CORRECTION OFFICER NOT ENTITLED TO TWO-YEAR LEAVE OF ABSENCE; THERE WAS SUPPORT IN THE RECORD FOR THE FINDING PETITIONER'S PHYSICAL CONFRONTATION WITH AN INMATE WAS NOT AN ASSAULT WITHIN THE MEANING OF THE CIVIL SERVICE LAW (SECOND DEPT).

The Third Department, over a two-justice dissent, determined petitioner correction officer was not entitled to a two-year workers' compensation leave of absence because there was support in the record for the finding petitioner was not assaulted. Petitioner was injured trying to prevent an inmate from swallowing contraband:

> ... [R]espondent advised petitioner that, pursuant to Civil Service Law § 71, his employment would be terminated ... because his absence from employment ... exceeded one cumulative year. Petitioner asserted through counsel that he was entitled to a two-year leave of absence under Civil Service Law § 71 because his injuries resulted from an assault sustained during the performance of his duties. * * *
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> Pursuant to Civil Service Law § 71, an employee who "has been separated from [his or her] service by reason of a disability resulting from occupational injury" is "entitled to a leave of absence for at least one year." If, however, "an employee has been separated from the service by reason of a disability resulting from an assault sustained in the course of his or her employment, he or she shall be entitled to a leave of absence for at least two years" ... . * * *
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> Although the record demonstrates that the parolee was combative and refused orders to stop resisting and to surrender the contraband, there is no indication that the parolee directed any intentional physical act of violence toward petitioner before, during or after petitioner's application of the body hold. Given the absence of such record evidence, respondent's determination that petitioner's injuries were not the result of an assault sustained during the course of employment had a sound basis in reason and, thus, was rational ... . Matter of Froehlich v New York State Dept. of Corr. & Community Supervision, 2020 NY Slip Op 00652, Third Dept 1-30-20

THIRD-PARTY PLAINTIFFS WERE NOT REQUIRED TO AND DID NOT PARTICIPATE IN THE WORKERS' COMPENSATION PROCEEDINGS; THEREFORE THE WORKERS' COMPENSATION BOARD'S FINDING THAT THIRD-PARTY DEFENDANT WAS PLAINTIFF'S EMPLOYER WAS NOT BINDING ON THE THIRD-PARTY PLAINTIFFS (FIRST DEPT).

The First Department, reversing Supreme Court, determined the Workers' Compensation Board's finding that third-party defendant I & G Group was plaintiff's employer was not binding on the third-party plaintiffs because the third-party plaintiffs did not participate in the Workers' Compensation proceedings. Therefore the matter has to be litigated and I & G Group's motion for summary judgment should should not have been granted:

> The Court of Appeals has ... recognized that a decision by the worker's compensation board may not be binding on parties who do not participate in its hearings. * * * "[U]nless the Legislature expands the definition of parties in interest, the unfortunate result will be that a duplicative proceeding must be held and the issue of compensability adjudicated anew because defendants never had a full and fair opportunity' to litigate the question" ... .
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> Here, because it is undisputed that appellants [third-party plaintiffs] were not given notice of the worker's compensation hearing, and were not afforded the opportunity to present evidence or cross-examine witnesses, their third-party claims, in which they challenge the identity of plaintiff's employer, should not have been dismissed as precluded by the board's prior determination of that issue ... . Martinez v 250 W. 43 Owner, LLC, 2020 NY Slip Op 00058, First Dept 1-7-20

CLAIMANT SHOULD NOT HAVE BEEN REQUIRED TO PROVIDE AN UNLIMITED MEDICAL RELEASE AS OPPOSED TO A LIMITED RELEASE CONCERNING ONLY THOSE AREAS OF HIS BODY AT ISSUE IN THE CLAIM FOR BENEFITS (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined claimant was not required to provide an unlimited medical release. Claimant should have been required to provide a release limited to those areas of his body which were at issue in the claim for benefits:

The Board's regulations provide that a limited release is a "limited authorization to obtain relevant medical records regarding the prior medical history of the body part or illness at issue" (12 NYCRR 300.37 [b] [1] [iii]). It is applicable "if the claimant files a completed employee claim form and indicates on the form that he or she had a prior injury to the same body part or similar illness to the one(s) listed on the form" (12 NYCRR 300.37 [b] [1] [iii]). There is no question that, prior to filing his claim, claimant received medical treatment from various physicians for the same sites of injury dating back to at least 2011. It is evident from the record and the briefs that both parties agree that the employer is entitled to claimant's past medical records for the claimed sites. That said, claimant maintains that the Board erred in requiring him to sign an open-ended HIPAA release, without limiting that release to treatment records pertaining to the claimed sites. Although the employer would certainly be entitled to the medical records of all providers, once identified, who treated the claimed sites, the fact remains that claimant was only obligated to provide a limited release for those providers. As such, we agree with claimant that the Board erred in directing him to provide an unlimited medical release. Matter of Trusewicz v Delta Envtl., 2019 NY Slip Op 09336, Third Dept 12-26-19

PLAINTIFF POLICE OFFICER'S MOTION FOR SUMMARY JUDGMENT AGAINST THE DRIVER OF THE TRACTOR TRAILER WHICH STRUCK HIM WHEN HE WAS STANDING IN THE ROADWAY SHOULD HAVE BEEN GRANTED, FREEDOM FROM COMPARATIVE FAULT NO LONGER NEED BE SHOWN; OTHER ISSUES ADDRESSED IN THE DECISION INCLUDE THE EMPLOYER'S LIABILITY, THE TRUCK RENTAL COMPANIES' LIABILITY, THE EMERGENCY DOCTRINE, WORKERS' COMPENSATION AND GENERAL MUNICIPAL LAW 205-e (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court determined plaintiff police officer was entitled to summary judgment against the driver of the tractor trailer which struck the officer who was standing in the roadway both under a common law negligence theory and under General Municipal Law 205-e. The court dealt with several other issues including: (1) whether a second police officer was engaged in an emergency operation, giving rise to the reckless disregard standard, when he stopped to assist the plaintiff who had made a traffic stop (the answer is no); (2) whether the second officer was liable based upon the position of his car (the answer is no, the car furnished a condition for the accident but was not the cause); (3) whether the injured officer's recovery was confined to Workers' Compensation (there is a question of fact whether the injury was "grave"); (4) whether the Graves Amendment protected the truck rental companies (the answer is yes); (5) whether vicarious liability applies to the truck driver's employer (there is a question of fact on that issue). With respect to the common law negligence and the General Municipal Law 205-e causes of action, the court wrote:

> … [T]he plaintiffs were not required to demonstrate that the injured plaintiff was free from comparative negligence in order to obtain summary judgment on the issue of Burke's [the truck driver's] liability on the first cause of action [negligence]. * * *
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> When the light changed, Burke began his left turn onto northbound Midland Avenue. Prior to beginning his turn, Burke was aware that there was a police officer conducting a traffic stop on foot and a police car parked on the northbound side of Midland Avenue. Although Burke believed he could make the turn safely, the rear of the trailer hit the injured plaintiff. * * *
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> The plaintiffs also established … Burke's liability as to … a violation of General Municipal Law § 205-e. … [T]hat statute permits a police officer to bring a tort claim for injuries sustained "while in the discharge or performance at any time or place of any duty imposed by . . . superior officer[s]" where such injuries occur "directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments" … . In order to recover under the statute, "a police officer must demonstrate injury resulting from negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties" … .
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> Vehicle and Traffic Law § 1146(a) requires a driver to "exercise due care to avoid colliding with any . . . pedestrian." Here, the unrebutted evidence established a prima facie violation of § 1146(a), as it demonstrated that Burke failed to exercise due care to avoid hitting the injured plaintiff. Cioffi v S.M. Foods, Inc., 2019 NY Slip Op 09251, Second Dept 12-24-19

REGULATION LIMITING BRIEFS TO EIGHT PAGES IS ARBITRARY AND CAPRICIOUS AND THE LONGER BRIEF WAS NOT AN ADEQUATE GROUND FOR REJECTING THE

EMPLOYER’S APPLICATION AND APPEAL (THIRD DEPT).

The Third Department determined the regulation limiting the length of briefs to eight pages was arbitrary and capricious. The employer’s application had been rejected solely because the brief was longer than eight pages:

> The difficulty here is that there is no defined standard as to what explanation the Board would consider adequate. Worse yet, the regulation, by its express terms, does not authorize the Board to dismiss an application for Board review where a brief longer than eight pages is submitted without an adequate explanation. In such an instance, the regulation simply specifies that the brief “will not be considered” (12 NYCRR 300.13 [b] [1] [i]). Although the regulation also provides that an application may be denied “when the applicant . . . does not comply with prescribed formatting. . . requirements” (12 NYCRR 300.13 [b] [4] [i]), the filing of a brief is discretionary, not mandatory. As such, we find that the Board acted arbitrarily in dismissing the employer’s application for Board review. We further conclude that it would not be reasonable in the first instance for the Board to reject an oversized brief outright for to do so would undermine the role of counsel. We find this aspect of the regulation flawed for there is simply no safety valve that would allow an applicant to seek permission to file a lengthier brief without jeopardizing the ability to submit a legal analysis supportive of the application for Board review … . As such, we find that the regulation is unreasonable with respect to the oversized brief exception and must be rejected as arbitrary and capricious. The matter must be remitted to the Board for further proceedings. Matter of Daniels v City of Rochester, 2019 NY Slip Op 08902, Second Dept 12-12-19

ABSENT A FINDING OF PERMANENT PARTIAL DISABILITY, CLAIMANT NEED NOT SHOW ATTACHMENT TO THE LABOR MARKET AND IS ENTITLED TO RELY ON HER CHIROPRACTOR’S OPINION SHE IS TEMPORARILY TOTALLY DISABLED (THIRD DEPT).

The Third Department, reversing the Workers’ Compensation Board, determined claimant was not required to show attachment to the labor market because there had not been a finding of permanent partial disability:

> Claimant sought review by the Workers’ Compensation Board, contending that she was not required to demonstrate attachment to the labor market because, absent a finding that she had sustained a permanent partial disability, she was entitled to rely upon her chiropractor’s opinion that she was temporarily totally disabled. …
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> Claimant’s obligation to demonstrate attachment to the labor market is predicated — in the first instance — upon a finding of a permanent partial disability … . Matter of Bowers v New York City Tr. Auth., 2019 NY Slip Op 08748, Second Dept 12-5-19

DISMISSAL OF A CLAIM BASED UPON THE PRECLUSION OF AN INDEPENDENT MEDICAL EXAMINATION (IME) REPORT DID NOT CONSTITUTE LITIGATION OF THE CLAIM; CLAIMANT WAS ENTITLED TO CONSIDERATION OF THE CLAIM BASED UPON A NEW IME REPORT (THIRD DEPT).

The Third Department, reversing the Workers’ Compensation Board, determined that the dismissal of the claim based upon the preclusion of the 2015 Independent Medical Examination (IME) report was not a litigation on the merits and claimant was not precluded from further consideration of the claim based upon a new 2017 IME report:

> Claimant contends that the Board erred in denying his request for further action without considering … 2017 IME report on the ground that the claim had already been litigated and disallowed. We agree. By disallowing the claim in its prior decision based upon the record as it existed after the preclusion of … 2015 IME report, and declaring that no further direction was planned at the time, the Board did not deny the claim outright … . As such, the Board’s prior decision did not preclude claimant from submitting further medical evidence of causally-related consequential injuries (see Workers’ Compensation Law § 123 …). Accordingly, the Board’s decision that the claim for causally-related consequential injuries was already litigated and that claimant could not submit further medical evidence in support thereof was in error, as was its decision denying reconsideration, and they must be reversed. Matter of Galatro v Slomins, Inc., 2019 NY Slip Op 53955, Third Dept 11-27-19

ALTHOUGH THE ISSUE WAS NOT RAISED BY THE PARTIES, SUPREME COURT SHOULD NOT HAVE DISMISSED PLAINTIFF'S NEGLIGENCE ACTION BEFORE THE WORKERS' COMPENSATION BOARD RULED ON WHETHER PLAINTIFF WAS INJURED WITHIN THE SCOPE OF HIS EMPLOYMENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court and reinstating the negligence action, determined Supreme Court did not have jurisdiction over the matter because the Workers' Compensation Board had not yet ruled whether plaintiff was injured when acting in the scope of his employment. The parties did not raise this issue:

> Although not raised by the parties, we conclude that Supreme Court erred in entertaining defendant's motion. "It is well settled that primary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board [(Board)] . . . [I]t is therefore inappropriate for the courts to express views with respect thereto pending determination by' the Board" ... . Whether plaintiff was injured within the scope of his employment "must in the first instance be determined by the [B]oard" ... , and the court thus should not have entertained defendant's motion at this juncture. Rather, the case should have been referred to the Board for a determination of plaintiffs' eligibility for workers' compensation benefits ... . Warren v E.J. Militello Concrete, Inc., 2019 NY Slip Op 08300, Fourth Dept 11-15-19

MEDICAL PROVIDER'S REQUEST FOR A VARIANCE ALLOWING PAYMENT FOR CLAIMANT'S TREATMENT WITH MEDICAL MARIJUANA SHOULD HAVE BEEN CONSIDERED FOR PROSPECTIVE TREATMENT OF CHRONIC PAIN (THIRD DEPT).

The Third Department determined the treating medical provider's request that the cost of claimant's treatment with medical marijuana (called a "variance") be covered by workers' compensation was properly denied for past treatment but should have been considered for future treatment:

> Attached to the August 2017 variance request from claimant's treating medical provider was a July 2017 medical report in which the provider summarized claimant's pain management regimen and reviewed the various "beneficial effects of the medical mari[h]uana" that claimant had received. The provider reported, among other things, that claimant's sleep has improved and pain was reduced "since using medical marihuana," that medical marihuana "allowed him to participate more with his wife and children" and that he "[e]motionally feels much improved" as a result of using medical marihuana. The treating medical provider also noted that claimant was experiencing a "[f]inancial burden with continuing an optimal dose of the medical THC."
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> In our view, the Board properly denied the variance request for medical care but only to the extent such care had already been provided (see 12 NYCRR 324.3 [a] [1]). In an instance such as here, however, where the claimant has a chronic pain condition necessitating ongoing treatment, the Board should have addressed the merits of claimant's variance request for prospective medical marihuana treatment. Matter of Kluge v Town of Tonawanda, 2019 NY Slip Op 07470, Third Dept 10-17-19

METHODS FOR DETERMINING WEEKLY WORKERS' COMPENSATION BENEFITS FOR SHORT-TERM EMPLOYMENT EXPLAINED, MATTER REMITTED FOR THE GATHERING OF EVIDENCE AND RE-CALCULATION (THIRD DEPT).

The Third Department, reversing the Workers' Compensation Board, determined the benefits to be provided to the injured worker, based upon only 78 days of employment may have been wrongly calculated and remitted the matter:

> Following a hearing, a Workers' Compensation Law Judge (hereinafter WCLJ) established claimant's average weekly wage as $933.14, which was arrived at by dividing his total earnings ($12,130.76) by the number of weeks worked (13). The employer and its workers' compensation carrier (hereinafter collectively referred to as the carrier) sought administrative review. Upon that review, the Workers' Compensation Board determined that claimant's average weekly wage should have been calculated pursuant to Workers' Compensation Law § 14 (3), using a 200 multiplier, and that, so calculated, claimant's average weekly wage was $598.15. * * *

Under Workers' Compensation Law § 14 (2), the average annual earnings of a six-day worker is 300 "times the average daily wage or salary . . . which an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed." The carrier did not submit payroll records for similar employees or otherwise assert that such records were unavailable … . In the absence of such information, we cannot determine whether the Board properly rejected the method set forth in Workers' Compensation Law § 14 (2) before resorting to Workers' Compensation Law § 14 (3) to calculate claimant's average weekly wage. Matter of Molina v Icon Parking LLC, 2019 NY Slip Op 07467, Third Dept 10-17-19