

**Matter of Tooker v New York State Crime Victims  
Bd./Exec. Dept.**

2012 NY Slip Op 31520(U)

June 6, 2012

Supreme Court, New York County

Docket Number: 112360/2010

Judge: Martin Schoenfeld

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARTIN SCHOENFELD  
Justice

PART 28

**COPY**

Robin Tucker  
✓  
NYS Crime Victims Board

INDEX NO. 112360/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 1  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for A.T. 78

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

PAPERS NUMBERED  
1-3  
~~4-7~~ 4-7

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is decided in accordance  
with the accompanying memorandum decision

**UNFILED JUDGMENT**

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 141B).

Dated: June 8 2012

[Signature]  
J.S.C.

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

COPY

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 28

In the Matter of the Application of  
ROBIN TOOKER,  
  
Petitioner,

For a Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules,

~~UNFILED JUDGMENT~~

~~This judgment has been entered by the County Clerk and notice of entry should be sent to that person. To obtain entry, counsel or interested parties must appear in person at the Judgment Clerk's Desk (Room 141B).~~

MEMORANDUM DECISION  
AND JUDGMENT

-against-

Index No.: 112360/2010

NEW YORK STATE CRIME VICTIMS  
BOARD-EXECUTIVE DEPARTMENT,

Respondent.

Petitioner Pro Se:  
Robin Tooker  
120 Thompson Street, Apt. 14  
New York, New York 10012

For Respondent:  
Eric T. Schneiderman  
Attorney General of the State of New York  
120 Broadway, 24<sup>th</sup> Floor  
New York, New York 10271

HON. MARTIN SCHOENFELD, J.:

In this Article 78 proceeding, *pro se* Petitioner Robin Tooker challenges a decision of Respondent New York State Crime Victims Board-Executive Department (CVB or the Board)<sup>1</sup> that denied her compensation for injuries she suffered as a result of a "hit and run" bicyclist. The CVB cross-moved to dismiss the petition pursuant to CPLR 3211(a)(7) and 7804(f). On March 29, 2011, this Court denied Respondent's cross-motion to dismiss and directed it to answer the petition. *Matter of Tooker v. N.Y. State Crime Victims Board*, 32 Misc.3d 186 (Sup. Ct. N.Y.

<sup>1</sup>Pursuant to Executive Law § 622, as of June 22, 2010, the New York State Crime Victims Board was reformulated as the Office of Victim Services.

2011). Having reviewed the Verified Answer and for the reasons set forth below the Court now remits this case to the CVB to provide Petitioner with an opportunity for a hearing before the Board on this matter.

### BACKGROUND

On April 20, 2007, Petitioner was struck by a bicycle while she was walking in the crosswalk across a downtown Manhattan street. Petition at 1. According to her account, “a guy on a delivery bike” hit her from behind, knocked her down and “left [her] lying in the middle of the street.” *Id.* at 1-2. As a result, she broke her wrist. Petitioner was taken by ambulance to St. Vincent’s Hospital, where she remained for four days during which time she underwent surgery on her left wrist. Petitioner alleges that as a result of this injury she cannot use her wrist, has difficulty opening and closing her hand, and has lost the use of several fingers. She also states that she was unable to work at her profession as a photographer. *Id.* at 2.

In July 2008, Petitioner filed an application with the CVB, seeking compensation for over \$20,000 in medical expenses she incurred as a result of her injuries. She appended the application and her medical bills to her papers. CVB member Louis A. Mosiello issued a decision on January 14, 2009, denying her claim. Verified Answer, Exhibit 2. In his short decision, Mr. Mosiello noted that the CVB may provide an award if there is evidence that “a crime was committed.” *Id.* He concluded, however, that the evidence provided indicated that what happened to Petitioner “was an accident, not a crime.” *Id.* He also informed Petitioner that she had 30 days “after receiving this decision” to make a written request to the Chairperson of the Board to appeal his decision. He provided the address and wrote “Your request should

explain the reason for your appeal and should be sent to the Board.” *Id.*

In a letter to the CVB Chairperson, dated February 10, 2009, Petitioner appealed this decision. Verified Answer, Exhibit 3. On May 18, 2010, a three member panel of the CVB affirmed Mr. Mosiello’s decision, writing “Based on the information in the claimant’s file and the further information obtained as a result of this appeal, the Board affirms the original Decision.” *Id.*, Exhibit 4. The letter also indicated that the decision was based on review of Petitioner’s file “as the claimant did not request a hearing.” *Id.*

Acting *pro se*, Petitioner filed this Article 78 action asking the court to reverse the CVB’s decision. The CVB then cross-moved to dismiss. The CVB argued that the petition should be dismissed as a matter of law because the CVB may only compensate *victims of crime* and that in the instant case no crime occurred. It relied on Vehicle and Traffic Law (“VTL”) § 600, under which it is a crime for the driver of a “motorized vehicle” to leave the scene of an accident. It argued that pursuant to section 125 of the VTL and related case law, section 600 does not cover “hit and run” bicyclists. *Pro se* Petitioner in her response papers countered that CVB relied on the wrong statutory provision. She argued that under VTL § 1241, “[l]eaving the scene of an incident involving a wheeled non-motorized means of conveyance,” including bicycles, is a Class B misdemeanor where a “serious physical injury” has resulted.

On March 29, 2011, the Court denied Respondent’s cross-motion, finding that Petitioner made out a cognizable claim that she was a victim of a crime pursuant to VTL § 1241. The Court directed Respondent to answer the Petition.

In its Verified Answer, CVB now contends that it based its finding that no crime was committed in Petitioner’s case on the fact that it never received “any criminal justice agency

record indicating that a crime had been committed” despite its request for any such report to the New York City Police Department (NYPD).<sup>2</sup> Verified Answer at ¶ 24-25. It does note, however, that it did receive two faxed letters from NYPD Police Officer Kenneth Rogers who indicated that he responded to Petitioner being hit by the bicycle, that the New York City Fire Department provided her medical assistance, and that she was taken to the hospital by ambulance. Affidavit of Eamonn Trainor, dated April 26, 2011. It concludes that “The Board decision to classify Petitioner’s incident as an accident was a rational decision based upon the failure to receive any criminal report concerning the incident” and therefore was not arbitrary and capricious. Verified Answer ¶ 26.

## DISCUSSION

Judicial review of an Article 78 proceeding is limited to whether an administrative determination was “affected by an error of law or was arbitrary and capricious, or an abuse of discretion” CPLR § 7803(3); see *Pell v. Board of Education of Union Free School District*, 34 N.Y.2d 222, 230-31 (1974); *Goldberg v. Crime Victims Board*, 234 A.D.2d 370, 371 (applying arbitrary and capricious standard to Article 78 appeal of a CVB decision). A decision is arbitrary and capricious if it is “without sound basis in reason and is generally taken without regard to the facts.” *Pell*, 34 N.Y.2d at 231. Courts generally defer to the expertise of the administrative body charged with enforcing particular statutes. *District Council 37 v. City of New York*, 22 A.D.3d

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<sup>2</sup>Under Executive Law § 631 the CVB may not make an award unless it finds that “(a) a crime was committed, (b) such crime directly resulted in personal physical injury . . . and (c) criminal justice agency records show that such crime was promptly reported to the proper authorities . . .”

279, 283 (1<sup>st</sup> Dept. 2005). A court “may not substitute its judgment for that of” the administrative body when the determination is reasonable. *Pell*, 34 N.Y.2d at 232 (citations omitted).

Nevertheless, the Court of Appeals has found that “failure of the agency to set forth an adequate statement of the factual basis for the determination forecloses the possibility of fair judicial review and deprives the petitioner of his statutory right to such review.” *Montauk Improvement v. Proccacino*, 41 N.Y.2d 913, 914 (1977). Thus, the court has the inherent power to remit a decision to an agency “when further agency action is necessary to cure deficiencies in the record.” *Police Benevolent Association of the New York State Troopers Inc. v. Vacco*, 253 A.D.2d 920, 921 (3d Dept. 1998); see *Matter of 47 Clinton Street Co. v. New York State Div. Of Housing & Community Renewal*, 161 A.D.2d 402, 403 (1<sup>st</sup> Dept. 1990); *Lizotte v. Johnson*, 4 Misc.3d 334, 344 (Sup. Ct. NY 2004); 6A N.Y. Jur. 2d Article 78 § 392 (“It is well established that an Article 78 proceeding may be remitted to the body or officer, whose action or determination is at issue, for further proceedings where there is a need for further consideration or reconsideration.”).

Here, neither Mr. Mosiello nor the Board laid out a factual basis for their conclusion that what happened to Petitioner was an accident not a crime. Moreover, in this Article 78 proceeding the CVB has provided two very different justifications for its decision. First, in its cross-motion to dismiss it supports its decision by arguing that a hit and run involving a bicycle is not a crime under the VTL. It, however, never addresses Petitioner’s argument that under VTL § 1241 it is a crime to leave the scene of a bicycle accident where serious injury has resulted. Next, in its Verified Answer the Board contends that its decision is based on the fact that it

received no official police reports of the incident. Yet, there is no explanation why the two faxes from Police Officer Kenneth Rogers are not considered criminal justice records despite their confirmation that the NYPD was at the scene and that one of the faxes describes the incident as a "Hit and run." Trainor Affidavit, Exhibit B.

Additionally, the Board made its decision without holding a hearing, explicitly stating in its letter that Petitioner "did not request a hearing." Verified Answer, Exhibit A. However, nowhere in the record is there an indication that the *pro se* Petitioner knew or was ever informed that according to CVB's regulations, she could have requested a hearing.<sup>3</sup>

This Court is charged with determining whether the Board's decision had a rational basis and it may not substitute its judgment for that of CVB. It is not the Court's role to suss out which of several bases the Board actually relied on to make its decision. Considering that the Board has provided conflicting justifications for its decision, that the police have provided documentation concerning the incident, and that no hearing was held, this Court finds that fairness dictates that to render "substantial justice to the parties concerned" the case should be remitted to the CVB to provide the *pro se* Petitioner, if she so desires, with the opportunity to be heard. *Matter of 47 Clinton St. Co.*, 161 A.D.2d at 403.

In accordance with the foregoing, it is

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<sup>3</sup>See Practices and Procedures Before the Office of Victims Services, Sec. 525.13, Review of a Decision on a Claim ("The claimant may request to personally appear or otherwise make him or her available in a manner for a hearing . . . prior to the rendering of a decision.")

ORDERED and ADJUDGED that the petition is granted, but only to the extent that the Court remits the case to the CVB directing it to give Petitioner the opportunity to pursue a hearing on the matter, provided Petitioner does so within a reasonable time.

Dated: New York, New York  
June 6, 2012

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based thereon. To obtain entry, accepted or substituted representative must appear in person at the Judgment Clerk's Desk (Room 441B).

  
\_\_\_\_\_  
J.S.C.