

<b>Matter of Griffiths v Kelly</b>
2011 NY Slip Op 32072(U)
July 26, 2011
Supreme Court, New York County
Docket Number: 0116631/2010
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT. *Saliann Scarpulla*

PART 19

Index Number : 116631/2010

GRIFFTHS, GALE

INDEX NO. \_\_\_\_\_

vs

KELLY, RAYMOND

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. \_\_\_\_\_

ARTICLE 78

MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this <sup>petition</sup> motion is determined in accordance with the accompanying decision/order.

**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: 7/26/11

*Saliann Scarpulla*  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X  
IN THE MATTER OF THE APPLICATION OF  
GALE GRIFFITHS,

Petitioner,  
-against-

Index No.: 116631/10  
Submission Date: 6/8/11

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, AND THE  
BOARD OF TRUSTEES OF THE NEW YORK CITY  
POLICE PENSION FUND, ARTICLE II,

**DECISION AND ORDER**

Respondents.

-----X  
For Petitioner:  
Jeffrey L. Goldberg, P.C.  
2001 Marcus Avenue  
Lake Success, NY 11042

For Respondents:  
Michael A. Cardozo, Corporation Counsel of the City of New York  
100 Church Street  
New York, NY 10007

Papers considered in review of this petition:

Petition . . . . . 1  
Answer . . . . . 2

**UNFILED JUDGMENT**

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HON. SALIANN SCARPULLA, J.:

In this Article 78 proceeding, petitioner Gale Griffiths ("Griffiths") seeks to annul the September 8, 2010 determination of respondents Raymond Kelly ("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 ("PPF"), and the Board of Trustees of the New York City Police Pension Fund, Article II ("Board of Trustees") (collectively "City

respondents”) denying her an accident disability retirement (“ADR”) allowance pursuant to New York City Administrative Code §13-252.

Griffiths was appointed to the NYPD uniformed force on July 5, 1989 and served continuously until her retirement on August 25, 2010. On February 24, 2009, she sustained a line of duty injury to her neck and right shoulder when she tripped over an extension cord attached to a heater in an office in the Queens Family Court in Jamaica. The Command Supervisor’s Report of Injury provided that Griffiths “tripped over a heater cord and fell into file cabinets in the clerical room, causing injury and pain to her neck, right shoulder and right arm.” The Investigating Supervisor noted that “preliminary investigation reveals that injury occurred while [Griffiths] was in proper performance of official police duty. Recommend Line of Duty designation for injury.”

On March 8, 2010, Griffiths filed an ADR allowance application pursuant to Administrative Code §13-252 based on her February 24, 2009 injury. She alleged that she was in constant pain from her neck to right arm and shoulder, and had loss of range of motion and mobility. She maintained that the accident occurred “while walking in Family Ct. central booking tripped on exposed wire which was not in its proper place...” The Police Commissioner filed an Ordinary Disability Retirement (“ODR”) allowance application on Griffith’s behalf.

Police Officer Helen Gumiela (“Gumiela”), the officer who responded to the scene of Griffiths’ February 24, 2009 incident, prepared a statement dated May 10, 2010,

indicating that she “observed Det. Griffiths on the floor with papers and tea strewn about the heater upended. Det. Griffiths stated to me that she tripped on the extension cord that was attached to the heater. This heater is normally under the desk. I can only surmise that it was moved by the night time cleaning crew and they failed to put it back under the desk.”

On May 12, 2010, the PPF Medical Board examined Griffiths and reviewed her medical history. The Medical Board approved her ADR application, stating “the final diagnosis is right cervical radiculopathy. The competent causal factor is the line of duty injury of February 24, 2009.”

In a statement dated June 1, 2010, Griffiths provided that the incident occurred when she “unexpectedly tripped over a power surge cord attached to a heater which caused [her] to fall into a chair and then into a file cabinet, landing on the floor injuring [her] neck, right shoulder and right arm.” She further indicated that she had “been in this office on many previous occasions and the heater with power surge cord was always under the desk.” She opined that the cleaning crew failed to place the heater back into its normal location under the desk after cleaning the office.

At the Board of Trustees’ July 14, 2010 meeting, Elizabeth Botwin (“Botwin”), trustee for the New York City Department of Finance, expressed her position that Griffiths should have seen the cord over which she tripped, and Botwin also noted discrepancies between the contemporaneous and later acquired evidence. Essentially,

Botwin maintained that the statements provided about the heater/cord having been moved by the cleaning crew were made over a year after the incident and were not consistent with the accounts of the incident from February 2009, in which there was no mention of the heater/cord having been moved by the cleaning crew. The matter was tabled until September 8, 2010, when the Board of Trustees reviewed Griffiths' case and by a tie vote of 6 to 6 denied Griffiths' ADR application pursuant to *Matter of the City of New York v. Schoeck*, 294 N.Y. 559 (1945), finding that the February 24, 2009 incident was not an "accident" for pension purposes.

Griffiths now commences this Article 78 proceeding, arguing that the Board of Trustees' September 8, 2010 determination was arbitrary and capricious and should be annulled. Griffiths maintains that she met her burden of proving that she was injured in an "accident" because the February 24, 2009 Line of Duty Injury Report, supported by the supervisor's investigation and Gumiel's statement established that Griffiths was injured in an accidental event that was sudden, unexpected, out of the ordinary and injurious in impact.

The City respondents answered the petition, arguing that the Board of Trustees' determination to deny Griffiths ADR benefits because the February 24, 2009 incident was not an "accident" was based on substantial evidence. They maintain that Griffiths failed to prove that her injuries were caused by a sudden or out of the ordinary event, rather, the

evidence presented established that her injuries resulted from an incident that was an inherent hazard of performance of police duties and her own misstep.

### Discussion

In order to obtain accident disability retirement benefits, a petitioner must establish that he or she suffered physical or mental incapacitation as a natural and proximate result of an accidental injury received in city-service and that such disability was not the result of petitioner's own willful negligence. *See* New York City Administrative Code §13-252. The injury must be the result of a sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact. *See Lichtenstein v. Bd. of Trs.*, 57 N.Y.2d 1010 (1982). "To be distinguished are injuries sustained while performing routine duties but not resulting from unexpected events." *McCambridge v. McGuire*, 62 N.Y.2d 563, 568 (1984). For example, an injury caused by a trip, where tripping is a foreseeable risk of the work being performed, does not entitle the applicant to ADR. *Matter of Brenes v Kelly*, 2011 NY Slip Op 51265U (Sup. Ct. N.Y. Co., June 28, 2011).

The court may set aside a denial of accident benefits as a consequence of a tie vote when it concludes that the applicant is entitled to them as a matter of law. *McCambridge v. McGuire*, 62 N.Y.2d at 568. If 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, the decision of the Board of Trustees denying accidental disability benefits as a consequence of a tie vote can be overruled. *Canfora v. Board of Trustees*, 60 N.Y.2d 347 (1983).

Here, the City respondents argue that (1) the contemporaneous evidence provided by Griffiths describing her incident did not warrant a finding that the incident was an “accident” as a matter of law; and (2) the affidavits provided by Griffiths and Gumiela some time after the incident conflict with the contemporaneous evidence and therefore, were properly discounted by the Board of Trustees in reaching its determination. Here, the contemporaneous evidence established that Griffiths walked into an office room, tripped over an extension cord and then fell into a heater. In statements provided some time after the incident, Griffiths and Gumiela further explained that the heater and cord were not in their usual location under a desk when Griffiths tripped because the heater was likely moved by the cleaning crew and not restored to its usual position.

In support of their position, the City respondents reference cases in which courts found that it was reasonable for a Board of Trustees to credit contemporaneous accounts of an accident and discredit subsequent or amended affidavits in reaching a decision to deny ADR benefits. *See e.g. Matter of Bisiani v. Kelly*, 39 A.D.3d 261 (1<sup>st</sup> Dept. 2007); *Matter of Hall v. Kelly*, 33 A.D.3d 514 (1<sup>st</sup> Dept. 2006); *Morgan v. Kerik*, 305 A.D.2d 288 (1<sup>st</sup> Dept. 2003); *Matter of Fulbrook v. Kelly*, 2010 NY Slip Op 32019U (Sup. Ct. N.Y. Co., July 27, 2010). In those cases, the courts found that the contemporaneous accounts of the incidents did not establish that there was an “accident,” and that those accounts were more reliable than any subsequent or amended affidavits presented later. For example in *Matter of Hall v. Kelly*, (33 A.D.3d 514 [1<sup>st</sup> Dept. 2006]), petitioner

injured her knee while running with classmates in the gym of the police academy. She later submitted an affidavit alleging that her injuries resulted from a slippery substance or foreign object on the gym floor. The court found that the Board of Trustees reasonably relied on the contemporaneous account of the incident and discredited the subsequent affidavit. The court concluded that it could not find, as a matter of law, that the injury was the result of an accident and not petitioner's own misstep.

The instant case is distinguishable from those cases. Here, the court finds, as a matter of law, that the contemporaneous accounts of the incident established, on their own, and without reference to the subsequent accounts, that there was an "accident" within the meaning of New York City Administrative Code §13-252 and *Lichtenstein v. Bd. of Trs.*, 57 N.Y.2d 1010 (1982). The facts presented describe an incident which would be commonly called an accident, and there is no indication that the incident occurred through any willful negligence on the part of Griffiths. Griffiths' more detailed, later account simply added more detail to the facts surrounding the incident. Griffiths' fall was sudden, unexpected, and out of the ordinary in that one would not normally expect an extension cord to be laying on a floor where people are walking in an office room. *See Matter of Lang v Kelly*, 2011 NY Slip Op 31279U (Sup. Ct. N.Y. Co., May 13, 2011); *see generally Finazzo v. Safir*, 273 A.D.2d 75 (1<sup>st</sup> Dept. 2000).

In accordance with the foregoing, it is hereby

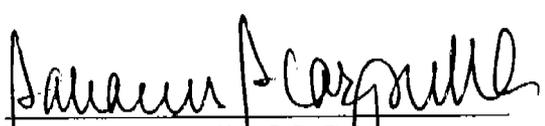
ORDERED AND ADJUDGED that the petition is granted to the extent of annulling the findings of the Board of Trustees with respect to the denial of Gale Griffiths' application for accident disability retirement benefits and the matter is remanded to the Board of Trustees in accordance with the foregoing; and it is further

ORDERED that the petitioner Gale Griffiths is directed to settle judgment.

This constitutes the decision and order of the court.

Dated: New York, New York  
July 26, 2011

ENTER:

  
Saliann Scarpulla, J.S.C.

**UNFILED JUDGMENT**

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