d 387, at 395 (2021), an unrelated Workers' Compensation litigation involving the interpretation and application of a different section of the *WCL*, "In resolving the question before us, we apply our well-established rule that "[t]he primary consideration of courts in interpreting a statute is to 'ascertain and give effect to the intention of the Legislature' " (*Riley v County of Broome*, 95 N.Y.2d 455, 463 [2000], quoting McKinney's *Cons Laws of NY, Book 1, Statutes* § 92 [a] at 177). To that end, "the plain meaning of the statutory text is the best evidence of legislative intent" (*People v Cahill*, 2 N.Y.3d 14, 117 [2003], citing *Riley*, *supra*, at 463)." (see also, *Matter of Johnson v. City of New York*, 38 N.Y.3d 431, 440-41 [2022] ("In determining the extent to which SLU awards for successive injuries to the same enumerated member must be offset, we are presented with a question of pure statutory interpretation, the starting point for which 'must always be the [statutory] language itself, giving effect to the plain meaning thereof' (*Majewski v. Broadalbin–Perth Cent. School Dist.*, 91 N.Y.2d 577, 583, 673 N.Y.S.2d 966, 696 N.E.2d 978 [1998]);" *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 [1988] ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").

The Court's role is to interpret a statute. It is not to rewrite it. *Clark v. Martinez*, 543 U.S. 371, 378, 125 S.Ct. 716, 160 L.Ed.2d 734 [2005] (rejecting an interpretation that would "... invent a statute rather than interpret one"); *United States v. Reese*, 92 U.S. 214, 221, 23 L. Ed. 563 [1875], ("To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.").

The 3rd Dept.'s decision comports with the plain meaning of the *WCL* § 21(1) in determining that the presumption was rebutted by substantial evidence and that the claim was not compensable because, "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." (R- 401). That is all *WCL* § 21(1) requires to rebut the presumption. Under *WCL* § 21(1), once substantial evidence is established that the assault was not related to the employment and arose from something other than the employment, the presumption is rebutted. It is of no moment that there was also evidence that no personal reasons existed for this assault.

Applying *WCL* § 21(1)'s presumption and existing case law, this Court found in *Rosen* that the assault arose out of and in the course of the claimant's employment. That assault involved two co-workers who were engaged in a dispute over a loan of

money, a practice condoned by the employer. The co-workers had no social ties outside of work. The Court also held that the WCB properly rejected testimony that the assault was motivated by personal considerations.

In contrast to *Rosen's* facts, Respondent and Bello were not co-workers, nor were they engaged in conduct condoned by their employer or combatants. Also, unlike *Rosen*, there was substantial evidence that the assault on Respondent was not work-related. Accordingly, the dichotomy between work-related assaults and assaults motivated by personal animus found in *Rosen* is inapplicable to the assault on Respondent where the record establishes that Bello's assault was motivated by neither a work-related nor personal motive.

The cases other than *Rosen* relied upon by both BLH and the WCB do not provide support for their contention that in cases involving assaults in the workplace, the *WCL* § 21(1) presumption can only be rebutted by substantial evidence that the assault was a result of a personal animus. For example, *Matter of Jean-Pierre v. Brookdale Hosp. Med. Ctr.*, 190 A.D.3d 1053 [3rd Dept. 2021], *Matter of Cuthbert v. Panorama Windows Ltd.*, 78 A.D.3d 1450 [2010], *Matter of Shambaun v. All. Consulting Grp.*, 26 A.D.3d 587 [3rd Dept. 2006], *Matter of Tompkins v. Morgan Stanley Dean Witter*, 1 A.D.3d 695 [3rd Dept. 2003], *Matter of Blair v. Bailey*, 279 A.D.2d 941 [3rd Dept. 2001], *Matter of Rothenberg v. AAA Custom Lab*, 77 A.D.2d 708 [3rd Dept. 1980], *Matter of Conyers v. Rush Bar*, 38 A.D.2d 987 [3rd Dept. 1972],

Matter of Moran v. Moran Transp. Lines, 264 A.D. 966 [3rd Dept. 1942], amended *sub nom*. *Matter of Moran v. Moran Transportation Lines*, 266 A.D. 763 [3rd Dept. 1943], and *Matter of Funicello v. Chain Bldg. Corp.*, 251 A.D. 759 [3rd Dept. 1937], did not even reference the *WCL* § 21(1) presumption, let alone consider the nature of the evidence needed to rebut the presumption in an assault related case.

In those cases that did reference the *WCL* § 21(1) presumption, such as *Matter of Seymour v. Rivera Appliances Corp.*, 28 N.Y.2d 406 [1971], *Johnson*, *supra*, [2020], *Matter of Wadsworth v. K-Mart Corp.*, 72 AD3d 1244 [3rd Dept. 2010], *Matter of Thompson v. Genesee Cnty. Sheriff's Dept.*, 43 A.D.3d 1252 [3rd Dept. 2007], *Matter of Turner v F.J.C. Sec. Servs*. 306 A.D.2d 649 [3rd Dept. 2003], *Matter of Boston v Medical Servs. for Women*, 215 A.D.2d 845 [3rd Dept.1995], *lv denied* 86 N.Y.2d 706 [1995], *Matter of Barth v. Cassar*, 38 A.D.2d 984 [3rd Dept. 1972], *Matter of Valenti* v. *Valenti*, 28 A.D.2d 572 [3rd Dept. 1967], *Matter of DeAngelis v. Garfinkel Painting Co.*,20 A.D.2d 162 [3rd Dept. 1963] *aff'd*18 N.Y.2d 727 [1966] and *Matter of Bennett v. G.O. Dairies, Inc.*,114 A.D.2d 574 [3rd Dept.1985], substantial evidence either established that the assault was not work-related because it was motivated by a personal animus or, in those cases where compensability was found, it was concluded that the *WCL* § 21(1) presumption was not rebutted by the employer/carrier. The Courts in these cases simply assessed whether substantial evidence was submitted to rebut the presumption. While some of these cases cited

Rosen, none of them addressed, let alone supported, the contention being proffered by BLH and WCB, that a "default rule" exists whereby the only evidence concerning the attacker's personal animus can be used to rebut the *WCL* § 21(1) presumption.

Indeed, in *Matter of Toro v. 1700 First Ave. Corp.*, 16 A.D.2d 852 [3rd Dept. 1962), *aff'd*, 12 N.Y.2d 1001 (1963), a case concerning an assault, the Court first found that the evidence did not support the contention that the assault was a result of personal animus. However, that was not the end of the Court's inquiry; it then entertained an additional argument that the *WCL* § 21(1) presumption should be rebutted because the claimant was the victim of a robbery. It went on to reject that argument—not because it was an improper attempt to rebut the *WCL* § 21(1) presumption in a case involving an assault, but because it found that the claimant was performing his work in a zone of special danger.

POINT IV.

APPELLANTS' BROAD AND SWEEPING EXPRESSIONS OF CONCERN ARE NOT WARRANTED. IT IS FOR THE LEGISLATURE TO DETERMINE WHETHER ALL RANDOM WORKPLACE ASSAULTS ARE COMPENSABLE UNDER THE *WCL*

A. Appellants' broad and sweeping expressions of concern are unavailing

Both Appellants, with little more than conjecture, have predicted dire consequences to workers who are victims of a random assault in the workplace if the 3rd Dept.'s decision is affirmed. Specifically, according to WCB, "The Third

Department's decision undermines this public policy ('protection of the workman') by making it harder for workers to receive compensation in the case of a workplace assault." (WCB Brief p. 24). BLH joins in this prognostication stating, "In the instant matter, however, the Third Department's decision defeated the purpose of the Workers' Compensation Law when it limited recovery for assaults at the work place to only those involving affirmative 'employment-related animus.' (R-401)." (BLH Brief, p. 52).

The unwarranted nature of Appellants' concerns is effectively demonstrated by one of the very examples they cite for their dire predictions. Both Appellants reference the Tops Friendly Market, Buffalo, N.Y. tragic May 15, 2022, mass shooting by a non-employee of thirteen victims (ten were murdered and three were injured). (WCB Brief, p.26; BLH Brief, pps 57-59). Four of the victims were, a Tops security guard; another Tops employee working outside of the store assisting a customer; and a pharmacist and the Tops manager both of whom were inside the supermarket.[9] In light of the public nature of their work responsibilities, their

9 Ben Ashford, *Buffalo Supermarket Gunman Who Killed 10 Aimed His Gun At Wounded Manager*, *Daily Mail.com*, May 16, 2022, (https://www.dailymail.co.uk/news/article-10822007/Buffalo-shooter-spared-managers-life-said-sorry-realizing-hes-white.html); David Robinson and Peter D. Kramer, *Survivors of Buffalo attack include Tops employees shot in neck, head while doing their jobs*, *Democrat & Chronicle*, May 16, 2022, (https://www.democratandchronicle.com/story/news/2022/05/16/buffalo-shooting-survivors-zaire-goodman-jennifer-warrington-christopher-braden/9796793002/).

injuries may indeed result in Workers' Compensation benefits being awarded. (*cf Matter of Funicello v. Chain Bldg. Corp., supra*).

The Tops shooting demonstrates that while there might indeed be instances when employees who are victims of mass random shootings will not be eligible for Workers' Compensation benefits, there will also be instances when they will be. The 3rd Dept.'s decision does not portend a situation where every employee assaulted at the workplace by a random person will be denied benefits.

As it pertains to Appellants' ruminations, Judge Joseph Bellacosa was pointedly relevant in voicing his view in an unrelated *WCL* case, *Matter of Johannesen v. New York City Dep't. of Hous. Pres. & Dev.*, 84 N.Y.2d 129 [1984]. "Finally, in a policy-based argument, appellant suggests that recovery here will open floodgates . . . and make every allergic reaction, common cold or ordinary ailment compensable. This argument is often advanced when precedent and analysis are unpersuasive. It is unavailing in this case" (citations omitted). The same can be said about the unwarranted predictions proffered by Appellants that the 3rd Dept. decision will "open floodgates."

In the final analysis, Appellants' predictions are irrelevant. The merits of this case depend on the *WCL* and this Court's application of the law. Appellants' expressions of concern, which are overstated as detailed above, should not affect this Court's consideration of the merits of this appeal.

B. It is the Legislature's role to determine whether all random workplace assaults should be compensable under the *WCL*

Unfortunately, and regrettably, mass shootings in and out of the workplace are our nation's re-occurring nightmare. To address random acts of violence occurring in the workplace, the Court of Appeals suggested, "Perhaps, 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, an injury is not compensable unless it is one 'arising out of' as well as 'in the course of' the employment." *Matter of Ognibene v. Rochester Mfg. Co., supra*, at p. 750; see also, *Murphy v. Am. Home Prod. Corp.*, 58 N.Y.2d 293, 302 [1983], ("[I]ssue[s], involving perception and declaration of relevant public policy…are best and more appropriately explored and resolved by the legislative branch of our government. The Legislature has infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and, in any event, critically interested, and to investigate and anticipate the impact of imposition of such liability."). (citations omitted).[10]

10 Since the *WCL* was enacted over a century ago, Governors and the State Legislature have on numerous occasions undertaken to review and address the myriad of social and economic concerns associated with worker safety. After the enactment of the *WCL* in 1914, in 1922, the Legislature with the involvement of labor, employers, administrative officers and the public amended the *WCL* to have, "A much more orderly and logical arrangement

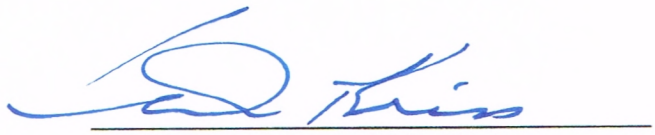
CONCLUSION

Appellants' arguments are unavailing.

The 3rd Department's decision should be affirmed.

Dated: Brooklyn, New York
July 20, 2023

Respectfully submitted,



ARNOLD N. KRISS, ESQ.

On the Brief
Gabriel Taussig, Esq.

---

of the law was effected, conflicting provisions were brought into harmony and obsolete provisions were eliminated." 1922 Report of Joint Legislative Committee to Recodify and Revise the Workmen's Compensation Law at 3, Bill Jacket, L 1922, ch 615. In more modern times, Governors Nelson Rockefeller, George Pataki, Eliot Spitzer, Andrew Cuomo and Sandra Hochul with the Legislature have attempted to improve and revise the *WCL,* "to decide once and for all how this law is to be interpreted and carried out effectively in the interests of the injured workmen." *Text of Governor's Annual Message to the Legislature as 1961 Session Opens, E. Social Insurance Protection, New York Times*, January 5, 1961; *Compensation Law To Get State Study, New York Times* September 29, 1961; Raymond Hernandez, *An Overhaul of Workers' Compensation Is Major Obstacle In Albany Budget Talks, New York Times*, June 26, 1996; Al Baker, *Governor Calls for Changes in Workers' Compensation, New York Times*, March 24, 2004; Danny Hakim and Steven Greenhouse, *Deal Reached on New York Workers Compensation, New York Times*, February 27, 2007, Rick Karlin, *N.Y. Workers' Compensation reforms are off the table for now*, T*imes Union*, March 15, 2016, Joshua Solomon, *Business community criticizes workers' compensation legislation*, T*imes Union*, June 21, 2022.

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using [name of word processing system].

Type. A proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
Point size:	14
Line spacing:	Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, corporate disclosure statement, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, regulations, etc., is 6,996 words.

Dated: July 20, 2023

ARNOLD N. KRISS, ESQ.
LAW OFFICES OF ARNOLD N. KRISS
Attorneys for Respondent
40 Clinton Street, Suite 10H
Brooklyn, New York 11201

– and –

125 Landau Avenue
Floral Park, New York 11001
Tel.: (212) 577-2000
Fax:(212) 577-2138
akriss@lawkriss.com

STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
	)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK	)		**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 July 20, 2023

deponent served the within: **Brief for Respondent**

upon:

SARAH L. ROSENBLUTH
Assistant Solicitor General
NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
DIVISION OF APPEALS AND OPINIONS
Attorneys for Appellant Workers' Compensation Board
Main Place Tower
350 Main Street, Suite 300A
Buffalo, New York 14202
Tel.: (716) 853-8407
Fax: (716) 853-8571
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
ksolomon@mlnappeals.com

Appellate Counsel to:

WEISS, WEXLER & WORNOW, P.C.
Attorneys for Appellants Bronx-Lebanon Hospital and State Insurance Fund
25 Park Place, 4th Floor
New York, New York 10007
Tel.: (212) 227-0347
Fax: (212) 227-1549
eperigoe@wwandwlaw.com

the address(es) designated by said attorney(s) for that purpose by depositing **3** 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 July 20, 2023

Mariana Braylovskiy

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

Job# 321804