CasePrepPlus

April 22, 2022

An advance sheet service summarizing recent and significant New York appellate cases

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FIRST DEPARTMENT

FAMILY LAW, EVIDENCE.

MOTHER'S MARIJUANA USE DURING PREGNANCY AND THE FACT THAT MOTHER AND CHILD TESTED POSITIVE FOR MARIJUANA AT THE TIME OF THE CHILD'S BIRTH WERE NOT SUFFICIENT TO DEMONSTRATE NEGLECT; NEW YORK HAS LEGALIZED MARIJUANA USE.

The First Department, reversing Family Court, determined mother's marijuana use during pregnancy, and the fact that mother and the child tested positive for marijuana at the time of birth, were insufficient to demonstrate neglect: "[T]he evidence that the mother smoked marijuana while pregnant with her youngest daughter, and that the mother and child both tested positive for marijuana at the time of the birth, is insufficient, in and of itself, to sustain a finding that the child was physically, mentally or emotionally impaired, or was in imminent danger of being impaired ... . Here, as acknowledged by the agency, there was no evidence that the mother's marijuana use impacted her judgment or behavior, or that the child was impaired or placed in imminent risk of impairment by the mother's drug use ... . Furthermore, the finding of neglect based solely on use of marijuana, without a finding of actual or imminent impairment of the child's physical or emotional condition, is inconsistent with this State's public policy legalizing marijuana, as reflected in the recent amendment to the Family Court Act (Family Court Act § 1046[a][iii] ...)." ***Matter of Saaphire A.W. (Lakesha B.)*, 2022 N.Y. Slip Op. 02382, First Dept 4-12-22**

SECOND DEPARTMENT

ARBITRATION, INSURANCE LAW.

AN ARBITRATOR'S DETERMINATION WILL NOT BE REVERSED BECAUSE OF AN ERROR OF LAW, BUT WILL BE REVERSED WHERE, AS HERE, IT IS IRRATIONAL.

The Second Department, reversing the arbitrator, noted that an arbitrator's determination will not be reversed because of an error of law, but will be reversed if the determination is irrational. Here the arbitrator's determinations with respect to no-fault insurance coverage were deemed irrational: " '[A] master arbitrator's determination of the law need not be correct: mere errors of law are insufficient to set aside the award of a master arbitrator' ... . 'If the master arbitrator vacates the arbitrator's award based upon an alleged error of 'a rule of substantive law,' the determination of the master arbitrator must be upheld unless it is irrational' ... . The master arbitrator's determination that a denial of liability based upon a failure to appear at an examination under oath constitutes a defense of lack of coverage, which is not subject to preclusion, is irrational ... . Further, the master arbitrator's application of 11 NYCRR 65-3.5(p) is irrational, as it effectively allows an insurer to avoid the statutory timeliness requirements set forth in 11 NYCRR 65-3.8(a). Where, as here, the initial request for an examination under oath is sent more than 30 days after receipt of the claim, the request is a nullity ... , and the insurer's failure to timely notice the examination under oath is not excused by 11 NYCRR 65-3.5(p) ...". ***Matter of Advanced Orthopaedics, PLLC v. Country-Wide Ins. Co.*, 2022 N.Y. Slip Op. 02406, Second Dept 4-13-22**

CIVIL PROCEDURE, JUDGES.

ABSENT A SHOWING OF GOOD CAUSE FOR THE DELAY, A MOTION TO SET ASIDE A VERDICT MADE MORE THAN 15 DAYS AFTER THE VERDICT WAS RENDERED SHOULD NOT BE GRANTED.

The Second Department, reversing Supreme Court, determined the defendants' motion to set aside the verdict as against the weight of the evidence should not have been granted because it was made more than 15 days after the jury verdict: "The Supreme Court should have denied the defendants' motion pursuant to CPLR 4404(a) as untimely, as it was made more than 15 days after the jury verdict was rendered, without good cause shown for the delay ...". ***Galarza v. Heaney*, 2022 N.Y. Slip Op. 02395, Second Dept 4-13-22**

CIVIL PROCEDURE, JUDGES.

DEFENDANTS WERE UNABLE TO COMPLETE DISCOVERY BECAUSE OF PLAINTIFF'S ILLNESS AND THE COVID-19 SHUTDOWN; DEFENDANTS' MOTION TO EXTEND THE TIME FOR FILING A SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion to extend the time for making a summary judgment, for reasons related to COVID-19, should have been granted: "[T]he defendants submitted evidence showing that after their prior motion was decided, the plaintiff did not attend scheduled independent medical examinations because of illness and that discovery was further delayed by the COVID-19 shutdown. As a result, the defendants established good cause for their failure to timely move for summary judgment ... . Under these COVID-19-related circumstances, the Supreme Court improvidently denied those branches of the defendants' motion which were for leave to renew those branches of their prior motion which were to vacate the note of issue and certificate of readiness and extend the time to move for summary judgment. Upon renewal, the court should have granted those branches of the defendants' motion which were to vacate the note of issue and certificate of readiness and to extend the time to move for summary judgment. We therefore remit the matter to the Supreme Court, Kings County, for the selection of a new date by which summary judgment motions shall be filed....". ***Newfeld v. Midwood Ambulance & Oxygen Serv., Inc.*, 2022 N.Y. Slip Op. 02422, Second Dept 4-13-22**

CIVIL PROCEDURE, ATTORNEYS, JUDGES.

HERE PLAINTIFF'S ATTORNEY OFFERED A DETAILED, CREDIBLE EXPLANATION OF THE LAW OFFICE FAILURE WHICH RESULTED IN MISSING THE DEADLINE FOR PROVIDING DISCOVERY, AS WELL AS THE DEMONSTRATION OF POTENTIALLY MERITORIOUS CAUSES OF ACTION; DEFENDANTS' MOTIONS TO ENFORCE THE PRECLUSION ORDER SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's attorney offered a reasonable "law office failure" excuse for not complying with a discovery deadline (conditional order of preclusion): " 'The court has discretion to accept law office failure as a reasonable excuse (see CPLR 2005) where that claim is supported by a detailed and credible explanation of the default at issue' ... . 'Conversely, where a claim of law office failure is conclusory and unsubstantiated or lacking in credibility, it should be rejected' ... . Here, in opposition to the defendants' separate motions, inter alia, in effect, to enforce the conditional order, the plaintiff's counsel provided a detailed and credible explanation of the law office error that resulted in the failure to comply with the conditional order ... . The plaintiff also demonstrated potentially meritorious causes of action ...". ***Fortino v. Wheels, Inc.*, 2022 N.Y. Slip Op. 02393, Second Dept 4-13-22**

FAMILY LAW, APPEALS.

CHANGED CIRCUMSTANCES BROUGHT TO THE APPELLATE COURT'S ATTENTION BY THE ATTORNEYS FOR THE CHILDREN RENDERED THE RECORD INSUFFICIENT FOR REVIEW OF THE CUSTODY RULING; MATTER REMITTED.

The Second Department determined changed circumstances brought to the Second Department's attention by the attorneys for children rendered the appellate record insufficient for review of Family Court's custody ruling. The matter was remitted: "[T]he Family Court determined that it was in the best interests of the children for the mother to have sole residential custody. However, the respective attorneys for the children, in their briefs submitted to this Court, have brought to this Court's attention certain alleged new developments since the order under review was issued in June 2019. As the Court of Appeals has recognized, changed circumstances may have particular significance in child custody matters and may render the record on appeal insufficient to review whether a child custody determination is still in the best interests of the children ...". ***Matter of Fitzsimmons v. Fitzsimmons*, 2022 N.Y. Slip Op. 02411, Second Dept 4-13-22**

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE MADE FINDINGS TO ENABLE THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) SUCH THAT THE CHILD WOULD NOT BE RETURNED TO GUATEMALA.

The Second Department, reversing Family Court, determined Family Court should have made findings to enable the child to petition for special immigrant juvenile status (SIJS) such that the child would not be returned to Guatemala: "[A] special immigrant juvenile is a resident alien who ... is under 21 years of age, unmarried, and dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court. ... [F]or a child to qualify for SIJS, a court must find that reunification of the child with one or both parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under state law ... , and that it would not be in the child's best interests to be returned to his or her country of nationality or country of last habitual residence ... . The Family Court should have granted that branch of the child's motion which was for a specific finding that reunification with his father is not viable due to parental neglect. Based upon our independent factual review, the record demonstrates that the child's father physically and emotionally mistreated the child, and prevented him from attending school for more than one year and on other occasions without a reasonable justification, and that the child's mother failed to protect him from such mistreatment. Thus, the record supports the requisite

finding that reunification with the child's father is not viable due to parental neglect ...". ***Matter of Jose F. M. P. (Francisco D. M. G.)*, 2022 N.Y. Slip Op. 02414, Second Dept 4-13-22**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

THE BANK IN THIS FORECLOSURE ACTION SENT THE RPAPL 1304 NOTICE TO BOTH BORROWERS IN THE SAME ENVELOPE, A VIOLATION OF THE "SEPARATE ENVELOPE" RULE.

The Second Department, reversing Supreme Court, determined the bank's motion for summary judgment in this foreclosure action should not have been granted. The bank did not comply with the notice requirements of RPAPL 1304, specifically the "separate envelope for each borrower" rule: "...[T]he plaintiff failed to establish its strict compliance with RPAPL 1304. Although the plaintiff demonstrated that it mailed the RPAPL 1304 notice to the defendants by both certified and first-class mail ... , and that the contents of the notice complied with RPAPL 1304(1), the plaintiff failed to establish that it sent a 90-day notice individually addressed to each defendant in separate envelopes, as required by the statute ... . Instead, as the plaintiff concedes, the notice was mailed in a single envelope jointly to both defendants." ***Deutsche Bank Natl. Trust Co. v. Loayza*, 2022 N.Y. Slip Op. 02392, Second Dept 4-13-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE EIGHT-INCH-WIDE BEAM CLAIMANT WAS MOVING ALONG WHEN HE FELL WAS THE FUNCTIONAL EQUIVALENT OF A SCAFFOLD, BRINGING THE ACTION WITHIN THE SCOPE OF LABOR LAW § 240(1); THE SAFETY LINE PROVIDED TO CLAIMANT DID NOT PROTECT HIM FROM THE FALL; CLAIMANT WAS ENTITLED TO SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined claimant's motion for summary judgment on the Labor Law § 240(1) cause of action should have been granted. Claimant, Lazo, was moving along an eight-inch-wide, 17-foot long, beam suspended above a platform when he fell. He was attached to two safety lines which he had to detach and reattach to anchorage points. He fell while in the process of reattaching one of the lines. The second line did not prevent the fall: "Lazo would use a hook at the end of each safety line to secure it to various anchorage points on another horizontal beam located above him. To move across the beam, workers were instructed to unhook the first safety line from the first anchorage point, connect it to a second anchorage point, and then repeat this process with the second safety line. This effectively allowed workers to move along the beam while always having at least one safety line attached to an anchorage point. * * * Lazo's deposition testimony established, prima facie, that his accident was within the purview of Labor Law § 240(1), since the beam from which he fell was being used as the functional equivalent of a scaffold ... . Lazo's deposition testimony also established, prima facie, that his second safety line was attached to an anchorage point but was nevertheless insufficient to prevent him from falling ...". ***Lazo v. New York State Thruway Auth.*, 2022 N.Y. Slip Op. 02400, Second Dept 4-13-22**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

BOARDING UP A VACANT HOUSE WAS WITHIN THE SCOPE OF LABOR LAW §§ 240(1) AND 241(6).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's work, boarding up a vacant house to prevent access, was within the scope of work covered by Labor Law § 240(1) and Labor Law § 241(6). Plaintiff allegedly fell from a ladder when attempting to board up a window: "[P]laintiff's work of boarding up the house, thus making it uninhabitable, was "altering" the premises within the meaning of Labor Law § 240(1), as it constituted a significant physical change to the configuration or composition of the building ... . Further, as the work the plaintiff was engaged in constituted 'alteration,' it was within the scope of "construction work" for purposes of Labor Law § 241(6) ...". ***Nucci v. County of Suffolk*, 2022 N.Y. Slip Op. 02423, Second Dept 4-13-22**

PERSONAL INJURY, MUNICIPAL LAW, EMPLOYMENT LAW, APPEALS.

PLAINTIFF SUED BOTH THE COUNTY AND THE SHERIFF FOR ALLEGED EXPOSURE TO CONTAMINATED WATER IN THE SHOWER AT THE JAIL; THE ACTION AGAINST THE COUNTY WAS NOT BROUGHT UNDER A VICARIOUS LIABILITY THEORY (THE COUNTY IS NOT VICARIOUSLY LIABLE FOR THE ACTS OR OMISSIONS OF THE SHERIFF); RATHER THE CAUSE OF ACTION ALLEGED THE COUNTY WAS NEGLIGENT IN ITS OWN RIGHT.

The Second Department, reversing Supreme Court, determined plaintiff, an inmate at the Orange County Correctional Facility (OCCF), stated a cause of action against the county, as well as the county sheriff. Plaintiff alleged he was exposed to contaminated shower water at the jail. The cause of action against the county was not based on a vicarious liability theory (the county is not vicariously liable for the acts or omissions of the sheriff's office). Rather plaintiff stated a cause of action alleging the county was negligent in failing to ensure the safety of the water at the jail. That cause of action is distinct from the sheriff's duty to keep inmates safe. The issue was properly raised for the first time on appeal: "[T]he complaint did not solely seek to hold the County vicariously liable for the actions and omissions of the sheriff and his deputies. The complaint alleged that the County had a duty to maintain the OCCF, including its water supply, in a safe and proper manner, and that the County's breach of that duty caused the plaintiff to sustain personal injuries. The County's duty to provide and main-

tain the jail building is distinguishable from the sheriff's duty to receive and safely keep inmates in the jail over which the sheriff has custody ... . Contrary to the defendants' contention, the plaintiff's argument that the County is liable for its own negligence, as opposed to being vicariously liable for the negligence of the sheriff or his deputies, is not improperly raised for the first time on appeal." ***Aviles v. County of Orange*, 2022 N.Y. Slip Op. 02384, Second Dept 4-13-22**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

ALTHOUGH INFORMATION PROVIDED FOUR DAYS BEFORE TRIAL PURSUANT TO A DEFENSE SUBPOENA INCLUDED BRADY MATERIAL, THE MAJORITY CONCLUDED THE DEFENSE HAD A MEANINGFUL OPPORTUNITY TO USE THE INFORMATION TO CROSS-EXAMINE THE PEOPLE'S WITNESSES; THE DISSENTER DISAGREED.

The Third Department, over a dissent, determined that the People's failure to turn over Brady material in this sexual-offense prosecution, which the defense received four days before trial pursuant to a subpoena, did not require reversal: " '[W]hile the People unquestionably have a duty to disclose exculpatory material in their control,' a defendant's constitutional right to a fair trial is not violated when, as here, he [or she] is given a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during his [or her] case' ... .. Defendant, by way of a subpoena, received the records from the victim's evaluation four days before trial. Defendant asserts that these records contain two pieces of allegedly exculpatory information. The first is that a physical examination of the victim, performed three months after the incident, was 'normal' and did not reveal any corporeal injury. The second is that the victim, during an interview related to the physical examination, disclosed allegations of prior sexual abuse by two different individuals, which defendant asserts were fabricated. **From the dissent:** ... [I]n my view, the withheld evidence was clearly material and defendant was prejudiced. As a result of the Brady violation, defendant was denied an opportunity to pursue other strategies with defense counsel. He was denied, among other things, the opportunity to investigate and interview other potential defense witnesses well in advance of trial, or to develop a more detailed argument on the issue of whether he could cross-examine the victim and call certain witnesses without running afoul of the Rape Shield Law (see CPL 60.42). With more time, he also could have called the examining physician or retained his own medical expert to review the records. Learning of the existence of potential witnesses such as the victim's brother and the mother's landlord a mere four days before trial provided defendant no opportunity to locate and interview these witnesses and possibly incorporate their testimony into his defense. Moreover, as County Court noted, defendant, under these circumstances, was under no obligation to seek an adjournment of the trial." ***People v. Sherwood*, 2022 N.Y. Slip Op. 02455, Third Dept 4-14-22**

DISCIPLINARY HEARINGS (INMATES).

THE EVIDENCE DID NOT SUPPORT THE DETERMINATION PETITIONER-INMATE WAS GUILTY OF "CREATING A DISTURBANCE."

The Third Department, annulling the disciplinary determination, held the evidence did not demonstrate petitioner-inmate was guilty of "creating a disturbance:" "Pursuant to the relevant regulations, an incarcerated individual 'shall not engage in conduct which disturbs the order of any part of the facility' (7 NYCRR 270.2 [B] [5] [iv]). Such disruptive conduct includes, as relevant here, 'loud talking in a mess hall, program area or corridor' (7 NYCRR 270.0 [B] [5] [iv]). The misbehavior report, which was the sole evidence relied upon by the Hearing Officer, provided, in relevant part, that petitioner was observed 'arguing' with another incarcerated individual 'in the dorm hallway . . ., which drew the attention of the [incarcerated individuals] nearby.' The misbehavior report does not reflect that petitioner was scream ... or otherwise speaking in a loud or boisterous manner ... , nor does it establish that petitioner's behavior triggered an affirmative response on the part of the incarcerated individuals observing the alleged argument ... . Similarly, petitioner was found not guilty of fighting, and there were no other established disciplinary infractions that would give rise to a reasonable inference that his conduct was disruptive ... . In short, as the misbehavior report fails to identify the manner in which petitioner's conduct disturbed the order of the facility, we cannot say that respondent's determination is supported by substantial evidence ...". ***Matter of Hogan v. Thompson*, 2022 N.Y. Slip Op. 02470, Third Dept 4-14-22**

UNEMPLOYMENT INSURANCE.

CLAIMANT DELIVERY DRIVER WAS NOT AN EMPLOYEE OF NEL, A BUSINESS LOGISTICS COMPANY WHICH ASSIGNED CLAIMANT TO DELIVER AUTO PARTS FOR ITS CLIENT, ANY-PART AUTO STORES.

The Third Department, reversing the Unemployment Insurance Appeal Board, determined claimant was not an employee of NEL, a business logistics company, and NEL was, therefore, not liable for unemployment insurance contributions on remuneration paid to claimant and others similarly situated. Claimant was a delivery driver who was assigned by NEL to deliver auto parts for Any-Part Auto Stores: "The record reflects that, after NEL initially referred claimant to Any-Part,

NEL did not retain any supervisory authority over him. NEL did not provide any training, set delivery goals for claimant, conduct performance reviews or evaluations, require any proof of delivery or require any contact from claimant on a day-to-day basis. Any-Part assigned the deliveries to claimant and handled any complaints. Claimant used his own vehicle, NEL did not reimburse him for any expenses and claimant was not restricted from working for others. Under the parties' written agreement, claimant could refuse an assignment, but, once he accepted an assignment, he was required to complete it. Per the agreement, claimant was permitted to hire other individuals to perform the work if claimant could not, and claimant was responsible for ensuring that those individuals comply with state and federal regulations, including licensing and insurance requirements. ...". ***Matter of Pasini (Northeast Logistics, Inc.--Commissioner of Labor)*, 2022 N.Y. Slip Op. 02464, Third Dept 4-14-22**

UNEMPLOYMENT INSURANCE, EVIDENCE.

CLAIMANT WAS NOT ALLOWED TO SUBMIT AS EVIDENCE A FLYER FROM THE DEPARTMENT OF LABOR WHICH INDICATED IT WAS NECESSARY TO APPLY FOR STATE UNEMPLOYMENT BENEFITS TO RECEIVE FEDERAL PANDEMIC UNEMPLOYMENT BENEFITS; THE EVIDENCE WAS RELEVANT TO WHETHER CLAIMANT WILLFULLY MISREPRESENTED HER EMPLOYMENT STATUS AND SHOULD HAVE BEEN CONSIDERED; MATTER REMITTED.

The Third Department, reversing the Unemployment Insurance Appeal Board, determined claimant should have been allowed to present evidence that her misrepresentation that she was not employed was not willful. Based on a flyer put out by the Department of Labor, claimant allegedly believed that she needed to apply for state unemployment benefits to be eligible for federal pandemic unemployment insurance: "At the hearing, claimant requested to admit over 50 pages of documentation into the record. Included in these documents is a flyer, which claimant contends was on the Department of Labor's website and led her to believe that, despite not being eligible for state unemployment benefits, she may have been entitled to pandemic unemployment assistance under federal legislation that was put in place due to the coronavirus pandemic. Claimant argues that she understood this flyer to mean that she was required to apply for state unemployment benefits to obtain relief under the federal legislation. A fair interpretation of the flyer supports that contention. Also included in these documents is evidence of claimant's many attempts to contact the Department of Labor to determine whether she was, in fact, entitled to the benefits that she was receiving. As these documents bear directly on the issue of determining whether claimant's misrepresentation was willful, as well as on claimant's credibility, not allowing them into evidence denied her 'a sufficient opportunity to present proof in support of her claim' and did, in fact, deprive her of a fair hearing ...". ***Matter of Nottage (Commissioner of Labor)*, 2022 N.Y. Slip Op. 02476, Third Dept 4-14-22**

WORKERS' COMPENSATION.

BECAUSE CLAIMANT WAS NOT ENTITLED TO A NONSCHEDULE AWARD DUE TO RETIREMENT, HE WAS ENTITLED TO A SCHEDULE LOSS OF USE (SLU) AWARD.

The Third Department, reversing the Workers' Compensation Board, determined claimant was entitled to a schedule loss of use (SLU) award because he was not eligible for a nonschedule award due to retirement: "A nonschedule award 'is based [up]on a factual determination of the effect that the [permanent partial] disability has on the claimant's future wage-earning capacity' and is mathematically derived from a claimant's average weekly wages and wage-earning capacity ... . On the other hand, an SLU award is designed to compensate for a claimant's 'loss of earning power' as a result of anatomical or functional losses or impairments ... and, as such, 'is not allocable to any particular period of disability' ... and is 'independent of the time an employee actually loses from work' ... . That said, '[a] claimant who sustains both schedule and nonschedule injuries in the same accident may receive only one initial award,' because SLU and nonschedule awards 'are both intended to compensate a claimant for loss of wage-earning capacity sustained in a work-related accident[,] and concurrent payment of an award for a schedule loss and an award for a nonschedule permanent partial disability for injuries arising out of the same work-related accident would amount to duplicative compensation' ... . 'However, in the unique circumstance where no initial award is made based on a nonschedule permanent partial disability classification, a claimant is entitled to an SLU award' for the permanent impairments sustained in the same work-related accident ... . [T]here is no dispute that claimant is not entitled to a nonschedule award based upon his nonschedule classification because he voluntarily retired in April 2020 and was therefore not attached to the labor market at the time of classification ... . Thus, as 'no initial award [wa]s made based [up]on [claimant's] nonschedule permanent partial disability classification' ... , he 'is entitled to an SLU award for the permanent partial impairments to [his] statutorily-enumerated body members' ... . Finally, and contrary to the position taken by the Board, the fact that claimant voluntarily retired, and was therefore not attached to the labor market, does not preclude him from receiving an SLU award, because 'it is axiomatic that a claimant's lack of attachment to the labor market, voluntary or otherwise, is irrelevant to a determination as to entitlement to an SLU award' ...". ***Matter of Gambardella v. New York City Tr. Auth.*, 2022 N.Y. Slip Op. 02475, Third Dept 4-14-22**

WORKERS' COMPENSATION.

ALTHOUGH CLAIMANT WAS STRUCK BY A VEHICLE WHILE HE WAS RIDING HIS BICYCLE TO WORK (USUALLY NOT COMPENSABLE), HIS INJURY WAS FOUND COMPENSABLE BY THE WORKERS' COMPENSATION LAW JUDGE (WCLJ) UNDER THE "SPECIAL ERRAND" EXCEPTION; BECAUSE THE WORKERS' COMPENSATION BOARD DID NOT ADDRESS THAT ISSUE, THE MATTER WAS REMITTED.

The Third Department, remitting the matter to the Workers' Compensation Board, determined the Board did not address the basis of the Workers' Compensation Law Judge's (WCLJ's) ruling that claimant was entitled to benefits. Claimant was struck by a vehicle while riding his bicycle to work. Although travel to work is usually not covered by Workers' Compensation, the WCLJ found that "claimant was engaged in a special errand given that he was traveling for the purpose of an overtime assignment and at a location different from his regular work locations." That issue was not addressed by the Board: "In finding that the claim was compensable, the WCLJ found that claimant was engaged in a special errand given that he was traveling for the purpose of an overtime assignment and at a location different from his regular work locations. The Board, however, did not address the exception relied upon by the WCLJ but, instead, found that the outside employee exception did not apply in concluding that the accident did not arise out of or in the course of claimant's employment. Whether an exception to the general rule applies turns on the Board's fact-intensive analysis of the particular circumstances of a given case ... , and '[t]he courts are bound by the . . . Board's findings of fact which, including the ultimate fact of arising out of and in the course [of employment], must stand unless erroneous in law and regardless of whether conflicting evidence is available' ... . The fact that claimant was not an outside employee, as found by the Board, is not dispositive as to whether the special errand exception applies, which was the basis of the WCLJ's finding that claimant was entitled to workers' compensation benefits. As the Board has made no findings of fact with regard to whether the special errand exception applies, the matter must be remitted to the Board for further proceedings in regard to this particular issue....". ***Matter of Waters v. New York City Tr. Auth.*, 2022 N.Y. Slip Op. 02474, Third Dept 4-14-22**

WORKER'S COMPENSATION.

THERE WAS NO INDICATION ON THE FORM AND NO REGULATION REQUIRING CLAIMANT TO SUBMIT A SEPARATE RB-89 FORM FOR EACH CLAIM; THE BOARD THEREFORE ABUSED ITS DISCRETION WHEN IT REFUSED TO REVIEW THE WORKERS' COMPENSATION LAW JUDGE'S (WCLJ'S) DECISION ON THAT GROUND.

The Third Department, reversing the Workers' Compensation Board and remitting the matter, determined it was an abuse of discretion to deny claimant's application on the ground that a separate copy of the RB-89 form was not submitted for each claim: "We note ... that the requirement that a party submit a copy of the RB-89 form when referencing multiple claims, or that failing to provide a copy for each claim could result in review being denied on one of the claims, is not included on the form, in the instructions to the form or in the Board's regulations. Although the Board may certainly adopt the formatting requirement that applicants provide a copy of their RB-89 form for each claim referenced therein, we find, under the circumstances presented here, that the Board's denial of claimant's application for review of the WCLJ's decision on the 2017 claim for failing to provide the Board with an additional copy of their RB-89 form was an abuse of the Board's discretion ...". ***Matter of Olszewski v. PAL Envtl. Safety Corp.*, 2022 N.Y. Slip Op. 02469, Third Dept 4-14-22**

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