To be Argued by:
CARYN L. LILLING
(Time Requested: 30 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 APPELLANTS BRONX-LEBANON HOSPITAL AND STATE INSURANCE FUND

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Date Completed: June 5, 2023

CORPORATE DISCLOSURE STATEMENT

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

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

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QUESTIONS PRESENTED

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

Answer: Yes. An assault that arose in the course of employment is presumed to have arisen out of the employment, absent substantial evidence to the contrary. The case law in the Third Department demonstrates that, in the event of a workplace assault, the WCL § 21(1) presumption is only rebutted by substantial evidence that the assault stemmed from purely personal animosity between the combatant and the claimant. Accordingly, in cases where claimants are injured by unknown assailants with unknown motivations while the claimants are performing work duties, the WCL § 21(1) presumption applies and is not rebutted, and the claims are compensable.

2. Does the Third Department's decision relating to compensability improperly narrow the scope of compensable claims in the future?

Yes. The Third Department's decision in the instant matter is at odds with prior awards of compensability in cases where claimants were assaulted or injured

as a result of an intentional act by an unknown assailant occurring at the claimants' workplace. Moreover, an affirmance of this decision would render victims injured in the course of their employment *unprotected* by the Workers' Compensation Law, in cases of mass casualty events, such as a mass shooting or a terrorist attack. Previously, victims of this nature were able to recover under the Workers' Compensation Law, such as victims of the September 11, 2001 terrorist attacks.

JURISDICTION

Jurisdiction Under CPLR 5602(a)(1)(i)

The legal issue on this appeal was raised before the Workers' Compensation Board by claimant, who requested a review of the Workers' Compensation Law Judge's ("WCLJ") decision filed on September 24, 2020, finding compensability, which was unanimously affirmed by the Workers' Compensation Board on January 27, 2021 (R. 4-11). A Notice of Appeal was served on behalf of claimant, dated February 2, 2021 (R. 1). The Appellate Division, Third Department issued its Decision and Order on the Appeal on February 3, 2022 (R. 395-402). The Appellate Division's decision reversed the Workers' Compensation Board's decision that the claimant's injury was compensable under the Workers' Compensation Law, thereby finally determining the matter (R. 395-401).

On March 3, 2022, within 30 days of the Appellate Division's decision, Bronx Lebanon Hospital ("BLH") and the State Insurance Fund moved to reargue the Third Department's decision and/or for leave to appeal to this Court.

By order of the Appellate Division, Third Department, dated August 25, 2022, the motion on behalf of BLH and the State Insurance Fund was denied. The Appellate Division's August 25, 2022 order was served with Notice of Entry on August 26, 2022.

On September 22, 2022, within 30 days of service of the August 25, 2022 order, BLH and the State Insurance Fund moved in this Court for an order, pursuant to CPLR § 5602(a), granting defendants leave to appeal to this Court (see Whitfield v City of New York, 90 NY2d 777 [1997]; see also 22 NYCRR 500.22[b][2][ii][a-c]). On September 26, 2022, the Workers' Compensation Board filed a separate motion for leave to appeal to this Court.

On March 21, 2023, this Court granted both motions for leave to appeal to this Court (R. 393-394).

BLH and the State Insurance Fund are Aggrieved

This Court has jurisdiction over this appeal as BLH and the State Insurance Fund are aggrieved by the Appellate Division, Third Department's decision and order reversing the Workers' Compensation Board's finding of compensability. BLH and the State Insurance Fund opposed claimant's appeal in the Appellate Division, Third Department (see e.g. Dolomite Products Co., Inc. v Town of Ballston, 151 AD3d 1328, 1331 [3d Dept 2017]; Sacchieri v Cathedral Properties Corp., 123 AD3d 899 [2d Dept 2014]; Mixon v TBV, Inc., 76 AD3d 144, 149 [2d Dept 2010]; Parochial Bus Sys., Inc. v Bd. of Educ. of City of New York, [60 NY2d 539, 544 [1983]). Since BLH and the State Insurance Fund were *not* the prevailing parties in the Appellate Division, its decision "must be deemed to have affected [their] right adversely" (Coe v House Inside, Ltd., 29 NY2d 241, 244 [1971]). Additionally, the Appellate Division's decision exposes BLH to liability as it would strip BLH of the benefits of WCL § 11's exclusivity provision, which, if applicable, would serve as an automatic complete defense to claimant's civil suit, as a matter of law (see Weiner v City of New York, 84 AD3d 140, 143 [2d Dept 2011], affd 19 NY3d 852 [2012]["A cornerstone of the workers' compensation framework is a tradeoff: the employee is afforded 'swift and sure' compensation and the employer is assured that its workers' compensation liability to its employee 'shall be exclusive and in place of any other liability whatsoever'"]).

Accordingly, BLH and the State Insurance Fund are aggrieved parties, and therefore this Court has jurisdiction to hear this appeal.

PRELIMINARY STATEMENT

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

The Workers' Compensation Board (hereinafter the "Board") issued a decision, holding that claimant's claim was compensable under the Workers' Compensation Law ("WCL") because the injury (1) arose *in the course* of employment and (2) arose *out* of the employment. Pursuant to WCL § 21(1), an injury that arose *in the course* of employment is presumed to have arisen *out* of the employment, absent substantial evidence to the contrary. The Board noted that the "issue of compensability in the present case is relatively simple, given the

undisputed facts in this case" (R. 9). The undisputed facts included that (1) at the time of the shooting, claimant was an employee of the Hospital and was performing work duties in a non-public area of the Hospital; (2) the assailant was a former employee of the Hospital and unknown to claimant; and (3) the shooting was *not* motivated by any personal animosity between claimant and the assailant. Accordingly, the Board concluded that the WCL § 21(1) presumption (that the injury arose out of the employment), was *not* rebutted and the claim was deemed compensable.

On appeal, the Appellate Division, Third Department reversed. Contrary to well-settled law, and despite the undisputed facts, the Third Department concluded that the evidence on the record rebutted the WCL § 21(1) presumption because the assailant was unknown to claimant and because there was no evidence that the attack was based upon "an employment-related animus between the two individuals or that the attack had any nexus to Timperio's employment or 'performance of h[is] job duties'" (Matter of Timperio v Bronx-Lebanon Hosp., 203 AD3d 179, 185 [3d Dept 2022]).

It is respectfully submitted that not only is the Third Department's decision contrary to well-settled law, but if sustained, will preclude future claimants from

obtaining Workers' Compensation benefits for injuries that were previously compensable. Indeed, under almost a century of case law, a claimant who was injured by an unknown assailant at or even near their workplace, while performing work-related duties was entitled to Workers' Compensation benefits (see e.g. Matter of Jean-Pierre v Brookdale Hosp. Med. Ctr., 190 AD3d 1053 [3d Dept 2021]; Matter of Shanbaum v Alliance Consulting Group, 26 AD3d 587 [3d Dept 2006]; Matter of Tompkins v Morgan Stanley Dean Witter, 1 AD3d 695 [3d Dept 2003]; Blair v Bailey, 279 AD2d 941, 942-43 [3d Dept 2001]; Matter of Boston v Medical Servs. For Women, 215 AD2d 845 [3d Dept 1995]; Bennett v G.O. Dairies, Inc., 114 AD2d 574 [3d Dept 1985]; Rothenberg v AAA Custom Lab, 77 AD2d 708 [3d Dept 1980]; Conyers v Rush Bar, 38 AD2d 987 [3d Dept 1972]; Valenti v Valenti, 28 AD2d 572 [3d Dept 1967]); Moran v Moran Transp. Lines, 264 AD 966 [3d Dept 1942]; Matter of Funicello v Chain Bldg. Corp., 251 AD 759 [3d Dept 1937]; see also Seymour v Rivera Appliances Corp., 28 NY2d 406, 409 [1971]; DeAngelis v Garfinkel Painting Co., 20 AD2d 162, 163-164 [3d Dept 1963], affd 18 NY2d 727 [1966]).

Based upon the foregoing case law, the Workers' Compensation Board's determination should have been affirmed. Instead, however, the Third Department focused on the fact that the assault was "arbitrary" and not based upon "work-

related differences" to conclude that claimant rebutted the presumption that claimant's injuries did not arise out of the employment (Matter of Timperio, 203 AD3d at 185). Not only is the Third Department's decision contrary to its own prior case law (see e.g. Jean-Pierre, 190 AD3d at 1054-55; Shanbaum, 26 AD3d 587; Tompkins, 1 AD3d 695; Blair, 279 AD2d at 942-43; Boston, 215 AD2d 845; Bennet, 114 AD2d 574; Rothenberg, 77 AD2d 708; Conyers, 38 AD2d 987; Valenti, 28 AD2d at 573; Moran, 264 AD 966; Funicello, 251 AD 759), but it will strip employees of avenues of compensation that were previously open to them, including for injuries sustained during mass casualty events, such as mass shootings and terrorist attacks, which unfortunately appear to be on the rise.

Given the significant impact the Third Department's case will have on future Workers' Compensation cases (which are exclusively heard by the Third Department), together with the erroneous interpretation of well-settled law, this Court should reverse the Third Department's decision denying Workers' Compensation coverage to claimant and reinstate the decision of the Workers' Compensation Board that claimant's claim was compensable under the Workers' Compensation Law because the injury (1) arose *in the course* of employment and (2) arose *out* of the employment.

STATEMENT OF FACTS

Factual Background

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

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

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

[1] Number preceded by "R" refer to the Record on Appeal.

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

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

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

Procedural History and Timeliness

On July 3, 2017, the Workers' Compensation Board received the First Report of Injury regarding claimant's injuries (R. 38-40). On that same date, the Workers' Compensation Board mailed claimant a Notice of Case Assembly, which was

ultimately returned to sender on July 15, 2017 (R. 41-43). The Workers' Compensation Board then sent a Case Assembly Follow-Up Notice on December 20, 2017, which again was returned to sender on January 31, 2018 (R. 44-46).

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

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

Plaintiff opposed BLH's motion to dismiss, arguing that his action should not be dismissed because (1) his injury was not the result of a Workers' Compensation Law compensable assault; (2) BLH was not entitled to Workers' Compensation Law's exclusivity protection in plaintiff's premises liability lawsuit; (3) plaintiff was not seeking Workers' Compensation benefits (R. 58-77).

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

The next day, BLH moved for reconsideration of the Court's March 31, 2019 order, or in the alternative, for an order certifying an interlocutory appeal to the Second Circuit, and separately, a stay of all proceedings in this matter pending

the Workers' Compensation Board's final determination of plaintiff's exclusive remedy (R. 116). Plaintiff opposed BLH's and the Court heard argument on the motion on June 20, 2019 (R. 134-163, 230).

Meanwhile, on May 8, 2019, a Request for Further Action by Carrier form was filed on behalf of BLH and the State Insurance Fund, requesting an administrative decision from the Workers' Compensation Board to establish a claim and enter awards in accordance with medical evidence (R. 114-115). Alternatively, a hearing to determine benefits was requested (R. 115).

By letter dated June 25, 2019, claimant's counsel requested that a copy of the Workers' Compensation records be released to him (R. 166-167).

On July 5, 2019, a Workers' Compensation Board hearing was conducted before WCL Judge George Blassman (R. 168-173). Neither the claimant nor claimant's representation was present for the hearing (R. 168). However, a lawyer for both BLH and their insurance carrier was present (R. 168). Judge Blassman agreed to establish the claim without prejudice because the claimant was not present, and indicated no further action pending an indication from claimant that he was ready to proceed with the case (R. 170, 172). A Notice of Decision was filed

by the Workers' Compensation Board on July 10, 2019, consistent with the July 5, 2019 hearing (R. 174-176).

On July 11, 2019, BLH submitted to the Southern District of New York the Workers' Compensation Board's decision awarding workers' compensation benefits to plaintiff (R. 230).

On August 8, 2019, counsel for claimant submitted an Application for Board Review to the Workers' Compensation Board, requesting that the board vacate the July 10, 2019 decision due to claimant's absence from the July 5, 2019 hearing (R. 189-190). Claimant claimed he had no notice of the hearing and never received any Workers' Compensation Board notices at the address listed since he had moved from that address by March 18, 2018 (R. 189, 191-194). Claimant also stated that at no point did he file a claim for or accept any Workers' Compensation benefits as a result of his injury on June 30, 2017, and that the claim was filed without his knowledge (R. 191).

By letter dated, December 16, 2019, claimant's counsel advised the Workers' Compensation Board of the federal action and argued that claimant's injuries were

not subject to the Workers' Compensation Law or the jurisdiction of the Workers' Compensation Board (R. 195-196).

A Workers' Compensation Board hearing was conducted on December 18, 2019, before WCL Judge Craig Cooke, with all counsel present, but with claimant absent (R. 198). Claimant's counsel reiterated claimant's position that the decision in the federal action that the injury was not compensable under the Workers' Compensation Law should result in the dismissal of the Workers' Compensation claim (R. 202-205). In response, Judge Cooke explained that since the claim was established, the proper procedure to seek dismissal of the claim was an appeal to the Workers' Compensation Board (R. 211). The Court indicated that it would refer the matter to the Appellate Board and include an internal note regarding the discussion at the hearing (R. 216-217). Accordingly, on December 23, 2019, the Workers' Compensation Board mailed a Notice of Decision to the parties, stating that no further action was planned by the Board at that time (R. 220-221).

Subsequently, on February 18, 2020, the Workers' Compensation Board issued a Memorandum of Board Panel Decision, detailing that the issue presented for administrative review was whether the record supported the establishment of the claim (R. 222-227). The Board Panel determined that it was not bound by the

federal court's decision that the claimant's injury did not occur in the course of his employment, and found that the federal district court's decision was not entitled to res judicata or collateral estoppel as the Board was not party to the federal action (R. 225). Moreover, the Board asserted that, had they been heard on BLH's motion in the Federal Action, the Board would have argued that the question of whether an accident occurred in the claimant's employment "lies squarely within the jurisdiction of the Board, and, therefore, the federal court should abstain from exercising jurisdiction over it" (R. 225 [internal quotations omitted]).

The Board determined, however, that it was prejudicial to the claimant to establish the claim without providing him an opportunity to present evidence to the Board regarding whether his injuries were sustained during the course of his employment (R. 226). Ultimately, the Board rescinded the establishment of the claim, without prejudice, and the case was returned to the trial calendar for development of the record on all issues regarding the establishment of the claim, whereby the WCL judge was directed to make a final determination regarding the establishment of the claim, and specifically whether claimant's injury occurred in the course of his employment (R. 226).

Thereafter, on February 26, 2020, claimant reported to the Southern District of New York that the Workers' Compensation Board appellate panel issued a decision remanding the case to the trial calendar for development of the record on all issues regarding the establishment of a claim (R. 231).

By order, dated March 9, 2020, the federal court, without providing any reasoning, denied BLH's motion for reconsideration or, in the alternative, an order certifying an interlocutory appeal (R. 229-234). The Court, however, granted BLH's motion to stay the federal matter pending the completion of the Workers' Compensation Board proceedings (R. 229-234). The Court noted the plethora of New York state court decisions holding that an award of Workers' Compensation benefits precludes plaintiffs from suing their employer in tort and recognized that the Workers' Compensation Board proceedings may affect the outcome in the federal case such that the litigation would be stayed until the administrative proceedings were complete (R. 233). The federal action continues to be stayed pending a decision by this Court on the appeal (Timperio v Bronx-Lebanon Hospital Center, et al., US Dist Ct, SD NY, 1:18-cv-01804-PGC, Doc 104 [April 4, 2023]).

A hearing before the Workers' Compensation Board was held on April 2, 2020 before WCL Judge Michael Cestaro (R. 235-259). At the hearing, Judge Cestaro indicated that he would put the case on the calendar for a 15-minute control date (R. 256). On this date, either the carrier would present prima facie medical evidence or both parties would submit a joint statement of facts and Judge Cestaro would direct a memorandum of law on the legal issues (R. 256, 258).

In accordance with the April 2, 2020 hearing, all parties submitted a joint statement of facts to the Workers' Compensation Board on May 27, 2020 (R. 262-265). The Board held another hearing before Judge Cestaro on May 29, 2020 (R. 266-278). At this hearing, the parties agreed that there was prima facie medical evidence and discussed a briefing schedule for memoranda of law, culminating in a calendar date after September 15, 2020 for summations and a decision on compensability (R. 271-275). A Notice of Decision continuing the case and reflecting the outcome of the hearing was filed with the Workers' Compensation Board on June 3, 2020 (R. 279-280).

Subsequently, on July 9, 2020, both BLH and the State Insurance Fund submitted a memorandum of law and summation, arguing that a finding of compensability must be made (R. 281-293). In response, and in accordance with

the briefing schedule, the claimant submitted his memorandum of law in opposition to BLH's memorandum on August 26, 2020 (R. 294-315). A hearing was then scheduled for September 21, 2020 (R. 317).

At the September 21, 2020 hearing, Judge Cestaro allowed both parties to submit oral arguments to the Board, in addition to the written memoranda previously submitted (R. 317-359). After hearing both sides and taking into consideration the written memoranda, Judge Cestaro held that the Workers' Compensation Board had primary jurisdiction over the case (R. 334-335). Judge Cestaro also made clear that, in order to rebut the presumption that an injury occurring at the injured person's place of work arose in and out of such person's course of employment, the party attempting to rebut the presumption must present substantial evidence that the accident did not occur in and out of the course of employment (R. 349). At bottom, Judge Cestaro concluded that the case was compensable, based in part on the fact that the claimant was at his job and doing a duty that was required of him when he was injured (R. 352). The awards, however, were held in abeyance at the request of claimant's counsel, pending a filing of the appeal (R. 359). As with the prior hearings, a Notice of Decision was filed with the Workers' Compensation Board on September 24, 2020, outlining the outcome of the hearing (R. 360-361).

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

On January 27, 2021, the Workers' Compensation Board issued a Memorandum of Board Panel Decision reviewing the Workers' Compensation Law Judge's September 24, 2020 decision (R. 4-10). Consistent with the Board's February 18, 2020 decision, the Board Panel found that the Federal Action did not prevent the Board from addressing compensability of this claim (R. 8). The Board further concluded that none of the information cited by claimant rebutted the presumption that the assault occurred in and out of the claimant's course of employment; in fact, all such information was either neutral or supportive of the finding that the claim arose out of the claimant's employment (R. 9). Accordingly, the Board Panel affirmed Judge Cestaro's September 24, 2020 decision that the claim was compensable (R. 9-10).

The Appeal in the Third Department

On appeal, claimant argued that: (i) the Workers' Compensation Board should have been estopped from deciding compensability in light of the decisions in the Federal Action; (ii) the claim submitted by BLH to the Workers' Compensation Board on claimant's behalf was improperly established, as claimant's injuries did not arise out of his employment; and (iii) the Worker's Compensation Board improperly applied the Workers' Compensation Law § 21 presumption to the facts of this matter.

In response, BLH and the State Insurance Fund filed a joint Respondent's Brief, arguing first that a U.S. District Court's decision denying summary judgment was not a final adjudication giving rise to collateral estoppel and, in any event, such denial of summary judgment did not restrict the Workers' Compensation Board from determining the issue of whether claimant's injuries arose in and out of his employment. Second, BLH and the State Insurance Fund argued that claimant's injury arose in the course of his employment, as he was performing work, at his work location, during working hours, and that the injury arose out of his employment, as the WCL § 21(1) presumption applied and was not rebutted by claimant.

The Workers' Compensation Board filed its own Respondent's Brief, similarly arguing first that the Federal Court's order denying summary judgment did not collaterally estop the Workers' Compensation Board from determining compensability, as the Workers' Compensation Board had primary jurisdiction to apply the Workers' Compensation Law to determine whether a claimant's injuries were compensable and an order denying summary judgment was not a final adjudication on the merits. Second, the Workers' Compensation Board argued that claimant's injuries were compensable under the Workers' Compensation Law because claimant failed to rebut the WCL § 21(1) presumption that the injury, which arose in the course of claimant's employment, also arose out of the claimant's employment. Claimant then filed a Reply Brief that essentially reiterated the arguments raised in his main brief.

The Third Department issued a decision on the appeal on February 3, 2022 (R. 395-402). As an initial matter, the Court held that the Board properly adjudicated the issue of compensability in the first instance, and that it was not estopped or otherwise precluded from doing so (R. 397-400). However, the Court ultimately reversed the Board's decision on compensability, holding that claimant presented evidence "sufficient to rebut the presumption articulated in Workers' Compensation Law § 21(1) and to establish that the assault on [claimant] resulted

exclusively from arbitrary, broad-sweeping and gravely maligned personal animosity and not from work-related differences with [claimant]" (R. 400-401). The Court's decision did not address the case law or arguments proffered by any of the respondents, and instead focused solely on whether the injury arose out of either work-related differences or personal animosity (R. 400-401).

POINT I

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

As noted, the Third Department reversed the decision of the Workers' Compensation Board and held that claimant's "proof was sufficient to rebut the presumption articulated in Workers' Compensation Law § 21(1) and to establish that the assault on [claimant] resulted exclusively from arbitrary, broad-sweeping and gravely maligned personal animosity and not from work-related differences with [claimant]" (R. 401). It is respectfully submitted that the Third Department's holding in this regard represents a drastic and inexplicable change in the law and will have significant repercussions if it is not reconsidered and reversed.

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

(2) arise *out* of the employment (WCL § 10[1]). Moreover, and as explained further below, an assault that arose *in* the course of employment is *presumed* to have arisen *out* of the employment, absent substantial evidence to the contrary (WCL § 21; Barth v Cassar, 38 AD2d 984 [3d Dept 1972]; Toro v 1700 First Ave. Corp., 16 AD2d 852, 852-53 [3d Dept 1962], affd 12 NY2d 1001 [1963]). Ultimately, whether an injury has arisen in the course of and out of employment "is a factual issue for the Board to resolve and its decision will not be disturbed when supported by substantial evidence" (Morales v Lopez, 192 AD3d 1298, 1299-1300 [3d Dept 2021], citing Matter of Siliverdis v Sea Breeze Services Corp., 82 AD3d 1459, 1460 [3d Dept 2011]). Moreover, the Board has broad authority to "draw any reasonable inference from the evidence in the record" (Matter of Pappas v State Univ. of N.Y. at Binghamton, 53 AD3d 941, 943 [3d Dept 2008]).

As will be shown, the facts in the record and the corresponding relevant case law require the conclusion that claimant's injuries are compensable under the Workers' Compensation Law. 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. Further, the record establishes the requisite nexus between the motivation for the assault and claimant's employment.

Claimant's Injuries Arose
In the Course of His Employment

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

In general, "the determination of whether an activity is within the course of employment or is purely personal is a factual question for the Board's resolution and depends upon whether the activity is reasonable and sufficiently work related" (Blanchard v Eagle Nest Tenancy in Common, 285 AD2d 857 [3d Dept 2001][citations omitted]). In making this determination, the Workers' Compensation Board has broad authority to resolve factual issues by, in part, drawing any reasonable inferences from the evidence in the record (Matter of

Marshall v Murnane Assoc., 267 AD2d 639, 640 [3d Dept 1999]; see also Blanchard, 285 AD2d at 857). Whether an activity is within the course of employment does not require an extensive factual basis; often courts have made this determination simply based on whether the injury occurred while the claimant was on duty in his place of employment or whether the claimant was performing a job-related activity at the time of the injury (see e.g. Valenti v Valenti, 28 AD2d 572, 573 [3d Dept 1967]; see also Bennett v G.O. Dairies, Inc., 114 AD2d 574 [3d Dept 1985]).

For example, in Valenti, the decedent was performing his work duties at his place of employment when he was shot to death by a non-employee occupant of the restaurant (Valenti, 28 AD2d at 572). The Third Department held that "at the time of the shooting, the decedent was on duty in his place of employment and was, therefore, in the course of his employment" (id. at 573). Similarly, in Bennett, the claimant was performing a job-related activity when she was wounded by gunshots from an unknown assailant, and therefore, the Third Department held that the injury was sustained in the course of the claimant's employment (Bennett, 114 AD2d at 574). Moreover, in Blanchard, the Third Department found that an accident occurred while in the course of employment where the accident happened within the time and space limits of the decedent's employment, even when there

was no direct evidence as to whether the decedent was actually engaged in a work-related activity when the accident occurred (Blanchard, 285 AD2d at 857-58).

Despite the foregoing unambiguous case law finding an accident arose in the course of employment where "the accident happened within the time and space limits of [claimant's] employment," claimant has previously contended that "mere presence in the workplace" is not the standard to be applied to establish compensability under WCL § 10(1). However, his arguments were based on inapposite cases, where a claimant is harmed outside of work hours, while he or she is not at work, and/or while not on a work-related errand (see e.g. Matter of Lemon v NYC Transit Auth., 72 NY2d 324 [1998]; Matter of Malacarne v City of Yonkers Parking Auth., 41 NY2d 189 [1976]). For example, in Lemon, the claimant, a transit worker, was injured while taking the subway – for free, as a benefit of the claimant's employment – from her place of employment after the end of her workday. There was no evidence that the Transit Authority derived any benefit because the claimant utilized her work-provided pass to commute to and from work; the pass was a fringe benefit that could be used by Transit employees as they wished and was not limited to commuting to and from work (id.). Under these circumstances, this Court held that the location of the accident "could not have been within the precincts of claimant's employment at the time of the

accident, since her employment had terminated at 4:00 a.m. when she signed out of work in the Bronx," further explaining that, at the time of the claimant's injury, she was "using the subway just as any other member of the public, whether they have free passes or not" (id.).

In Malacarne, the decedent was an attendant who manned a Yonkers Raceway parking lot; his duties included jockeying cars, collecting parking fees, and depositing the evening's proceeds in a bank located directly across the street shortly before its 11:00 p.m. closing time (id. at 190). On the date the decedent was shot to death, the decedent left work about 45 minutes earlier than usual in order to meet his wife at a party at her brother's home about half an hour from his work (id.). The decedent was shot by an unknown assailant after he had parked his car while he was walking toward his brother-in-law's house (id). There was some testimony that the decedent's assailant demanded "the money bag with the money from the parking lot" (id.).

In analyzing whether this incident occurred in the course of employment, this Court stated that "[g]enerally, absent some physical connection to the premises of an employer in time and space, an accident which befalls an employee on his way to or from work has not arisen 'in the course of employment'" (id. at 194).

Ultimately, this Court held that the decedent's accident did not occur in the course of business because "the decedent performed his work only at the parking lot, his workday started the moment he arrived there, and, on the day of the shooting, it ended as usual when he drove away. His job did not demand travel. He was not on an errand for his employer. He was not required or permitted to take the proceeds or any other indicia of his employment with him when his day's work was done, and he followed that rule on this occasion" (id. at 196-97).

To read Lemon and Malacarne as having a broader holding is to ignore the essential facts in a fact-based inquiry. At bottom, both Lemon and Malacarne are concerned with exploring whether an accident may be compensable when the accident occurred away from the location of employment and during a period of time outside of the claimant's work hours. Even further, Malacarne leaves open the possibility that an accident may occur in the course of business, even where the accident happened by an unknown assailant, away from the claimant's place of employment, outside of the claimant's hours of employment, if such an accident began at the claimant's place of business (see Malacarne, 41 NY2d at 196).

Here, it is uncontroverted that claimant was at his place of employment, during scheduled work hours, and performing a job-related activity at the time of

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

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

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

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

The crux of the matter, however, and where the Third Department deviated from established case law, is that where the record is barren of any evidence of a prior relationship between the claimant and the attacker, "cases involving the two original combatants and the instigation and cause of the dispute between them are inapposite" (id.). The Court in Seymour explained that this is because, where the record is barren of any evidence of a prior relationship between the claimant and

the assailant, "such personal animosity cannot be inferred in the absence of substantial evidence to support it" (id.).

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

For example, in Conyers, the claimant was performing his work as a bartender when he was shot by an unknown assailant. The Third Department affirmed the decision of the Workers' Compensation Board that "the accidental injury and death arose out of and in the course of employment" (id.). Importantly, the Third Department affirmed the decision of the Workers' Compensation Board that "the assault was not motivated by personal animosity and that the

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

Conyers is not an anomaly. The Third Department in Blair, similarly found that "there is no evidence to support the conclusion that the assault arose from a personal dispute between claimant and [the assailant] or, for that matter, that they had even met prior to the date in question," and ultimately held that the claimant's injury arose in the course of and out of his employment considering the circumstances under which the assault occurred and the location of the assault.

Likewise, in Valenti, the Third Department held that "although there is no indication for the reason for the shooting, the claimant is entitled to the benefit of the presumption that, when an employee is accidentally killed in the course of his employment, in the absence of substantial evidence to the contrary, the death arose out of the employment" (Valenti, 28 AD2d at 573). Even more, the Third Department in Moran, opined that, even when the "assailant was unidentified and has never been apprehended" and when the record did not reflect "substantial proof indicating the reason or motive for the assault," there was substantial evidence to sustain the finding of compensability.

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

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

(R. 401). Considering these undisputed facts, with particular focus on the fact that claimant and Bello did not know each other prior to the assault, it is clear that there is *no evidence* to support the conclusion that the assault arose from a personal dispute and, therefore, no basis to rebut the WCL § 21(1) presumption (see e.g. Blair, 279 AD2d at 942-43). Moreover, the law establishes that the fact that Bello provided no reason for the attack is not sufficient to rebut the WCL § 21(1) presumption that the attack arose out of claimant's employment (see Valenti, 28 AD2d at 573 [holding that "although there is no indication for the reason for the shooting, the claimant is entitled to the benefit of the presumption that, when an employee is accidentally killed in the course of his employment, in the absence of substantial evidence to the contrary, the death arose out of the employment"]).

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

Moreover, the cases cited by the Third Department do not stand for the proposition that, in order for the WCL § 21(1) presumption to apply, there must be a showing of "employment-related animus between the two individuals or that the attack had any nexus to [claimant's] employment or 'performance of h[is] job duties'" (see R. 401). Instead, these cases stand for the longstanding proposition that the WCL § 21(1) is rebutted only where there is substantial evidence that the motivation for an assault stemmed from *purely* personal reasons.

For example, in McMillan, 254 AD2d 619, the Third Department found the claim not compensable where the claimant's sister gained access to the claimant's place of employment and struck her with a hammer, holding that the "[a]ssault stemmed from *purely personal* differences between claimant and her sister and was unrelated to claimant's work or performance of her job duties" (emphasis added). Similarly, in Wadsworth, 72 AD3d 1244, WCL § 21(1)'s statutory presumption "was rebutted by substantial evidence presented that the motivation for the assault was *purely personal animosity* between the claimant and the individual she discovered driving her stolen vehicle" (emphasis added). The Third Department in Turner, 306 AD2d 649, again determined that the Workers' Compensation claim was not compensable because "substantial evidence supports the Board's finding that the assault arose out of *purely personal differences* between claimant and his

coworker and that there was no nexus between claimant's employment and the assault" (emphasis added).

There is no evidence on the record – let alone substantial evidence – that Bello had *any* personal animosity toward claimant, and, as such, the law requires that the WCL § 21(1) presumption apply. In appropriately applying the law, the Board found the claimant's injuries compensable, stating that: "[i]n this case, there is more than the slender nexus required between the claimant's employment and the assault at issue. The assault occurred while the claimant was working, it was perpetrated by a former employee, and the assault occurred in a non-public area of the hospital" (R. 9).

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

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

Furthermore, a claim is compensable "if there is any demonstrated nexus, however slender, between the motivation for the assault and employment" (Gutierrez v Courtyard Marriott, 46 AD3d 1241, 1242 [3d Dept 2007]; see also Seymour, 28 NY2d at 409). The requisite nexus does not require an extensive showing. In fact, "*any* credible nexus between the motivation for the assault and the employment" is sufficient (Blair, 279 AD2d at 942 [emphasis added]). Moreover, "[a] claimant is not required to prove that something directly related to job duties caused the injury" (Keevins v Farmingdale UFSD, 304 AD2d 1013, 1014 [3d Dept 2003]).

For example, in Gutierrez, the Third Department found the necessary nexus existed between the decedent's employment and her death when the perpetrator, who was the decedent's boyfriend, was also an employee of the hotel, and the presumed motive for the attack was that the perpetrator was "overly jealous as a result of the manner in which decedent dealt with customers at the hotel," which was a jealousy born from the perpetrator's personal romantic relationship with the decedent (Gutierrez, 46 AD3d at 1242).

Similarly, in Matter of Mosley v Hannaford Bros. Co., 119 AD3d 1017 (3d Dept 2014), the Third Department found the required nexus between the accident and the claimant's work, where the claimant was harassed by a co-worker's husband after the claimant made a telephone call to his co-worker at home to discuss work-related matters, and the co-worker's husband became convinced that the claimant and the co-worker were engaged in a romantic relationship. The co-worker's husband undertook a course of threatening and harassing conduct against the claimant, culminating in an unsuccessful murder-for-hire plot against him, and contacted the claimant's supervisor regarding the alleged affair, triggering an internal investigation, which ultimately triggered the claimant's pre-existing post-traumatic stress disorder (id.). The Third Department held that "the work-related phone call from claimant to his coworker's home was the basis for the subsequent harassment of claimant at his place of employment" and that "as the record reveals no connection between claimant and the coworker's husband outside of claimant's work-related duties, the Board properly found the required nexus between the threatening conduct that exacerbated claimant's preexisting condition and claimant's employment" (id.).

In fact, courts have found claims compensable under the Workers' Compensation Law where an assault occurred without reason or provocation, but

while the claimant was performing business duties. As described above, in Conyers, Blair, Valenti, and Moran, the Third Department considered – and, in part, relied upon – the fact that each claimant was at their place of employment and performing work duties when the respective assaults occurred (Conyers, 38 AD2d at 987; Blair, 279 AD2d at 942-43; Valenti, 28 AD2d at 573; Moran, 264 AD at 966; see also Matter of Funicello v Chain Bldg. Corp., 251 AD 759 [3d Dept 1937][Affirming an award in the claimant's favor where "claimant was employed as a watchman by the employer and the Industrial Board found that . . . while he was engaged in his regular occupation and while guarding the premises of his employer, he was attacked and assaulted by an unknown persons and sustained the injuries in question"]).

Additionally, in Bennett (114 AD2d at 574-75), the Third Department upheld the Board's finding of compensability when the claimant was wounded by gunshots from an unknown assailant moments after parking her car across the street from the store where she worked, because, at the time of the accident, she was being paid her hourly wage and she was driving the store manager to work, thereby providing her employer with a benefit. Moreover, in Rothenberg v AAA Custom Lab, 77 AD2d 708 (3d Dept 1980), the Third Department upheld the Board's finding of compensability when claimant was killed by gunshots from an

unknown assailant, while he was near a diner where he told witnesses that he had a business meeting.

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

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

Here, there can be no dispute that a nexus between claimant's injuries and his employment existed. Not only was claimant on his employer's property when the incident occurred, but he was in the hospital, on the 16th floor, in a non-public

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

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

The danger – and the subsequent injuries as a result of that danger – was not "common to all, shared by anybody and everybody in the vicinity," but rather

attached specifically to BLH and the 16th floor non-public work area where claimant was writing patient charts, and to which claimant's employment at BLH exposed him (see Gilotti, 246 NY at 282-283). The record evidence clearly established that Bello intended to inflict harm on people and property at BLH, which is "precisely the kind of case in which the mandate of the statutory presumption ought to be effective" (see DeAngelis, 20 AD2d at 163).

Despite the foregoing undisputed facts, the Third Department inexplicably determined that "there is no evidence that...the attack had any nexus to [claimant's] employment or 'performance of h[is] job duties" (Timperio, 203 AD3d at 185). The absence of an explanation was likely because the only conclusion supported by the facts and the law in the Third Department is that a "nexus, however slender, between the motivation for the assault and employment" was established "[such that] an award of workers' compensation…benefits is appropriate" (see Gutierrez, 46 AD3d at 1242; see also Seymour, 28 NY2d at 409).

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

Third Department's decision and reinstate the Workers' Compensation Board's finding of compensability.

The Third Department's Analysis of the Controlling Law Regarding the WCL § 21(1) Presumption is Erroneous

The Third Department's reasoning in its decision was faulty on multiple grounds. In the first instance, the Third Department seemed to suggest that affirmative evidence of "employment-related animus" was required to trigger the WCL § 21(1) presumption. In coming to this conclusion, the Third Department relied on the language that "[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 Mosely v Hannaford Bros. Co., 119 AD3d 1017 [3d Dept 2014], quoting Matter of Cuthbert v Panorama Windows Ltd., 78 AD3d 1450, 1451 [3d Dept 2010]).

Many of the recent cases using this language can be traced back to the Third Department's decision in Matter of Rosen v First Manhattan Bank (202 AD2d 864, 865 [3d Dept 1994]). There, the Court stated that "[t]he test to determine the compensability of injuries sustained in an assault is whether the assault originated in work-related differences or purely from personal animosity between the

combatants" and that "[t]his is a question for the Board and, if an award is made, it must be sustained so long as there is any nexus, however slender, between the motivation of the assault and the employment."

However, in affirming Matter of Rosen, this Court framed the law differently (Matter of Rosen v First Manhattan Bank, 84 NY2d 856 [1994]). This Court stated that "[p]ursuant to Workers' Compensation Law § 21(1), an assault which arose in the course of employment is presumed to have arisen out of the employment, absent substantial evidence that the assault was motivated by purely personal animosity" (id. at 857). To date, this Court has not rendered any decisions altering this framework for the applicability of the WCL §21(1) presumption. Accordingly, the Third Department *should* have analyzed whether there was substantial evidence on the record to establish that the assault in question was motivated *purely* by personal animosity to rebut the WCL § 21(1) presumption – which there was not – instead of requiring a showing of "employment-related animus."

Further, none of the cases cited by the Third Department support the notion that the WCL § 21(1) presumption is rebutted by proof of a lack of employment-related animus, but rather turn on whether the assault was motivated by *purely* personal animosity. In other words, to the extent that prior decisions by the Third

Department discuss an employment related connection between the assault and the claimant's employment, they are essentially analyzing whether the assault was purely personal, or whether there was "any nexus, however slender, between the motivation for the assault and the employment" (Seymour, 28 NY2d at 409).

For example, as described above, in Gutierrez (46 AD3d 1241, 1242 [3d Dept 2007]), the Third Department found the necessary nexus existed between the decedent's employment and her death when the perpetrator, who was the decedent's boyfriend and co-employee, was "overly jealous as a result of the manner in which decedent dealt with customers at the hotel."

Similarly, and again, as described above, in Mosely (119 AD3d 1017 [3d Dept 2014]), the record showed that the harassment of the claimant stemmed from jealously, specifically a non-employee's belief that his wife and the claimant were engaged in a romantic relationship, which, arguably, is a purely personal motivation. Nonetheless, the Third Department held that "[a]s the record reveals no connection between the claimant and the coworker's husband outside of claimant's work-related duties, the Board properly found the required nexus between the threatening conduct that exacerbated claimant's preexisting condition and claimant's employment" (id.). Notably, in the instant matter, like in Mosely, it is

undisputed that claimant and Bello had no connection outside of claimant's work-related duties, which he was performing at his place of employment, in a non-public area, when he was shot by Bello (R. 262-264).

Importantly, the Third Department, in Blair (279 AD2d 941 [3d Dept 2001]), determined that a claim of Workers' Compensation was compensable where there was "no evidence to support the conclusion that the assault arose from a personal dispute between the claimant and [the assailant], or, for that matter, that they had even met prior to the date in question." The Third Department further reflected that, "[i]nstead, the circumstances under which claimant was assaulted and the location of the assault establish that claimant was engaged in his job-related duties when injured and the evidence provides the necessary nexus supporting the Board's conclusion that claimant's injury arose out of an in the course of his employment."

In fact, and as described above, courts in New York routinely find that, in cases where the claimant and assailant are not known to each other and there is no other evidence of a personal disagreement or other reason for the assault, which are the facts in the present matter, the presumption under WCL § 21(1) applies (see e.g. Conyers, 38 AD2d at 987; Blair, 279 AD2d at 942-43; Valenti, 28 AD2d at

573; Moran, 264 AD at 966). The Workers' Compensation Board's January 27, 2021 final determination was consistent with the foregoing law, when it stated: "the lack of any prior personal or professional relationship between the claimant and the co-worker does not rebut the WCL 21 presumption as there is no evidence whatsoever to support that the shooting was motivated by personal animosity" and "[t]he lack of any prior personal or professional relationship between the claimant and the former employee actually supports the finding that the claim is compensable" (R. 9).

Additionally, and inexplicably, the Third Department attempted to contrast, through citation, the facts of the instant matter with those of Valenti (28 AD2d 572 [3d Dept 1967]) (see R. 401). Ignored by the Third Department, however, was that the operative facts in Valenti are nearly identical to the facts in the present matter. For example, in Valenti, the decedent was shot by an occupant of his place of work, who was not an employee (Valenti, 28 AD2d at 572). In the instant matter, claimant was shot by an occupant of his place of work, who was not a current employee (R. 63-64, 229-230, 263-264). In Valenti, the decedent was performing work-related duties at his place of work when he was shot (Valenti, 28 AD2d at 572). In the instant matter, claimant was performing work-related duties at his place of work when he was shot (R. 63-64, 229-230, 263-264). In Valenti, there

was no indication of the reason for the shooting (Valenti, 28 AD2d at 573). In the present matter, Bello did not explain his reason for the shooting (R. 102).

Under these facts, and as explained above, in Valenti, the Third Department affirmed the Board's finding of compensability, holding that "[a]t the time of the shooting, the decedent was on duty in his place of employment. Although there is no indication of the reason for the shooting, the claimant is entitled to the benefit of the presumption that, when an employee is accidentally killed in the course of his employment, in the absence of substantial evidence to the contrary, the death arose out of the employment. The record indicates that the presumption has not been overcome by substantial evidence" (Valenti, 28 AD2d at 573). In the instant matter, nothing in the record, and nothing contained in the Third Department's decision warrants straying from a comparable holding to Valenti, that the WCL § 21(1) presumption was not rebutted and that the claim is compensable.

Even further, the Third Department's determination that "the assault on [claimant] resulted exclusively from arbitrary, broad-sweeping and gravely maligned personal animosity and not from work-related differences with [claimant]" demonstrates that the Third Department imputed intent on Bello that was not supported by any evidence in the record, namely that Bello took his anger

at his prior employer out on claimant and the other victims of the shooting. However, should the Third Department be permitted to make this leap – which it is not – this rationale is still insufficient to support its decision. Specifically, the Third Department in DeAngelis, 20 AD2d 162, 163-64 (3d Dept 1963), explained that "[i]ndeed, if the premises were set on fire, or blown up by an enemy of the owner, it could not seriously be argued that the claimant's injury would not arise out of employment." Thus, even if this Court credits the theory that Bello's assault was the result of animus directed at BLH, generally, "it could not seriously be argued that the claimant's injury would not arise out of employment" (see id.).

Based upon the foregoing, this Court should conclude that claimant's injury arose in the course of and out of his employment and that a nexus between the motivation for the assault and the employment existed, such that the injury is compensable.

POINT II

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

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

In the instant matter, however, the Third Department's decision defeated the purpose of the Workers' Compensation Law when it limited recovery for assaults at the workplace to only those involving affirmative "employment-related animus" (R. 401). If the Third Department's incorrect interpretation of the Workers' Compensation Law is followed in future decisions, the entire landscape of Workers' Compensation Law cases will have been changed. Pursuant to the Third Department's decision in this case, *all* injuries sustained at or near the workplace

from assaults by unknown assailants, for unknown reasons, or any other reason, will no longer be compensable unless the claimant is able to affirmatively link the assault to "work-related differences" between the assailant and the claimant.

As outlined above, New York has a long history of allowing Workers' Compensation Law claims in cases where the injury was caused by a non-employee or unknown assailant and/or for unknown reasons (see e.g. Valenti, 28 AD2d 572; Bennett, 114 AD2d 574; Conyers, 38 AD2d 987; Blair, 279 AD2d 941; Moran, 264 AD 966; Funicello, 251 AD 759; Rothenberg, 77 AD2d 708; Boston, 215 AD2d 845; Jean-Pierre, 190 AD3d 1053). Moreover and most significantly, this Court affirmed compensability where the claimant was injured as a result of an individual throwing a stone through a window of the claimant's work premises, presumably intending to damage the premises, since such an attack on the premises and injury flowing therefrom was "precisely the kind of case in which the mandate of the statutory presumption ought to be effective" (DeAngelis, 20 AD2d 162 [3d Dept 1963], affd 18 NY2d 727 [1966]).

The foregoing concepts are part of the previously solid foundation that allowed for compensation under the Workers' Compensation Law for injuries that occurred as a result of actions by non-employees for reasons other than those

solely based on personal animus. Such actions range from attacks targeting a single person (see e.g. Valenti, 28 AD2d 572; Bennett, 114 AD2d 574; Conyers, 38 AD2d 987; Blair, 279 AD2d 941; Moran, 264 AD 966; Funicello, 251 AD 759; Rothenberg, 77 AD2d 708) to incidental injuries as a result of an attack on property (see e.g. DeAngelis, 20 AD2d 162), and even to incidental injuries as a result of a terror attack (see e.g. Matter of Tompkins v Morgan Stanley Dean Witter, 1 AD3d 695 [3d Dept 2003]; Matter of Shanbaum v Alliance Consulting Group, 26 AD3d 587 [3d Dept 2006]). In all of these instances, the Third Department simply addressed the question of whether the injury occurred in the course of and out of the claimant's employment, and the answers were consistently in the affirmative.

Should the Third Department's holding stand in the present case, workers would be stripped of the protection of the Workers' Compensation Law in a great variety of instances. These instances include tragic – and previously compensable events – such as mass shootings, as in the present case, and even terror attacks, such as those that occurred on September 11, 2001. Prior to the decision at issue, the Third Department engaged in the required analysis of whether an injury arose in the course of and out of the claimant's employment when determining compensability. In this instance, however, the Court twisted these requirements until they were unrecognizable and denied compensability despite a long history of

comparable cases upholding compensability under near identical circumstances (see e.g. Tompkins, 1 AD3d 695; Shanbaum, 26 AD3d 587; Duff v Port Authority of N.Y. and N.J., 13 AD3d 875 [3d Dept 2004]).

For example, in Tompkins, the Third Department engaged in an analysis of whether the claimant, who was struck by flying debris resulting from the second plane hitting Two World Trade Center, was within the scope of his employment at the time of the injury, when he was on his way to – and two blocks away from – his office in Two World Trade Center (id. at 695). The Court found that "substantial evidence supports the Board's finding that claimant's injuries arose out of and in the course of his employment" (id. at 696). Similarly, in Shanbaum, the Third Department found that the claimant was injured in the course of her employment when the claimant was injured as she fled from her apartment, where she was permitted to work, and after she had already logged into work, as a result of the terrorist attacks on the World Trade Center. Importantly, the Third Department in Tompkins and Shanbaum did not require a showing of "work-related animus" between the terrorists and the claimant – or anybody working in either World Trade Center building – and, further, did not deny compensation because the attack "resulted exclusively from arbitrary, broad-sweeping and

gravely maligned personal animosity and not from work-related differences" with the claimant (see R. 400-401).

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

Although it is not suggested that the circumstances of the present case can compare to the events of September 11, 2001 in terms of scope, trauma, or the scale of devastation, the similarities are enough to exemplify that, if the Third Department's decision in this matter was issued before September 11, 2001, there would have been far fewer awards of compensation as a result of the terror attacks, including for the claimants in Tompkins and Shanbaum. By way of comparison,

neither the September 11 terrorist attacks nor the mass shooting at BLH were perpetrated by individuals who were currently employed at the locations in question. Second, none of these attacks were perpetrated by co-workers of the claimants. Third, none of the claimants knew the attackers. And fourth, none of the attacks were the result of "employment-related animus." In fact, the September 11 terrorist attacks are even farther removed from the employment of the claimants than the instant matter, because in this case, the attacker was previously employed by the hospital where the attack occurred, left his employment under less-than-ideal circumstances, and used his prior employment at BLH to facilitate his commission of the mass shooting. The foregoing four considerations formed the basis for the Third Department's decision to deny Workers' Compensation Benefits in the present matter. Thus, had the Third Department's decision been applied to the September 11 terrorist attacks, Tompkins, Shanbaum, and other similarly situated claimants would *not* have been awarded compensation.

As demonstrated, the Third Department's decision in the present matter will have a tremendous impact going forward. Using a recent example from current events, should this decision stand and be followed in future cases, the employee-victims of the May 15, 2022 mass shooting at Tops Friendly Market in Buffalo, NY would not have any recourse through the Workers' Compensation Law for the

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

Applying the Third Department's decision in the present matter, the employees at Tops, who were injured or killed, will have no recourse through Workers' Compensation for the injuries sustained, including a security guard, a pharmacist, and an employee collecting shopping carts (Jon Harris, Jay Tokasz, *Tops employee survives bullet through neck from mass shooter* [May 15, 2022], available at https://buffalonews.com/news/local/tops-employee-survives-bullet-

through-neck-from-mass-shooter/article_2c7666e8-d48c-11ec-b677-4b06defdab16.html [last accessed June 30, 2022]). Such a holding is contrary to the law in New York (prior to the decision in the instant matter), under which these prospective claims would have been compensable.

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

Accordingly, the Third Department's decision in the present matter will have far-reaching implications for compensability of injuries resulting from victims of random singular acts of violence to victims of mass shootings, and even to victims of terror attacks, by drastically narrowing the scope of compensability in a manner

that is contrary to the well-established law in New York, even as workplace shootings are arguably on the rise (see e.g. Noah Berger, *We're Seeing a Spike in Workplace Shootings. Here's Why* [May 27, 2021], available at https://www.npr.org/2021/05/27/1000745927/why-were-seeing-a-spike-in-workplace-shootings [last accessed June 30, 2022]). Therefore, this Court should reverse the Third Department's February 3, 2022 decision and reinstate the Workers' Compensation Board's finding of compensability.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Court reverse the Decision and Order of the Appellate Division, Third Department dated February 3, 2022 and reinstate the Workers' Compensation Board's finding of compensability, together with such other and further relief as this Court deems is just and proper.

Dated: Woodbury, New York
June 5, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief was prepared on a computer using Microsoft Word 365. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

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Dated: Woodbury, New York
June 5, 2023

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

AFFIDAVIT OF SERVICE BY OVERNIGHT FEDERAL EXPRESS NEXT DAY AIR

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

On June 5, 2023

deponent served the within: **Brief for Appellants Bronx-Lebanon Hospital and State Insurance Fund**

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at 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
June 5, 2023

Mariana Braylovskiy

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

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