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.

REPLY BRIEF FOR APPELLANT WORKERS' COMPENSATION BOARD

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

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PRELIMINARY STATEMENT

As established in the Workers' Compensation Board's opening brief, substantial evidence supports the Board's determination that respondent Justin Timperio was injured in a workplace accident compensable in workers' compensation. The Board offers three points in response to Timperio's brief.

First, Timperio agrees that he was injured in the course of his employment. (Resp. Br. at 6.)[1] The factual predicate for invoking the W.C.L. § 21(1) presumption was thus undisputedly established.

Second, contrary to Timperio's argument, the W.C.L. § 21(1) presumption independently established that Timperio's injury also arose out of his employment, and no additional evidence was needed to establish that fact.

Third, Timperio failed to rebut the presumption with substantial evidence that the shooting committed by Henry Bello was motivated by purely personal animosity. In fact, Timperio freely admits that the record

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[1] References to "Resp. Br." are to Timperio's brief. References to "Employer Br." are to the opening brief filed on behalf of the Bronx-Lebanon Hospital and the State Insurance Fund. References to "Board Br." are to the Board's opening brief.

does not establish personal animosity as a motive for the assault. (Resp. Br. at 20.) And evidence suggesting a lack of a work-related motive is not, as Timperio argues, sufficient to rebut the presumption. Instead, the absence of evidence as to Bello's motive makes this case "precisely the kind of case in which the mandate of the statutory presumption ought to be effective." *Matter of De Angelis v. Garfinkel Painting Co.*, 20 A.D.2d 162, 164 (3d Dep't 1963), *aff'd*, 18 N.Y.2d 727 (1966).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S DETERMINATION THAT TIMPERIO'S INJURY WAS COMPENSABLE

A. The W.C.L. § 21(1) Presumption Was Triggered Because Timperio Was Undisputedly Injured in the Course of Employment.

As explained in the Board's opening brief (at 10), W.C.L. § 21(1) provides that an injury that occurs in the course of employment is presumed to also arise out of the employment, and thus to be compensable under W.C.L. § 10(1). *Matter of Malacarne v. City of Yonkers Parking Auth.*, 41 N.Y.2d 189, 193 (1976). Timperio does not dispute that he was injured in the course of his employment. (Resp. Br. at 6; *see also* Employer Br. at 29-30 [agreeing that Timperio was injured in the course of

employment].) The factual predicate for applying the W.C.L. § 21(1) presumption was therefore satisfied: the undisputed fact that Timperio was injured in the course of his employment triggered the rebuttable presumption that his injury also arose out of his employment and was accordingly compensable in workers' compensation.

Timperio is mistaken to the extent he argues that the W.C.L. § 21(1) presumption categorically does not apply to cases of "random workplace assaults" and that new legislation would be needed to extend workers'-compensation benefits to victims of those assaults. (Resp. Br. at 25.) W.C.L. § 21(1) already reflects a legislative judgment that on-the-job injuries are presumptively compensable, regardless of their cause. It is Timperio's position that would require the Legislature to carve out an exclusion from W.C.L. § 21(1) for injuries caused by "random acts of violence" with unknown motivations. (Resp. Br. at 25.)

B. Because the Presumption Applied, No Independent Evidence Was Needed to Establish That Timperio's Injury Arose Out of His Employment.

Timperio criticizes the Board for relying on the W.C.L. § 21(1) presumption, claiming that reliance on the presumption evinces an admission that the record evidence, "standing alone," did not establish

that Timperio's injury arose out of his employment. (Resp. Br. at 11.) Contrary to Timperio's argument, it is irrelevant whether the record evidence affirmatively established that his injury arose out of his employment, because the application of the W.C.L. § 21(1) presumption obviated the need for affirmative evidence establishing this element of the claim.

Like any other presumption applicable in civil cases, the W.C.L. § 21(1) presumption is "a rule of law that requires a finding of fact B upon proof of fact A," "unless and until the existence of B is adequately rebutted." Robert A. Barker & Vincent C. Alexander, 5 New York Practice, Evidence in New York State and Federal Courts §§ 3:17, 3:18 (2d ed., Nov. 2022 update). Thus, once sufficient evidence was presented to establish that Timperio was injured in the course of employment (fact A)—and it concededly was—the Board was required to find that his injury also arose in the course of employment (fact B), unless Timperio, as the opponent of the claim, adequately rebutted fact B. Timperio is therefore incorrect in asserting that both facts A and B were required to be independently proved. (Resp. Br. at 6, 11.) *See, e.g.*, *Matter of Humphrey v. Tietjen & Steffin Milk Co., Inc.*, 235 A.D. 470, 471-72 (3d Dep't 1932), *aff'd*, 261 N.Y. 549 (1933) (unrebutted presumption

established that workplace injury arose out of employment, "even though it did not appear otherwise from the record that the accident arose out of the employment").

The cases on which Timperio relies do not support his contrary argument. First, in *Matter of Lemon v. New York City Tr. Auth.*, 72 N.Y.2d 324 (1988) (Resp. Br. at 7-8), this Court considered whether a train conductor sustained a compensable injury when she was injured in a Brooklyn subway station during her commute home, 80 minutes after her shift had ended in the Bronx. 72 N.Y.2d at 325-28. The dispositive question was not whether the injury arose out of the employment but whether it occurred within the course of employment in the first instance—a question that depended on whether there was evidence of a "causal relationship or nexus" between the accident and the employment. *Id.* at 327. The Court held that the claimant was not injured in the course of employment because there was no evidence of a "reasonable connection" between the injury and the employment, given the injury's "remoteness in terms of time and space" from the claimant's work. *Id.* at 328. (*See also* Board Br. at 22 n.4 [discussing this case].) Here, in

contrast, it is undisputed that Timperio was indeed injured in the course of employment, making *Lemon* inapposite.

Matter of McCarter v. La Rock, 240 N.Y. 282 (1925), does not assist Timperio either. In that case, decided in 1925, a claimant was injured when "a shell which had been preserved on adjoining premises as a souvenir of the war exploded." *Id.* at 284. The Court held that the mere fact that the claimant was at work when he was injured was insufficient to establish that the injury arose out of the employment; instead, a "causal connection" between the employment and the accident was required, and such a connection was absent. *Id.* at 285.

This holding would perhaps support Timperio if it represented an accurate statement of current law, but it does not. As the Third Department observed in *Matter of De Angelis v. Garfinkel Painting Co.*, 20 A.D.2d 162 (3d Dep't 1963), "[I]t 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." 20 A.D.2d at 164 (citing *Matter of State Indus. Commr. v. Leff*, 265 N.Y. 533 [1934]; *Matter of Filitti v. Lerode Homes Corp.*, 244 N.Y. 291 [1927]). The Third Depart-

ment in *De Angelis* thus declined to follow *McCarter*'s rule and instead held that a claimant suffered a compensable injury when he was hit by a stone that was thrown onto his work premises by an unknown assailant; the W.C.L. § 21(1) presumption established that the injury arose out of the employment, and the presumption had not been rebutted. 20 A.D.2d at 164. This Court affirmed. 18 N.Y.2d 727 (1966). (*See also* Board Br. at 15 [discussing this case].)

Finally, Timperio relies on *Matter of Ognibene v. Rochester Mfg. Co.*, 298 N.Y. 85 (1948), for the proposition that, although W.C.L. § 21 is to be liberally construed, "the courts must give heed to its provisions that the injury arise not only 'in the course of' but also 'out of' the employment." (Resp. Br. at 9 [quoting 298 N.Y. at 87].) *Ognibene*, however, addressed only the threshold question of the applicability of the W.C.L. § 10(1) exclusion for injuries caused by a worker's own action that was intended to injure or kill himself or another. The Court concluded that that exclusion barred recovery by a claimant who had playfully thrown a small item at a coworker and then struck his nose while ducking to avoid detection; the Court explained that "an employee who initiates or instigates a particular bit of horseplay—constituting a purposeful interfer-

ence with the person and having no sanction in ordinary conduct—is not entitled to the protection of the statute." 298 N.Y. at 87. Because it concluded that the claimant's conduct was subject to this threshold exclusion, the Court in *Ognibene* had no opportunity to address the showing required to establish a claim that, like Timperio's, is not subject to any such exclusion.

In sum, because the W.C.L. § 21(1) presumption applied, no independent evidence was needed to establish that Timperio's injury arose out of his employment.

C. Timperio Failed to Rebut the Presumption with Substantial Evidence That the Assault Was Motivated by Personal Animosity.

Timperio failed to tender any evidence, let alone substantial evidence, that the assault against him was "motivated by purely personal animosity," as required to rebut the presumption that his injury in a workplace assault arose out of his employment. *Matter of Rosen v. First Manhattan Bank*, 84 N.Y.2d 856, 857 (1994). In fact, Timperio now concedes that "the record establishes" that the assault lacked a "personal motive." (Resp. Br. at 20.) That concession is fatal to Timperio's case. Failing to appreciate the significance of his concession, Timperio instead

argues that he successfully rebutted the presumption with substantial evidence "that the assault was not related to the employment"—in particular, evidence that he and Bello lacked any "work-related contact" and that the shooting happened outside any "zone of danger." (Resp. Br. at 10, 13, 19.) That argument, however, is at odds both with this Court's precedent and the policy rationale underlying the presumption.

As discussed in the Board's opening brief (at 12), this Court's decision in *Rosen* holds 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." 84 N.Y.2d at 857; *accord Matter of Seymour v. Rivera Appliances Corp.*, 28 N.Y.2d 406, 409 (1971).[2] This holding leaves no ambiguity as to the type of evidence needed to rebut

[2] *See also Matter of Tecce v. McKesson & Robbins*, 20 N.Y.2d 779, 780 (1967) (presumption rebutted where substantial evidence established that assault "was the result of a personally incited quarrel"); *Matter of Toro v. 1700 First Ave. Corp.*, 16 A.D.2d 852, 852 (3d Dep't 1962), *aff'd*, 12 N.Y.2d 1001 (1963) (presumption not rebutted where "[n]o personal motive [was] ascribed for the attack on deceased"); *Matter of Ramos v. Taxi Tr. Co.*, 276 A.D. 101, 104 (3d Dep't 1949), *aff'd*, 301 N.Y. 749 (1950) (presumption rebutted where substantial evidence established that "the assailant was motivated solely by personal hatred having nothing to do with the employment and the fact that the assault occurred in the course of employment was a coincidence").

the presumption—evidence of purely personal animosity—and squarely forecloses Timperio's argument that the "plain language" of W.C.L. § 21(1) permits rebuttal with evidence of a different type, namely, evidence that the assault was "not related to the employment." (Resp. Br. at 17, 19.) To the extent that Timperio argues that the lack of a work-related explanation for the assault itself establishes the personal animosity required by *Rosen*, this argument conflates an absence of evidence with affirmative proof. It thus ignores this Court's instruction against inferring personal animosity from a "barren" record.[3] *Matter of Seymour*, 28 N.Y.2d at 409.

Just as evidence regarding Timperio's lack of "work-related contact" with Bello is irrelevant to rebutting the presumption, so too is evidence that, when he was shot, he was in a "non-public area," outside any "zone

[3] Even if the Court were to extend *Rosen* to recognize a new category of evidence that could rebut the presumption in cases of assault, that evidence would still have to provide a basis to find that an assault was not work-related, and it is unclear that Timperio could provide any such evidence. He was assaulted by a disgruntled former hospital employee, a fact that suggests that the assault, though not based on personal animosity against Timperio, was indeed work-related. In the event that the Court were to adopt a new rule, remand would be warranted so that the Board could consider in the first instance whether Timperio successfully rebutted the presumption as newly interpreted.

of danger." (Resp. Br. at 10, 13-14.) Timperio's invocation of the "zone of danger" sounds in foreseeability. *See, e.g.*, *Di Ponzio v. Riordan*, 89 N.Y.2d 578, 583 (1997) (existence and scope of alleged tortfeasor's duty is based on, among other things, "whether the plaintiff was within the zone of foreseeable harm"). According to Timperio, the presumption was rebutted because his injury was not of the sort that one would "imagine" happening to a doctor in a non-public part of a hospital. (Resp. Br. at 15.) But the presumption exists precisely to avoid having to assess the foreseeability of any particular injury in any particular location. Indeed, as this Court has observed, applying "the tort concept of foreseeability" to workers'-compensation claims would "disregard the basic policy of workmen's compensation which is that if the injury was accidental and arose in the course of employment then recovery should be allowed." *Matter of Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d 505, 511 (1975); *see also Matter of Fogarty v. National Biscuit Co.*, 221 N.Y. 20 (1917) ("[T]he standard prevailing in negligence actions is not to be applied" in workers'-compensation cases).

When this Court has used the term "zone of danger" in workers'-compensation cases—which it has not done since 1932, in *Matter of*

Connelly v. Samaritan Hosp., 259 N.Y. 137 (1932)—it has not conceived of that location as a "zone of foreseeable harm," *Di Ponzio*, 89 N.Y.2d at 583, but rather as the place where the accident occurred. The dispositive question is whether the claimant was situated "where his employment took him" at the time of the accident—not whether the accident was of the sort that one might expect to happen in that particular location. *Matter of Giliotti v. Hoffman Catering Co.*, 246 N.Y. 279, 283 (1927). Thus, in *Giliotti*, this Court found a chef's death to be compensable where the chef was employed by a hotel, was required to sleep at the hotel as a condition of his employment, and died in his hotel room when a fire broke out. *Id.* at 281-83. The Court held that the chef's death arose out of his employment because his employment "called him into a place of potential danger"—not because, as Timperio appears to suggest (Br. at 9-10), dying in a fire while asleep was a foreseeable risk of the chef's job.[4] *Id.* at 283;

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[4] While Timperio quotes *Giliotti* for the proposition that an injury does not arise out of the employment unless the cause of the injury is "peculiar to the specific duties of employment" (Br. at 11), that quote is from the dissent, not the majority opinion. *See* 246 N.Y. at 286 (Kellogg, J., dissenting). The dissent, in turn, was quoting from this Court's opinion in *Matter of Kowalek v. New York Consol. R.R. Co.*, 229 N.Y. 489, 494 (1920). That quoted language was not necessary, however, to explain *Kowalek's* holding that the decedent, a railroad worker, was not injured in the course of employment when he was electrocuted by the third rail while on his way home.

accord Matter of Connelly, 259 N.Y. at 143-44 (laundry worker's employment exposed her to hazard of falling on table and thus placed her in "zone of special danger").

Accepting Timperio's invitation to engage in difficult line-drawing exercises about the foreseeability of injuries would undermine the policy supporting the "precise 'presumptions' set forth in the Workers' Compensation Law, which favor employees by granting easy initial access to benefits." *Matter of Balcerak v. County of Nassau*, 94 N.Y.2d 253, 260 (1999). For example, Timperio's proposed rule would require Tops grocery-store employees injured in last year's mass shooting in Buffalo to establish that their work responsibilities were of a "public nature." (Resp. Br. at 23-24.) Not only would this rule impose an unwarranted evidentiary burden on workers, it also would make no sense: there is no reason that a worker's eligibility for benefits should depend on whether he worked in the store's loading dock or at the cash register when the shooting occurred. This disparate treatment is contrary to the fundamental purpose of the Workers' Compensation Law, which was enacted "in deference to a widespread belief and demand that compensation should be awarded to workmen who were injured and disabled temporarily or

permanently in the course of their employment, even though sometimes the accident might occur under such circumstances as would not permit a recovery in an ordinary action at law." *Matter of Fogarty*, 221 N.Y. at 23.

At bottom, the Workers' Compensation Law reflects a legislative judgment that "swift and sure" benefits should be available to injured workers, and that a system of no-fault compensation should replace the traditional tort system so as to provide those benefits. *O'Rourke v. Long*, 41 N.Y.2d 219, 222 (1976). Thus, workers'-compensation benefits are available, and provide the exclusive remedy, whether or not the worker would previously have had a tort cause of action against the employer. Here, although Timperio's injury occurred under circumstances that could permit him to recover in tort, his injury was a workplace accident for which workers' compensation is the exclusive remedy. By failing to offer substantial evidence that Bello's shooting was motivated by purely personal animosity, Timperio failed to prove otherwise.

CONCLUSION

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

Dated: Buffalo, New York
September 6, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the body of the foregoing Reply Brief for Appellant Workers' Compensation Board contains 3,029 words and thus complies with the word limit set by 22 N.Y.C.R.R. § 500.13(c)(1).

SARAH L. ROSENBLUTH