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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF THE CLAIM OF LAZALEE

Respondent,

-against-

NO. 87

WEGMANS

Appellant.

WORKERS' COMPENSATION BOARD

Respondent.

92 Franklin Street
Buffalo, New York
November 14, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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Official Court Transcriber



1 MS. DAY: Good afternoon. May it please the
2 court. My name is Melissa Day.

3 CHIEF JUDGE WILSON: One moment, Counsel.

4 MS. DAY: Sorry.

5 CHIEF JUDGE WILSON: I have a few things to say
6 before we all start. First, I wanted to welcome everyone
7 that's joining us here in Buffalo, where my colleagues and
8 I are thrilled to be here. The Court of Appeals usually
9 sits in Albany. We have been in Buffalo to hear cases
10 three prior times in our history: 1849, 1901, and 2005. So
11 this is a little unorthodox because it will be twice in one
12 century we are sitting in Buffalo.

13 I also wanted to thank Administrative Judge Kevin
14 Carter, who, he and the staff here in the 8th Judicial
15 District have gone out of their way to accommodate the
16 Judges of this Court and our staff to make sure that the
17 arguments this week proceeded smoothly. And the efforts
18 really have been extraordinary. And we're tremendously
19 grateful to him. And finally, I wanted to welcome, we have
20 a lot of students here. Ms. Melissa Meola Shanahan is an
21 English teacher at Lafayette International High School, has
22 brought a group of students. We're grateful to have you
23 here. Ms. Tricia Davis and Mr. Mark Boesken, who are
24 social studies teachers of the Tapestry Charter School,
25 have also brought students. And we're happy to have you

1 here. And also, Mr. Orman Blenman, legal studies teacher
2 at East High School, has brought students. We're always
3 happy to have students because you're the next generation.
4 You're going to have to take over for us when we get too
5 old, and we're rapidly hitting that point.

6 So thank you all for being here. And if I can
7 call the first case, it is Matter of Claim of Lazalee v.
8 Wegmans. Counsel.

9 MS. DAY: Thank you, Judge Wilson. My name is
10 Melissa Day. May it please the court. I represent Wegmans
11 Food Markets, Inc. I am with The Law Offices of Melissa A.
12 Day, PLLC. I'd like to reserve five minutes of my time for
13 rebuttal, please.

14 CHIEF JUDGE WILSON: You may.

15 MS. DAY: Thank you. Your Honors, this case is
16 about whether or not the Board had authority to take the
17 action that it did, not about other actions that the
18 parties, including Wegmans, could have taken below. It's
19 our - - -

20 JUDGE SINGAS: Shouldn't the Board have some
21 discretion?

22 MS. DAY: The Board should have some discretion
23 if it's - - - promulgates a regulation that contains within
24 it an opportunity for the Board to exercise some
25 discretion. If the Board promulgates a regulation which is

1 mandatory as opposed to precatory, then no, the Board
2 should not have discretion. To the extent that the Board
3 has discretion to determine things like timeliness, then
4 the Board would have to limit its inquiries as to whether
5 or not - - -

6 JUDGE TROUTMAN: What do you say about the claim
7 here that the request was untimely?

8 MS. DAY: What do I say about the request is
9 untimely? I do not say that the request was untimely.

10 JUDGE TROUTMAN: Why wasn't it?

11 MS. DAY: It wasn't because under the standard
12 articulated in the regulation, and as we say, was properly
13 found by the Ferguson court, the only requirements are that
14 the party who's requesting cross-examination of a physician
15 on a workers' compensation claim do so at the first hearing
16 on the matter.

17 JUDGE TROUTMAN: Is there a requirement of notice
18 prior to that?

19 MS. DAY: Not within the four corners of the
20 regulation and - - -

21 JUDGE TROUTMAN: And is it the regulation that is
22 controlling?

23 MS. DAY: It would be our position, yes, that it
24 is. And if the Board actually wanted to include a timing
25 limitation or conditions precedent to a party exercising

1 its right to cross-examine a physician, then it holds the
2 power to promulgate a regulation requiring those additional
3 things.

4 JUDGE RIVERA: But if this is the interpretation,
5 their interpretation - - - if this is their interpretation,
6 why - - - why - - - of their own reg, why can't we defer to
7 that interpretation?

8 MS. DAY: Because a board - - - the Board as an
9 administrative agency is a creature that's created by
10 statute and it's limited by statute. It has only those
11 powers that have been granted to it by the legislature.
12 Those powers include the power, at least under the Board's
13 promulgate - - - the Board's enabling statute, those powers
14 include the power to promulgate regulations. But then the
15 Board can't then ignore the regulations that it itself has
16 promulgated as this Court - - -

17 JUDGE CANNATARO: But Counsel, there are cases,
18 maybe not really in play here, where prejudice is an issue.
19 If a request is made and it causes some prejudice to the
20 other party, it could be permissibly denied; isn't that
21 true?

22 MS. DAY: I would not disagree with that. And if
23 that was what had happened here, if the parties had
24 litigated whether there had been prejudice to the claimant
25 as a result of the actions that Wegmans took below - - -

1 JUDGE CANNATARO: Fair enough. But I guess my
2 question is, how - - - is it such a major leap from the
3 concept of prejudice to timeliness, a sort of waiver-type
4 argument that's being made here?

5 MS. DAY: Well, and again, it would be our
6 position that if you're talking about a due process right
7 here, which is what the permission - - - what allowing a
8 party to cross-examine a physician is, because the
9 physician's opinions at the Board, they govern what we pay
10 for medical, what the claimant receives for treatment and
11 what the claimant would receive when he's not, or she is
12 not, able to work, and what the employer has to pay for
13 liability. So the cross-examination of an attending
14 physician, this regulation is a due process right to the
15 party.

16 CHIEF JUDGE WILSON: So the strain that's kind of
17 running through the - - - the Third Department's decision,
18 if I'm not mischaracterizing, it has two pieces to it. One
19 piece is that in the normal course of things you had - - -
20 your client had many chances to controvert the issue and
21 didn't really do that. And there is Third Department case
22 law saying that timeliness matters and that as a matter of
23 discretion, the Board or the ALJ can in those circumstances
24 say, no, it's too late. So I've never practiced in - - -
25 in the workers' comp area, and I'm wondering how realistic

1 it is in practice that those opportunities that are pointed
2 out are real opportunities in the circumstance of this
3 case.

4 MS. DAY: So again, it would be my position that
5 there were many actions that Wegmans could have taken that
6 it didn't take. And those - - - those actions are exactly
7 what's at issue here, that it's our position that they
8 should have been able to take the action that they did and
9 still avail itself of the right that is conferred upon it
10 by the Board's regulation without prejudicing itself by
11 doing so.

12 CHIEF JUDGE WILSON: I guess what I'm asking is,
13 was there some earlier point where in the normal course of
14 things you would expect a party like Wegmans to have
15 controverted something?

16 MS. DAY: There's nothing in the regulations that
17 requires what - - - that would have required Wegmans to
18 take any position differently than what it did. And in
19 fact, the payments that it made weren't even at the
20 temporary - - - I mean, they were the same as the temporary
21 total rate, but they also would have been the equivalent of
22 an 80 percent rate, because the claimant's average weekly
23 wage was so high. And so I mean, the payments themselves
24 don't actually take on any character until the Board weighs
25 in on them. Except that in this case, it appears that

1 that's exactly what the Board has found, that - - - that by
2 making these payments at the highest rate that it could,
3 Wegmans has conceded that the claimant was entitled to
4 temporary total disability benefits for that period of
5 time, which amounts to a decision on the merits. And
6 there's nothing within the regulatory framework that the
7 Board has promulgated which allows the Board to take that
8 interpretation, especially since there is a regulation
9 which says that the Court is required to - - -

10 JUDGE TROUTMAN: What about the concern raised by
11 the claimant with respect to a clawing back of benefits, if
12 it's determined - - - if a determination is made against?

13 MS. DAY: So this going back and litigating the
14 degree of disability, if a party has paid benefits at a
15 higher rate, could lead to what's known in our world as an
16 overpayment, which means that the claimant would have
17 received more money than he was entitled to receive based
18 on awards that were ultimately made. And the Board has
19 procedures for how those benefits then could be recouped.
20 The Board retains jurisdiction over those overpayments as
21 long as there are ongoing payments to the claimant. Those
22 overpayments that they - - - they're not - - - it would be
23 my position that it's not prejudicial to the claimant to
24 have received more money than he or she was entitled to
25 receive.

1 JUDGE RIVERA: So - - -

2 MS. DAY: But the prejudice to the claimant here
3 - - -

4 JUDGE RIVERA: What about their argument that
5 there is something that they lost as a consequence of
6 Wegmans waiting until the hearing or until this hearing to
7 seek to cross-examine the physician?

8 MS. DAY: So nothing that Wegmans did would have
9 prevented the claimant. If the claimant - - - if Lazalee
10 believes that he was capable of working, he could have gone
11 back to his doctor and said, hey, I've only - - - I only
12 have one hand that's - - - that's injured at this point.
13 It has limited range of motion. I could still do one-
14 handed work. I could do work that doesn't require me to
15 use my hands like I normally do. So there's nothing that
16 Wegmans did that prevented him from being able to do that.

17 And I would posit that if Wegmans had paid the
18 claimant at this rate that they did, and the claimant had
19 sought unemployment benefits, which he could have because
20 there's nothing, again, that Wegmans did that prevented him
21 from seeking unemployment benefits, and he received them,
22 then he would have wanted to go to the Board and say, I was
23 not totally disabled during this period because otherwise
24 he could have potentially been found to be committing
25 uninsurance - - - unemployment insurance fraud.



1 JUDGE HALLIGAN: So I take it your position is
2 that while there are earlier junctures at which you could
3 have done something, and the Board points several out, that
4 you weren't obligated to do that under the regs. And if
5 that's right, where exactly - - - I'm looking at 300.10, I
6 assume that's what you're referring to. But if there's
7 another provision, it would be helpful to know that. Where
8 exactly in 300.10 do you see that specific requirement that
9 it is at the hearing that you are obligated to do that in
10 the first instance?

11 MS. DAY: So a party does not appear in front of
12 a referee on a workers' compensation matter until there's a
13 hearing that's held.

14 JUDGE HALLIGAN: Is there anything in the text of
15 the regulation that you can point us to that would be clear
16 that - - - that your - - -

17 MS. DAY: Yes. The - - - the regulation refers
18 specifically to the referee, so you can't request an
19 adjournment before a referee or be given one unless you're
20 at a hearing.

21 JUDGE CANNATARO: But in this case, you never
22 appeared before a referee previously because you never
23 challenged any of the findings that had been made along the
24 way.

25 MS. DAY: Correct.

1 JUDGE CANNATARO: Do you not bear any of the
2 freight for that decision?

3 MS. DAY: Well, we certainly couldn't have gone
4 back and challenged the first period of time because the
5 Board did issue a decision on the merits administratively.
6 So trying to then ask a referee to go back and set aside
7 what the Board had previously done, that would not be
8 permissible because there had been a decision on the
9 merits. That would be barred by principles of res
10 judicata.

11 JUDGE CANNATARO: No, but when you had received
12 other findings of a temporary - - - some - - - some amount
13 of loss of use, you could have challenged those, brought
14 them into a referee at that point, or at least advised the
15 other side that you intended to - - - to dispute that.

16 MS. DAY: Absolutely. And that's what we're
17 trying - - - that's one of the public policy concerns that
18 we've raised in our submission to the Court is that this is
19 going to - - - it - - - it - - - in our feeling it's going
20 to increase litigation because, yes, we could have
21 challenged it. Yes, we could have gotten an IME. Yes, we
22 could have reduced payments to the claimant. There are a
23 number of things that we could have done, and that that
24 would have amounted to taking a position adverse to the
25 claimant's position.

1 CHIEF JUDGE WILSON: Suppose you've very
2 successfully cross-examined the expert. What - - - and
3 then the Board concluded the expert was incredible. What -
4 - - what would then happen? What benefit is of that - - -
5 is that of to - - - is that to Wegmans?

6 MS. DAY: Benefit to Wegmans in this particular
7 case is that it would minimize the number of weeks that
8 were awarded at the temporary total disability designation.
9 So we could have even accepted award at the same monetary
10 rate of \$870.61, as long as it was characterized as a
11 partial disability as opposed to a temporary total
12 disability, because the schedule in Section 15, which gives
13 out awards for permanent loss of use of extremities, it has
14 a limitation on how many weeks can be paid at total, or it
15 increases the liability of the payer for the permanency
16 award when it's given. So that was what Wegmans' concern
17 was at the time of this hearing. They weren't seeking to
18 claw back any payments from the claimant.

19 JUDGE SINGAS: But if that was their concern - -
20 -

21 MS. DAY: They weren't even necessarily seeking
22 to reduce the payments.

23 JUDGE SINGAS: They could have - - - they would -
24 - - they knew at some point when it exceeded. So why not
25 challenge it at that point?

1 MS. DAY: Well, Your Honor, then I would be out
2 of a job because - - - and I would be unhappy about that.
3 It's - - - it's really, I mean, this is - - - workers'
4 compensation is a very technical area of the law. And just
5 as I wouldn't expect the claimant to necessarily be aware
6 that he could collect unemployment and receive workers'
7 compensation, and that's why he hires great attorneys like
8 Mr. Connors to assist him. Wegmans hired The Law Offices
9 of Melissa Day to assist them and appear - - - in appearing
10 before the Board. And we recognize, unlike an examiner who
11 doesn't know this arcane little section of the permanency
12 statute, that her payments that she made in beyond the
13 temporary total payments that she had to make, that those
14 could lead to increased liability.

15 JUDGE CANNATARO: Counsel, the - - - the - - -
16 the Board decision, the 2019 Board decision, didn't it
17 raise the possibility of a permanent total disability, a
18 schedule loss?

19 MS. DAY: That's standard language that the Board
20 includes - - -

21 JUDGE CANNATARO: That's boilerplate in every
22 decision?

23 MS. DAY: Boilerplate. Yeah, that's - - -that's
24 standard.

25 JUDGE CANNATARO: So it wouldn't put you on

1 notice that maybe now's a good time to let them know we
2 would - - - we would challenge that?

3 MS. DAY: It is - - - it is absolutely standard
4 language that the Board includes on any case akin to this
5 where there's an injury to an extremity, there's a surgical
6 procedure, and it's expected that the claimant is going to
7 experience some permanency because they want to put the
8 claimant on notice that, hey, a year after your surgery you
9 should go and you should get examined by your doctor
10 because you could be entitled to some award for a permanent
11 loss of use.

12 CHIEF JUDGE WILSON: Thank you, Counsel.

13 MS. DAY: Thank you.

14 MR. CONNORS: Good afternoon, Your Honors. I'm
15 Greg Connors from the law firm of Connors & Ferris. I'd
16 like five minutes and then reserve five minutes for Mr.
17 Mix. Welcome to Buffalo. We're excited and thrilled to
18 have you here. I'd like to address and talk about the
19 prejudice that was alluded to previously. It's a
20 significant impact upon my client, Mr. Lazalee, and injured
21 workers about the timeliness of the decisions that the
22 employer and the insurance companies make on temporary
23 disability payments. You really honed in on the key issue
24 here in terms of prejudice. If the - - - if there is a - -
25 - if there's a contest or a challenge as to a degree of

1 disability from the doctor, the injured worker then has
2 certain rights and certain options.

3 The first option is they can go back to the
4 employer and say, do you have work for me within a
5 restriction? And if the employer says yes and they can get
6 their regular pay, they have their regular wage back,
7 that's great. There's no loss of wage to the injured
8 worker. The employee is back at work. There's no
9 litigation. If the employee goes back to the employer and
10 says, do you have work for me, but I earn less money.

11 JUDGE CANNATARO: Counsel, the problem with - - -
12 with the prejudice and I fully understand - - - and fully
13 understand and appreciate your prejudice argument, it just
14 wasn't really part of the Board's determination or the
15 Appellate Division's determination. They didn't raise the
16 prejudice that you would have suffered as the reason
17 for - - - as any part of the reason for their decision.

18 MR. CONNORS: You're right, Your Honor. And one
19 of the things that's most important to the injured workers
20 as a whole is that potential consideration, the fact that
21 they didn't acknowledge it to me and to the injured workers
22 is the fact that that being overlooked ignores the
23 importance of how timeliness, why that - - - why that
24 discretion is so important to injured workers.

25 JUDGE SINGAS: But the regulation doesn't bake in

1 discretion. They use mandatory language. "You shall." So
2 how do you - - - how do we get around that?

3 MR. CONNORS: Within - - - within the statute, it
4 talks about appearing before a referee. I respectfully
5 disagree with co-counsel when it says the only time you're
6 in front of a referee in workers' comp is at a hearing. I
7 completely disagree. And this is where there is an
8 administrative decision issued in December of '19. That
9 was issued by a referee.

10 JUDGE RIVERA: Yeah, but 300.10 is about
11 adjournment of hearings.

12 MR. CONNORS: I'm sorry?

13 JUDGE RIVERA: 300.10 is about adjournment of
14 hearings. That's the section. It's related to hearings.
15 It's not about some other type of procedure.

16 MR. CONNORS: Well in - - - within - - - with the
17 way the Board proceeds now and operates now, these
18 administrative decisions, if you object within a time
19 period, you get an adjournment, and then you can come back,
20 and then you can go through and identify and litigate or
21 identify what the issues are. And that's why I - - - when
22 I look at the statute, it does provide the opportunity
23 where the referee, the Board here with the administrative
24 decisions, you can have the opportunities to - - - to go
25 through and litigate and raise these issues. And putting

1 the issues on notice is what's - - -

2 JUDGE RIVERA: I'm - - - I'm - - - I'm a little
3 unclear. Are you saying that those, what you're calling
4 are opportunities, are also hearings within the meaning of
5 the terms in 300.10? Or are they something else?

6 MR. CONNORS: The administrative decision, we
7 view as opportunities similar to hearings. Because we
8 don't have as many hearings anymore, Your Honor - - - the
9 number of hearings are, anecdotally, 25 percent of what
10 they were - - - everything is done a lot through
11 administrative decisions and proposed decisions within the
12 practical elements of what we do in a practice.

13 JUDGE RIVERA: Is that - - - is that analogous to
14 saying something submitted on papers versus a hearing where
15 there may be witnesses who testify?

16 MR. CONNORS: Correct.

17 JUDGE RIVERA: Okay.

18 MR. CONNORS: Yes.

19 JUDGE RIVERA: So again, I understand 300.10 as
20 being only about hearings, not about these other
21 opportunities, as you call them.

22 MR. CONNORS: In the regulation was - - - was - -
23 - was - - - was approved prior to the way the Board
24 currently rules now. So the Board makes a lot more
25 decisions and we as practitioners have to go through and

1 exercise our rights based upon the - - - the - - - the
2 adjustments they've made for hearings. When I started
3 practicing 25 years ago, 28 years ago, we didn't have
4 administrative decisions nearly what we have now. They
5 were very, very rare. We always had hearings with these
6 opportunities - - -

7 JUDGE GARCIA: Assume the Board is aware of that.
8 I mean, it's their regulation. They can change it. I
9 mean, I'm with Chief Judge Wilson. I've never practiced in
10 this area, but they know that change. They've kept this
11 reg. And it seems like there really is very little
12 discretion baked into it.

13 MR. CONNORS: And so where the Board has - - -
14 where we as practitioners and has been applied in a
15 practical sense, is that the Board submits for us to - - -
16 to proactively engage when there is an issue so that their
17 rights are preserved in a timely fashion.

18 CHIEF JUDGE WILSON: But when is the latest point
19 in time, in your view, that somebody who wanted to cross-
20 examine an expert could say so and be timely?

21 MR. CONNORS: It depends on what the issue is.
22 In a degree of disability issue, like we have in Mr.
23 Lazalee's case, it would be contemporaneous to the receipt
24 of the report and the assessment of the report. Right then
25 and there, the adjuster gets the report, they review. A

1 trained professional working for Wegmans, gets the report,
2 reviews, looks at the case and says, do we agree with this
3 report or not. They have medical professionals on staff.
4 It's even referenced in their memo how they had a medical
5 professional review documentation to decide how they wanted
6 to proceed. That to me would be a contemporaneous,
7 reasonable objection or time period. When you look at
8 permanency, it's a little more different because the time
9 periods aren't as sensitive.

10 CHIEF JUDGE WILSON: It seems like, if I
11 understand this correctly, the circumstances change them a
12 little bit. That is, they got whatever they got in the
13 first place, and they decided they were going to pay the
14 claim in full. And then you move to amend the claim to add
15 an injury to the other hand. And at that point they
16 thought, well, wait a minute, maybe now this claim is
17 different, we ought to object or at least inquire about the
18 expert. Is that - - - what am I missing?

19 MR. CONNORS: No, they actually accepted it. The
20 reason why we amended it is because the Board didn't
21 include it. And in order for us to make sure that we had
22 everything properly done, we wanted to be fully inclusive
23 of it. But the carrier Wegmans had accepted that and had
24 paid it, knowing that it was part of the claim. We just
25 wanted to administratively make sure it was done. To be

1 honest with you, we thought there'd be administrative
2 decisions that would be issued like the prior one that
3 would just include it and then make the awards. That's
4 what we actually thought because that's the way it really
5 works these days. If there was an objection, it would be -
6 - - the referee issues it. If there's an objection to it,
7 they would then have to timely raise it. If not, it would
8 be waived.

9 JUDGE TROUTMAN: So are you saying that - - -

10 MR. CONNORS: Which is what we submitted happened
11 here.

12 JUDGE TROUTMAN: - - - the - - - adding the second
13 hand didn't make a difference? That the time ran from the
14 first - - - from the first hand where Wegmans accepted?

15 MR. CONNORS: So they had accepted the claim and
16 paid it. When we moved to include the second hand, it was
17 a procedural, administrative act that we were looking to do
18 to the - - -

19 JUDGE TROUTMAN: So why wouldn't they be entitled
20 to exercise rights when you move to amend?

21 MR. CONNORS: And we would have hoped they would
22 have exercised that in a timely manner four months after
23 the fact, Your Honor, when - - - when outside - - - outside
24 counsel came in to appear at a scheduled hearing four
25 months later - - -

1 JUDGE TROUTMAN: But let's go back to the shall
2 language in the statute. How - - - doesn't it expect that
3 you're going to ask for an adjournment at a particular
4 time? And the hearing looks like here that was the first
5 opportunity, which the claimant is the one that asked for
6 it.

7 MR. CONNORS: Which is correct, Your Honor, which
8 for us is even more compelling because they didn't raise
9 even that it was an issue in a timely manner. Because had
10 they done that, Mr. Lazalee would have had certain rights
11 that he could exercise that would have actually preserved
12 and even benefited him in terms of monetary benefits. So
13 there would have been - - - the issues of litigation would
14 have been significantly mitigated if not eliminated - - -

15 JUDGE TROUTMAN: Don't you actually - - - isn't
16 there an argument to be had that you're discouraging
17 businesses to pay up without causing great litigation here?

18 MR. CONNORS: Yeah, I actually completely
19 disagree. It's the exact opposite effect because if an
20 injured worker - - -

21 JUDGE TROUTMAN: So they should have - - - they
22 should have - - -

23 MR. CONNORS: Yes.

24 JUDGE TROUTMAN: - - - they should have said,
25 we're not paying you a dime and make them go through

1 litigation instead of just agreeing to pay; is that what
2 you're really saying here?

3 MR. CONNORS: No, because the statute wouldn't
4 allow for that because they accepted the claim. So because
5 they accepted the claim, they had to pay something.

6 JUDGE TROUTMAN: No, but when you say accept it,
7 aren't you creating a situation where they're not going to
8 accept anything, they're going to object to everything?

9 MR. CONNORS: Well, there has to be - - -
10 fortunately, the law provides they have to have a legal
11 basis for it. And in this instance, they didn't because
12 their own medical and staff professionals - - -

13 JUDGE TROUTMAN: But they can litigate. That's
14 what litigation involves, people fighting instead of
15 accepting. I'm confused as to why it is a bad thing that
16 Wegmans went ahead and paid your client without him having
17 to fight for it.

18 MR. CONNORS: Yeah, it's not a bad thing, Your
19 Honor. Don't - - - please don't misunder - - -
20 misinterpret what I'm trying to say. It's not a bad thing.
21 It is a good thing. But the - - - Mr. Lazalee also had
22 certain rights or benefits that he could have exercised had
23 they done it in a timely fashion, like going back to work,
24 he would have been getting paid more than his comp benefit.
25 If he - - - if he got unemployment, his unemployment plus

1 his workers' comp benefit would have been greater than his
2 - - - than his workers' comp benefit he received.

3 CHIEF JUDGE WILSON: Let me - - - let me just
4 tease that out a little bit. I mean, he could have gone
5 back to work regardless of whether they accepted the claim
6 or not, depending on how he felt, right? But what - - - I
7 think what you're saying is his calculus on which decision
8 was a better one depends on whether he thinks the claim is
9 being opposed by the employer or not. And if the employer
10 had said, I want to cross-examine the expert, that would at
11 least indicate some doubt as to whether he was going to
12 recover. And he would weigh that in his calculus about
13 whether going back to work or not. Is that what you're
14 saying?

15 MR. CONNORS: Yeah. He relied upon his doctor's
16 opinion as to his disability detrimentally by doing that.

17 CHIEF JUDGE WILSON: Oh, you mean if it turned
18 out that his doctor could be successfully cross-examined?

19 MR. CONNORS: Correct. If - - - if the insurance
20 company had identified we challenge your doctor's report,
21 it would have given him notice that he should have inquired
22 into his options. By them not challenging for four months
23 later, it precludes him from even having that come to him
24 as a potential issue. So he relied upon his doctor, which
25 then precludes him from having - - - exercising other



1 rights. I think I just completely - - - am sorry. I think
2 I ate up all of - - -

3 CHIEF JUDGE WILSON: No, no. We won't do it that
4 way. Don't worry.

5 MR. CONNORS: Okay. Thank you. Thank you for
6 your time.

7 CHIEF JUDGE WILSON: Yep.

8 MR. MIX: May it please the court. Sean Mix on
9 behalf of the Workers' Compensation Board. I'd like to
10 begin by addressing this issue about the - - - the hearing
11 that occurred here, because I think it's important to
12 understand the context of this hearing in that, you know,
13 this was a hearing in which - - - really wasn't intended to
14 be an evidentiary hearing, but rather a hearing to amend
15 the claim to conform to the proof that had been submitted.
16 As - - - as my - - - as former other respondents stated - -
17 -

18 JUDGE RIVERA: Is there some distinction in
19 300.10? About what you're saying is not an evidentiary
20 hearing versus some hearing to amend our decision?

21 MR. MIX: No, no, Your Honor. But I think
22 another way to look at this is that the notice of the
23 hearing specifically stated that the scope of the hearing
24 was to amend the claim to add an additional injury site.
25 In other words, to amend the claim to conform to the proof



1 that had been submitted at the time. And so a different
2 way to look at this is Wegmans' request for cross-
3 examination wasn't merely a request for cross-examination
4 under 300.10(c) but was also a request to expand the scope
5 of the hearing. And under a separate regulation, workers'
6 compensation law judges are directly vested with discretion
7 on whether or not to expand the scope.

8 JUDGE GARCIA: That isn't the basis of any of the
9 decisions below, is it? Did they mention that you're
10 asking to expand the hearing here, and we're not doing
11 that?

12 MR. MIX: Well, not directly, Your Honor. But
13 had Wegmans timely raised this issue of degree - - -

14 JUDGE GARCIA: But when they raised it in the
15 hearing, why didn't - - - the judge could have - - - the
16 referee could have just said that, well, this is X and you
17 want to do Y and I'm not expanding it. But that wasn't the
18 basis for the decision here.

19 MR. MIX: Well, it's simply a different way
20 because if a request was timely - - -

21 JUDGE HALLIGAN: Can we - - -

22 MR. MIX: - - - well, the scope of the hearing
23 wouldn't need to be expanded, because at that point in
24 time, the issue that would be noticed by the hearing would
25 be the degree of disability.

1 JUDGE SINGAS: It was timely, wasn't it?

2 According to your regulation, it was timely.

3 MR. MIX: Although the regulations contemplate an
4 adjournment to accommodate a request for cross-examination,
5 the Board reasonably reads that regulation as leaving in
6 place some discretion for a workers' comp - - -

7 JUDGE RIVERA: Well, okay. So that was where I
8 started with - - - with your adversary about whether or not
9 we have to defer to the Board's interpretation of this
10 regulation. And I take her point, which is but there's
11 nothing in the regulation that allows for this type of an
12 interpretation because it's mandatory, not some discretion.
13 I mean, you could have written it as may, may grant the
14 adjournment, but it says shall. And not only once, but a
15 couple of times.

16 MR. MIX: Yes, Your Honor. But the Board has
17 interpreted and long interpreted this as a timely - - -

18 JUDGE RIVERA: I understand. But again, I'm
19 having difficulty seeing the basis for the interpretation
20 based on the plain language. If it had said, may, I
21 understand why the Board could then say, we can now
22 interpret it and we do in this manner?

23 MR. MIX: Well, that interpretation stems from
24 the regular discretion that a judge has to manage its own
25 docket. Instead - - -

1 JUDGE TROUTMAN: Well, why is it that in some
2 instances it clearly says, "May adjourn a hearing if
3 employer fails to present evidence as directed by the
4 Board", referee may? But they said, shall, with respect to
5 the request for cross-examination. Doesn't that show a
6 clear intent to treat them differently?

7 MR. MIX: Not necessarily, Your Honor, because I
8 do believe that the Board's position is that - - -

9 JUDGE TROUTMAN: Then why not just use the word
10 may? If you want permissive, that's the permissive
11 verbiage, correct?

12 MR. MIX: Correct. That's permissive verbiage.
13 But the Board has long read this as - - -

14 JUDGE CANNATARO: Well, Counsel, that gets back
15 to the deference issue. We're just reading the words in a
16 statute, something that we're frequently called upon to do.
17 We interpret statutes all the time. And my colleagues have
18 all made a very good point that at various points in this
19 particular section we see may, but in this particular
20 Section 310(c), I guess it is, it says shall. So why
21 shouldn't we read those words in their very commonly
22 understood meaning, not just - - - not just in the public
23 at large, but that's how lawyers, that's how litigators
24 understand the word shall. Shall means you have to give it
25 to them. Where is the deference owed? That's my question.

1 MR. MIX: Deference is owed because this is how
2 the Board has interpreted its regulation and under - - -

3 JUDGE CANNATARO: But doesn't our interpretation
4 supersede their interpretation if the language is crystal
5 clear and plain?

6 MR. MIX: That's - - - that's correct, Your
7 Honor. But in this case, the Board believes that some
8 interpretation is - - - should be - - - or some deference
9 should be given to its essential - - - its interpretation,
10 which is providing for some housekeeping and allowing the
11 Board to have some discretion to control its docket. And
12 it's particularly relevant in a case like this where
13 throughout the course of time that claimant was out of
14 work, there was no attempt to raise the issue - - -

15 JUDGE HALLIGAN: Counsel, who noticed this
16 hearing, the hearing that's at issue here?

17 MR. MIX: The claimant filed a letter with the
18 Board.

19 JUDGE HALLIGAN: And the purpose, as I understand
20 it, was to add the additional hand, I forgot if it was
21 right or left; is that correct?

22 MR. MIX: Initially, it was to add a left carpal
23 tunnel syndrome.

24 JUDGE HALLIGAN: Right.

25 MR. MIX: And then at the time of the hearing,



1 the parties had agreed to add these additional injuries.

2 JUDGE HALLIGAN: And was there no hearing that
3 was conducted prior to this? Was this the first hearing?

4 MR. MIX: This was the first hearing.

5 JUDGE HALLIGAN: And so - - - so if Wegmans does
6 not believe that it wants to cross-examine when only one
7 hand is in play, but when a second hand is in play does,
8 what would you have had them do? Would you have had them -
9 - - given that the regulation appears to me to contemplate
10 cross-examination in the context of the hearing, should
11 they have noticed their own hearing? How - - - how would
12 it work as a practical matter?

13 MR. MIX: Well, they could have - - - there are
14 several mechanisms they could have used to bring this issue
15 to the Board's attention. They could have requested a
16 hearing after receiving the medical reports and reading
17 them in thinking perhaps the claimant isn't totally
18 disabled. They could have obtained an IME, which maybe
19 would have had competing results, and the Board would have
20 received that and maybe decided a hearing should be called
21 to address this issue. And they could have sought to
22 reduce or suspend those payments that they were making
23 based on medical evidence submitted and they should have
24 done that before claimant was returned to work. And had
25 they done that, this issue would have been brought to the

1 Board's attention at that hearing, which likely would have
2 been noticed for the purpose of disputing the degree of
3 disability.

4 A request for an adjournment at that hearing
5 would be timely because the purpose of that hearing is to
6 dispute the degree of disability. Here all along, Wegmans
7 did nothing to signal that it had contested the degree of
8 disability until months after claimant had returned to work
9 at a hearing that was scheduled for the purpose of amending
10 a claim to really conform to the proof that had previously
11 been - - -

12 JUDGE GARCIA: Counsel, you seem to concede in
13 your brief, correct me if I'm wrong, that Wegmans' argument
14 that they face increased liability potentially and possible
15 future schedule loss is a real potential for increased
16 liability, right?

17 MR. MIX: It's - - - yes. There's a potential
18 that Wegmans could have some increased liability.

19 JUDGE GARCIA: Right. I mean, I think you say
20 they should have thought that before. But so this isn't
21 only confirming something that happened in the past, it's
22 confirming something that has at least a potential effect
23 on future liability, right?

24 MR. MIX: It does have an effect on future
25 liability. But again, Wegmans had several mechanisms, had

1 they disputed this, to raise this issue, and if they had
2 done that, a hearing would have been noticed on the degree
3 of disability. And at that point in time they could have
4 asked for an adjournment of that.

5 CHIEF JUDGE WILSON: Let's - - - let's assume the
6 proof in the record is what it is, right, as to the - - -
7 from the expert. What would have happened had the claimant
8 here never moved to amend? Would Wegmans be in a better
9 position?

10 MR. MIX: It's likely consistent with the prior
11 administrative determination that this - - - this - - -
12 unless they had raised the issue, this might have been
13 dealt with administratively because there was no contrary
14 medical evidence. If the Board didn't think there was a
15 contested issue, it has the ability to make a determination
16 administratively.

17 CHIEF JUDGE WILSON: So Wegmans would be no
18 better or worse off regardless of what happens with the
19 motion to amend?

20 MR. MIX: I'm not sure. They'd be no better or
21 worse off based on the motion to amend?

22 CHIEF JUDGE WILSON: Yeah, to - - - to - - -
23 yeah, to amend to add the left-hand carpal tunnel.

24 MR. MIX: Yeah, I believe so Your Honor.

25 CHIEF JUDGE WILSON: That it would be the same.

1 It's they're indifferent as to whether it's amended or not,
2 at least in terms of their financial liability?

3 MR. MIX: Correct.

4 JUDGE RIVERA: Counsel, can I just clarify the
5 Board's perspective with respect to the purposes and intent
6 of the workers' compensation law? What is it that you are
7 concerned about with this kind of conduct, which seems, as
8 Wegmans has framed it, the claimant may disagree, I
9 understand, that they simply were deciding at various
10 points before the hearing, before there was a request for
11 the hearing, to pay? They thought this was the right thing
12 to do, or for whatever reason it was the better business
13 choice. Well, what - - - what concerns the Board with
14 respect to - - - beyond - - - beyond this claimant as a
15 policy of - - - of the purpose of the law?

16 MR. MIX: The prejudice it could have to
17 claimants who - - - who would be assuming that this was
18 uncontroverted, that we're taking actions based on that
19 assumption, based on no signal that this was controverted
20 in any way, that there was any dispute on the degree of
21 disability. So there would be no reason to perhaps try to
22 go back to work. There would be no reason to try other
23 mechanisms to obtain more, you know, financial security.
24 And that all of a sudden, at the 11th hour, at a hearing
25 that appears to be convened simply to amend a claim to

1 conform to the proof, that then opens the door to conflict
2 to - - - to new evidence on degree of disability, an issue
3 that had never been disputed before. And so - - -

4 JUDGE RIVERA: But it's the Board's position that
5 there - - - there would not be any way that a claimant
6 could otherwise protect themselves against this kind of
7 prejudice.

8 MR. MIX: Correct. Unless - - - unless they
9 decide to voluntarily, even though their employer is not
10 signaling that they contest these reports at all, decide,
11 well, maybe if I request to amend a claim, there will be a
12 hearing and then this will open the door. Maybe I should
13 go in and see if I should be going back to work anyway,
14 even though my doctor says that I'm totally disabled.

15 JUDGE RIVERA: Let's say we disagree with you and
16 the claimant; we agree with the Wegmans argument. We read
17 the statute differently, perhaps not giving any deference.
18 Am I correct to assume that there is a way that you can
19 amend the reg or add another reg to address these very
20 concerns that you have identified? Are there any - - -
21 anything that's stopped you from doing that?

22 MR. MIX: That's correct.

23 JUDGE RIVERA: Okay. Thank you.

24 MR. MIX: Thank you very much. We ask that you
25 affirm the Third Department's decision.

1 MS. DAY: Thank you, Your Honors. Just briefly,
2 we've talked a lot about the prejudice - - - the potential
3 prejudice to the claimant here. And I believe that had
4 that been litigated, that the Board would have had the
5 discretion to determine that Wegmans should be equitably
6 estopped from taking the position after the fact that the
7 claimant wasn't entitled to temporary total disability
8 benefits.

9 But that's not what happened here. So the Board
10 does maintain discretion in order to be able to address
11 what it could be perceived as potential prejudice to the
12 claimant. I maintain that there's no prejudice here
13 because the claimant is not subject to the whims of what
14 the employer does. The claimant is an agent who can
15 himself go out and take positions with his physician.
16 Actually, the claimant's in a much better position to
17 discuss with his physician whether or not he feels that
18 he's capable of doing some work or not.

19 JUDGE RIVERA: Well, in any event, even if
20 you - - - even have gotten the opportunity to cross, it
21 doesn't mean you would have persuaded anybody through that
22 cross.

23 MS. DAY: I'm pretty good.

24 JUDGE RIVERA: I see that.

25 MS. DAY: So it's just our position that the



1 Board has a remedy here, that the Board could amend the
2 regulation if it feels that the actions that Wegmans took
3 were not - - - were prejudicial and that there should be a
4 different way of adjudicating these kinds of claims. We
5 thank you.

6 CHIEF JUDGE WILSON: Thank you, Counsel.

7 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Lazalee v. Wegmans, No. APL-2022-180 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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