

<b>Matter of Agnelli v Kelly</b>
2007 NY Slip Op 30434(U)
March 22, 2007
Supreme Court, New York County
Docket Number: 0106373
Judge: Louis B. York
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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**  
**PRESENT: Hon. LOUIS B. YORK** **PART 2**  
**Justice**

-----X

In the Matter of the Application of  
**ANTHONY AGNELLI,**

Petitioner,

For a Judgment Under Article 78 of the Civil Practice  
and Rules

Index No. 106373/06  
Motion Date 12/13/06  
Motion Seq. No. 001  
Motion Cal. No.     

-against-

**RAYMOND KELLY**, as the Police Commissioner of  
the City of New York, and as Chairman of the Board of  
Trustees of the Police Pension Fund, Article II, **THE**  
**BOARD OF TRUSTEES** of the Police Pension Fund,  
Article II, **NEW YORK CITY POLICE DEPARTMENT**  
and **THE CITY OF NEW YORK,**

Respondents,

-----X

The following papers, numbered 1 to            were read on this motion for Article 78

NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**PAPERS**  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Cross-Motion:**     Yes     No

*Unlawful Entry Judgment  
his judgment has not been entered by the County Clerk  
and notice of entry cannot be given based hereon. To  
obtain entry, counsel or a court-appointed representative must  
appear in person at the Judgment Clerk's Desk (Room  
118).*

Petitioner, a veteran policeman, has applied for accident disability benefits  
incurred in the line of duty. The Police Commissioner applied for ordinary disability  
benefits in his behalf. The Board of Trustees, on the recommendation of the Medical  
Board, denied petitioner accident disability benefits while granting the Police

Commissioner's request for ordinary disability benefits based on the fact that he suffers from vertigo. There is, therefore, a question whether the vertigo was caused by injuries that petitioner sustained in the line of duty.

Petitioner sustained injuries in his back and neck both in the line of duty and while off duty. The last such injury occurred on August 8, 2003 when petitioner incurred injuries to his back and neck when climbing over a fence. On April 2, 2004, petitioner applied for accident disability benefits.

The basis of the Medical Board's decision was that the petitioner's accidents make it unclear when and where petitioner's vertigo was caused. Petitioner contends that the medical board failed to state the factual basis for its decision and did not consider that even if the last line of duty accident was not the initial cause of his injuries, whether or not it exacerbated his injuries because it was after the last accident that he went on restricted duty, eventually applying for the Accident Disability retirement pension.

There has been a showing that petitioner's disabling vertigo condition may be the result of the aggravation of a pre-existing condition. This is an issue that neither the Medical Board nor the Trustees have considered. As the Court of Appeals cogently stated in reversing the Appellate Division in a line of duty disability

application of a Department of Sanitation stationary fireman:

“... an accident which precipitates an injury may be a proximate cause of that injury [requiring only] that petitioner’s disability be a natural and proximate result of an accidental injury (citation omitted).

\* \* \*

The causation rule both in tort law and under the workers’ compensation statute is that an accident which produces injury by precipitating the development of a latent condition or by aggravating a preexisting condition is a cause of that injury [emphasis in original]

*In the Matter of Tobin v Steisel*, 64 NY2d 254, 259, 485 NYS2d 730 (185).

*In the Matter of Meyer v McGuire*, 64 NY2d 1152, 490 NYS2d 730, (1985), a companion to the *Tobin* case, in reversing a denial of the Accident Disability benefits to a disabled police officer, the Court vacated ~~and remanded~~ <sup>and remanded</sup> for new findings on the authority of *Tobin*.

Accordingly it is

**ORDERED** and **ADJUDGED** that the determination of the respondents that petitioner is not entitled to accident disability benefits is vacated and the matter is

remanded to respondents to reconsider the petitioner's application in accordance with this decision.

Dated: 3/22/07

Enter:

*LY*  
\_\_\_\_\_  
Louis B. York, J.S.C.

**LOUIS B. YORK**  
J.S.C.

**NOT FOR ENTRY**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
Check if appropriate:     DO NOT POST     REFERENCE