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.

REPLY BRIEF FOR APPELLANTS BRONX-LEBANON HOSPITAL AND STATE INSURANCE FUND

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PRELIMINARY STATEMENT

Claimant's arguments amount to a misinterpretation and misunderstanding of the relevant case law, which dates back nearly 100 years. The undisputed facts of this case are that claimant's injuries arose from an assault that occurred at his workplace, while he was working, by an unknown assailant and for unknown reasons. The application of precedent and the plain language of the Workers' Compensation Law to these facts confirm that the claim is compensable.

WCL § 10(1) states that a Workers' Compensation claim is compensable when the disability resulted "from injury arising out of and in the course of employment without regard to fault as a cause of the injury…" and the WCL § 21(1) presumption establishes that, if an injury arose in the course of employment, it also arose out of the course of employment, absent substantial evidence to the contrary.

Indeed, this case is governed by the holding in Matter of Rosen v First Manhattan Bank (84 NY2d 856, 857 [1994], citing Matter of Seymour v Rivera Appliances Corp., 28 NY2d 406 [1971]), which defines the nature of the "substantial evidence" that rebuts the WCL § 21(1) presumption in the case of an assault in the workplace. In particular, this Court in Rosen held that: "[p]ursuant to

Workers' Compensation Law § 21(1), an assault which arose in the course of employment is presumed to have arisen out of the employment, absent substantial evidence that the assault was motivated by purely personal animosity." Here, it is undisputed that personal animosity did not exist between the claimant and the assailant, and the record is barren of *any* evidence to rebut the WCL § 21(1) presumption; accordingly, the presumption has not been rebutted and the claim is compensable.

Finally, claimant's attempt to minimize the impact the Third Department's decision will have on future cases should be rejected out of hand. It cannot be legitimately disputed that the Third Department's decision, if affirmed, will negatively impact employees across New York State, who may be the unfortunate victims of assaults at their workplaces by unknown assailants. If the Third Department's decision is followed, such employees, including those who work for small businesses and those who cannot prove their employer's negligence, will be left without any recovery for their injuries.

In sum, the Third Department's decision must be reversed and the Workers' Compensation Board's decision reinstated.

POINT I

THE WCL § 21(1) PRESUMPTION THAT CLAIMANT'S INJURY AROSE OUT OF HIS EMPLOYMENT IS APPLICABLE AND REQUIRES A FINDING OF COMENSABILITY.

[Responding to POINT I, II and III of Respondent's Brief]

Claimant's arguments demonstrate a fundamental misunderstanding of the application of the WCL § 21(1) presumption generally and also specifically as it relates to claims for compensation for injuries resulting from workplace assaults. First, claimant's argument that his injury did not arise out of his employment rests on inapplicable and/or misunderstood case law. Second, claimant presents no evidence, let alone substantial evidence, to rebut the WCL § 21(1) presumption. Third, claimant ignores the clear language in this Court's opinion in Rosen, thereby ignoring this Court's holding that in cases of injuries stemming from assaults in the workplace, the WCL § 21(1) presumption can only be rebutted by substantial evidence that the assault was motivated by purely personal animus.

Claimant Misapplies The Law In Arguing That The Facts Of This Case Do Not Support The Conclusion The Injury Arose Out Of Claimant's Employment

Claimant incorrectly argues that "the uncontroverted and agreed upon facts, standing alone" fail to establish that claimant's injuries arose out of his employment (Respondent's Brief, p. 11). Misunderstood by claimant is that the

WCL § 21(1) presumption applies to *all* Workers' Compensation claims. The plain language of the statute states that "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 provisions of this chapter" (WCL § 21[1][emphasis added]). Accordingly, under the undisputed facts of this case, together with the applicable law, claimant's injuries were properly deemed compensable by the Workers' Compensation Board. In arguing to the contrary, claimant relies solely on irrelevant, improperly applied cases, which do not support his contention that his injuries are not compensable under WCL § 10(1).

As discussed in the appellant's brief filed on behalf of BLH and the State Insurance Fund, claimant's reliance on Matter of Lemon v NYC Transit Auth. (72 NY2d 324 [1998]) and Matter of Malacarne v City of Yonkers Parking Auth. (41 NY2d 189 [1976]) is misguided. As a general matter, both Lemon and Malacarne seek to answer whether the claimants were in the course of their employment at the time of the accident, and specifically whether a claimant's journey to or from work is deemed to be within the scope of employment. As it is undisputed that claimant's injury arose in the course of his employment, both Lemon and Malacarne are inapposite.

What is more, claimant takes the quote from Lemon regarding a "purely fortuitous time and place" out of context, when arguing that there was no nexus between claimant's injuries and claimant's employment (Respondent's Brief, p. 7). The full context of the quote is:

> 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). A purely fortuitous coincidence of time and place is not enough. There must be a causal relationship or nexus between the accident and the employment (Matter of Connelly v Samaritan Hosp., supra, at 139).
>
> (Lemon, 72 NY2d at 327).

The language regarding a "purely fortuitous coincidence" is related to whether an injury occurs *in* the course of employment, *not* whether it arose *out* of the employment. In that context, the purely fortuitous coincidence in Lemon was that the claimant was injured while leaving the subway station, which was a station on her route as a conductor, *after* her shift working for the New York City Transit Authority had ended. Lemon stands for the proposition that merely being in a public place that happened to employ the claimant, while outside of work hours and while the claimant was not doing the work for which she was employed, "is not sufficient to create a relationship between her accident and her employment"

(id. at 330). This reasoning is not relevant to the instant matter, where claimant was at work, during working hours, while he was being paid as an employee, and while he was doing the work for which he was employed when he was injured (R. 64, 262-263).

Similarly Matter of Ognibene v Rochester Mfg. Co. (298 NY 85 [1948]), cited by claimant, involves the question of whether injuries arising out of horseplay – or other non-employment-related activity – are covered under the Workers' Compensation Law, which, again, is not a question at issue in the instant matter. Additionally, claimant's reliance on Matter of McCarter v La Rock (240 NY 282 [1925]) is misplaced, because, as it is explained in DeAngelis v Garfinkel Painting Co. (20 AD2d 162, 164 [3d Dept 1963]), "it seems clear from the subsequent trend of the New York decisions that the rule of McCarter has been so distinguished and circumscribed that it now retains little vitality and ought to be limited almost to its own peculiar facts."

Lastly, in claimant's attempts to distinguish the instant matter from Giliotti v Hoffman Catering Co. (246 NY 279 [1927]), he quotes a single passage from the dissent (id. at 286). However, the majority decision states that, as in the instant matter, the danger the claimant "was exposed attached specifically to the premises

where he was employed; it was peculiar to the situation and a risk to which his employment exposed him...” (id. at 283).

Accordingly, contrary to claimant’s contention, the proper application of the Workers’ Compensation law to the undisputed facts should result in reversal of the Third Department’s decision.

Claimant Presented No Evidence To Rebut The WCL § 21(1) Presumption

In arguing that the undisputed facts on the record rebutted the WCL § 21(1) presumption, claimant again ignores decades of case law holding nearly identical facts do *not* rebut the WCL §21(1) presumption. Moreover, claimant fails to provide any evidence to establish that the Workers’ Compensation Board’s determination of compensability was not supported by substantial evidence (see e.g. Cerami v City of Rochester School Dist., 82 NY2d 809 [1993][“The appropriate role for the courts is simply to determine whether the Board’s determination is supported by substantial evidence”]).

Indeed, each fact that claimant contends rebuts the WCL § 21(1) presumption has, in prior cases, been used to support the application of the WCL § 21(1) presumption, resulting in findings of compensability. First, claimant argues

that "relevant to the rebuttal of the presumption are the facts that there is no motive as to why Bello shot Respondent" (Respondent's Brief, p. 13). Notably, claimant failed to support his assertion with any case law. And, most significantly, cases have found compensability where there was a lack of evidence demonstrating the reason or motive for the assault (see e.g. Matter of Moran v Moran Transp. Lines, 264 AD 966 [3d Dept 1942]; DeAngelis, 20 AD2d 162; Valenti v Valenti, 28 AD2d 572 [3d Dept 1967]).

Claimant then argues that "Bello had no work-related contact with BLH since his employment ended," "they never worked together," "they were never co-employees," they "had no relationship outside of the workplace," "there was never any direct or indirect contact between Respondent and Bello," and claimant "and Bello had no personal or work-related relationships" (Respondent's Brief, pp. 13-14). In sum, claimant asserts, without any legal authority, that the fact that claimant and Bello did not know each other prior to the assault is sufficient to rebut the WCL § 21(1) presumption. Again, there is a long history of cases establishing compensability and/or applying the WCL § 21(1) presumption where the assailant is unknown or a stranger (see e.g. Matter of Funicello v Chain Bldg. Corp., 251 AD 759 [3d Dept 1937]; Moran, 264 AD 966; DeAngelis, 20 AD2d 162; Valenti, 28 AD2d 572; Conyers v Rush Bar, 38 AD2d 987 [3d Dept 1972]; Matter of

Bennett v G.O. Dairies, Inc., 114 AD2d 574 [3d Dept 1985]; Blair v Bailey, 279 AD2d 941 [3d Dept 2001]).

Claimant also relies on the district court's decision in the federal case stemming from this incident (Timperio v Bronx-Lebanon Hosp. Ctr., 384 F.Supp3d 425 [SDNY 2019]), which is not binding on this Court, and to Matter of Mintiks v Metropolitan Opera Ass'n, Inc. (153 AD2d 133 [3d Dept 1990]) in support of his contention. In the first instance, in Mintiks, the Third Department did not make a finding that the WCL § 21(1) presumption was rebutted (id. at 138). Rather, the Court remitted the matter to the Workers' Compensation Board for clarification as to "whether the Board in fact weighed the available evidence and properly determined that the statutory presumption was not rebutted…" (id.). Moreover, Mintiks is significantly distinguishable from the case at bar to the extent that the nature of the crime, attempted rape, is by, its very nature, a purely personal act (id. at 137-138).

In contrast, the Workers' Compensation Board in the instant matter considered every fact that claimant contends rebuts the WCL § 21(1) presumption. In considering these facts, the Workers' Compensation Board stated:

> The lack of a 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. The lack of any prior personal or professional relationship between the claimant and the former employee actually supports the finding that the claim is compensable. In 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. Although the claimant argues that he has submitted substantial evidence to rebut the presumption, none of the information cited by the claimant actually rebuts the presumption. All such information is either neutral or supportive of the finding that the claim arose out of the claimant's employment. As such, the claim was properly deemed compensable.

(R. 9). The applicable law supports the Workers' Compensation Board's finding, and there is nothing in the record, nor in claimant's brief, that supports any other finding.

Accordingly, as the WCL § 21(1) presumption was not rebutted by substantial evidence that the assault was perpetrated out of purely personal animosity (see Rosen, 84 NY2d 856), this Court must find the Workers Compensation claim compensable and reverse the Third Department's decision.

The WCL § 21(1) Presumption Applies To Claimant's Injury And Can Only Be Rebutted By Substantial Evidence That The Assault Was Motivated By Purely Personal Animus

Claimant argues that Rosen does not stand for the proposition that, where a workplace injury is the result of an assault, the WCL § 21(1) presumption applies unless the party opposing the application of the presumption presents substantial evidence that the assault was motivated purely by personal animosity (Respondent's Brief, p. 16). He further argues that this rule "places an unsupported limitation on the circumstances under which the WCL § 21(1) presumption can be rebutted" and that "appellants' contention is inconsistent with the plain language of WCL §§ 21(1) and 10(1) and reflects a misapplication of Rosen and its progeny" (Respondent's Brief, p. 17).

Contrary to claimant's assertion, Rosen explicitly states: "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" (Rosen, 84 NY2d at 857, citing Matter of Seymour v Rivera Appliances Corp., 28 NY2d 406 [1971]). No subsequent decision of this Court has altered this statement of the law. Even more, this Court, in Rosen, was not re-writing WCL § 21(1). Instead, Rosen merely clarified the type of "substantial evidence to the contrary" that would be

sufficient to rebut the WCL § 21(1) presumption, namely, substantial evidence that the assault was motivated by purely personal animosity.

Moreover, claimant asserts that "[t]here 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" (Respondent's Brief, p. 17). However, there is a long history of cases, going back nearly a century, that demonstrates that injuries arising out of an assault by an unknown person while the claimant is performing the duties for which he was employed is compensable under the Workers' Compensation Law. For example, going back to 1929, this Court, in Matter of Thomas v U.S. Trucking Corporation (250 NY 567 [1929]), affirmed an award made under the "Workmen's Compensation Law" to the claimant where the decedent was employed as a truck driver and was required to deliver a truck load of freight to a pier, and, while helping to unload the truck, a watchman on the pier drew a revolver and shot him (id.).

Similarly, in Funicello, the Third Department held that the evidence supported the finding of compensability where the claimant, who was employed as a watchman, "was engaged in his regular occupation and while guarding the premises of his employer he was attacked and assaulted by unknown persons and

sustained the injuries in question" (251 AD 759). In Moran, the Third Department upheld a finding that the claimant's injuries were accidental and arose out of and in the course of the claimant's employment, where the claimant was "engaged in the regular course of his employment and while checking freight in a truck at his employer's loading platform on the employer's premises, an unidentified stranger approached and shot [claimant], causing injuries which resulted in his immediate death" (264 AD 966). Even further, in Moran, the award of compensation was affirmed even where the party opposing compensability did not produce "substantial proof indicating the reason or motive for the assault" (id.).

Although none of the foregoing cases specifically refer to WCL § 21(1), they all contain substantially similar facts to the instant matter, where claimant was engaged in his regular course of business – namely writing medical charts – at his place of employment when he was shot and injured by a stranger for an unknown reason, and claimant – the party opposing compensability – did not produce substantial proof indicating the reason or motive for assault.

The Third Department's analysis of the application of the WCL § 21 presumption in cases of assault by unknown assailants and/or for unknown reasons dates back to at least 1941, with the Third Department's decision in Christiansen v

Hill Reproduction Co. (262 AD 379 [3d Dept 1941]). In Christiansen, the decedent was required by his employer to go to a tavern to meet an advertising editor (id. at 380). While at the tavern waiting for the advertising editor to arrive, an unknown man entered and "suddenly without any provocation and for no known reason, drew a revolver from his pocket and shot and wounded the bartender, shot at but missed the proprietor, shot at and fatally injured [the decedent]" (id.). The Third Department first held that, while the decedent was in the tavern, it was "virtually his workshop" and that "he was then exposed to the dangers incident to his presence there in the same manner that a factory workman is subject to the perils of the factory" (id. at 381). Ultimately, after analyzing prior similar cases and considering the WCL § 21(1) presumption, the court in Christiansen held that the State Industrial Board "was required to find that the injury suffered by [the decedent] arose out of his employment" (id. at 384).

Over the course of the past century, the case law surrounding assaults at the workplace and the application of the WCL § 21(1) presumption further developed, and continues to support the proposition that injuries stemming from a workplace assault, particularly by an unknown individual and/or for an unknown reason, is compensable under the Workers' Compensation Law (see e.g. DeAngelis, 20 AD2d 162 [applying the WCL § 21(1) presumption where a claimant was injured when

an unknown person threw a rock through the window of the claimant's place of employment for an unknown reason, 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"]; Valenti, 28 AD2d 572 [citing WCL § 21 and affirming the Workers' Compensation Board's finding that the decedent's death arose out of and in the course of his employment "where, 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" despite there being "no indication of the reason for the shooting"]; Conyers, 38 AD2d 987 [applying the WCL § 21(1) presumption where the claimant was performing his work when he was shot by an unknown assailant, and the assault was not motivated by personal animosity"]; Bennett, 114 AD2d 574 [holding that "[h]aving established that [the claimant's] activities were job related, claimant was entitled to the presumption under Workers' Compensation Law § 21(1) that her injuries arose out of employment" and that the presumption was not rebutted, where the claimant was wounded by gunshots from an unknown assailant"]; Blair, 279 AD2d 941[finding that the claimant's injury arose out of and in the course of his employment, where there was no evidence that the claimant's assault arose from a personal dispute between the claimant and assailant or that they had even ever met prior to the assault, and that, at the time of the assault, the claimant was engaged in his job-related duties]).

In contrast, claimant failed to proffer a single case concerning a workplace assault occurring while a claimant was performing the work for which he/she was employed, by an unknown assailant or a stranger and/or for unknown reasons that resulted in a finding that the claim was not compensable. Instead of citing to cases supporting his interpretation of WCL § 21(1), claimant asks this court to re-interpret a statute that courts in New York, including this Court, have been interpreting for approximately a century (compare Matter of Verneau v Consol. Edison Co. of New York, 37 NY3d 387 [2021][interpreting an amendment to WCL § 25-a, effective March 29, 2013]; Majewski v Broadalbin-Perth Cen. School Dist., 91 NY2d 577 [1998][interpreting an amendment to WCL § 11, which was passed on July 12, 1996]).

Even more, claimant's attempts to distinguish the cases cited in all appellants' respective briefs was feeble, at best. First, claimant asserts that the cases relied upon by BLH and the State Insurance Fund are purportedly distinguishable because they do not refer to the WCL § 21(1) presumption and do not consider the nature of the evidence needed to rebut the presumption in an assault-related case (Respondent's Brief, pp. 20-21). On the contrary, all of the cases claimant cites in this paragraph discuss the facts required to find compensability in assault-related cases. Moreover, some cases, in either the

decision or in underlying briefs, refer to WCL § 21(1). For example, in Conyers, the Third Department adopted the Workers' Compensation Board decision, stating "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" (Conyers, 38 AD2d at 987 [emphasis added]). Even more, as discussed above, Conyers' finding that the claimant's accidental injury and death "arose out of and in the course of employment" is particularly relevant to the present matter as the claimant in Conyers was performing the work for which he was employed, as claimant was, when he was shot by an unknown assailant, as claimant was (id.).

Second, claimant attempts to distinguish another long list of cases by stating that "the Courts in these cases simply assessed whether substantial evidence was submitted to rebut the presumption" (Respondent's Brief, pp. 21-22). Claimant's position is baffling, as the Courts, by assessing "whether substantial evidence was submitted to rebut the presumption," were engaging in the exact analysis required to determine the applicability of the WCL § 21(1) presumption (see e.g. Rosen, 84 NY2d at 857; Belaska v New York State Dept. of Law, 96 AD3d 1252 [3d Dept 2012]["Injuries stemming from an assault which arose in the course of employment are presumed to have arisen out of the employment unless substantial

evidence is presented that the assault was motivated by purely personal animosity"]; Turner v F.J.C. Securities Services, 306 AD2d 649 [3d Dept 2003]["An injury from an assault that arises in the course of a claimant's employment is presumed to have arisen out of said employment (see Workers' Compensation Law § 21[1]). This presumption, however, may be rebutted by the presentation of substantial evidence that the assault grew out of 'purely personal animosity' between the parties"]; Colas v Watermain, 295 AD2d 775 [3d Dept 2002]["In order to rebut this presumption, the employer 'must present substantial evidence to the contrary which, as a matter of law, precludes the Board from crediting any explanation for the death except that offered by the employer.' Stated another way, the employer must demonstrate that the underlying attack was motivated by personal animosity between the decedent and his or her assailant" [citations omitted]).

Accordingly, claimant's argument that the cases cited by the appellants do not support the contention "that a 'default rule' exists whereby [] only evidence concerning the attacker's personal animus can be used to rebut the WCL § 21(1) presumption" (Respondent's Brief, p. 22), is baseless. The case law is consistent, and the relevant appellate decisions applying such a rule generally fall into three broad categories: (1) where the assault occurs in the course of employment, while

the claimant is performing the work for which he is employed at his place of employment, by an unknown assailant and/or for unknown reasons, the WCL § 21(1) presumption 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; Funicello, 251 AD 759); (2) where the reason for the assault can be connected, in any way, to the claimant's employment, the WCL § 21(1) presumption applies, even if there is a personal motive for the assault (see e.g. Gutierrez v Courtyard Marriott, 46 AD3d 1241, 1242 [3d Dept 2007]; Matter of Mosley v Hannaford Bros. Co., 119 AD3d 1017 [3d Dept 2014]; and (3) only where there is substantial evidence that the assault was the result of purely personal animosity will the WCL § 21(1) be rebutted (see e.g. Matter of McMillan v Dodsworth, 254 AD2d 619 [3d Dept 1998]; Matter of Belaska v New York State Department of Law, 96 AD3d 1252 [3d Dept 2012]; Matter of Wadsworth v K-Mart Corp., 72 AD3d 1244 [3d Dept 2007]; Matter of Turner v F.J.C. Sec. Servs., 206 AD2d 649 [3d Dept 2003]).

Here, the facts fall into the first category: an assault occurred in the course of employment while claimant was performing the work for which he was employed, at the location of his employment, and was perpetrated by a stranger for unknown reasons. Accordingly, the WCL § 21(1) presumption applies and the Workers' Compensation claim at issue is compensable (see e.g. Conyers, 38 AD2d at 987;

Blair, 279 AD2d at 942-43; Valenti, 28 AD2d at 573; Moran, 264 AD at 966; Funicello, 251 AD 759).

Claimant's reliance on Matter of Toro v 1700 First Ave Corp. (16 AD2d 852 [3d Dept 1962], affd 12 NY2d 1001 [1963]) is equally misguided, as Toro's holding *supports* BLH's position. In Toro, the "deceased was assaulted about the head with a piece of iron pipe by an unknown and unapprehended assailant" while he was going to fix a boiler in one of the buildings operated by his employer. The Third Department held:

> That the assault arose in the course of employment is demonstrated by uncontradicted evidence supplied in considerable measure by the employer itself. Respondents do not now otherwise contend. Thus it must be presumed as a matter of law in the absence of substantial evidence to the contrary that the injuries which resulted in death arose "out of" employment. Our examination of the record fails to disclose evidence legally sufficient to overcome the operative presumption.

(id. at 852 [citations omitted]). The Third Department also noted that "[n]o personal motive is ascribed for the attack on the deceased" (id.). The Court in Toro made clear that the claim was compensable, as the WCL § 21(1) applied as "a matter of law" because there was a lack of legally sufficient evidence to overcome the presumption (id.). The Court's subsequent discussion of "the zone of special

danger" merely completed the analysis of the Workers' Compensation Board's bases for its maligned decision and had no bearing on the prior analysis regarding the WCL § 21(1) presumption (id. ["The assigned bases for the board's decisions are unsustainable as a matter of law even in the absence of the statutory presumption"]). Also notable is that in affirming the Third Department' decision, this Court made no mention of any "zone of danger," and cited only the "evidence that the deceased shortly before he was assaulted stated that he was going out to fix a boiler in one of the buildings operated by his employer" (12 NY2d at 1001).

Based upon all of the foregoing, it is respectfully submitted that this Court should conclude that the WCL § 21(1) presumption clearly applies in the instant case, and therefore claimant's injuries arose both in the course of and out of the course of his employment. Therefore, the claim at issue is compensable and this Court must reverse the Third Department's decision and reinstate the Workers' Compensation Board's finding of compensability.

POINT II

THE THIRD DEPARTMENT'S DECISION REWROTE THE LAW REGARDING THE APPLICATION OF THE WCL § 21(1) PRESUMPTION SO THAT, IF AFFIRMED, IT WILL DEPRIVE FUTURE EMPLOYEES OF COMPENSATION.

In discussing the ostensibly unintended but far-reaching consequence of the Third Department's decision in the instant matter, claimant again misconstrues precedent in an attempt to make it fit his narrative and ignores the purpose and history of the Workers' Compensation Law.

At its inception, the Workers' Compensation Law was "passed to benefit workmen in hazardous employments who were without a legal remedy. Compensation is given without regard to the fault of the master at common law or under the Employers' Liability Acts. The law has been and should be construed fairly, indeed liberally, in favor of the employee" (In re Heitz, 218 NY 148, 154 [1916]; see also Williams v Hartshorn, 296 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"]). This reasoning has continued through more contemporary jurisprudence: "It is a 'fundamental principle' that the Workers' Compensation Law should be construed

liberally 'to accomplish…[its] economic and humanitarian object[ives],' and there exists a litany of judicial determinations exemplifying both the broad and liberal interpretation of these salubrious objectives" (Spyhalsky v Cross Const., 294 AD2d 23, 25 [3d Dept 2002][citations omitted]).

The Workers' Compensation Law not only protects the employee, but, in exchange, it also provides protection to the employer. "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'" (Weiner v City of New York, 84 AD3d 140, 143 [2d Dept 2011], affd 19 NY3d 852 [2012], quoting WCL § 11; see also William, 296 NY at 50 ["After imposing this new and comprehensive liability upon the employer, the statute accords him, in return therefor, relief from any and all other liability 'on account of such injury or death'"][quoting Workers' Compensation Law § 11]).

The Third Department's decision denying compensation disregards *both* of these aspects of the Workers' Compensation Law and, if affirmed, would make it more difficult for employees to seek compensation for assaults occurring in the course of employment and provide less protection to the employer than previously

afforded. This narrowing of the Workers' Compensation Law is two-fold: first, it requires a showing of an "employment-related animus" underpinning the assault, as, according to the Third Department, a lack of such evidence "was sufficient to rebut the presumption articulated in Workers' Compensation Law § 21(1)" (R. 401 [quotations and citations omitted]). Second, it creates a higher burden for the claimant in showing that an assault had any "nexus" to a claimant's "employment or performance of his job duties" (R. 401 [quotations and citations omitted]).

The Third Department's decision requiring a showing of "employment-related animus" to apply the WCL § 21(1) presumption would preclude compensation in cases where the motivation for the assault is unknown – such as where the assailant is never caught or, like here, the assailant commits suicide or otherwise dies – or where the available evidence shows that, while the assault was unrelated to the claimant's work, it was not motivated by purely personal animosity. This requirement alters the rule underpinning nearly a century's worth of cases and re-stated in Rosen, 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" (Rosen, 84 NY2d at 857, citing Matter of Seymour v Rivera Appliances Corp., 28 NY2d 406 [1971]).

Under the Third Department's statement of the law in this case, the claimants in cases such as Conyers, Blair, Valenti, Moran, Funicello, and Christiansen would not have been compensated (see e.g. Conyers, 38 AD2d at 987; Blair, 279 AD2d at 942-43; Valenti, 28 AD2d at 573; Moran, 264 AD at 966; Funicello, 251 AD 759; Christiansen, 262 AD 379). In each of these cases, the claimant was assaulted in the course of employment by an assailant not known to the claimant. In each of these cases, there was no evidence of "employment-related animus" since the reason for the assault was unknown. However, in contrast to the Third Department's decision in the instant matter, in each of these cases, the claims were deemed compensable. Similarly, the plethora of findings of compensability in the wake of the September 11, 2001 terrorist attacks on the World Trade Center would have reached far different results under the Third Department's instant ruling, and many would have been without compensation and, likely, with no means of recovery at all for injuries or death.

Ultimately, as the Third Department stated many years ago in Welz v Markel Service (270 AD 15, 19 [3d Dept 1945]), "[n]o well considered case has held that the presumption under the statute is inoperative unless claimant proves the cause of the accident." This remains true today and is evidenced by the long history of cases

applying the WCL § 21(1) presumption in instances where the motive for an assault is unknown.

Second, the Third Department's reliance on the line of cases requiring proof that the cause of an injury had a "nexus" to a claimant's "employment or performance of his job duties" misconstrues the relevant case law and imposes an additional evidentiary burden on claimants that did not previously exist. As an initial matter, in cases of workplace assault, any "nexus" requirement is, at its core, the rule articulated in Rosen that "an assault which arose in the course of employment is presumed to have arisen out of the employment, absent substantial evidence that the assault was motivated by purely personal animosity" (Rosen, 84 NY2d at 857).

The foregoing reasoning is evidenced in Rosen, which cited to Seymour v Riviera Appliances Corp (28 NY2d 406 [1971]) in support of this rule. In Seymour, while this Court stated that "[a]n award of compensation may be sustained even though the result of an assault, so long as there is any nexus, however slender, between the motivation for the assault and the employment," its decision finding compensability was based on the fact that "the record is barren of any evidence of a prior relationship between the decedent and [assailants]" and that

"*such personal animosity cannot be inferred in the absence of substantial evidence to support it*" (Seymour, 28 NY2d at 409 [emphasis added]). Both Rosen and Seymour make it clear that, in order to rebut the WCL § 21(1) presumption in the setting of a workplace assault, the party opposing the presumption must show substantial evidence that the assault was motivated by personal animosity.

Additionally, the cases cited by the Third Department, such as McMillan and Wadsworth, involve inapposite claims where the reason for the assault was known and involved proof that the reason was based on "purely personal differences" and "purely personal animosity," respectively. Such proof does not exist here.

Moreover, should this Court consider a "nexus" requirement as an independent element of a claim for compensation – which it is not – the cases cited by the Third Department in the instant matter do not demonstrate the minimum evidence required to create a "nexus" between the assault and the employment, particularly in a situation where the assailant and claimant were previously unknown to each other, and the assault occurred for unknown reasons. In fact, the very evidence in this case *supports* the contention that the required nexus exists. For example, in Blair (279 AD2d 941 [3d Dept 2001]), the Workers' Compensation claim 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" because "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 and in the course of his employment*" (emphasis added).

The Third Department's departure from established case law, therefore, improperly increases the evidentiary burden on claimants and creates a higher bar to compensation than has ever been required. Any future reliance on this Third Department decision would impermissibly restrict the conditions for obtaining workers' compensation awards and leave many without a path to compensation. What is more, if such path exists, it would be through the pursuit of tort claims against employers or third parties, which, in contravention of a core purpose of the Workers' Compensation Law, is neither "swift" nor "sure" (see Weiner, 84 AD3d at 143).

As a result, the Third Department's decision, if affirmed, will negatively impact employees across New York State who may be the unfortunate victims of

such assaults, such as those employees who were victims of the May 15, 2022 mass shooting at Tops Friendly Market in Buffalo, NY. Claimant's arguments to the contrary are unavailing. Claimant's contention that, under the Third Department's decision in the instant matter, the Tops employees would be afforded workers' compensation because of the public nature of the Tops employees' work responsibilities, is not supported by any law (Respondent's Brief, pp. 23-24). Claimant fails to cite to any authority that would support the distinction between the instant matter and the mass shooting at Tops Friendly Market in Buffalo, nor how the two events would be treated differently under the Third Department's holding in the instant matter. This is because, as argued in both appellants' briefs, they would not.

Even more perplexing is claimant's reliance on Matter of Johannesen v New York City Dept. of Hous. Pres. & Dev. (84 NY2d 129 [1994]). In Johannesen, the appellant's policy-based arguments were deemed unavailing because "the holding of this case does not change existing criteria and legal principles for determining whether a work-related and work-site injury is accidental" (id. at 138). That is not the case here. In the instant matter, the Third Department's holding *does* "change existing criteria and legal principles" for determining whether the WCL § 21(1)

presumption should be applied where a workplace assault occurs in the course of employment.

Claimant's reliance on Ognibene is similarly unavailing. There, this Court was assessing a claim involving an injury arising out of horseplay, which is not compensable under WCL § 10(1), when it stated that, at some point in the future, the legislature may act and make such conduct compensable (Ognibene, 298 NY at 87). Again, here, the nearly century of case law preceding this case makes clear that claimant's injury *is* compensable, and as such, no act of legislation is necessary to make it so.

Ultimately, claimant is unable to demonstrate or explain how "appellants' broad and sweeping expressions of concern are not warranted." On the contrary, and as explained above and in both appellants' briefs, the Third Department's decision in the instant matter will have far-reaching consequences that will limit the Workers' Compensation Law in unprecedented ways, leaving employees assaulted in the course of employment without guaranteed recompense. This narrowing of the Workers' Compensation Law defeats the core underlying the principle of those laws: "[T]o 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" (Williams, 296 NY at 50).

Therefore, and to preserve the core tenants of the Workers' Compensation Law, this Court should reverse the Third Department's decision and reinstate claimant's workers' compensation award.

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
September 1, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 NYCRR § 500.13(c)

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

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Dated: Woodbury, New York
September 1, 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 September 1, 2023

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

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Sworn to before me on
September 1, 2023

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
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Commission Expires March 30, 2026

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