APL 2023-00049

To be argued by:
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Time requested:
10 MINUTES

Court of Appeals of the State of New York

In the Matter of the Claim of

JUSTIN TIMPERIO,

Respondent,

v.

BRONX-LEBANON HOSPITAL, et al.,

Appellants,

WORKERS' COMPENSATION BOARD,

Appellant.

BRIEF FOR APPELLANT WORKERS' COMPENSATION BOARD

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Dated: June 6, 2023

Workers' Compensation Board No. G1955710; Third Dept. No. 533584

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PRELIMINARY STATEMENT

Respondent Justin Timperio was an employee of Bronx-Lebanon Hospital when he was injured in a mass shooting there. He sued the hospital for damages, but his action was stayed pending the outcome of proceedings that the hospital had initiated before the Workers' Compensation Board (the "Board"). Relying on the statutory presumption set forth in Workers' Compensation Law ("W.C.L.") § 21(1), the Board found that the claim for workers'-compensation benefits presumptively arose out of Timperio's employment and was thus compensable under the W.C.L.—a finding that, in turn, precluded Timperio's private lawsuit against the hospital. The Third Department reversed, concluding that the applicable presumption had been rebutted and thus that the claim did *not* arise out of Timperio's employment.

This appeal turns on the proper application of W.C.L. § 21(1). That statute creates a rebuttable presumption, applicable in any proceeding for the enforcement of a claim for workers' compensation, that a claim for a workplace injury arises out of a worker's employment and is thus compensable under the W.C.L.. Where the claim relates to a workplace assault in particular, this Court has held that under W.C.L. § 21(1), "an

assault which arose in the course of employment is presumed to have arisen out of the employment, absent substantial evidence that the assault was motivated by purely personal animosity." *Matter of Rosen v. First Manhattan Bank*, 84 N.Y.2d 856, 857 (1994).

That presumption applies here because Timperio was injured in an assault that occurred while he was on the job. It is therefore presumed that his injuries arose out of his employment. And because there is no evidence—let alone substantial evidence—that the assault was motivated by purely personal animosity, there is no basis to overcome the presumption. The Board thus properly found that Timperio's injuries were compensable under the W.C.L..

In reversing the Board's determination, the Third Department flipped the W.C.L. § 21(1) presumption on its head. The Third Department held that the absence of evidence of motive *rebutted* the presumption that Timperio's on-the-job injury arose out of his employment. As a result, it found that Timperio's claim is *not* compensable under the W.C.L.—thereby clearing the way for Timperio to proceed with his tort claim against the hospital.

Not only is the Third Department's decision wrong on the law, but its broader policy implications are untenable, even if it benefits Timperio in this particular case. "A cornerstone of the workers' compensation framework is a tradeoff" between workers and employers: workers injured on the job receive "swift and sure" compensation regardless of fault, while employers receive assurance that they will not be held liable in tort for unpredictable and potentially large sums of money damages. *Weiner v. City of New York*, 84 A.D.3d 140, 143 (2d Dep't 2011), *aff'd*, 19 N.Y.3d 852 (2012). The Third Department's decision undermines that assurance to both employers and employees in cases of workplace violence: it exposes employers to potential financial liability above and beyond amounts fixed by the W.C.L., and it precludes compensation for the many employees injured or killed in random acts of workplace violence who cannot prove the employer was at fault. This Court should reverse.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal under CPLR 5602(a)(1)(i). Upon the Board's decision in this matter, Timperio timely appealed to the Third Department under W.C.L. § 23. In its opinion and

order, the Third Department reversed the decision of the Board establishing Timperio's claim. Because the Third Department found that the claim is not compensable under the W.C.L., its order finally determined the proceeding. Although the Third Department remitted the matter to the Board for further proceedings, nothing remains before the Board other than the purely ministerial task of dismissing the application before it.

The Board, the employer, and the insurance carrier thereafter timely moved for reargument or, alternatively, leave to appeal. The Third Department denied those motions by order dated August 25, 2022. The same parties then timely moved in this Court for leave to appeal. Those motions were granted by orders dated March 21, 2023.

The question whether substantial evidence supports the Board's determination that Timperio's claim arose out of his employment is a question of law, and it is preserved for this Court's review. (See Board App. Div. Br. at 25-31.)

QUESTION PRESENTED

Whether the Board's decision that Timperio's injury was compensable is supported by substantial evidence, where Timperio was

injured on the job by an assailant unknown to him and there was no evidence that the assailant was motivated by purely personal animosity towards Timperio.

STATEMENT OF THE CASE

A. Underlying Incident

On June 30, 2017, a mass shooting occurred at Bronx-Lebanon Hospital ("BLH") in Bronx, New York. (Record on Appeal ["R."] 262 ¶ 1.) The shooting was committed by a former BLH doctor, Henry Bello, who reportedly had resigned from the hospital in 2015 following an allegation of workplace sexual harassment. (R. 63 n.1; R. 262 ¶ 1.) Bello killed one individual and wounded six before killing himself. (R. 63-64.) Justin Timperio, a first-year medical resident and BLH employee, was one of Bello's victims; he had been performing his normal job duties when he was shot in the abdomen. (R. 262 ¶ 2; R. 263 ¶ 13; R. 264 ¶ 19.) Timperio's employment at BLH did not overlap with that of Bello and the two men did not know each other. (R. 263 ¶¶ 4-6.) Timperio's injury apparently prevented him from completing his medical residency. *See Timperio v. Bronx-Lebanon Hosp. Ctr.*, No. 18-cv-01804 (S.D.N.Y. Mar. 1, 2018) (ECF No. 9 ¶ 51).

In March 2018, Timperio commenced a civil suit against BLH in the United States District Court for the Southern District of New York. (*See* R. 100.) On BLH's motion, the district court stayed the litigation in federal court pending the outcome of the workers'-compensation proceedings that BLH had initiated before the Board. (R. 114, 229-234.)

B. Decision of the Workers' Compensation Board

The Board determined that Timperio's injury was compensable under the Workers' Compensation Law ("W.C.L.")—a finding that, under the exclusive-remedy provision of that law, precludes Timperio from seeking a separate tort recovery from his former employer. (R. 9.) *See* W.C.L. § 29(6). The Board based its compensability determination on the presumption set forth in W.C.L. § 21(1), which states: "In any proceeding for the enforcement of a claim under this chapter, it shall be presumed in the absence of substantial evidence to the contrary [t]hat the claim comes within the provision of this chapter." In *Matter of Rosen v. First Manhattan Bank*, 84 N.Y.2d 856 (1994), this Court explained that, under this statutory presumption, an assault that occurs in the course of a worker's employment is presumed to have arisen out of that employment,

and thus presumed to be compensable, absent substantial evidence that the assault was motivated by "purely personal animosity." *Id.* at 857.

Relying on the W.C.L. § 21(1) presumption and its interpretation in *Rosen*, the Board found the issue of the claim's compensability to be "relatively simple" in light of the undisputed facts. (R. 8-9.) The Board reasoned that, contrary to Timperio's argument, "[t]he lack of any prior personal or professional relationship between [Timperio] and [Bello] actually supports the finding that the claim is compensable," because it means that there is "no evidence whatsoever to support that the shooting was motivated by personal animosity." (R. 9.) In the absence of such evidence, the Board concluded that the presumption had not been rebutted by the requisite substantial evidence of personal animosity and thus that the claim was compensable.

C. Decision of the Appellate Division, Third Department

In an opinion and order, the Third Department unanimously reversed the Board's decision and held that the claim was not compensable under the W.C.L.. The Third Department reasoned that there was no demonstrated "nexus" between the assault and Timperio's employment—even though Timperio was on the job at the time—and that

the W.C.L. § 21(1) presumption was rebutted by (i) evidence that Timperio and Bello had never been coworkers and did not know each other, and (ii) the absence of evidence of a motivation for Bello's attack, such as whether it arose out of any employment-related animus between Bello and Timperio. (R. 401.) The Third Department thus concluded that the record established that "the assault on Timperio resulted exclusively from arbitrary, broad-sweeping and gravely maligned personal animosity and not from work-related differences with Timperio." (R. 401.)

After the Third Department denied motions by the Board, the employer, and the insurance carrier for reargument or, alternatively, leave to appeal, those parties sought leave from this Court, and their motions were granted. (R. 393-394.)

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S DETERMINATION THAT TIMPERIO'S INJURY WAS COMPENSABLE, AND THE THIRD DEPARTMENT ERRED IN HOLDING OTHERWISE

Appellate courts are constrained to uphold the Board's factual determinations, such as whether a compensable accident occurred, as long as they are supported by substantial evidence. *Zamora v. New York Neurologic Assoc.*, 19 N.Y.3d 186, 192-93 (2012); *see also, e.g.*, *Matter of*

Galdon v. Robert Basil Inc., 213 A.D.3d 1063, 1064 (3d Dep't 2023). As demonstrated below, substantial evidence supports the Board's factual determination at issue here—that Timperio's injury was the result of a compensable accident. The Third Department thus erred in reversing that determination.

A. Substantial Evidence Supports the Board's Determination That the W.C.L. § 21(1) Presumption Applied and Had Not Been Rebutted.

Substantial evidence supports the Board's determination that the applicable W.C.L. § 21(1) presumption had not been rebutted and thus that Timperio's injuries arose out of his employment and were compensable.

Workers are entitled to compensation for injuries "arising out of and in the course of the employment." W.C.L. § 10(1). In the typical case, compensation is sought by the injured worker. However, employers also may initiate claims for compensation on behalf of their employees.[1] And,

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[1] *See, e.g.*, *O'Connor v. Midiria*, 55 N.Y.2d 538, 539 (1982) (holding that worker could not recover in tort against employer in light of exclusivity of W.C.L. benefits, which employer had sought on worker's behalf); *Aprile-Sci v. St. Raymond of Penyafort R.C. Church*, 151 A.D.3d 671, 672 (2d Dep't 2017) (same); *Fouchecourt v. Metropolitan Opera Assn.*, 537 F. Supp. 2d 629, 630-31

(footnote continues on next page)

in "any proceeding" to enforce a claim for compensation, "it shall be presumed in the absence of substantial evidence to the contrary [t]hat the claim comes within the provision of this chapter." *Id.* § 21(1). Courts have interpreted this W.C.L. § 21(1) presumption to provide that an accident that occurs in the course of employment—*i.e.*, "while the employee was doing the work for which he was employed"—also arises out of that employment—*i.e.*, that the injury was a "natural consequence [of] and directly connected with the work." *Matter of Malacarne v. City of Yonkers Parking Auth.*, 41 N.Y.2d 189, 193 (1976) (internal quotation marks omitted); *see also, e.g.*, *Matter of Sarmiento v. Empire Contr. of NY Corp.*, 188 A.D.3d 1384, 1384-85 (3d Dep't 2020) (explaining statutory presumption).

To illustrate how the presumption works in practice, consider a worker who suffers a debilitating heart attack while on the job (*i.e.*, in the course of employment). Under W.C.L. § 21(1), it is presumed that the heart attack was caused by (*i.e.*, arose out of) the employment. No affirmative evidence is required on this point.

(S.D.N.Y. 2008) (same); *Smith v. State of New York*, 91 A.D.2d 1181, 1181 (4th Dep't), *aff'd*, 59 N.Y.2d 718 (1983) (same).

The presumption may, however, be rebutted with evidence that a worker's injury was not in fact causally related to the work. In the case of the worker who suffered the heart attack, the presumption might be rebutted with evidence that the heart attack was not work-related but rather the result of a preexisting cardiovascular disease. *See, e.g.*, *Matter of Kaplan v. New York City Tr. Auth.*, 178 A.D.3d 1262, 1264 (3d Dep't 2019) (sustaining Board's determination that employer had rebutted the presumption with such evidence). If such evidence is offered, the presumption drops away and the burden shifts back to the proponent of the claim to come forward with competing proof as to the cause of the injury, because the proponent retains the ultimate burden to show that a compensable injury occurred. *Id.*; *see also Matter of Sarmiento*, 188 A.D.3d at 1384-85. The Board then weighs the evidence to decide whether the injury arose out of the employment.

If, however, no evidence is tendered to rebut the W.C.L. § 21(1) presumption, the proponent of the claim retains its benefit, and it is thus established that the on-the-job injury arose out of the employment and is therefore compensable.

This general framework applies equally to workplace injuries resulting from intentional assaults. In assault cases, as in all other cases, there is a presumption that injuries sustained in the course of employment also arose out of that employment. *Matter of Rosen v. First Manhattan Bank*, 84 N.Y.2d 856, 857 (1994). The opponent of a claim can show that the assault did *not* arise out of the employment, and thereby rebut the presumption, by coming forward with substantial evidence that "the assault was motivated by purely personal animosity." *Id.* Thus, if a worker was assaulted on the job, the default rule is that the resulting injury is compensable. That default rule can be overcome only with substantial evidence that the assault was motivated by personal animosity toward the victim.

This approach makes sense. An on-the-job assault proved to have been motivated by purely personal animosity towards the victim has only an incidental relationship to the workplace and could just have readily occurred outside that workplace. *See Matter of Ramos v. Taxi Transit Co.*, 276 A.D. 101, 103 (3d Dep't 1949), *aff'd*, 301 N.Y. 749 (1950). For example, where one spouse assaults another spouse on the job, evidence of a long-simmering domestic dispute between the two may constitute

evidence of purely personal animosity sufficient to rebut the W.C.L. § 21(1) presumption; in such a case, the assault may have been likely to happen anywhere, and the fact that it ultimately happened at work may have been pure happenstance. *See, e.g.*, *Matter of Robinson v. Village of Catskill Police Dept.*, 209 A.D.2d 748, 748 (3d Dep't 1994), *lv. denied*, 85 N.Y.2d 810 (1995). Where, however, there is no evidence of personal animosity between the victim and assailant, there is no basis to find that an on-the-job assault arose out of anything other than the employment, and thus no basis to displace the presumption.

There was no evidence of personal animosity here. It was "undisputed that, at the time of the shooting, [Timperio] was an employee of the hospital and was performing work duties." (R. 9.) It was thus undisputed that the assault occurred *in the course of* Timperio's employment. That fact triggered the presumption that the assault also *arose out of* Timperio's employment. And the presumption was not rebutted because, as the Board found, there was "no evidence whatsoever to support that the shooting was motivated by personal animosity" between Bello and Timperio. (R. 9.) Indeed, "[t]he lack of a prior personal or professional relationship between [Timperio] and [Bello] actually supports the finding

that the claim is compensable" because there could not have been any animosity between the two men where they did not even know each other. (R. 9.)

In rejecting the Board's conclusion, the Third Department flipped the W.C.L. § 21(1) presumption on its head. As discussed, when an injury occurs as a result of an on-the-job assault, the presumption asks whether there is substantial evidence of personal animosity between the assailant and the victim; if not, the default rule of compensability is not displaced. The Third Department here asked a different question: whether "the attack was based upon an employment-related animus between the two individuals." (R. 401.) The court found that the *absence* of any such evidence, and the absence of any evidence that Bello even knew Timperio, not only overcame the presumption but affirmatively "established[ed] that the assault on Timperio resulted exclusively from arbitrary, broad-sweeping and gravely maligned personal animosity."[2] (R. 401.) This conclusion contravenes this Court's instruction that where "the record is barren of any evidence of a prior relationship" between the assailant and

[2] The court also found that a "nexus" between the employment and the motivation for the assault was lacking. (R. 400.) This purported nexus requirement is discussed in greater detail in Point I.B below.

the victim, "personal animosity cannot be inferred." *Matter of Seymour v. Rivera Appliances Corp.*, 28 N.Y.2d 406, 409 (1971). In finding that the barren record *established* the personal animosity necessary to rebut the presumption, the Third Department misapplied W.C.L. § 21(1).

Indeed, in so doing, the Third Department departed from its own precedent, including cases that have been affirmed by this Court. Earlier decisions of the Third Department routinely affirmed the compensability of claims that, like the claim here, arose from seemingly random acts of workplace violence committed by assailants unknown to their victims. For example, in *Matter of De Angelis v. Garfinkel Painting Co.*, 20 A.D.2d 162 (3d Dep't 1963), a painter was injured when an unknown assailant threw a stone through the painter's work premises. The Third Department found no evidence in the record to rebut the W.C.L. § 21(1) presumption, observing that this was "precisely the kind of case in which the mandate of the statutory presumption ought to be effective." *Id.* at 164. This Court summarily affirmed. *See Matter of De Angelis v. Garfinkel Painting Co.*, 18 N.Y.2d 727 (1966). This Court also summarily affirmed the Third Department's decision in *Matter of Toro v. 1700 First Ave. Corp.*, 16 A.D.2d 852 (3d Dep't 1962), which held that there was no

evidence of personal animosity sufficient to rebut the presumption that an apartment superintendent's fatal on-the-job injury at the hands of a robber arose out of his employment. *See Matter of Toro v. 1700 First Ave. Corp.*, 12 N.Y.2d 1001 (1963).[3]

To be sure, the Third Department's case law on this topic has not been consistent. In this case, the Third Department relied on precedent (R. 401) in which evidence that an assailant was unknown to the injured worker, or the absence of any clear "work-related explanation" for the assault, contributed to a finding that the W.C.L. § 21(1) presumption had been rebutted. *See Matter of Wadsworth v. K-Mart Corp.*, 72 A.D.3d 1244, 1245 (3d Dep't 2010); *see also, e.g.*, *Matter of Belaska v. New York State Dept. of Law*, 96 A.D.3d 1252, 1253 (3d Dep't), *lv. denied*, 19 N.Y.3d 814 (2010). These cases are mistaken for the same reason that the Third

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[3] *See also, e.g.*, *Matter of Blair v. Bailey*, 279 A.D.2d 941, 942-43 (3d Dep't), *lv. dismissed*, 96 N.Y.2d 824 (2001) (presumption not rebutted where worker was shot while on the job by employer's son, in light of absence of evidence "that the assault arose from a personal dispute between claimant and [the employer's] son or, for that matter, that they had even met prior to the date in question"); *Matter of Barth v. Cassar*, 38 A.D.2d 984 (3d Dep't), *lv. denied*, 30 N.Y.2d 485 (1972) (same where taxi driver was killed on the job by unknown assailant in a robbery); *Matter of Valenti v. Valenti*, 28 A.D.2d 572 (3d Dep't 1967) (same where restaurant employee was shot by a patron for unknown reasons).

Department's decision in this case is mistaken: when the record does not reveal the true motivation for an assault, the record lacks substantial evidence to rebut the presumption.

Matter of Thompson v. Genesee County Sheriff's Dept., 43 A.D.3d 1252 (3d Dep't 2007), is instructive. There, the worker collapsed at work and died shortly thereafter; the cause of death was ventricular arrhythmia, but the cause of that condition was unexplained. *Id.* at 1253. The Board denied the claim because it was "only speculative what actually caused decedent's death." *Id.* at 1254 (internal quotation marks omitted). The Third Department reversed, holding that the Board erred in requiring the claimant to come forward with evidence of a causal relationship between the death and the employment before applying the statutory presumption. *Id.* The court reasoned that, "[i]n light of the social policy underlying the Workers' Compensation Law, as embodied in the presumption of compensability set forth in Workers' Compensation Law § 21(1)," uncertainty over the cause of death should have been resolved in favor of compensability. *Id.*; *see also Matter of Johannesen v. New York City Dept. of Hous. Preserv. & Dev.*, 84 N.Y.2d 129, 134 (1994) (explaining that W.C.L. § 21[1] effectuates statutory objective of provid-

ing broad protection to workers); *Matter of Richardson v. Fiedler Roofing*, 67 N.Y.2d 246, 250-51 (1986) (same).

Similarly, here, the Third Department erred in holding that any uncertainty as to Bello's motive for the attack was to be resolved against the claim's compensability. Instead, substantial evidence supported the Board's determination that the W.C.L. § 21(1) presumption in favor of the claim's compensability had not been rebutted.

B. The Third Department Misapplied This Court's Case Law Regarding the Requisite "Nexus" Between the Motivation for the Assault and the Employment.

The Third Department also mistakenly concluded that the absence of a demonstrated "nexus" between the motivation for Bello's assault and Timperio's employment defeated the claim for compensation. (R. 400.) In so finding, the Third Department misread this Court's decision in *Matter of Seymour v. Rivera Appliances Corp.*, 28 N.Y.2d 406 (1971).

Seymour involved a decedent who, while at work, got into a fight with two coworkers (Cordero and Rodriguez) after coming to the defense of a female coworker with whom Cordero and Rodriguez had been arguing. *Id.* at 408. The next day, Cordero and Rodriguez returned to work and shot and killed the decedent. *Id.* Affirming the Board's finding of

compensability, the Court stated, "An award of compensation may be sustained even though the result of an assault so long as there is any nexus, however slender, between the motivation for the assault and the employment." *Id.* at 409 (internal citation omitted). Such a nexus was present, the Court reasoned, because the decedent's only relationship with the female coworker whose argument sparked the deadly altercation was "as a coemployee"; the decedent "would not have become engaged in this quarrel had his employment not exposed him to it." *Id.* Moreover, the record was "barren of any evidence of a prior relationship between decedent and Cordero and Rodriguez." *Id.* "Such personal animosity cannot be inferred in the absence of substantial evidence to support it." *Id.* (citing W.C.L. § 21).

The Court's statement in *Seymour*—that an assault-related injury is compensable "so long as there is any nexus, however slender, between the motivation for the assault and the employment"—could be read to suggest that affirmative evidence of such a nexus is an independent element of a successful claim for compensation and that without it, the proponent of the claim loses. The Third Department apparently read it that way. (*See* R. 400-401 [ruling against compensability because "such

nexus is lacking," citing *Seymour*]). Such a rule, however, cannot be squared with the W.C.L. § 21(1) presumption, which, as discussed in Point A above, sets forth the exact opposite default rule: in the absence of any evidence of the assault's motivation, the presumption is not rebutted and the proponent wins. Although the Court in *Seymour* did not discuss the presumption in detail, it cited and applied W.C.L. § 21 in its opinion. *See* 28 N.Y.2d at 409. The Third Department's interpretation of *Seymour*, then, cannot be correct.

Instead, *Seymour*'s nexus rule is best understood as another way of articulating the W.C.L. § 21(1) presumption that an on-the-job assault arises out of the employment, which presumption is overcome only by evidence of personal animosity between the victim and assailant. In seeking a nexus between the motivation for the assault and the employment, the nexus inquiry effectively asks whether there is any evidence of an employment-related motivation for the assault. If so, then the assault *arose out of* the employment. Only a minimal evidentiary showing is needed to satisfy this nexus test; the requisite nexus is present whenever the employment "exposed" the worker to the injury. *Seymour*, 28 N.Y.2d at 409. Thus, a worker's employment can be said to have exposed the

worker to injury whenever the worker is assaulted on the job—whenever he is assaulted *in the course of* employment. Ultimately, then, under *Seymour*'s test, the fact that an assault occurred in the course of employment is sufficient evidence to show that it also arose out of the employment.

This is simply another way of expressing the concept that injuries that occur in the course of employment are presumed to also arise out of the employment—the W.C.L. § 21(1) presumption. And while *Seymour* does not use the word "presumption" or explicitly discuss how it may be rebutted, it makes clear there is no basis to infer that an on-the-job assault did *not* arise out of the employment unless there is "substantial evidence" of "personal animosity" between the assailant and the victim. 28 N.Y.2d at 409.

This Court's more recent decision in *Matter of Rosen v. First Manhattan Bank*, 84 N.Y.2d 856 (1994), confirms this reading of *Seymour*. *Rosen* involved a decedent who was killed by a coworker in a dispute over a loan that unfolded as the two men rode the elevator to their employer's office. *Id.* at 857-58. The Court held that substantial evidence supported the conclusion that the assault arose in the course of

employment. *Id.* at 857. Then, citing *Seymour*, the Court explained that, under the W.C.L. § 21(1) presumption, "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. The Court made no reference to any "nexus" between the motivation for the assault and the employment. Instead, the Court affirmed the Board's determination that the presumption had not been rebutted, where the only evidence of personal animosity was the assailant's own testimony that the Board had reasonably discredited. *Id.* at 858; *see also Matter of Rosen v. First Manhattan Bank*, 202 A.D.2d 864, 865 (3d Dep't 1994) (providing more detailed background facts).

Accordingly, the supposed "nexus" requirement in assault cases is not an independent element of a claim for compensation, but instead a restatement of the W.C.L. § 21(1) presumption.[4] And that is how the

[4] However, where there is a question in the first instance as to whether the injury occurred *in the course of* employment—as when, for example, the injury occurred during the claimant's commute—there is still a separate threshold requirement that the claimant show "some reasonable nexus between the risk to which a claimant was exposed and the employment." *Matter of Lemon v. New York City Tr. Auth.*, 72 N.Y.2d 324, 327 (1988).

Board applied it here, finding the nexus requirement satisfied because Timperio was on the job at the time of the shooting. (R. 9.)

While properly viewed as a restatement of the presumption, the nexus requirement has created confusion in the law. The Third Department has taken a variety of methodological approaches in assault cases, yielding inconsistent results. Many cases apply both the W.C.L. § 21(1) presumption and the nexus requirement. *See, e.g.*, *Matter of Gutierrez v. Courtyard by Marriott*, 46 A.D.3d 1241, 1242 (3d Dep't 2007); *Matter of Turner v. F.J.C. Sec. Servs.*, 306 A.D.2d 649, 649-50 (3d Dep't 2003). Others apply the presumption without mentioning the nexus requirement, *see, e.g.*, *Matter of Belaska*, 96 A.D.3d at 1252, and still others do the opposite, *see, e.g.*, *Matter of Mosley v. Hannaford Bros. Co.*, 119 A.D.3d 1017, 1017-18 (3d Dep't 2014). Different cases have also come to different conclusions as to what is needed to satisfy the nexus requirement. *Compare, e.g.*, *Matter of Wadsworth*, 72 A.D.3d at 1245 (assault that occurred in course of employment on employer's premises not compensable where there was "no established nexus between the attack and claimant's employment"), *with, e.g.*, *Matter of Baker v. Hudson Val. Nursing Home*, 233 A.D.2d 608, 609 (3d Dep't 1996), *lv.*

denied, 89 N.Y.2d 813 (1997) (fact that "the assault occurred during working hours on the employer's premises" constituted "sufficient nexus between the motivation for the assault and claimant's employment").

The Court should therefore take this opportunity to clarify that, in a proceeding to enforce a claim for workers'-compensation benefits for an assault-related injury, the relevant question is simply whether the injury occurred in the course of employment; if so, it is presumed to be compensable in the absence of substantial evidence of purely personal animosity. *Matter of Rosen*, 84 N.Y.2d at 857. The nexus requirement, which merely restates the statutory presumption, has no *independent* relevance to this inquiry.

C. The Third Department's Decision Undermines New York's Strong Public Policy of Ensuring Broad Protection for Workers.

The Workers' Compensation Law was "enacted for socioeconomic remediation purposes," *Matter of Johannesen*, 84 N.Y.2d at 134, and "framed on broad principles for the protection of the workman," *Matter of Waters v. Taylor Co.*, 218 N.Y. 248, 251 (1916). The Third Department's decision undermines this public policy by making it harder for workers to receive compensation in the case of a workplace assault.

As explained above, the Third Department's decision changes the default rule governing claims for compensation in assault cases. Under the Third Department's decision, in the absence of any evidence of the motivation for the assault, a claim's proponent (typically the worker) will be unable to show that an on-the-job assault was due to "employment-related animus" and may thus be denied benefits. (R. 401.) The rule adopted by the Third Department will thus screen out workers who are unable to put forward affirmative evidence of the motivation for an unknown assailant's assault. The rule will similarly preclude compensation in cases where the available evidence shows that the assault had nothing to do with work. For example, if the Third Department's decision had been on the books before 9/11, employees who worked in the Twin Towers would have been ineligible for compensation because there was no evidence that the hijackers were motivated by work-related animus. Thousands of workers'-compensation claims, however, were correctly paid to the victims of 9/11 and their families.[5] *See, e.g.*, New

[5] In the wake of 9/11, the Legislature passed a law that made it easier for participants in World Trade Center rescue, recovery, and cleanup operations to apply for workers'-compensation benefits. *See* W.C.L. §§ 161-169. However, existing law protected workers who were injured (or who died) on the job at the Twin Towers when the planes hit.

York State Workers' Compensation Bd., *World Trade Center Cases in the New York Workers' Compensation System* (Sept. 2009), *available at* http://www.wcb.ny.gov/content/main/TheBoard/WCBWTCReport2009.pdf. The Third Department's rule would also preclude compensation for workers who were injured in the May 2022 shooting at the Tops supermarket in Buffalo.

The Third Department's decision leaves these screened-out workers free to pursue tort claims against their employers (or third parties), but the potential availability of this alternative remedy does not necessarily leave such workers better off. While Timperio may have a meritorious negligence claim against his employer Bronx-Lebanon Hospital, based on the allegation that the hospital failed to confiscate Bello's security badge when it terminated him (R. 102), other workers may be less fortunate. In many cases—if not most—workers will have no plausible cause of action against their employers, as is likely the case where, for example, the worker's place of employment is an establishment open to the public and the assailant is a member of the public who had authority to enter. And even if the worker does have a plausible claim against the employer, the no-fault system of compensation established by the Workers' Com-

pensation Law "was intended to obviate, among other things, the delay and expense to the claimant caused by the protracted litigation involved in pursuing a negligence claim." *Crosby v. State of N.Y., Workers' Compensation Bd.*, 57 N.Y.2d 305, 313 (1982). Thus, by forcing injured workers to avail themselves of "expensive and sometimes risky litigation," the Third Department's decision undermines the fundamental purpose of the Workers' Compensation Law to provide injured workers with a guarantee that they will receive fixed benefits regardless of fault. *Weiner v. City of New York*, 19 N.Y.3d 852, 854 (2012) (internal quotation marks omitted).

CONCLUSION

The order of the Appellate Division, Third Department should be reversed and the award of the Board reinstated.

Dated: Buffalo, New York
June 6, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the body of the foregoing Brief for Appellant Workers' Compensation Board contains 5,403 words and thus complies with the word limit set by 22 N.Y.C.R.R. § 500.13(c)(1).

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