

THE ONLY THING TO FEAR IS FEAR ITSELF (AND POSSIBLY COVID)

The McLaurin case, § 10 (3) (c) and their impacts
on mental injury claims.

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What We Will Cover

- 1) The Similarly Situated Worker Test & and How Recent Developments Affect When We Can Use It
 - a) How has the Board Applied § 10 (3) (c)
- 2) What happened at the Third Department and what can we learn from this?
 - a) Move Fast and Break Things: Iterative Development as Litigation Strategy
 - b) Broken Rules: handling new arguments raised in a reply brief
 - c) Professional Responsibility Avoiding the problem of Cross Case ex parte communication:
- 3) Arguing to the Courts: Let them know what's really going on.

Part I:

The Similarly Situated Worker Test &
and How Recent Developments
Affect When We Can Use It

Before § 10 (3) (c) and this litigation: The Similarly Situated Worker Test

Before 2020, it was settled that, if a claimant sought to prove:

(1) ***solely*** mental, emotional or psychological injury

(2) resulting from emotional strain, then

- the claimant had the burden of proving that the claim should not be disallowed on the basis that:

*“the stress experienced by claimant was *no greater than that which other similarly situated workers experienced* in the normal job environment” without untoward effects. (Grace v Bronx Mun. Hosp. Ctr., City of New York Health and Hosps. Corp., 272 AD2d 799, 800 [3d Dept 2000])*

Origin of the The Similarly Situated Worker Test

- Matter of Fowler v Risedorph Bottling Co, (175 AD 224, 226 [3d Dept 1916]) held that “if “[a]nybody would say that the man had met with an accident” then an “accident” has occurred, so if a worker faces “unusual strain or exertion” a heart attack is an **accident**.

The “Common Sense Viewpoint” Test Stands Behind all other Tests

The “common sense viewpoint of the average person” has been the test for determining whether there was an accident within the meaning of the Workers’ Compensation Law for 110 years. This has not changed.

Question: Who is the average person and how do we determine what their common sense viewpoint is?

Klimas v. Trans Caribbean Airways, 10 N.Y.2d 209 (1961) - Majority and dissent disagree solely about whether “average person” would think an accident occurred.

Origin of the The Similarly Situated Worker Test

- Asking “would anyone say an accident occurred” in every stress claim, like Klimas doesn’t work – you get a different answer every time.
- So In Matter of Santacroce v 40 W. 20th Street, Inc., 9 A.D.2d 985, 985, [3d Dept 1959], the court held the strain must be “greater than the countless differences and irritations to which all workers are occasionally subjected without untoward result”

The Claimant's Bar Seeks to Abolish the Similarly Situated Worker Rule using Two Different Approaches

Seeking Judicial Repeal of a Judge-Made Rule

One attorney brings 5 Third Department cases:

- 1) Matthews
- 2) Brown
- 3) Djanuzakov
- 4) McLaurin
- 5) Andersons

Seeking Legislative Repeal of a Judge-Made Rule

Legislature proposes S6635 which would create rule that the Board “may not disallow [a] claim [for extraordinary work stress] upon a factual finding that the stress was not greater than that which usually occurs in the normal work environment.”

The Claimant's Bar Succeeds only Partly in Abolishing the Similarly Situated Worker Rule

Judicial Repeal Ultimately Fails after a Pitched Battle

- 1) Matthews & Djanusakov: 3rd Dept affirms similarly situated worker rule
- 2) Anderson, 3d Dept says Rule is Repealed, reverses its own earlier Matthews & Djanusakov decisions.
- 3) Court of Appeals in McLaurin, Affirms SSW Rule

Legislative Efforts *Mostly* Succeed after a Pitched Battle, with the Rule Limited but not Repealed

- 1) S6635 becomes law as L.2024, c. 546, § 1 on 1/1/2025
- 2) But on 2/14/2025 by L.2025, c. 79, § 1, restores the old law until 6/4/2025 when the new WCL § 10 (3) (c) comes into force

WCL § 10 (3) (c): What are the limits on the Similarly Situated Worker Rule?

Under § 10 (3) (c), the Board “may not disallow [an extraordinary work stress] claim upon a factual finding that the stress was not greater than that which usually occurs in the normal work environment” if:

- 1) PTSD, acute stress disorder or major depressive disorder is diagnosed;
- 2) the medical evidence of this is in accordance with the DSM-V (currently);
- 3) the claimant shows this resulted from an extraordinary work-related stress attributable to a distinct work-related event or events

The Active Participant Requirement post-§ 10(3)(c)

The “Active Participant Requirement” announced by Matter of Wolfe v Sibley, Lindsay & Curr Co., 36 NY2d 505, 508 (1975) is is not barred by § 10 (3) (c):

- Matter of Everett v. A.S. Steel Rule Die Corp. 106 A.D.2d 181 (3d Dept 1985) where the claimant was no more than an observer of a co-worker's bandaged hand, and “himself suffered no accident.”
- Matter of Wood v Laidlaw Tr., Inc., 77 NY2d 79, 83 (1990): “Wood was by virtue of her employment an active participant—more than a third party merely witnessing another's injury—... even though she did not come upon the scene of the accident until after it had occurred. Claimant's job responsibilities involved her in a unique way and distinguished her from others who might have passed on the road. The feeling on claimant's part that she should have been able to help, but couldn't, precipitated her psychological injuries.

Part I(a):

How Has the Board handled mental
injury claims post-§ 10 (3) (c)?

Case #1: Employer: Sight Med. Doctors, PLLC, 2025 WL 2428614 (WCB No. G368378, Aug. 14, 2025)

Claimant's supervisor was attacked while she was on a different floor. She did not witness the event.

- Board disallowed claim because the “claimant was not an active participant in the event, did not witness the event, and was not in a zone of danger created by the event.”
- It wrote: “Medical evidence alone is not enough to satisfy § 10 (3) (c) . The claimant must still show that the condition 1) arose out of extraordinary work-related stress attributable to distinct work-related event or events; 2) directly related to employment; and (3) occurring during the performance of the employee's job duties.

Case #1: Employer: Sight Med. Doctors, PLLC, 2025 WL 2428614 (WCB No. G368378, Aug. 14, 2025) – Part 2

The Board's reasoning has flaws:

- The “Zone of Danger” was thrown out over 60 years ago in a decision affirmed by the Court of Appeals. DeAngelis v Garfinkel Painting Co., (20 AD2d 162, 163-64 [3d Dept 1963], affd sub nom. De Angelis v Garfinkel Painting Co., 18 NY2d 727 [1966].)
- The Board did not find § 10 (3) (c) unsatisfied and disallow based on the similarly situated worker test, so the non-medical parts of the test are irrelevant. Only the Active participant requirement of Wood v. Laidlaw explains this result.
- You can never have PTSD under DSM if the claimant was not an active participant.

Case #2: Employer: New York City Tr. Auth., 2025 WL 2369793, WCB No. G3585415, Aug. 6, 2025)

A train operator alleged PTSD as a result of observing a passenger sitting on a platform with his legs hanging over the platform as she was entering the station.

- Board disallowed on two grounds:
 - (1) That “no specific event occurred” under § 10 (3) (c)
 - (2) The DSM-V criteria for PTSD were not satisfied.
- If “no specific event occurred” something is not an “extraordinary event” because it is “ordinary” is this another way of saying the event is one found in a normal work environment that does not have untoward effects on similar workers?

**Case #3: Employer: Manhattan & Bronx Surface Tr.,
2025 WL 2262622, WCB No. G374 3848, Jul. 3, 2025)**

A bus operator, alleged PTSD and an anxiety disorder from witnessing a gun fire attack while stopped at a red light.

- Board found 10(3)(c) inapplicable for PTSD claim because the symptoms were not present for more than 30 days as required by DSM V and disallowed.
- Board noted anxiety disorder is not covered under 10(3)(c) and disallowed as claimant's stress was not greater than the stress experienced by similarly situated workers.

**Case #4: Employer: Suffolk County Community College,
2025 WL 3101505, (WCB No. G3815832, Oct. 29, 2025)**

The claimant alleged PTSD as a result of a male exposing his genitals and using lewd language. The claim was disallowed because the claimant's psychologist did not provide the diagnostic criteria for PTSD (the PTSD checklist).

- Exposure of genitals is obviously satisfies the similarly situated worker test. (After McLaurin, Matter of Smith v Steuben County Highway Dept., 199 AD2d 590, 590 [3d Dept 1993] can only be explained on this basis. See also Penal Law § 245.01.)
- Board simply did not believe claimant had proved PTSD.

Implications of the McLaurin Decision: “Prevalence”

- The “prevalence doctrine” seen in COVID-19 contraction cases does not apply to stress claims based on fear of contracting COVID or any virus.
- Why?: Because the prevalence theory is used to establish that the accident (contraction of the virus) occurred in the course of employment. It is not used to establish that the events described constitute an accident within the common sense viewpoint of the average point
- Question: If exposure to a virus without contracting the virus is not sufficient to establish that a physical injury occurred, should a mental injury based on fear of contracting the virus after exposure to the virus constitute an accident?
- What if the exposure is to asbestos or a hazardous materials?

Part II:

What happened at the Third Department and what can we learn from this?

Part II (a):

Move Fast and Break Things:
Iterative Development as Litigation
Strategy

v1.0: My Work Environment was not “normal”!

Claimant Position

- The Board wrongly looked only at whether I was similarly situated to other workers and ignored that I wasn't in a “normal work environment”
- Calling the work environment normal was arbitrary given “Prevalence” is premised on a catastrophe.

Employer Response

- “Normal Work Environment” language is not part of Rule, but a product of “broken telephone”
- Substantial evidence supports finding COVID was “normal” risk; only exposure to COVID-19 is an “extraordinary event.”

v2.0: This stress isn't inherent in my work!

Claimant Position

- I have a new test: If the stress is not inherent in my work, then any mental injury from that stress is an accident.

Employer Response

- This isn't the law, the cases you cite to support it actually support the Similarly Situated Worker Rule
- Very convenient for you: Every mental injury would either be an occupational disease or an accident.

v3.0: “Particular Vulnerability” is the “Determinative Factor”

Claimant Position

“The Court of Appeals in Matter of Wolfe v. Sibley, Lindsay & Curr Co., 36 N.Y.2d 505 (1975), emphasized that the singular vulnerability of a claimant to a particular psychic trauma in the workplace is a “determinative factor” in making a claim for a direct mental stress injury legally accidental in nature and, hence, compensable.... Matter of Rackley v. County of Rensselaer, 141 A.D.2d 232, 234, 535 N.Y.S.2d 137, 138 (App. Div., 3d Dept. 1988) (“[A] determination of psychic accident may be made even though the underlying cause is common to all similarly employed and adversely affects claimant only because of his peculiar vulnerability.”)”

**Five
Cases,
Ten
3d
Dept
Briefs**

Date	#	Claimant	Employer	Bri.	
9/6/22	1	Matthews	NYCTA	App	
10/10/22	2	Brown	NYCTA	App	
1/2/23	3	Matthews	NYCTA	Rep	
1/19/23	4	Brown	NYCTA	Rep	
2/16/23	5	McLaurin	NYCTA	App	
2/22/23	6	Djanuzakov	MABSTOA	App	
3/21/23	7	Djanuzakov	MABSTOA	Rep	
5/22/23	8	Anderson	City of Yonkers	App	
12/1/23	9	McLaurin	NYCTA	Rep	
12/10/23	10	Anderson	City of Yonkers	Rep	

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Date	#	Claimant	Employer	Bri.	
9/6/22	1	Matthews	NYCTA	App	11/29 & 12/20/22: NYCTA Files first two respondents' briefs.
10/10/22	2	Brown	NYCTA	App	
1/2/23	3	Matthews	NYCTA	Rep	
1/19/23	4	Brown	NYCTA	Rep	3/13/22: NYCTA Files Djanuzakov Reply Br.
2/16/23	5	McLaurin	NYCTA	App	
2/22/23	6	Djanuzakov	MABSTOA	App	7/20/2023: 3rd Det. decides Matthews, Djanuzakov and Brown in favor of NYCTA 8/21/23: 3 Claimants file reargument motion; same arguments used.
3/21/23	7	Djanuzakov	MABSTOA	Rep	
5/22/23	8	Anderson	City of Yonkers	App	
12/1/23	9	McLaurin	NYCTA	Rep	
12/10/23	10	Anderson	City of Yonkers	Rep	

How Do briefs Shift Over Time?	Date	#	Claimant	Employer	Bri.	Argument
	9/6/22	1	Matthews	NYCTA	App	Not Normal Work Envir.
	10/10/22	2	Brown	NYCTA	App	Not Normal Work Envir.
	1/2/23	3	Matthews	NYCTA	Rep	+ Non-Inherent Stress
	1/19/23	4	Brown	NYCTA	Rep	+ Non-Inherent Stress
	2/16/23	5	McLaurin	NYCTA	App	+ Non-Inherent Stress
	2/22/23	6	Djanuzakov	MABSTOA	App	+ Non-Inherent Stress
	3/21/23	7	Djanuzakov	MABSTOA	Rep	+ Non-Inherent Stress
	5/22/23	8	Anderson	City of Yonkers	App	+ Non-Inherent Stress
	12/1/23	9	McLaurin	NYCTA	Rep	+ Non-Inherent Stress
	12/10/23	10	Anderson	City of Yonkers	Rep	++Particular Vulnerability

Part II (b):

Broken Rules:

Handling New Arguments in a
Reply Brief

Limits on when you can change your arguments - Never in a Reply Brief

- It is “improper” to raise new arguments for the first time as part of a reply brief. (People v Ford, 69 NY2d 775, 777 [1987])
- These are “not properly before” the Court. (Fuller-Astarita v ABA Transportation Holding Co., 176 AD3d 1530, 1531 [3d Dept 2019])
- New arguments deny Due Process.

How Do

Date	#	Claimant	Employer	Bri.	Argument
9/6/22	1	Matthews	NYCTA	App	Not Normal Work Envir.
10/10/22	2	Brown	NYCTA	App	Not Normal Work Envir.
1/2/23	3	Matthews	NYCTA	Rep	+ Non-Inherent Stress
1/19/23	4	Brown	NYCTA	Rep	+ Non-Inherent Stress
2/16/23	5	McLaurin	NYCTA	App	+ Non-Inherent Stress
2/22/23	6	Djanuzakov	MABSTOA	App	+ Non-Inherent Stress
3/21/23	7	Djanuzakov	MABSTOA	Rep	+ Non-Inherent Stress
5/22/23	8	Anderson	City of Yonkers	App	+ Non-Inherent Stress
12/1/23	9	McLaurin	NYCTA	Rep	+ Non-Inherent Stress
12/10/23	10	Anderson	City of Yonkers	Rep	++Particular Vulnerability

Do these arguments seem familiar?

Indeed, in reviewing the standard applied to stress-based injuries prior to *Matter of Wolfe* – which standard is substantially similar to the modern standard enunciated herein – we recognized that it was necessary to overrule the prior standard to the extent that it failed to take into account the requisite consideration of an individual claimant's **particular vulnerabilities** (see *Matter of Rackley v. County of Rensselaer*, 141 A.D.2d at 234, 535 N.Y.S.2d 137; see also *Matter of Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d at 510, 369 N.Y.S.2d 637, 330 N.E.2d 603)....

Third Department Decision in Anderson

Indeed, in reviewing the standard applied to stress-based injuries prior to Matter of Wolfe – which standard is substantially similar to the modern standard enunciated herein – we recognized that it was necessary to overrule the prior standard to the extent that it failed to take into account the requisite consideration of an individual claimant's **particular vulnerabilities** (see Matter of Rackley v. County of Rensselaer, 141 A.D.2d at 234, 535 N.Y.S.2d 137; see also Matter of Wolfe v. Sibley, Lindsay & Curr Co., 36 N.Y.2d at 510, 369 N.Y.S.2d 637, 330 N.E.2d 603)....

If a Reply Brief Raises a New Argument - Move to Strike it.

- Court may not not strike reply brief, but since you cannot file another brief, this is all you can do.
- Can argue “if we were permitted to address this new argument, we would point out that...”
- In this case, NYCTA moved to strike the reply briefs in *Matthews & Brown* unsuccessfully.

Part II (c):

Professional Responsibility Issues:

Avoiding Cross-Case Ex Parte
Communication

Ex Parte Contact breaks Rule 3.5 (a) (2)

(a) A lawyer shall not: (2) in an adversarial proceeding communicate ... as to the merits of the matter with a judge ... before whom the matter is pending, except:

(i) in the course of official proceedings *in the matter*;

(ii) in writing, (copying the other side)

(iii) orally, (with notice to the other side)

(iv) as otherwise authorized by law, or by Part 100 of the Rules of the Chief Administrator of the Courts

Dangers in Multi Case Litigation

- Anna represents Betty in a case against Chuck. Before the same judge at the same time, Anna also represents Dierdra against Ed. The decisive legal issue is the same in both cases.
- Anna gives no notice to Chuck or Ed about each other's cases. Anna argues the case against Chuck one way and argues the case against Ed using entirely different case law and arguments.
- The judge decides the Dierdre v. Ed case against Ed, and then uses this as a precedent to decide the Betty v. Chuck case against Chuck.

Has Rule 3.5 (a) (2) been violated?

- Has Anna violated Rule 3.5 (a) (2)?
- Does the answer change if there is a motion for extension of time in the case against Ed in which Anna asks for more time pointing out that the issues in Chuck and Ed's cases are the same, and that she knows the judges decision in one case will affect the other?

Unclear, but Due Process is an Issue

- There is no clear answer to this question, but it is very rare for the Third Department to grant leave to appeal to the Court of Appeals.
- While the 3d Dept may have granted leave to appeal because Anderson reversed Matthews and Djanuzakov, they may also have recognized they had to grant leave on Due Process grounds that:
 1. the decisive argument of Anderson was in a reply brief City of Yonkers was not heard on,
 2. cross-case ex parte communication against NYCTA.

Lessons from Multi-Appeal Scenarios

1. **Always** make the best arguments you can in each new appellant's brief, even if these are different from other prior cases.
2. But also **always** give notice to the attorneys of the other cases your are litigating that you have done this. (You can also move to amend earlier briefs to include new argument or seek consolidation.)
3. **Never** file a reply brief with a new argument not in your appellant's brief.

Part III:

Arguing to the Courts: Let them
know what's really going on

#1 - Lack of Credibility=Mootness

- Raise every “independent adequate ground” to affirm a decision a claimant appeals against.
- But where the Board finds a claimant is “not credible” then you can argue both that the case is moot and destroy any sympathy for the claimant.
 1. The Workers’ Compensation Board is the “the sole arbiter of witness credibility.” (Matter of Dixon v. Almar Plumbing, 111 A.D.3d 1230, 1231, 977 N.Y.S.2d 101 [2013]).
 2. If the Board finds a claimant is incredible, a medical opinion based on that claimant’s history cannot be used to meet the claimant’s burden. (Matter of Wen Liu v Div. of Gen. Internal Medicine, Mount Sinai School of Medicine, 186 AD3d 1770, 1771 [3d Dept 2020], lv to appeal denied, 36 NY3d 904 [2020]).

Credibility Examples from these Appeals

- In “Matthews,” the Board described the claimant’s “story” as to why and how he developed a mental injury before explicitly holding that the claimant was not credible.... The timing of Mr. Matthews so-called “injury” strongly suggested he was simply trying to get paid to stay home while avoiding the danger from COVID-19: he stopped working 3 days after the Governor’s lockdown order and was cleared to return to work on March 19, 2021, after vaccines had been available to “Public Transit Workers” for several weeks.”

Credibility Examples from these Appeals

- In McLaurin the Board explicitly held that “the claimant was not a credible witness” with respect to very issue on appeal – whether her psychological stress was greater than that experienced by other workers. It also noted how testimony regarding her so-called “symptoms” of COVID-19 was inconsistent with the evidence that she was never infected with COVID-19. (Id.)
- In Anderson, we argued that the Board “noted that the claimant was trying to obtain a work from home accommodation over the summer, well before the school year started in September 2020, and it was unclear how the claimant self-determined that she had developed a psychological injury when filing her

#2 - Policy Arguments Offer an Opportunity

- If a claimant argues the law should be changed, especially based on policy, policy arguments can be raised. For example here we argued:
 - Any claim not meeting the similarly situated worker test lacked credibility because it was saying “I have an injury that a no one else in my position would have.” We then pointed to how all 4 workers in this case had been found not credible or been shown to have dubious credibility by the Board.
 - Need for medical opinion was not a “check” on fraudulent claims since all 4 claimants had got opinions from the same practice, despite credibility issues.

Questions?

Feel free to follow up with any questions one-on-one after the presentation or via email:

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