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FIRST DEPARTMENT

CIVIL PROCEDURE, EMPLOYMENT LAW, CLASS ACTIONS.

CLASS ACTION SUIT AGAINST EMPLOYER ALLEGING EMPLOYEES WERE ROUTINELY UNDERPAID ALLOWED TO GO FORWARD.

The First Department determined plaintiffs, former and current non-managerial employees of defendant Jenny Craig (weight-loss centers), established commonality (CPLR 901(a)(2)) such that their class action suit could proceed. Seven hundred fifty-one class members alleged they were regularly underpaid because 30 minutes of pay was routinely deducted for breaks which the employees did not take: "Where, as here, 'the same types of subterfuge [were] allegedly employed to pay lower wages,' commonality of the claims will be found to predominate, even though the putative class members have 'different levels of damages' ... . Class action is an appropriate method of adjudicating wage claims arising from an employer's alleged practice of underpaying employees, given that 'the damages allegedly suffered by an individual class member are likely to be insignificant, and the costs of prosecuting individual actions would result in the class members having no realistic day in court'...". ***Weinstein v. Jenny Craig Operations, Inc.*, 2016 N.Y. Slip Op. 02932, 1st Dept 4-19-16**

CRIMINAL LAW.

FAILURE TO INFORM JURY OF EFFECT OF ACQUITTAL ON THE TOP COUNT BASED ON THE JUSTIFICATION DEFENSE REQUIRED REVERSAL IN THE INTEREST OF JUSTICE.

The First Department reversed defendant's conviction in the interest of justice because the trial judge did not make clear that acquittal of the top count (second-degree murder) based on the justification defense required acquittal of the lesser homicide charges: "[R]eversal in the interest of justice is warranted by the court's failure to convey to the jury, either directly or indirectly, in any part of its charge, that an acquittal on the top count of murder in the second degree based on a finding of justification would preclude consideration of the two lesser homicide charges. While the jury may have acquitted on the top charge without relying on defendant's justification defense, it is nevertheless 'impossible to discern whether acquittal of the top count . . . was based on the jurors' finding of justification so as to mandate acquittal on the two lesser counts'...". ***People v. Rowley*, 2016 N.Y. Slip Op. 03084, 1st Dept 4-21-16**

CRIMINAL LAW, EVIDENCE.

ADMISSION OF PREJUDICIAL EVIDENCE UNRELATED TO THE CHARGED OFFENSES WAS REVERSIBLE ERROR.

The First Department, in a full-fledged opinion by Justice Richter, determined photographs depicting defendants making gang signs and holding a weapon, as well as Facebook messages sent by a defendant boasting about firing weapons, should not have been admitted in this weapons possession trial. Neither the pictures nor the messages related to the weapon defendants' were alleged to have possessed, which was found on the backseat of a car. The prejudicial effect of the evidence outweighed its probative value: "There was no evidence that the gun in the photographs had anything to do with the gun found in the car or with any other criminal activity. … The mere fact that defendants were in possession of a different gun in the past is not probative of whether they knowingly possessed the weapon they were charged with possessing. Nor are the photographs probative of defendants' intent to unlawfully use the weapon found in the car. They merely show defendants displaying a gun, and do not depict any unlawful use of the weapon. * * * The People concede that [defendant] was not referring to the charged crime in [the Facebook] messages, but to an entirely different incident that occurred months later. Thus, these messages are far too attenuated to have any probative value as to [defendant's] knowledge of the gun found in the car or his intent to use that weapon on the day of the incident ...". ***People v. Singleton*, 2016 N.Y. Slip Op. 02945, 1st Dept 4-19-16**

FORECLOSURE.

FORECLOSURE COULD PROCEED DESPITE ERRONEOUS SATISFACTION OF MORTGAGE.

The Second Department determined foreclosure proceedings could proceed despite an erroneous, recorded satisfaction of mortgage: " 'A mortgagee may have an erroneous discharge of mortgage, without concomitant satisfaction of the underlying mortgage debt, set aside, and have the mortgage reinstated where there has not been detrimental reliance on the errone-

ous recording' ... . 'Only bona fide purchasers and lenders for value are entitled to protection from an erroneous discharge of a mortgage based upon their detrimental reliance thereon' ... . [T]he complaint's factual allegations, i.e., that the plaintiff was the holder and owner of the subject note and mortgage, that the satisfaction of mortgage was erroneously executed and recorded, that the mortgage had not been satisfied, that the original mortgagor defaulted on the note and mortgage, and that the balance due under the note remained outstanding, were sufficient to set forth viable causes of action to foreclose the mortgage and to cancel and vacate the satisfaction of mortgage ...". ***Wells Fargo Bank N.A. v. E & G Dev. Corp.*, 2016 N.Y. Slip Op. 02988, 2nd Dept 4-20-16**

INSURANCE LAW.

ORDINANCE OR LAW ENDORSEMENT DID NOT REQUIRE INSURER TO PAY FOR REMEDIATION OF CODE VIOLATIONS NOT RELATED TO THE COVERED DAMAGE.

The First Department, in a full-fledged opinion by Justice Saxe, determined a "Blanket Ordinance or Law Coverage Endorsement" did not cover remediation of below-code construction which was not related to the covered damage. Below-code structural concrete was discovered when covered water-related damage was being repaired. Because the below-code concrete was unrelated to the water damage, the "Law Coverage Endorsement" did not obligate the insurer to pay for remediation of the concrete-work: "Here . . . the latent problem that was uncovered by inspection necessitated by the covered damage was not a problem related to the covered damage; rather, the inspection discovered a latent, unrelated problem with the building's infrastructure. The condition of the concrete slabs in plaintiff's building, which had to be repaired to bring the building into compliance with the Building Code, bore no relationship to the covered loss — the water damage ... . The Ordinance or Law endorsement cannot be triggered simply by the discovery, in the course of an inspection necessitated by a covered event, of structural problems that amount to code violations. That is so whether the discovered condition could have been discerned earlier . . . or where, as here, it could not have been discovered absent the covered damage." ***St. George Tower v. Insurance Co. of Greater N.Y.*, 2016 N.Y. Slip Op. 03100, 1st Dept 4-21-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

LADDER WAS NOT DEFECTIVE, FALL NOT COVERED BY LABOR LAW § 240.

The First Department determined plaintiff's fall from a ladder did not support a Labor Law § 240 cause of action. Plaintiff's pant leg caught on an unmarked rebar as he descended from the third rung. The accident was not caused by a defective ladder and was not attributable to an extraordinary elevation-related risk: "[D]ismissal of the Labor Law § 240 claim was proper, as there is no dispute that the ladder was free from defects, and the record shows that plaintiff's fall was not attributable to the kind of extraordinary elevation-related risk that the statute was designed to prevent. Rather, plaintiff's injuries 'were the result of the usual and ordinary dangers at a construction site' ...". ***Almodovar v. Port Auth. of N.Y. & N.J.*, 2016 N.Y. Slip Op. 03075, 1st Dept 4-21-16**

SECOND DEPARTMENT

CRIMINAL LAW, EVIDENCE.

PEOPLE DID NOT MEET THEIR BURDEN OF DEMONSTRATING A LACK OF UNDUE SUGGESTIVENESS IN THE PHOTO ARRAY AND LINEUP IDENTIFICATION PROCEDURES.

The Second Department, over a substantial dissent, determined defendant's motion to suppress photo array and lineup identification evidence should have been granted. The People did not meet their burden to demonstrate the lack of undue suggestiveness. The photo arrays were not preserved and certain detectives who participated in the photo array and lineup identification were not called as witnesses at the *Wade* hearing: "At the suppression hearing, [detective] McDermott testified that he did not preserve the photo arrays viewed by [witness] Seeram because the computer that displayed those arrays was not attached to a printer. He stated that after Seeram identified the defendant from a photo array, McDermott used another computer to print out a single photograph of the defendant using the defendant's NYSID number, and then showed that photograph to Seeram. It cannot be said that this testimony was sufficient to dispel any inference of suggestiveness. McDermott did not explain why he did not attach a printer to the computer Seeram was using, or why he did not attempt to reconstruct the photo array (*see id.*). Moreover, the single photograph was not signed by Seeram, and was dated January 9, 2006, the day following Seerem's photographic identification procedure. Further, the People failed to produce the detective who conducted [witness] Clyne's photographic identification procedure, or the detective who conducted Seeram's lineup identification procedure. Contrary to our dissenting colleague's determination, McDermott did not conduct either of those procedures, and, therefore, could not provide competent evidence as to the circumstances thereof and what, if anything, transpired during those identification procedures...". ***People v. McDonald*, 2016 N.Y. Slip Op. 03017, 2nd Dept 4-20-16**

CRIMINAL LAW, EVIDENCE, SEX OFFENDER REGISTRATION ACT (SORA)

IF THE SORA COURT'S RELIANCE ON THE VICTIM'S GRAND JURY TESTIMONY, WHICH WAS NOT DISCLOSED TO THE DEFENDANT, WAS ERROR, UNDER THE FACTS, IT WAS HARMLESS ERROR.

The Second Department, over an extensive dissent, determined the SORA court's reliance on the victim's grand jury testimony, which was not provided to defense counsel, did not deprive defendant of due process of law. Twenty points were assessed based upon the victim's helplessness. At the grand jury, the victim testified she was asleep (i.e., helpless) when the abuse began. Because evidence disclosed to the defendant amply notified defendant of the victim's claim to have been asleep, any error in relying on the undisclosed grand jury minutes was harmless: "The Court of Appeals was recently presented with the issue of whether a defendant's due process rights were violated when the hearing court relied, in part, upon grand jury minutes that were not disclosed to the defense in reaching the defendant's SORA risk level determination (*see People v Baxin*, 26 NY3d 6). The Court found that '[g]iven that [the] defendant is entitled to broad discovery of the evidence that is used against him in order to be able to defend himself . . . the failure to disclose the grand jury minutes was a due process violation' ... . Significantly, the Court concluded that, given the overwhelming evidence which was disclosed to the defendant in support of the same risk factor, the error was harmless ... . It further recognized that '[t]his is not to say that grand jury minutes must be disclosed to the defendant in every SORA proceeding as a matter of course. It remains within the hearing court's discretion to limit the release of such minutes' ...". ***People v. Wells*, 2016 N.Y. Slip Op. 02978, 2nd Dept 4-20-16**

ENVIRONMENTAL LAW.

ORGANIZATION HAD STANDING TO CONTEST HARDSHIP WAIVER GRANTED TO MINE IN CORE PRESERVATION AREA.

The Second Department found that petitioner Richard Amper, director of the Long Island Pine Barrens Society, Inc., had standing, in his individual and representative capacities, to contest a hardship waiver granted to respondent, Westhampton, which operated a sand and gravel mine within a "core preservation area." The Second Department found that the waiver was properly granted, but further found the petition should not have been denied on the standing issue. With respect to standing, the court explained: "An association or organization has standing when 'one or more of its members would have standing to sue,' 'the interests it asserts are germane to its purposes,' and 'neither the asserted claim nor the appropriate relief requires the participation of the individual members' ... . Here, the petitioners established that Amper, in both his individual and professional capacities, uses and enjoys the Pine Barrens to a greater degree than most other members of the public. Further, the petitioners established that the threatened injury to Amper caused by development within the core preservation area of the Central Pine Barrens falls within the zone of interests sought to be protected by the Long Island Pine Barrens Protection Act of 1993 ... . Thus, Amper has standing to sue individually, and his standing satisfied the first prong of the test for the Society's organizational standing. The Society meets the second and third prongs of the organizational standing test, namely, that its interests in the instant proceeding are germane to its purposes, and that neither the asserted claim nor the appropriate relief requires the participation of the individual members ... . Therefore, the Society also has standing to challenge the Commission's determination ...". ***Matter of Long Is. Pine Barrens Socy., Inc. v. Central Pine Barrens Joint Planning & Policy Commn.*, 2016 N.Y. Slip Op. 02997**

ENVIRONMENTAL LAW, ZONING.

VILLAGE BOARD OF TRUSTEES DID NOT FAIL TO STRICTLY COMPLY WITH THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA).

The Second Department, reversing Supreme Court, determined the village comprehensive plan and zoning amendments should not have been annulled on the ground the board of trustees failed to strictly comply with the State Environmental Quality Review Act (SEQRA): " 'SEQRA mandates literal compliance with its procedural requirements and substantial compliance is insufficient to discharge the responsibility of the agency under the act' ... . As relevant here, 6 NYCRR 617.6(a)(4) permits an agency to waive the requirement for an environmental assessment form (hereinafter EAF) if a draft environmental impact statement is prepared or submitted. In this case, such a draft environmental impact statement was prepared. Thus, the failure to prepare an EAF did not amount to a failure to literally comply with SEQRA's procedural requirements. * * * ... [T]he Board of Trustees satisfied SEQRA's substantive requirements. In particular, the Board of Trustees adequately analyzed a reasonable range of alternatives ... . Accordingly, the Supreme Court should have denied so much of the petition/complaint as sought to annul the Comprehensive Plan and the Zoning Amendments on the ground that the Board of Trustees failed to strictly comply with the substantive requirements of SEQRA ...". ***Matter of Village of Kiryas Joel, N.Y. v. Village of Woodbury, N.Y.*, 2016 N.Y. Slip Op. 03005, 2nd Dept 4-20-16**

FRAUD.

PARTY WHO SIGNS A DOCUMENT WITHOUT READING IT IS CONCLUSIVELY BOUND BY ITS TERMS.

The Second Department, affirming the dismissal of a fraud cause of action, noted that plaintiff's acknowledgment he did not read the relevant documents before signing them prevented plaintiff from establishing justifiable reliance on any alleged misrepresentations in the documents: " 'The elements of a cause of action sounding in fraud are a material misrepresentation of an existing fact, made with knowledge of the falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages' ... . Each of the foregoing elements must be supported by factual allegations containing the details constituting the wrong sufficient to satisfy CPLR 3016(b) ... . Here, the complaint, as supplemented by the plaintiff's affidavit in opposition, does not contain any allegations setting forth any material misrepresentations the defendants made to the plaintiff. Moreover, the plaintiff's averment that he did not read the documents before signing them prevents him from establishing justifiable reliance, an essential element of fraud ... . 'A party who signs a document without any valid excuse for not having read it is conclusively bound' by its terms'...". ***Stortini v. Pollis*, 2016 N.Y. Slip Op. 02984, 2nd Dept 4-20-16**

PERSONAL INJURY.

DEFENDANTS FAILED TO DEMONSTRATE WHEN SLIP AND FALL AREA LAST CLEANED OR INSPECTED, SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined defendants' (appellants') motion for summary judgment in a slip and fall case was properly denied because the defendants failed to demonstrate when the area was last cleaned or inspected: "Here, the appellants failed to establish, prima facie, their entitlement to judgment as a matter of law on the ground that they did not have constructive notice of any hazardous condition. Although the appellants presented evidence that they neither created nor had actual notice of the alleged condition, they failed to demonstrate that they did not have constructive notice of the alleged condition, as they failed to tender any evidence establishing when the subject area was last inspected prior to the plaintiff's alleged accident ...". ***James v. Orion Condo-350 W. 42nd St., LLC*, 2016 N.Y. Slip Op. 02964, 2nd Dept 4-20-16**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

OPENINGS THROUGH WHICH A WORKER'S BODY COULD NOT COMPLETELY FALL NOT ACTIONABLE UNDER LABOR LAW §§ 240(1) OR 241(6).

Plaintiff was injured when his leg slipped into a 12-inch square opening in a rebar grid. The Second Department determined an opening through which a worker's body could not fall was not an elevation hazard (Labor Law § 240(1)) and did not violate a regulation prohibiting "hazardous openings" (Labor Law § 241(6): "[T]he openings of the grid, which were not of a dimension that would have permitted the plaintiff's body to completely fall through and land on the floor below, did not present an elevation-related hazard to which the protective devises enumerated in Labor Law § 240(1) are designed to apply ... . This Court has repeatedly held that 12 NYCRR 23-1.7, which concerns 'hazardous openings,' does not apply to openings that are too small for a worker to completely fall through ...". ***Vitale v. Astoria Energy II, LLC*, 2016 N.Y. Slip Op. 02986, 2nd Dept 4-20-16**

PERSONAL INJURY, MUNICIPAL LAW.

VILLAGE DID NOT DEMONSTRATE IT DID NOT CREATE THE CONDITION WHICH LED TO PLAINTIFF'S TRIP AND FALL, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department determined defendant village's motion for summary judgment in this slip and fall case should have been denied. Although the village demonstrated it did not have written notice of the stop-sign "stump" over which plaintiff tripped, the village did not demonstrate it did not create the dangerous condition. There was evidence the stump was exposed (not buried) immediately after the village removed the stop sign: " 'Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained street or sidewalk unless it has received written notice of the defect, or an exception to the written notice requirement applies' ... . 'The only recognized exceptions to the statutory prior written notice requirement involve situations in which the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a benefit upon the municipality' ... . The affirmative negligence exception 'is limited to work by the City that immediately results in the existence of a dangerous condition' ... . Where, as here, the plaintiff has alleged that the affirmative negligence exception applies, the Village was required to show, prima facie, that the exception does not apply. Although the Village proved that it did not receive prior written notice of the alleged defect, it failed to establish, prima facie, that it did not create the alleged defect ...". ***Kelley v. Incorporated Vil. of Hempstead*, 2016 N.Y. Slip Op. 02966, 2nd Dept 4-20-15**

PERSONAL INJURY, MUNICIPAL LAW, EVIDENCE.

POLICE OFFICER'S GENERAL MUNICIPAL LAW § 205-E CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED, CRITERIA FOR SUMMARY JUDGMENT NOT MET BY POINTING TO GAPS IN OTHER PARTY'S PROOF.

The Second Department, reversing Supreme Court, determined the dismissal of plaintiff police officer's negligence cause of action did not mandate dismissal of the General Municipal Law § 205-e cause of action. Plaintiff alleged his slip and fall injury resulted from defendant's failure to comply with specified regulations. In its motion for summary judgment, defendant did not affirmatively demonstrate the regulations were not breached. The court noted that simply pointing to gaps in plaintiff's proof is not enough in the summary judgment context: "[T]he dismissal of the plaintiff's common-law negligence cause of action was not fatal, as a matter of law, to his General Municipal Law § 205-e cause of action. In order to recover under General Municipal Law § 205-e, the statute does not mandate that the plaintiff establish general negligence, but rather, negligence of any person in 'failing to comply' with the requirements of, inter alia, a regulation ... , or 'negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties' ... . Furthermore, while the plaintiff alleged in his consolidated complaint that the defendants violated certain identified regulations, the defendants failed to affirmatively demonstrate in their submissions to the Supreme Court that these regulations were not breached. A defendant's prima facie burden on a motion for summary judgment cannot be met by pointing to gaps in the plaintiff's case ...". ***Vaughn v. Veolia Transp., Inc.*, 2016 N.Y. Slip Op. 02985, 2nd Dept 4-20-16**

PERSONAL INJURY, MUNICIPAL LAW, MEDICAL MALPRACTICE.

LATE NOTICE OF CLAIM PROPERLY ALLOWED DESPITE ABSENCE OF EXCUSE.

The Second Department determined a late notice of claim was properly allowed despite the absence of an excuse for the delay in serving the notice. The claim alleged negligence during an emergency cesarean birth at defendant facility. Because the medical records memorialized the event, the delay caused no prejudice to the defendant: "The petitioner established that the appellant had actual knowledge of the essential facts constituting the claim by virtue of its possession of the infant's medical records, which detail her delivery and post-natal care, and established that the delay in serving the notice of claim would not substantially prejudice the appellant in maintaining its defense on the merits. Under those circumstances, the fact that the petitioner could not show a reasonable excuse for the delay does not bar the granting of leave to serve a late notice of claim upon the appellant ...". ***Matter of Benjamin v. Nassau Health Care Corp.*, 2016 N.Y. Slip Op. 02989, 2nd Dept 4-20-16**

THIRD DEPARTMENT

REAL PROPERTY.

DEFENDANT DEMONSTRATED WATER WAS NOT DIVERTED ONTO PLAINTIFF'S PROPERTY IN BAD FAITH.

The Third Department, reversing Supreme Court, determined defendant land-owner was entitled to summary judgment dismissing the complaint alleging the improper diversion of water onto plaintiff's property: " 'Landowners making improvements to their land are not liable for damage caused by any resulting flow of surface water onto abutting property as long as the improvements are made in a good faith effort to enhance the usefulness of the property and no artificial means, such as pipes and drains, are used to divert the water thereon' ... . 'Thus, a plaintiff seeking to recover must establish that the improvements on the defendant's land caused the surface water to be diverted, that damages resulted and either that artificial means were used to effect the diversion or that the improvements were not made in a good faith effort to enhance the usefulness of the defendant's property'... . Defendant averred that the complained-of work involved the removal of 17 to 25 cubic yards of soil around the entrance to the culvert and that it did not artificially channel water onto plaintiffs' property. He also stated that he performed the work in a good faith effort to create a detention area that would remediate drainage issues on his property in the event that the flow through the culvert was slow or blocked. Defendant further submitted the affidavit of a neighbor of the parties, a civil engineer with experience in stormwater management, who opined that the work did improve drainage and had no effect on the amount of water flowing onto plaintiffs' property. Defendant accordingly met his prima facie burden of demonstrating his entitlement to summary judgment, shifting the burden to plaintiffs to demonstrate that the changes were undertaken in bad faith or diverted additional water onto their property by artificial means ...". ***Silverman v. Doell*, 2016 N.Y. Slip Op. 03054, 3rd Dept 4-21-16**

UNEMPLOYMENT INSURANCE.

PARALEGAL IN SMALL LAW OFFICE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined claimant, a paralegal in a small law office, was an employee entitled to unemployment insurance benefits: "[C]laimant's work was assigned by the law office, he could not reassign his work to anyone, he was paid hourly and he was required to submit time sheets reflecting both client billable hours and administrative hours. Furthermore, claimant's work was reviewed by an attorney, any corrections were to be made by claimant, the law office was

ultimately responsible for the work product, the law office supplied claimant with all of the equipment and material needed to perform the work and any expenses were reimbursed by the law office. In view of the foregoing, substantial evidence supports the Board's finding that the law office exercised sufficient control over claimant's work to establish an employer-employee relationship ...". ***Matter of Kristensen (Law Offs. of David C. Birdoff — Commissioner of Labor)*, 2016 N.Y. Slip Op. 03035, 3rd Dept 4-21-16**

UNEMPLOYMENT INSURANCE.

RADIATION THERAPIST WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS, DESPITE INDEPENDENT-CONTRACTOR DESIGNATION IN THE AGREEMENT.

The Third Department determined a licensed radiation therapist (RT) was an employee of La Cruz Radiation Consultants and was therefore entitled to unemployment insurance benefits, despite the use of the term "independent contractor" in the relevant agreement: "La Cruz screened the RTs' credentials and assigned them to its clients to provide radiation therapy services, directing them where and when to report. La Cruz paid the RTs a set rate of $50 per hour, did not take payroll deductions from their salary and issued 1099 tax forms; La Cruz required that the RTs submit to it biweekly time sheets signed by the client's supervisor, and La Cruz, in turn, billed the clients an increased price for the RTs' services and collected all payments from the client. Once assigned, the client determined the RTs' schedule to meet their staffing needs and whether to continue to use their services or seek a different referral from La Cruz, and the client's chief radiology therapist or physician oversaw their work. Under the agreement that designated the RTs as independent contractors, claimant was required to call La Cruz and the client if she could not be at work at the scheduled time, questions regarding payment for services were directed to La Cruz and the RTs were prohibited from working directly for the assigned clients or La Cruz competitors. La Cruz would find replacements for the RTs if they could not work the schedule set by the client for any reason. Claimant testified that, on the day that the client informed her that her services no longer were needed, she was under consideration to be hired as an employee of the client and, because the client had not given advance notice of her discharge, La Cruz reimbursed her for expenses for her travel to the client. Notwithstanding proof in the record that might support a contrary conclusion, we find that the foregoing constitutes substantial evidence to support the Board's decisions that La Cruz, while not directly supervising claimant's daily RT activities for the client, retained sufficient overall control over the work performed by claimant and those similarly situated to establish an employer-employee relationship ...". ***Matter of Ryan (La Cruz Radiation Consultants, Inc. — Commissioner of Labor)*, 2016 N.Y. Slip Op. 03038, 3rd Dept 4-21-16**

WORKERS' COMPENSATION.

HEART ATTACK DEEMED WORK-RELATED.

The Third Department determined substantial evidence supported the conclusion decedent-worker's heart attack was employment-related. Decedent suffered the heart attack while walking to a storage structure in freezing temperatures: "[T]he testimony and evidence in the record demonstrates that shortly before decedent collapsed, he was instructed to add insulation in an attempt to fix the frozen valve and, to do so, traveled outside at night across snow-covered ground in freezing temperatures to locate and retrieve additional insulation from a storage structure located at least 500 feet away. In addition, Thomas Martin, the lead process operator, explained in his testimony that if decedent and his colleague were unable to quickly fix the frozen valve that evening, the glycol treatment facility at the airport would have 'shut[] down.' Based upon the foregoing, Raymond Basri, a doctor specializing in internal medicine with 25 years of experience in diagnostic cardiology who reviewed decedent's medical records, opined that decedent's work activities immediately prior to his collapse, in combination with the environmental conditions at that time and the physical and emotional stress associated with having to assist with the timely repair of the frozen valve, were significant contributing factors to decedent's acute myocardial infarction and resulting death." ***Matter of Kilcullen v. AfFCO/Avports Mgt. LLC*, 2016 N.Y. Slip Op. 03033, 3rd Dept 4-21-16**

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