

<b>Matter of Stone v Kelly</b>
2013 NY Slip Op 30261(U)
February 1, 2013
Supreme Court, New York County
Docket Number: 103334/12
Judge: Joan B. Lobis
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: JOAN B. LOBIS  
Justice

PART 6

Index Number : 103334/2012  
STONE, MICHAEL  
vs.  
KELLY, RAYMON W.  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE 10/25/12  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 51, were read on this motion to for annual determination  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits Petition | No(s) 1-13  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s) 14-51  
Replying Affidavits \_\_\_\_\_ | No(s) \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

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

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION  
*Order & Judgment*

### 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: 2/1/13

JOAN B. LOBIS, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
In the Matter of the Application of  
MICHAEL STONE,

Petitioner,

Index No. 103334/12

-against-

**Decision, Order, and Judgment**

RAYMOND W. KELLY, as 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 and THE CITY  
OF NEW YORK,

Respondents,

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk  
and notice of entry cannot be served hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

For a Judgment pursuant to Article 78, C.P.L.R., to  
review and annul the determination made by respondents  
denying petitioner a pension of three quarters of  
petitioner's salary as required by Administrative  
Code § 13-252, and for a further order directing payment  
of such pension retroactive to the date of petitioner's  
retirement, and for such other appropriate relief.

-----X  
**JOAN B. LOBIS, J.S.C.:**

By this petition brought pursuant to Article 78 of the Civil Practice Law and Rules,  
Petitioner Michael Stone seeks a judgment of this Court annulling the denial of a line of duty  
accident disability retirement pension, and directing a retroactive award of that pension, or in the  
alternative directing a hearing on the factual and medical issues raised in this case or a remand to the  
Board of Trustees for a further evidentiary hearing. Respondents Raymond Kelly, The Board of  
Trustees of the Police Pension Fund ("Trustees"), and the City of New York oppose the petition and  
ask that it be denied and that the proceeding be dismissed. For the reasons stated below, the petition  
is denied, and the proceeding is dismissed.

Petitioner Michael Stone was appointed to the New York City Police Department ("NYPD") on July 18, 1996. On March 22, 2010, he was assigned to the NYPD Transit District 12. While attempting to isolate and contain an emotionally disturbed person, he suffered an injury to his right knee and was seen at Jacobi Hospital. He was diagnosed with internal derangement of the knee and cleared to return to full time duty on April 19, 2010.

Petitioner suffered another injury on January 17, 2011. He was still assigned to Transit District 12. After being on patrol with his partner in a radio patrol car ("RMP") in the morning, both officers were reassigned to a box truck in the afternoon. Petitioner was designated the recorder while his partner was the driver. The box truck is normally used to transport prisoners and has no passenger seat next to the driver. There are fixed benches behind the driver's area. A folding chair was in the truck. Officer Stone sat on the folding chair in the passenger area next to the driver. The truck made a turn and Officer Stone fell out of the chair onto the floor of the truck. He injured his neck and right knee. After an MRI was performed on January 27, 2011, he was diagnosed with a tear of the posterior horn of the medial meniscus. The officer had surgery to repair his knee, but it was not successful. After a limited period of improvement, Officer Stone experienced increasing pain. Additional treatment did not alleviate his pain or increase the stability of his knee.

On April 22, 2011, Petitioner completed an application for Accident Disability Retirement. As a member of the NYC Police Pension Fund, he is eligible for consideration under two programs upon retirement from active service: Ordinary Disability Retirement ("ODR") pension

and Accident Disability Retirement (“ADR”) pension. The ADR yields a considerably higher benefit to the recipient. The Medical Board Police Pension Fund Article II, which reviewed his medical claim, recommended that he be approved for ADR benefits on November 21, 2011. Before a claimant is awarded a pension, however, the Trustees must approve that recommendation. After due deliberation, the Trustees denied Petitioner’s application for ADR benefits.

The Trustees consist of representatives from the Police Department, the Mayor’s office, the Department of Finance, and various unions that represent employees of the NYPD. Petitioner’s application was presented at three different executive sessions of the Trustees on February 8, March 14, and April 11 of 2012. The transcripts reveal a lively exchange with significant debate about whether the injury on January 17, 2011, occurred as a result of the type of accident that gives rise to ADR benefits. The Trustees discussed the interior design of the box truck, the seating available in it,<sup>1</sup> the order to Officer Stone and his partner to use the box truck to continue their tour that afternoon, and whether Officer Stone could have performed his duties as recorder while sitting on one of the fixed benches. At the April session, a vote resulted in a 6/6 split of the Trustees. A tie vote results in a denial of an application for ADR benefits.

Petitioner argues that the decision was arbitrary and capricious in that the Trustees refused to follow the law. He argues that the Medical Board found him eligible so there can be no

---

<sup>1</sup> At the March session, photos taken in 2012 of the interior of this type of truck were displayed. One of the photographs showed a warning sticker that said “This vehicle is not equipped with passenger seating in driver’s area. Do not sit or stand in this area when the vehicle is in motion.”

doubt about his disability and that he was injured while performing his duties. He argues further that his falling off of the folding chair was accidental and unexpected. Therefore, there can be no rational basis to deny his application, since he has established that his line-of-duty injury was the result of an accident, and no one has maintained that he was wilfully negligent in the events of that day. Wilful negligence is a reason for denial of an ADR pension.

The City respondents argue that the Trustees properly concluded that the incident was not the result of a “sudden, fortuitous mischance, unexpected or out of the ordinary and injurious in impact.” Lichenstein v. Bd. of Trustees, 57 N.Y.2d 1010 (1982). Rather, they submit that the Petitioner was performing his normal duties when the truck made a left turn and he fell from the folding chair where he was seated. The injury occurred during a routine duty and was not caused by an unexpected precipitating event. Starnella v. Bratton, 92 N.Y.2d 836 (1998). They argue that there is sufficient evidence in the record to support the denial of an ADR pension. They do not challenge the findings of disability, but urge that the Trustees’ determination as to this type of pension be upheld.

In an article 78 proceeding challenging a denial of disability payments, the Pension Fund’s determination will be sustained unless it is “arbitrary, capricious, an abuse of discretion or contrary to law.” In re Jefferson v. Kelly, 51 A.D.3d 536, 537 (1st Dep’t 2008). The Court cannot “weigh the evidence, choose between conflicting proof, or substitute its assessment of the evidence or witness credibility for that of the administrative factfinder.” In re Porter v. New York City Hous. Auth., 42 A.D.3d 314 (1st Dep’t 2007) (citations omitted).

ADR benefits are available when an examination and investigation shows that the applicant is physically or mentally incapacitated from the performance of duty as a natural and proximate result of an “accidental injury” received in the line of duty, and that such disability was not the result of wilful negligence on the part of the applicant. See Administrative Code of City of New York § 13-252. A denial of ADR benefits due to a tie vote cannot be set aside “unless it can be determined as a matter of law on the record that the disability was the natural and proximate result of a service-related accident.” In re Meyer v. Bd. of Trs., 90 N.Y.2d 139, 145 (1997) (internal quotations and citations omitted). As set forth, supra, an injury caused by a “sudden, fortuitous mischance, [which is] unexpected, [and] out of the ordinary” is considered accidental. In re Lichtenstein, 57 N.Y.2d at 1012 (1982) (internal quotations and citations omitted). On the other hand, an injury caused by a trip where tripping is a foreseeable risk of the work being performed does not entitle the applicant to ADR. See, e.g., In re Sciabarassi v. Safir, 298 A.D.2d 329 (1st Dep’t 2002) (tripping on a roof depression not unexpected for a police officer whose duties included inspecting radio towers on roofs); In re Russell v. Bd. of Trs., 288 A.D.2d 19, 20 (1st Dep’t 2001) (getting a desk chair caught on a wire running across the floor not an accident); In re Ortiz v. New York City Employees’ Ret. Sys., 173 A.D.2d 237, 238 (1st Dep’t 1991) (tripping on an elevator gate not unexpected or sudden for an elevator mechanic); In re Magrino v. DiNapoli, 64 A.D.3d 868, 869 (3rd Dep’t 2009) (tripping on a tool on the floor of a garage not unexpected for an equipment maintenance manager); In re Quinn v. New York State Comptroller, 55 A.D.3d 1206 (3rd Dep’t 2006) (nearly colliding with other court officers while running down courthouse steps in an emergency not unexpected). The fall in this case is analogous to the tripping incidents described in the above cases. See also In re Starnella, 92 N.Y.2d at 836.

As the Appellate Division said in Nicolosi v. Bd. of Trustees, "when an application claiming accident disability is reviewed, a 6-6 tie vote of the Board results in a denial and the applicant is granted only ordinary disability benefits." 198 A.D.2d 282, 282 (2d Dep't 1993). It was neither irrational nor an error of law for the Trustees to deny Petitioner's ADR application on the grounds that Petitioner's fall was not an accident. Petitioner was injured because he chose to sit on an inherently unstable chair. He fell from the chair as the truck turned left during normal operation. Nothing in the record indicates that the turn was dangerous, unnecessary, or anything other than an ordinary traffic maneuver. The fall cannot be considered sudden, unexpected, and out of the ordinary, and it cannot be said that Petitioner is entitled to ADR benefit as a matter of law. See In re Mejia v. Kerik, 301 A.D.2d 385 (1st Dep't 2003). Accordingly, it is

ORDERED and ADJUDGED that the petition is denied, and the proceeding is dismissed.

Dated: February / , 2013

ENTER:

**UNFILED JUDGMENT**



**This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).**